

Offenses Moved from the Commentary to the Enumerated Offense Clause at USSG § 4B1.2 Effective August 1, 2016 – Generic Definitions and Other Issues

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Working Memo, May 2016

Effective August 1, 2016, the enumerated offenses that qualify as “crimes of violence” pursuant to the text of USSG § 4B1.2(a)(2) are “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).” U.S. Sent’g Comm’n, *Notice of submission to Congress of amendment to the sentencing guidelines effective August 1, 2016*, 81 Fed. Reg. 4741, 4742 (Jan. 27, 2016).

As part of the amendment, the Sentencing Commission defined two of the enumerated offenses in commentary: “extortion” and “forcible sex offense” (partially). The Commission considered providing definitions for all of the enumerated offenses now in the text, but ultimately decided not to do so because “adding several new definitions could result in new litigation, and that it was instead best not to disturb the case law that has developed over the years.” *See* 81 Fed. Reg. at 4744 (Reason for Amendment). As a result, the remaining terms will continue to be defined by their “generic” contemporary definitions, as set forth in caselaw.

For offenses committed before August 1, 2016, and where the instant or prior offense of conviction could have qualified as a “crime of violence” only because it was listed in commentary, insist that the court sentence your client under the guideline manual in effect at time the offense was committed, *see Peugh v. United States*, 133 S. Ct. 2072 (2013), and challenge it, based on *Stinson*, as inconsistent with the text of the guideline now that *Johnson* has voided the residual clause that it interpreted. *See* Commentary Offenses Memo at 1-5 (Mar. 2016). In the alternative, argue that the offense of conviction does not satisfy the relevant definition (generic or as defined by the Commission) under the categorical or modified categorical approach. For offenses committed on or after August 1, 2016, the only available challenge will be that the offense of conviction does not meet the relevant definition (generic or as defined by the Commission).

Courts determine the “generic” definition of an offense by looking to “the contemporary usage of the term,” *Taylor v. United States*, 495 U.S. 575, 592 (1990)—*i.e.*, “the way the offense is defined by the criminal codes of most states.” *Id.* at 598. To identify the “contemporary usage” of the term, courts survey the relevant definitions codified in state and federal statutes, as well as the definition adopted by the Model Penal Code and supported by scholarly commentary (most commonly Wayne R. LaFare’s treatise, *Substantive Criminal Law*). The Supreme Court in *Taylor* conducted such a survey and determined that the generic, contemporary definition of “burglary” has “the basic elements of [1] unlawful or unprivileged [2] entry into, or remaining in, [3] a building or structure, [4] with intent to commit a crime.” *Taylor*, 495 U.S. at 599. Following this approach, lower courts often look to the Model Penal Code as a starting point, but recognize that “the way the offense is defined by the criminal code of most states” takes precedence over the Model Penal Code definition. *See, e.g., United States v. Soto-Sanchez*, 623 F.3d 317, 322 (6th Cir. 2010); *see also United States v. Garcia-Jimenez*, 807 F.3d 1079, 1086-87

(9th Cir. 2015) (“[T]he Model Penal Code, while a helpful tool in the categorical analysis, does not dictate the federal generic definition of a crime.”).

You might think that now, courts have already adopted a uniform generic definition for each of the offenses previously listed in the commentary to § 4B1.1 (which are also listed in commentary to USSG § 2L1.2 as “crimes of violence”). But the answer is not always clear-cut, while the Commission’s recent amendment raises some new issues that we can use to our client’s best advantage. The purpose of this working memo is to set forth the prevailing definition for each enumerated offense (when it exists) and to identify some potential areas for litigation. It is not intended to be a comprehensive survey of the state of the law for each term, or to identify every possible issue, but to serve as a starting point for moving us toward the most narrow (and plausible) definition for each term.

“Murder”

Surprisingly, before 2014, no court of appeals had adopted a generic definition of “murder.” In *United States v. Marrero*, 743 F.3d 389 (3d Cir. 2014), the Third Circuit surveyed the 50 states and the Model Penal Code to determine that “murder” is “generically defined as [1] causing the death of another person [2] either [a] intentionally, [b] during the commission of a dangerous felony, or [c] through conduct evincing reckless and depraved indifference to serious dangers posed to human life.” *Id.* at 400-01 (alterations added).

Note that the term “dangerous” before “felony” in the [2][b] felony murder alternative narrows the scope of the definition, and appears to reflect the Model Penal Code’s list of specified felonies for that alternative (robbery, rape, “deviate sexual intercourse by force or threat of force,” arson, burglary, kidnapping, or felonious escape). See Model Penal Code § 210.2; see also 2 W.R. Lafave, *Substantive Criminal Law* § 14.5(b) (2d ed. 2003) (noting that for felony murder, the “felony attempted or committed by the defendant must be dangerous to life”). At least one other court of appeals has accepted *Marrero*’s formulation of generic murder. See, e.g., *United States v. Castro-Gomez*, 792 F.3d 1216, 1217 (10th Cir. 2015). In *United States v. Godoy-Castaneda*, 614 F. App’x 768, 771 (5th Cir. 2015), the Fifth Circuit assumed *arguendo* that in order to qualify as generic felony murder, the underlying felony must be “dangerous to life,” but the question was not dispositive there.

Note also that *Marrero*’s generic definition of “murder” includes unintentionally causing the death of another person “through conduct evincing *reckless and depraved indifference* to serious dangers posed to human life.” (Emphasis added.) The Third Circuit explained in a footnote that “[a]t least thirty states define a form of *unintentional* murder involving a substantial likelihood of death, indifference (often ‘extreme indifference’) to the value of human life, an abandoned, malignant, or depraved heart, express or implied malice, or recklessness.” *Marrero*, 743 F.3d at 400-01 & n.4 (emphasis added).

Marrero argued (pre-*Johnson*) that murder with a *mens rea* of only recklessness should not qualify as a crime of violence under *Begay v. United States*, 553 U.S. 137 (2008), which held that to qualify as a “violent felony” under the ACCA’s identical residual clause, an offense must be “purposeful.” The Third Circuit rejected *Marrero*’s argument on the ground that *Begay*

interpreted the residual clause of the ACCA, not the offenses listed in the commentary to the career offender guideline, which it said were freestanding “enumerated” offenses. 743 F.3d at 398. But the Third Circuit’s analysis depends on the (incorrect) theory that the Commission has the authority to set forth “crimes of violence” in commentary that do not interpret the guideline text, contrary to *Stinson v. United States*, 508 U.S. 36, 38 (1993), and in conflict with other courts of appeals, *see, e.g., United States v. Soto-Rivera*, 811 F.3d 53, 59-61 (1st Cir. 2016); *United States v. Armijo*, 651 F.3d 1226, 1234-37 (10th Cir. 2011); *see also* Commentary Offenses Memo at 3-4 (Mar. 2016).

Since then, the Commission itself has provided additional support for the proposition that only intentional offenses qualify as enumerated offenses under § 4B1.2, consistent with *Begay*. First, by eliminating the residual clause “to make the guidelines consistent with *Johnson*” and then moving the listed commentary offenses to the text, the Commission has implicitly acknowledged that the listed commentary offenses were not freestanding but interpreted the residual clause, which means that they have always required an intentional *mens rea*, consistent with *Begay*. Second, the Commission specifically eliminated involuntary manslaughter as a predicate “crime of violence” because its analysis indicated it was “rare for involuntary manslaughter to be identified as a predicate for the career offender guideline.” 81 Fed. Reg. at 4743 (Reason for Amendment). The Commission added that eliminating involuntary manslaughter as a predicate

is also consistent with the fact that involuntary manslaughter generally would not have qualified as a crime of violence under the “residual clause.” *See Begay v. United States*, 553 U.S. 137 (2008) (limiting crimes covered by the ACCA residual clause to those roughly similar in kind and degree of risk posed as the enumerated offenses, which typically involve “purposeful, violent, and aggressive conduct”).

Id. In other words, the Commission recognizes that if a prior conviction “would not have qualified under the residual clause,” it should not qualify as an enumerated offense.¹ As a result, the forms of “unintentional murder” identified by the Third Circuit as included in the definition of generic murder are not “crimes of violence” because they would not have qualified under the residual clause under *Begay*.

“Voluntary manslaughter”

As explained just above, the Commission narrowed the “manslaughter” offenses that will qualify to include only “voluntary manslaughter,” so that, consistent with *Begay*, a conviction under any state or federal manslaughter statute whose *mens rea* requires no more than recklessness or negligence does not qualify as a “crime of violence.” 81 Fed. Reg. at 4743. Because courts were previously tasked with determining the generic definition of the term

¹ This view comports, too, with the Commission’s 2012 statement that it defined “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 – Part C: Career Offenders* 4 (2012), so that the only difference in the text between § 4B1.2(a)(2) and the ACCA was that the term “burglary” in the ACCA was narrowed to “burglary of a dwelling” in § 4B1.2(a)(2).

“manslaughter,” which includes both voluntary and involuntary manslaughter, much of the existing caselaw will not be helpful in determining the generic meaning of the more narrow term “voluntary manslaughter.” Fortunately, in the process of defining the broader term “manslaughter,” at least one court has set forth a clear generic definition of “voluntary manslaughter” that is limited to intentional homicides.

In *United States v. Bonilla*, the Fifth Circuit looked to its previous 50-state survey of manslaughter statutes, the Model Penal Code, and LaFave’s *Substantive Criminal Law* to describe the elements of generic voluntary manslaughter:

“Voluntary manslaughter in most jurisdictions consists of an [1] intentional [2] homicide [3] committed under extenuating circumstances which mitigate, though they do not justify or excuse, the killing.” [2 Wayne R. LaFave, *Substantive Criminal Law*] § 15.2 491 [(2d ed. 2003)] (emphasis added). The Model Penal Code includes a similar definition. See Model Penal Code [§ 210.3] (defining manslaughter as, *inter alia*, “a homicide which would otherwise be murder” but “is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse”).

524 F.3d 647, 654 (5th Cir. 2008) (alterations added); see also *United States v. Dominguez-Ochoa*, 386 F.3d 639, 642, 643-46 (5th Cir. 2004).

“Kidnapping”

In *United States v. De Jesus Ventura*, 565 F.3d 870, 875–79 (D.C. Cir. 2009), the D.C. Circuit conducted a 50-state survey and found that “nearly every state kidnapping statute includes two common elements: (1) an act of restraining, removing, or confining another; and (2) an unlawful means of accomplishing that act.” *Id.* at 876. The court added a third element, derived from the Model Penal Code and a majority of states, requiring “a criminal purpose beyond the mere intent to restrain the victim,” such as holding the victim for ransom or as a hostage. *Id.* at 876–77.

In *United States v. Flores-Granados*, 783 F.3d 487 (4th Cir. 2015), the Fourth Circuit “consider[ed] the statutes of the fifty states and the District of Columbia as well as the Model Penal Code,” and concluded that “the best characterization” of generic kidnapping is

- (1) unlawful restraint or confinement of the victim,
- (2) by force, threat or deception, or in the case of a minor or incompetent individual without the consent of a parent or guardian,
- (3)[a] either for a specific nefarious purpose or with a similar element of heightened intent, *or*
- [3][b] in a manner that constitutes a substantial interference with the victim's liberty.

Id. at 493-94. Like the D.C. Circuit, the court determined that “it is plain that some additional element of severity is necessary to distinguish kidnapping from its lesser-included offenses,” such as false imprisonment. *Id.* at 493.

In *United States v. Gonzalez-Perez*, 472 F.3d 1158 (9th Cir. 2007), the Ninth Circuit determined that generic kidnapping

encompasses, *at a minimum*, the concept of a “nefarious purpose[]” motivating restriction of the victim’s liberty. *See* Wayne R. LaFare, 3 *Substantive Criminal Law* § 18.1(e), at 20, n.154 (2d ed. 2003) (noting that only eleven states do not specify that kidnapping requires a nefarious purpose); *see also* Model Penal Code § 212.1 (providing that a defendant is guilty of kidnapping only if his or her purpose is “(a) to hold for ransom or reward, or as a shield or hostage; or (b) to facilitate commission of any felony or flight thereafter; or (c) to inflict bodily injury on or to terrorize the victim or another; or (d) to interfere with the performance of any governmental or political function”).

Id. at 1161 (emphasis added).

The Fifth Circuit has addressed generic kidnapping in a number of decisions, which together by inference suggest that generic kidnapping consists of the following elements:

- (1) knowing removal or confinement,
- (2) by force, threat, or fraud,
- (3) plus an additional aggravating element, such as
 - (a) substantial interference with the victim’s liberty and circumstances exposing the victim to substantial risk of bodily injury or confinement as a condition of involuntary servitude, *or*
 - (b) with any of the following purposes: (a) to hold for ransom or reward, or as a shield or hostage; or (b) to facilitate commission of any felony or flight thereafter; or (c) to inflict bodily injury on or to terrorize the victim or another; or (d) to interfere with the performance of any governmental or political function.

See United States v. Gonzalez-Ramirez, 477 F.3d 310, 317-18 (5th Cir. 2007); *United States v. Moreno-Florean*, 542 F.3d 445, 454-55 (5th Cir. 2008); *United States v. Najera-Mendoza*, 683 F.3d 627, 630-31 (5th Cir. 2012). Note that the specified purposes in (3)(b) above are derived from the Model Penal Code definition of kidnapping, which states the following:

A person is guilty of kidnapping if he unlawfully removes another from his place of residence or business, or a substantial distance from the vicinity where he is

found, or if he unlawfully confines another for a substantial period in a place of isolation, with any of the following purposes: (a) to hold for ransom or reward, or as a shield or hostage; or (b) to facilitate commission of any felony or flight thereafter; or (c) to inflict bodily injury on or to terrorize the victim or another; or(d) to interfere with the performance of any governmental or political function.

Model Penal Code § 212.1.

As you can see, there are differences in these generic definitions that may be material in your case. For example, the Ninth Circuit has said, based on its survey of relevant sources under *Taylor*, that generic kidnapping *at a minimum* requires a nefarious purpose (a view with which the D.C. Circuit agrees), while the Fifth Circuit’s definition would appear to allow conviction without a nefarious purpose. Given that only eleven states would allow conviction for kidnapping without a nefarious purposes, the Fifth Circuit’s definition does not appear to accurately reflect the contemporary meaning of the term kidnapping. Even so, the Fifth Circuit’s definition is otherwise narrowed and will prevent some kidnapping convictions from qualifying as a “crime of violence. *See, e.g., United States v. Moreno-Flores*, 542 F.3d 445, 454-55 (5th Cir. 2008) (California kidnapping); *United States v. Najera-Mendoza*, 683 F.3d 627, 630-31 (5th Cir. 2012) (Oklahoma kidnapping). But when the kidnapping statute of conviction does not require a nefarious purpose and would qualify as generic kidnapping under your circuit’s definition, be sure to argue that the circuit’s definition is not in fact consistent with the contemporary meaning of the term “kidnapping.”

“Aggravated assault”

To determine the generic definition of “aggravated assault” in 2010, the Eleventh Circuit looked to the decisions of the Fifth, Sixth, and Ninth Circuits, finding them “instructive”:

After considering the Model Penal Code's definition of aggravated assault, consulting treatises, and surveying state law, these courts have held that the generic aggravated assault offense involves, at a minimum, the aggravating factors of either [1] serious bodily injury to the victim or [2] the use of a deadly weapon.

United States v. Palomino Garcia, 606 F.3d 1317, 1331-32 (11th Cir. 2010) (citing *United States v. McFalls*, 592 F.3d 707, 717 (6th Cir. 2010); *United States v. Esparza-Herrera*, 557 F.3d 1019, 1024-25 (9th Cir. 2009); *United States v. Fierro-Reyna*, 466 F.3d 324, 327-29 (5th Cir. 2006)). The court noted that this definition “closely tracks” the Model Penal Code, which provides:

A person is guilty of aggravated assault if he (a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Model Penal Code § 211.1(2).

The Eleventh Circuit further agreed with the Fifth Circuit that this definition is “consistent with the discussion of aggravated assault in Professor LaFave’s treatise on criminal law, which ‘focuses . . . on the two most common aggravating factors: the means used to commit the crime, such as use of a deadly weapon, and the consequences of the crime, such as serious bodily injury.’” *See id.* at 1132; *Fierro-Reyna*, 466 F.3d at 328 (citing 2 Wayne R. LaFave, *Substantive Criminal Law* § 16.2(d)). “And [the definition] is consistent with the dictionary definition of aggravated assault, which Black’s Law Dictionary defines as ‘[c]riminal assault accompanied by circumstances that make it more severe, such as the intent to commit another crime or the intent to cause serious bodily injury, especially by using a deadly weapon.’” *Id.* (quoting Black’s Law Dictionary 122 (8th ed. 2004) (alterations omitted)).

The Eleventh Circuit concluded that the generic offense of “aggravated assault” “involves a [1] criminal assault² accompanied by the aggravating factors of either [2][a] the intent to cause serious bodily injury to the victim or [2][b] the use of a deadly weapon.” *Id.* at 1332. As a result, the court agreed with the Fifth Circuit that the generic definition of aggravated assault does *not* include simple assault that has been converted to aggravated assault based solely on the identity of the victim. *Id.* at 1334; *Fierro-Reyna*, 466 F.3d at 327-29.

Note that the Eleventh Circuit’s generic definition requires “*intent* to cause serious bodily injury.” *Id.* at 1333. This is narrower than the definition in the Model Penal Code, which for offenses that do not involve a deadly weapon would permit conviction for injury caused “recklessly under circumstances manifesting extreme indifference to the value of human life.” Model Penal Code § 211.1(2). While the Eleventh Circuit’s narrower formulation is helpful, neither it nor the Fifth Circuit were focusing on the required *mens rea* for generic aggravated assault. Recent decisions in other circuits have squarely addressed it.

In November 2015, the Ninth Circuit conducted “the proper analysis” under *Taylor* by surveying the fifty states, federal law, and the Model Penal Code and concluded that “a mens rea of extreme indifference recklessness is *not* sufficient to meet the federal generic definition of aggravated assault.” *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1085 (9th Cir. 2015) (emphasis in original).

In *United States v. Duran*, 696 F.3d 1089 (10th Cir. 2012), the Tenth Circuit held that, consistent with *Begay*, both the text of § 4B1.2 and its commentary “‘only reach[] purposeful or intentional behavior.’” *Id.* at 1093 (quoting *United States v. Armijo*, 651 F.3d 1226, 1236 (10th Cir. 2011)). As a result, a statute criminalizing aggravated assault that reaches reckless conduct cannot qualify as a “crime of violence.” *Id.* That the Commission moved aggravated assault from commentary to the text does not change the analysis, as made clear by the Commission when it explained that the generic definitions would continue to be governed by established caselaw and that, consistent with *Begay*, only intentional crimes qualify as “crimes of violence.” *See* 81 Fed. Reg. at 4743 (Reason for Amendment).

² The Fifth Circuit has held that generic “assault” requires proof that the defendant either caused, attempted to cause, or threatened to cause bodily injury or offensive contact to another person. *See United States v. Esparza-Perez*, 681 F.3d 228, 231 (5th Cir. 2012).

Further, the generic definition should require specific intent, not general intent. Focusing on the “deadly weapon” form of aggravated assault set forth in the Model Penal Code (“attempt[] to cause or purposely or knowingly causes bodily injury to another with a deadly weapon”), the Fifth Circuit held that generic aggravated assault “requires specific intent to cause bodily injury.” *United States v. Hernandez-Rodriguez*, 788 F.3d 193, 198-200 (5th Cir. 2015):

The defendant must either “attempt to cause” or “purposely or knowingly cause” bodily injury. *Id.* With regard to the result of one’s conduct, “purposely” signifies that it is the defendant’s “conscious object” to cause that result, and “knowingly” signifies that the defendant “is aware that it is practically certain that his conduct will cause” that result. [Model Penal Code] § 2.02(2)(a)-(b). Attempt, in turn, requires the same “kind of culpability otherwise required for the commission of the crime,” and, “when causing a particular result is an element of the crime,” the defendant must act “with the purpose of causing or with the belief that it will cause such result.” *Id.* § 5.01(1)(b).

Id. at 198. Thus, in the Fifth Circuit, a statute requiring only general intent is not sufficient to meet the generic definition of aggravated assault. (Note, however, that the Ninth Circuit suggested in *Garcia-Jimenez*, *supra*, that generic aggravated assault is a general intent crime. See 807 F.3d at 1087 n.8.)

Some jurisdictions retain a distinct crime of assault for which the fear of injury is sufficient for conviction. The Sixth Circuit has held that for the assault element in those jurisdictions to qualify as generic aggravated assault, there must be actual intent to cause apprehension. *United States v. Rede-Mendez*, 680 F.3d 552, 556-58 (6th Cir. 2012) (relying on 2 Wayne R. LaFare, *Substantive Criminal Law* § 16.3(b) (2d ed. 2003)). Thus, aggravated assault in those jurisdictions must be [1] intent to cause fear of injury and [2] the use of a deadly weapon.³

Finally, the Model Penal Code’s definition of aggravated assault includes attempts to cause serious bodily injury. The Ninth Circuit held that, even assuming that attempts to cause bodily injury are part of the generic definition of aggravated assault (a question expressly left undecided), such attempts must be defined to require a “substantial step” and must include the “probable desistance” test, i.e., the “requirement that the defendant’s actions unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances.” See *Garcia-Jimenez*, 807 F.3d at 1088 (internal quotation marks omitted).

“Robbery”

The Fifth Circuit has defined generic robbery as “‘aggravated larceny,’ containing at least the elements of ‘misappropriation of property under circumstances involving immediate danger to the person.’” *United States v. Hernandez-Galvan*, 632 F.3d 192, 198 n.1 (5th Cir. 2011)

³ The Sixth Circuit did not conduct a 50-state survey, so it is not clear whether this form of “assault” should actually qualify as generic “assault” for purposes of generic aggravated assault. This is an area that warrants further investigation.

(quoting 3 W. LaFave, *Substantive Criminal Law* § 20.3(e) (2d ed. 2003) (alterations omitted)). The court has noted that the “immediate danger to the person” element “has been implemented by the states in two main ways”: “The majority of states require property to be taken from a person or a person’s presence by means of force or putting in fear,” while “Texas, the Model Penal Code, and ten other states differ somewhat in that they define the immediate danger in terms of bodily injury.” *United States v. Santiesteban-Hernandez*, 469 F.3d 376, 380 (5th Cir. 2006), *abrogated on other grounds by United States v. Rodriguez*, 711 F.3d 541 (5th Cir. 2013). But, the court said, these are “two sides of the same coin.” *Id.* at 381. Thus, for an offense to meet the “generic, contemporary meaning” of robbery, it must involve both [1] the misappropriation of property and [2] immediate danger to the person of another, met either by [a] bodily injury or [b] “by means of force or putting in fear.” *Id.* at 380-81.

Other courts follow this definition. *See, e.g., United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008) (“We adopt as a generic definition of robbery the same definition adopted by the Fifth Circuit, which described the crime as ‘aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving immediate danger to the person.’”). The Eleventh Circuit noted the differences identified by the Fifth Circuit in the majority and minority approaches to accomplishing the element of immediate danger to the person, and concluded that “to the extent that the definitions differ, we believe the generic, contemporary form of robbery is better reflected in the majority definition.” *United States v. Lockley*, 632 F.3d 1238, 1244 (11th Cir. 2011). It concluded therefore that the “generic definition of robbery to be ‘the taking of property from another person or from the immediate presence of another person by force or intimidation.’” *Id.*

Courts generally accept that generic robbery does not encompass mere threats to property. *See, e.g., Becerril-Lopez*, 541 F.3d at 891 (holding that a robbery statute that encompasses threats to property is broader than generic robbery); *United States v. Castillo*, 811 F.3d 342 (10th Cir. 2015) (robbery that may be accomplished through threats to property is not generic robbery); *see also* 3 Wayne R. LaFave, *Substantive Criminal Law* § 20.3(d)(2) & n.73 (2d ed. 2003) (noting that most modern statutes limit robbery to force or threats against a person). As LaFave puts it, “[t]he commonest sort of fear in robbery, of course, is the fear, engendered by the robber’s intentional threat, of immediate bodily injury or death” to those persons present. *Id.*

However, the Fifth Circuit has interpreted the phrase “immediate danger to the person of another” as encompassing threats to property when the statute at issue requires that the crime be committed “(1) directly against the victim or in his presence; and (2) against his will.” *United States v. Tellez-Martinez*, 517 F.3d 813, 815 (5th Cir. 2008) (holding that California robbery under Cal. Penal Code § 211, though criminalizing threats against property, is generic robbery). The Ninth Circuit expressly declined to follow this reasoning, because it would improperly include as generic robbery an offense where the offender says “Give me \$ 10 or I’ll key your car” or “Open the cash register or I’ll tag your windows.” *Becerril-Lopez*, 541 F.3d at 891 & n.8.

Regarding the timing of the use or threatened use of force, the Tenth Circuit has held that “the uniform generic definition of robbery incorporates the continuing offense theory.” *United States v. Garcia-Caraveo*, 586 F.3d 1230, 1235-36 (10th Cir. 2009). In other words, the generic

definition does not require the use of force before or during the actual taking or attempted taking of the property, but can occur after the taking or attempt, as in during flight. The court surveyed the 50 states, the Model Penal Code, and other treatises, noting that the Model Penal Code “holds that an act of force or violence ‘shall be deemed in the course of committing a theft if it occurs in an attempt to commit theft or in flight after the attempt or commission.’” *Id.* at 1236 (quoting Model Penal Code § 222.1 (internal quotation marks omitted)). The court also noted that LaFave’s treatise “deems the continuing offense theory ‘a desirable change’ from the common law.” *Id.* (quoting 3 LaFave, *Substantive Criminal Law* § 20.3(e)).

“Forcible sex offense”

In new commentary to § 4B1.2, the Commission has now defined the term “forcible sex offense” for purposes of determining whether a conviction for sexual abuse of a minor or statutory rape qualifies as a “crime of violence” (when there is no element of physical force that would qualify it under the force clause). The Commission now states that, “consistent with the definition in § 2L2.1,” the term “forcible sex offense” includes offenses that have as an element “where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced,” *see* 81 Fed. Reg. at 4742, but that sexual abuse of a minor and statutory rape are included “only if” the

sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

Id. The effect of this reference to federal aggravated sexual abuse at 18 U.S.C. § 2241(c) is that sexual abuse of a minor or statutory rape will count only if the elements of the offense require that the defendant “knowingly engage[d] in a sexual act” (defined at 18 U.S.C. § 2246(2)) with

[1] a person under age 12, or

[2] a person age 12 or over and less than age 16, and at least 4 years younger than the defendant under the circumstances in § 2241(a) or (b), which are either

(a) “knowingly cause[d]” another person to engage in a sexual act by using force against that person, or by threatening or placing that person in fear that any person will be subjected to death, serious bodily injury, or kidnapping, 18 U.S.C. § 2241(a); or

(b) “knowingly” rendered another person unconscious and thereby engaged in a sexual act with that person, or administered to another person by force or threat of force, or without the knowledge or permission of that person, a drug, intoxicant, or other similar substance and “thereby substantially impair[ed] the ability of that other person to appraise or control conduct” and “engage[d] in a sexual act with that other person,” 18 U.S.C. § 2241(b)(1)-(2).

The net effect of this new definition will likely be to narrow significantly the range of qualifying prior convictions for statutory rape or sexual abuse of a minor.

For example, the Fifth Circuit previously applied a “common sense” approach to define “minor” to mean under 18 years of age for purposes of generic “sexual abuse of a minor,” and defined “statutory rape” by reference to the age of consent in the jurisdiction of conviction. *United States v. Rodriguez*, 711 F.3d 541, 560 (5th Cir. 2013) (*en banc*); *see also, e.g., United States v. Medina–Valencia*, 538 F.3d 831, 834 (8th Cir.2008) (defining minor as a person under age 18); *United States v. Zuniga-Galeana*, 799 F.3d 801, 805 (7th Cir. 2015) (reaffirming precedent that “minor” means under age 18). This new definition effectively overrules that caselaw in the context of § 4B1.2.

Some courts previously held that statutory rape based on age alone, with no additional aggravating circumstances or elements, does not qualify as a “forcible sex offense” under § 4B1.2. *See, e.g., United States v. Wray*, 776 F.3d 1182 (10th Cir. 2015). Under this new definition, a conviction for statutory rape under a state statute that, by its elements, criminalizes sexual acts with a person under the age of 12 will qualify as a “forcible sex offense” for purposes of § 4B1.2. However, few statutes likely meet that test. For example, in Oklahoma, first degree statutory rape based on age alone requires that the person be under 14 years old while the defendant was over 18 years old. *See* 21 Okla. Stat. § 1114(A)(1). Because Oklahoma’s offense is broader than the new definition at § 4B1.2, it will not count as a “forcible sex offense.”

Also, courts have generally been inclined to count statutory rape as a generic statutory rape when it requires proof of elements in addition to age, such as incapacitation or mental coercion, so this new definition reflects that general trend. But many state statutes define those types of statutory rape more broadly than § 2241(c), so convictions under those state statutes will not qualify under this new definition of “forcible sex offense.” For example, unlike § 2241(c), to be convicted of second degree rape in Oklahoma where the person is unconscious or is otherwise unable to consent, age is not an element at all. *See, e.g., id.* § 1111(A)(2),(4), (5). Because this offense is broader than the new definition at § 4B1.2, it will not count as a “crime of violence.”

Regarding the new definition itself, courts have held that the term “force” as used in § 2241 “envisions actual force,” which requires “restraint . . . sufficient that the other person could not escape the sexual contact.” *United States v. Fire Thunder*, 908 F.2d 272 (8th Cir. 1990); *United States v. Lauck*, 905 F.2d 15 (2d Cir. 1990) (the force requirement of § 2241(a)(1) is met when the “sexual contact resulted from a restraint upon the other person that was sufficient that the other person could not escape the sexual contact”); *see also, e.g., United States v. H.B.*, 695 F.3d 931, 936 (9th Cir. 2012) (same). They point to legislative history stating Congress’s intent that “[t]he requirement of force may be satisfied by a showing of the use, or threatened use, of a weapon; the use of such physical force as is sufficient to overcome, restrain, or injure a person; or the use of a threat of harm sufficient to coerce or compel submission by the victim.” Sexual Abuse Act of 1986, H. Rep. No. 594, 99th Cong., at 14 n.54a (2d Sess. 1986), *reprinted in* 1986 U.S.C.C.A.N. 6186, 6194 n.54a. There are numerous decisions showing the level of force necessary to meet that test. For example, at least one court has held that locking or barricading a door does not rise to meet the level of “force” required. *United States v. Serdahl*, 316 F. Supp. 2d 859, 863 (D.N.D. 2004).

Note that the Fourth Circuit previously held that the generic term “sexual abuse of a minor” must be committed *for the purpose of sexual gratification*. See *United States v. Diaz-Ibarra*, 522 F.3d 343 (4th Cir. 2008) (holding that generic “sexual abuse of a minor” means a defendant’s physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification”); *United States v. Cabrera-Umanzor*, 728 F.3d 347 (4th Cir. 2013) (holding that because “intent to gratify sexual urges is not an element of [the state statute at issue],” conviction under it does not qualify as “sexual abuse of a minor”).

Section 2241(c), the now-governing definition of “sexual abuse of a minor” for purposes of § 4B1.2(a), defines “sexual act” by reference to 18 U.S.C. § 2246(2), as follows:

(A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;

(B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;

(C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or

(D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.

This definition obviously sweeps more broadly than the requirement of a “purpose associated with sexual gratification” to qualify as generic sexual abuse of a minor. Nevertheless, given the contemporaneous limitations also incorporated into the definition of sexual abuse of a minor though § 2241(c), this broader aspect of the new definition may not necessarily operate to include every previously excluded prior conviction under § 4B1.2(a). Note, too, that “sexual act” for purposes of § 2241(c) excludes touching through clothing.

So what about a prior conviction for a sex offense that is not statutory rape or sexual abuse of a minor (so not governed by § 2241(c)), and does not otherwise have an element of “strong physical force” as required by the force clause? Courts have said that generic “forcible sex offense” in the context of § 2L1.2 “requires the use or threatened use of force or compulsion,” see *United States v. Chacon*, 533 F.3d 250, 257 (4th Cir. 2008), and that compulsion may be accomplished through non-physical “power” or “pressure,” *id.* at 257, as when a rape is “accomplished by taking advantage” of someone who cannot give legal consent, *id.* at 258. Though the Fourth Circuit previously declined to transport § 2L1.2’s definition to the term “forcible sex offense” at § 4B1.2 when it was only listed in commentary (and thus an interpretation of the residual clause), see *United States v. Shell*, 789 F.3d 335, 345-46 (4th Cir. 2015), now that the Commission has expressly stated that this amendment is to make § 4B1.2 “[c]onsistent with the definition in § 2L1.2,” be prepared for the government to argue that the

generic definition for purposes of § 2L1.2 applies to “forcible sex offense” as now enumerated in the text of § 4B1.2.

The question whether generic “forcible sex offense” requires a purpose of sexual gratification, as does “sexual abuse of a minor” for purposes of § 2L1.2, will soon be decided by the Fourth Circuit.

“Arson”

The Seventh Circuit held in *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013), that generic arson requires a *mens rea* of willfulness or maliciousness. It relied on the Supreme Court’s reference in *Begay* to the Model Penal Code’s definition of arson, which provides that arson is [1] starting a fire or causing an explosion [2] with the purpose of [3][a] destroying a building or occupied structure of another; or [3][b] destroying or damaging any property, whether his own or another’s, to collect insurance for such loss. 719 F.3d at 590 & n.3 (citing *Begay*, 553 U.S. at 145); *see* Model Penal Code § 220.1(1).

As the Seventh Circuit pointed out, other circuits have also held, consistent with the Model Penal Code, that generic arson requires a malicious or willful *mens rea*. *See, e.g., United States v. Velez-Alderete*, 569 F.3d 541, 544 (5th Cir. 2009); *United States v. Whaley*, 552 F.3d 904, 907 (8th Cir. 2009); *United States v. Velasquez-Reyes*, 427 F.3d 1227, 1230 (9th Cir. 2005).

Most courts of appeals have held that generic arson includes burning of personal property, not just buildings or occupied structures, and regardless of its value or amount of damage. *See, e.g., United States v. Misleveck*, 735 F.3d 983, 986 (7th Cir. 2013); *United States v. Gatson*, 776 F.3d 405 (6th Cir. 2015); *Velez-Alderete*, 569 F.3d at 546 [5th Cir.]; *United States v. Whaley*, 552 F.3d 904, 906 (8th Cir. 2009); *United States v. Velasquez-Reyes*, 427 F.3d 1227, 1230 (9th Cir. 2005).

But beyond these elements, the definition of generic arson is not clear cut. In its recent decision in *Luna Torres v. Lynch*, 136 S. Ct. 1619 (2016), the Supreme Court said that “the elements of generic arson are themselves so uncertain as to pose problems for a court having to decide whether they are present in a given state law.” *Id.* at 1633 (citing John Poulos, *The Metamorphosis of the Law of Arson*, 51 Mo. L. Rev. 295, 364, 387-435 (1986) as “describing multiple conflicts over what conduct the term ‘arson’ includes”). The critical area of dispute, it seems, is whether the generic definition of arson requires that the property be “of another” or some other similar element. *See* Poulos, *The Metamorphosis of the Law of Arson*, *supra* at 387-402 (describing the several different ways that states include this element or something that accomplishes a similar purpose). It appears that some narrowing element may exist in the majority of jurisdictions, *see id.*, but no court has conducted the full 50-state survey on this particular question. The Eighth Circuit has said that the property (whether real or personal) must be “of another.” *United States v. Whaley*, 552 F.3d 904 (8th Cir. 2009). It looked in part to LaFave’s treatise, in which he states that arson is “the malicious burning of the dwelling house of another.” 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.3, at 239 (2d ed. 2003). The Fourth Circuit has cited the Eighth Circuit’s holding with approval, though it was not focusing on this particular element. *See United States v. Knight*, 606 F.3d 171, 173-74 (4th Cir. 2010).

If generic arson requires that the property be “of another,” federal arson does not qualify as a “crime of violence.” *See* 18 U.S.C. § 844(i) (“Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property.”).

“Extortion”

The Commission defined the term “extortion” to mean “obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.” 81 Fed. Reg. at 4742. By doing so, the Commission has “limit[ed] the offense to those having an element of fear or threats ‘of physical injury,’ as opposed to non-violent threats such as injury to reputation.” The Commission explained that this change is “[c]onsistent with [its] goal of focusing the career offender and related enhancements on the most dangerous offenders.” *Id.* Caselaw defining or relying on generic extortion no longer controls, except to the extent that it interprets a term in the Commission’s definition.

“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)”

Some courts have (incorrectly) found that an instant offense under § 922(g) qualified as “unlawful possession of firearm described in 26 U.S.C. § 5845(a)” for purposes of the career offender guideline by improperly applying the modified categorical approach to look beyond the elements of the offense of conviction.⁴ *See United States v. Beckles*, 565 F.3d 832, 843 (11th Cir. 2009) (finding § 922(g) categorically overbroad, then applying the modified categorical approach to determine the type of firearm).⁵

The Supreme Court 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

⁴ Courts do not appear to have made this error with respect to prior convictions, at least since the Supreme Court confirmed in *Begay* that the categorical approach applied to the residual clause.

⁵ “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.

Eleventh Circuit has since 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. App'x 415, 416 (11th Cir. 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 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.

Other courts have taken a different route to find that a conviction for unlawful possession of a firearm under § 922(g) qualifies as an instant conviction for unlawful possession of a firearm described in § 5845(a) for purposes of § 4B1.2, but this approach *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 states (until August 1, 2016) 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).

With the residual clause and the commentary tied to it at Application Note 1 now deleted from § 4B1.2, 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).

Note that this problem does not arise when the instant offense of conviction is an offense for which the type of firearm is actually an element of the offense. For example, a 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 an offense involving the “use or possession of a firearm described in 26 U.S.C. § 5845(a).”

Finally, the Commission added “use” of “a firearm described in 26 U.S.C. § 5845(a)” and changed “involves use of explosives” to “use *or possession* of . . . explosive material as defined in 18 U.S.C. § 841(c).” It appears that these changes will expand the range of offenses that will qualify as a “crime of violence,” but we have not yet determined the extent of the expansion, or any limiting effect that the reference to § 841(c) could have. We will update this memo with that information.

“Attempt”

Attempts are included in the force clause and continue to be listed in commentary. If an attempt offense would qualify only through commentary, argue that the Commission does not have authority to set forth freestanding offenses in commentary. *See* Commentary Offenses Memo (Mar. 2016). In any event, the attempt must be generic attempt.

In *United States v. Gonzalez-Monterroso*, 745 F.3d 1237 (9th Cir. 2014), the Ninth Circuit summarized its previous decisions defining generic attempt as follows:

We have defined “attempt” as requiring [1] an intent to commit the underlying offense, along with [2] an overt act constituting a substantial step towards the commission of the offense. Mere preparation to commit a crime does not constitute a substantial step. A substantial step occurs when a defendant’s actions unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances.

Id. at 1237, 1243 (internal quotation marks omitted; one alteration omitted). Because Delaware’s attempt statute criminalizes offenses that involve mere preparation, it sweeps more broadly than generic attempt and thus does not qualify as generic attempt under *Taylor*’s categorical approach. *Id.* at 1244-45.

More recently, the Ninth Circuit reconfirmed that to qualify as generic attempt, a statute of conviction must also include the “probable desistance” test, i.e., the “requirement that the defendant’s actions unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances.” *See United States v. Garcia-Jimenez*, 807 F.3d 1079, 1088 (9th Cir. 2015) (internal quotation marks omitted). Because New Jersey has eliminated the “probable desistance” test, a New Jersey conviction for attempt to cause serious bodily injury (as aggravated assault) “is not a categorical match for the federal definition” of attempt. *Id.* at 1088-89.

“Conspiracy”

Conspiracy is not included in the force clause and is not among the enumerated offenses, but the Commission continues to list conspiracy in the commentary. Argue that the Commission does not have authority to set forth freestanding offenses in commentary. *See Commentary Offenses Memo* (Mar. 2016). In any event, the conspiracy must be generic conspiracy.

The Ninth Circuit relied on a 50-state survey, the Model Penal Code, and LaFave’s *Substantive Criminal Law* to hold that the generic, contemporary meaning of the term “conspiracy” requires proof of an overt act in furtherance of the agreement. *United States v. Garcia-Santana*, 774 F.3d 528, 535-40 (9th Cir. 2014). There, because the Nevada statute of conviction at issue there did not require proof of an overt act, a conviction for conspiracy to commit burglary was not generic conspiracy, and thus not an “aggravated felony” for purposes of the INA. *Id.* at 543.

“Aiding and Abetting”

Aiding and abetting is not listed as a qualifying “crime of violence,” either in text or commentary. 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.