United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
December 8, 2020
Lyle W. Cayce
Clerk

No. 18-11168

UNITED STATES OF AMERICA,

Plaintiff—Appellant,

versus

EDDIE LAMONT LIPSCOMB,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:07-CR-375-M

Before CLEMENT, HO, and DUNCAN, *Circuit Judges*.

EDITH BROWN CLEMENT, *Circuit Judge*:

In 2007, a Dallas police officer arrested Eddie Lipscomb for illegal possession of a sawed-off shotgun. Lipscomb, who had nine prior felony convictions, pleaded guilty to illegal possession of a firearm by a felon in violation of 18 U.S.C. § 922(g). The district court then sentenced Lipscomb to 20 years in prison—a sentence that fell between the 15-year statutory minimum required by the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), and the 24-year bottom of the sentencing guidelines. We affirmed in *United States v. Lipscomb*, 619 F.3d 474, 476 (5th Cir. 2010).

Years later, Lipscomb moved for release under 28 U.S.C. § 2255, based on the Supreme Court's holding in *Johnson v. United States*, 576 U.S. 591, 597 (2015), that the residual clause of the ACCA's violent felony definition violated due process. Over the Government's objection, the district court granted Lipscomb's motion, concluding that he did not have the requisite three violent felonies to mark him as an armed career criminal. *See* 18 U.S.C. § 924(e)(1). The district court amended its judgment, reducing Lipscomb's sentence to ten years. *See id.* § 924(a)(2). Lipscomb was immediately released on time served, and the Government appealed.

In the years since the Government filed its appeal, our cases have crystalized in this area. It is settled: Lipscomb's prior convictions designated him an armed career criminal at the time of his sentencing. Because the district court erred in granting Lipscomb's section 2255 motion to the contrary, we vacate that order and direct the district court to reinstate its original judgment.

I.

Under the ACCA, "a person who violates section 922(g)," as Lipscomb did, "and has three previous convictions . . . for a violent felony . . . committed on occasions different from one another," faces a statutory minimum 15-year prison sentence. 18 U.S.C. § 924(e)(1). In relevant part, the statute defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year . . . that — (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary," or another enumerated offense. *Id.* § 924(e)(2)(B).

Among Lipscomb's nine prior felonies at the time of his 2007 arrest were two convictions for burglary—in 1993 and 1994—and four for robbery—one in 1994 and three in 2004. The Government does not argue

that the three 2004 robbery convictions were "committed on occasions different from one another," and, since it does not change our analysis, we will treat them as one. *See id.* § 924(e)(1).

In granting Lipscomb's section 2255 motion, the district court concluded that the robbery convictions did not qualify as violent offenses because they did not meet the elements requirement of § 924(e)(2)(B)(i).[1] Our recent cases demonstrate that was incorrect. In *United States v. Burris*, we held that "robbery under Texas Penal Code § 29.02(a) requires the 'use, attempted use, or threatened use of physical force.'" 920 F.3d 942, 945 (5th Cir. 2019); *see* 18 U.S.C. § 924(e)(2)(B)(i). Likewise, we held in *United States v. Herrold*, that "burglary convictions . . . under [Texas Penal Code] Section 30.02(a)(1) [are] generic burglary" as that term is used in 18 U.S.C. § 924(e)(2)(B)(ii). 941 F.3d 173, 182 (5th Cir. 2019) (en banc), *cert. denied*, --- S. Ct. ---, 2020 WL 5882400 (mem.) (Oct. 5, 2020). At the time of his sentencing, Lipscomb had the three previous violent felony convictions to bring him under the ACCA's ambit. It is clear that the district court's order granting Lipscomb's section 2255 motion was in error.[2] Nor does Lipscomb dispute this.[3]

II.

Lipscomb does, however, dispute what this court should do about it. We address, and ultimately reject, each of Lipscomb's three proposals.

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[1] We review this decision *de novo*. *United States v. Fuller*, 453 F.3d 274, 278 (5th Cir. 2006).

[2] *See United States v. Matthews*, 799 F. App'x 300 (5th Cir. 2020) (summarily affirming findings that Texas robbery and Texas burglary are categorically violent felonies for purposes of ACCA).

[3] Lipscomb preserves for further review his argument that *Burris* and *Herrold* were wrongly decided.

First, Lipscomb argues that the Government is estopped from appealing the district court's order because, during the pendency of this appeal, the Government "twice secured Mr. Lipscomb's reincarceration on allegations that he had violated his conditions of supervised release." If this sounds dubious, it is.

"Estoppel against the government is problematical at best." *United States v. Perez-Torres*, 15 F.3d 403, 407 (5th Cir. 1994) (citing *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990)). "[I]f estoppel were to be available against the government *at all* it would 'at least' require demonstrating all the traditional equitable prerequisites." *Id.* (quoting *Heckler v. Cmty. Health Servs. of Crawford*, 467 U.S. 51, 61 (1984)) (emphasis added). But, as an equitable doctrine, estoppel requires that "he who comes into equity must come with clean hands." *Id.* (quotation omitted). If not, "the doors of equity are closed to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the other party." *Id.* (quotation omitted). More than that, estoppel "assumes even wider and more significant proportions where the matter in issue concerns the public interest, for in such an instance the denial of equitable relief averts an injury to the public." *Id.* (quotation omitted).

So, in *Perez-Torres*, we declined to estop the defendant's prosecution for illegally reentering the United States after deportation, because "he [was] tainted with extreme bad faith, for he knew such conduct was a felony and nevertheless willfully and purposefully engaged in it." *Id.* Estoppel is equally inapposite here. Lipscomb argues that the Government cannot pursue this appeal because it took remedial action to secure his incarceration after he violated his supervisory release conditions. But, critically, the Government only took its actions in response to Lipscomb's violations. His hands are far from clean.

Lipscomb offers no persuasive authority to the contrary. All his cited cases are non-binding, out-of-circuit decisions, and none involve the Government or a criminal prosecution. *See Wohl v. Keene*, 476 F.2d 171, 177 (4th Cir. 1973); *In re Greenpoint Metallic Bed Co.*, 113 F.2d 881, 884 (2d Cir. 1940); *Smith v. Morris*, 69 F.2d 3, 4–5 (3d Cir. 1934); *Albright v. Oyster*, 60 F. 644 (8th Cir. 1894). We are unpersuaded.

Second, Lipscomb argues that "basic fairness" compels a stay until the Supreme Court considers a case that will determine whether *Burris* was decided correctly. *See Borden v. United States*, 140 S. Ct. 1262 (Mar. 2, 2020) (No. 19-5410) (granting petition for certiorari). Lipscomb notes that the court previously granted the Government's requested stays to allow for resolution of *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc), *Herrold*, 941 F.3d at 173, and *Walker v. United States*, 140 S. Ct. 519 (Nov. 15, 2019) (No. 19-373) (granting petition for certiorari), *abrogated by* 140 S. Ct. 953 (Jan. 27, 2020) (dismissing petition because of petitioner's death). Now that the case law supports the Government, Lipscomb asks for the same opportunity.

In arguing for fairness, Lipscomb acknowledges that "we remain bound to follow our precedent even when the Supreme Court grants certiorari on an issue." *United States v. Lopez-Velasquez*, 526 F.3d 804, 808 n.1 (5th Cir. 2008). Whatever his argument's intuitive appeal, we nevertheless "remain bound." We granted the Government's motions to stay its appeal (some of them, as Lipscomb acknowledges, unopposed) in the interest of resolving unsettled questions that directly affected this appeal. Those questions are now settled on the firmest foundations of our court. *See Burris*, 920 F.3d at 945; *Herrold*, 941 F.3d at 182 (en banc), *cert. denied*, ---

S. Ct. ---, 2020 WL 5882400; *see also Reyes-Contreras*, 910 F.3d at 169 (en banc). We will not delay any longer.[4]

Third, if we reverse, Lipscomb asks us to "remand rather than render judgment for the Government," so the district court can decide how to resolve this sentence and the two revocation judgments against Lipscomb. Of course, the district court must preside over the revocation judgments in the first instance. But as to the erroneous section 2255 order, Lipscomb offers no support for his assertion that the district court is better suited to correct its judgment.

* * *

The district court's order granting Lipscomb's motion for release under 28 U.S.C. § 2255 is hereby VACATED and REMANDED for the district court to reinstate its original judgment.

[4] In addition to Lipscomb's violations of supervised release, the Government cites five state criminal cases against Lipscomb since his release. These alleged offenses also counsel against further delay. For example, in August 2020, Lipscomb was arrested for a robbery in which he allegedly choked and threatened to kill his ex-girlfriend. Based on that incident, we granted the government's motion to expedite Lipscomb's appeal.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EDDIE LAMONT LIPSCOMB,	)	
Movant,	)	
vs.	)	**No. 3:16-CV-1500-M-BH**
	)	**No. 3:07-CR-357-M**
	)	
UNITED STATES OF AMERICA,	)	
Respondent.	)	**Referred to U.S. Magistrate Judge**

FINDINGS, CONCLUSIONS, AND RECOMMENDATION

By *Special Order 3-251*, this habeas case has been automatically referred for findings, conclusions, and recommendation. Based on the relevant findings and applicable law, the amended *Motion Under 28 U.S.C. § 2255, to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody*, filed on June 6, 2016, should be **GRANTED**, the sentence should be vacated, and the movant should be re-sentenced.

I. BACKGROUND

Eddie Lamont Lipscomb (Movant) challenges his federal conviction and sentence in Cause No. 3:07-CR-357-M. The respondent is the United States of America (Government).

By indictment filed on November 28, 2007, Movant was charged with being a felon in possession of a firearm in violation of 18 U.S.C. §§ 922(g)(1), 924(e)(1). (*See* doc. 1.)[1] He pled guilty on June 25, 2008. (*See* doc. 30.) On August 13, 2008, the United States Probation Office (USPO) prepared a Presentence Report (PSR), applying the 2007 United States Sentencing Guidelines Manual (USSG). (*See* doc. 54 at 5, ¶ 13.) It found that Movant was an armed career criminal because his federal conviction under 18 U.S.C. § 924(e) subjected him to an enhanced sentence based on his prior violent felony convictions for burglary of a habitation and four robberies,

[1] Unless otherwise indicated, all document numbers refer to the docket number assigned in the underlying criminal action, 3:12-CR-126-L.

resulting in an offense level of 35. (*See id*. at 5, ¶ 7; 7. ¶¶ 24, 26.) With a criminal history category of six, the resulting guideline range was 292-365 months' imprisonment. (*See id*. at 18, ¶ 77.) February 18, 2009, Movant was sentenced to 240 months' imprisonment. (*See* doc. 45 at 2.) The judgment was affirmed on appeal. (*See* doc. 64); *United States v. Lipscomb*, No. 09-10240 (5th Cir. Sept. 13, 2010).

Movant claims that his sentence was enhanced under the unconstitutional residual clause of the Armed Career Criminal Act (ACCA), and his sentence was unconstitutionally enhanced under the residual clause of USSG § 4B1.2. (*See* 3:16-CV-1500-M, doc. 1 at 7.) The Government filed a response on December 2, 2016. (*See id.*, doc. 11.) Movant's reply, filed on June 15, 2017, conceded that his claim regarding the sentencing guideline is not a basis for relief in light of *Beckles v. United States*, 137 S.Ct. 886, 895 (2017) (holding that the sentencing guidelines are not subject to a vagueness challenge under the Due Process Clause). (*See id.*, doc. 16 at 1.)

II. SCOPE OF RELIEF AVAILABLE UNDER § 2255

"Relief under 28 U.S.C. § 2255 is reserved for transgressions of constitutional rights and for a narrow range of injuries that could not have been raised on direct appeal and would, if condoned, result in a complete miscarriage of justice." *United States v. Gaudet*, 81 F.3d 585, 589 (5th Cir. 1996) (citations and internal quotation marks omitted). It is well-established that "a collateral challenge may not do service for an appeal." *United States v. Shaid*, 937 F.2d 228, 231 (5th Cir. 1991) (*en banc*) (quoting *United States v. Frady*, 456 U.S. 152, 165 (1982)).

A failure to raise a claim on direct appeal may procedurally bar an individual from raising the claim on collateral review. *United States v. Willis*, 273 F.3d 592, 595 (5th Cir. 2001). Defendants may only collaterally attack their convictions on grounds of error omitted from their direct appeals upon showing "cause" for the omission and "actual prejudice" resulting from the

error. *Shaid*, 937 F.2d at 232. However, "there is no procedural default for failure to raise an ineffective-assistance claim on direct appeal" because "requiring a criminal defendant to bring [such] claims on direct appeal does not promote the[] objectives" of the procedural default doctrine, "to conserve judicial resources and to respect the law's important interest in the finality of judgments." *Massaro v. United States*, 538 U.S. 500, 503-04 (2003). The Government may also waive the procedural bar defense. *Willis*, 273 F.3d at 597.

III. ARMED CAREER CRIMINAL ACT

As the Supreme Court of the United States noted in *Johnson*,

> Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," [Section 924 of] the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); *Johnson v. United States*, 559 U.S. 133, 136, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). The Act defines "violent felony" as follows"
>
> > any crime punishable by imprisonment for a term exceeding one year ... that—
> >
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another*. § 924(e)(2)(B) (emphasis added).

135 S.Ct. at 2555-56. Subsection (i) is known either as the force clause, *United States v. Lerma*, 877 F.3d 628, 630 (5th Cir. 2017), or as the elements clause, *United States v. Taylor*, 873 F.3d 476, 477 n.1 (5th Cir. 2017). The four offenses listed in subsection (ii) are referred to as the "enumerated offenses," *see United States v. Davis*, 487 F.3d 282, 285 (5th Cir. 2007), or as the "enumerated offenses clause," *Taylor*, 873 F.3d at 477 n.1. The remainder of the subsection is known as the

"residual clause," *Johnson,* 135 S.Ct. 2555-56.

Johnson held that the imposition of an increased sentenced under ACCA's residual clause violates the Constitution's guarantee of due process because the residual clause is unconstitutionally vague. *Johnson*, 135 S. Ct. at 2563.[2] After *Johnson*, a crime is a violent felony under ACCA only if it is one of the enumerated offenses, or if it qualifies under the force clause. *United States v. Moore*, 711 F. App'x 757, 759 (5th Cir. 2017) (per curiam).

Here, the offense of which Movant was convicted in four cases, robbery, is not an enumerated offense. The Fifth Circuit Court of Appeals does not appear to have considered whether it qualifies as a violent felony under ACCA's force clause because it has as an element the use, attempted use, or threatened use of physical force.

IV. TEXAS ROBBERY STATUTE

The version of Texas Penal Code § 29.02 in effect when Movant committed the robberies in 1994 and 2004 stated:

> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
>
> > (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
> >
> > (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Penal Code § 29.02 (1974); *see* Act of June 14, 1973, 63rd Leg., R.S., ch. 399, § 1, 1973 Tex. Gen. Laws 883, 926.

A. Applicable Approach

To determine whether a crime is a violent felony under the force clause, courts use either the

[2] This holding is retroactively available on collateral review. *Welch v. United States*, 136 S.Ct. 1257, 1268 (2016).

categorical approach or the modified categorical approach, depending on whether the statute setting out the offense is indivisible or divisible. *See Lerma*, 877 F.3d at 631; *United States v. Howell*, 838 F.3d 489, 494-95 (5th Cir. 2016). An indivisible statute sets out "a single set of elements [defining]", or "various means of committing," a single crime or offense. *Lerma*, 877 F.3d at 631; *Howell*, 838 F.3d at 497. A divisible statute "lists multiple, alternative elements, and so effectively creates 'several different ... crimes.'" *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013) (quoting *Nijhawan v. Holder,* 557 U.S. 29, 41 (2009)).

"Elements are the constituent parts of a crime's legal definition", i.e., what the prosecution must prove and the jury must find beyond a reasonable doubt to convict the defendant, or what the defendant must admit when he pleads guilty. *Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016). "An element of a crime must be distinguished from the means of satisfying a single element." *Lerma*, 877 F.3d at 631. The test for determining whether a statute alternatively sets out elements or means of satisfying an element is whether a jury must agree on one of the statutory alternatives in reaching a verdict. *Howell*, 838 F.3d at 497.

> Elements must be agreed upon by a jury. When a jury is not required to agree on the way that a particular requirement of an offense is met, the way of satisfying that requirement is a means of committing an offense not an element of the offense.

Id. at 498 (quoting *United States v. Hinkle*, 832 F.3d 569, 574-75 (5th Cir. 2016)).

If a statute is indivisible because it sets out a single set of elements, the sentencing court must apply the "categorical approach." *Mathis,*136 S.Ct. at 2248. It "requires the sentencing court, when determining whether a crime qualifies as a violent felony under the elements [or force] clause, to focus solely on whether the elements of the crime of conviction include the use, attempted use, or threatened use of physical force against the person of another." *Lerma*, 877 F.3d at 630. "The sentencing court is not permitted to review the particular facts of the case." *Id*.

If a statute is divisible because it lists alternative elements, the sentencing court must use the "modified categorical approach" to determine the elements under which the defendant was convicted. *Mathis*, 136 S.Ct. at 2253. Under this approach, the court looks "to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of [committing]." *Id*. at 2249 (citations omitted). "The court can then determine, in deciding whether the crime satisfies the elements [or force] clause, if one of those elements included the use, attempted use, or threatened use of physical force against the person of another." *Lerma*, 877 F.3d at 630.

To determine whether a statute is divisible or indivisible, courts may consider several sources, including the statutory text and state court decisions. *United States v. Reyes-Contreras*, 882 F.3d 113, 119 (5th Cir. 2018).

Texas courts do not appear to have conclusively addressed whether jury unanimity is required for the bodily injury and threat elements set out in subsections (1) and (2) of the robbery statute.[3] Robbery is a form of assault, however, with theft as the underlying offense. *See Ex parte Hawkins*, 6 S.W.3d 554, 559-60 (Tex. Crim. App. 1999). The bodily injury and threat elements in the robbery statute are almost identical to those of the assault statute.[4] *See Fennell*, 2016 WL

[3] In an aggravated robbery case, a state appellate court held that the two assaultive elements of the underlying robbery offense (bodily injury or threat) are the same offense because a conviction for two aggravated robberies of the same victim from the same incident, where one underlying robbery is based on bodily injury and the other robbery is based on threat, would be double jeopardy. *Burton v. State*, 510 S.W.3d 232, 237 (Tex. App. – Fort Worth 2017) (citing *Cooper v. State*, 430 S.W.3d 426 (Tex. Crim. App. 2014)). The Fifth Circuit declined to rely on *Burton* in determining whether the aggravated robbery statute is divisible or indivisible. *See Lerma*, 877 F.3d at 634 n.4. It observed that the issue in *Cooper* was whether a person could be convicted of robbing the same person twice at the same time, and not whether the statute is divisible. *Id*. at 634. State court cases on double jeopardy are not a source for determining whether a statute is divisible. *United States v. Herrold*, 883 F.3d 517, 528-29 (5th Cir. 2018).

[4] A person commits assault if the person "(1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse" or "(2) intentionally or knowingly threatens another with imminent bodily injury." Tex. Penal Code § 22.01(a)(1), (2). The only difference between these elements of an assault offense and the elements of robbery is that the assault statute provides that the spouse of the actor can be a victim of assault by bodily injury.

4491728 at *5. The state court decisions regarding the divisibility of the assault statute are therefore instructive.

The Texas Court of Criminal Appeals has explained that assault by bodily injury and assault by threat are separate crimes because one is a result-oriented offense (bodily injury) and the other is a conduct-oriented offense (threat). *Landrian v. State*, 268 S.W.3d 532, 540 (Tex. Crim. App. 2008), *citing with approval*, *Dolkart v. State*, 197 S.W.3d 887, 893 (Tex. App. – Dallas 2006) (holding that in order to convict of assault, a jury must agree whether the offense was assault by bodily injury or assault by threat); *Gonzales v. State*, 191 S.W.3d 741, 748-49 (Tex. App. – Waco 2006) (same); and *Marinos v. State*, 186 S.W.3d 167, 174-75 (Tex. App. – Austin 2006) (same). Because Texas courts have found that the bodily injury and threat elements of the assault statute set out separate offenses, and a jury is required to agree on which of the two statutory alternatives a defendant violated for purposes of that statute, the Court finds that the almost identically-worded elements in the robbery statute also set out separate offenses.

Because the elements of the robbery statute set out separate offenses, the statute is divisible. *See Lerma*, 877 F.3d at 631; *Howell*, 838 F.3d at 497. The applicable approach for determining whether the offense of robbery qualifies as a violent felony under ACCA's force clause is therefore the "modified categorical approach." *See Mathis,*136 S.Ct. at 2253. As noted, this requires review of state court documents to determine which crime, with what elements, Movant was convicted of committing. *See id*. at 2249.

Because the record does not include the state court documents from the four robbery convictions, it must be presumed that Movant violated the robbery statute in the least culpable manner, i.e., by threat. *See United States v. Garcia-Montejo*, 570 F. App'x 408, 413 (5th Cir. 2014). In an abundance of caution, however, both the bodily injury and threat elements of the offense will

be examined to determine whether they each include the use, attempted use, or threatened use of physical force against the person of another.

B. Physical Force

"The phrase 'physical force' [in § 924(e)(2)(B)(i)] means violent force—that is, force capable of causing physical pain or injury to another person." *See Johnson v. United States*, 559 U.S. 133, 140 (2010). Although the Fifth Circuit does not appear to have decided whether Texas robbery is a violent felony under the ACCA, this issue appears to be pending in *United States v. Patton*, No. 17-10942 (appeal of § 2255 case), and *United States v. Burris*, No. 17-10478 (direct appeal of criminal case). District courts are split on the issue. *See Joiner v. United States*, 2018 WL 814021 at *2 (W.D. Tex. Feb. 9, 2018) (citing cases).

This Court has previously held that a Texas robbery offense is not a violent felony under ACCA, regardless of whether the robbery statute is divisible or indivisible. *United States v. Fennell*, No. 3:15-CR-443-L, 2016 WL 4491728 at *6 (N.D. Tex. Aug. 25, 2016), *recons. denied*, 2016 WL 4702557 (N.D. Tex. Sept. 8, 2016), *aff'd* 695 F. App'x 780 (5th Cir. 2017). *Fennell* relied on *United States v. Villegas–Hernandez*, 468 F.3d 874 (5th Cir. 2006), in which the Fifth Circuit considered whether the Texas assault statute, which makes it a crime to cause bodily injury, includes the use of physical force as an element for purposes of deciding whether it qualifies as a "crime of violence" under 18 U.S.C. § 16(a).[5] The force clause in § 16(a) is almost identical to the one in ACCA.[6]

[5] Section 16(a) defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person *or property* of another." 18 U.S.C. § 16(a) (2000) (*emphasis added*). ACCA refers only to the use of physical force against the person of another.

[6] Courts analyzing issues arising under the force clause of either § 16(a) or ACCA rely on cases under both statutes, as well as on identically worded sentencing guidelines regarding crimes of violence. *See Johnson v. United States*, 559 U.S. 133, 140 (2010) (relying on case law under § 16 in an analysis of the elements of a crime under the force clause of § 924(e); *United States v. Paniagua*, 481 F. App'x 162, 166 (5th Cir. 2012) (relying on case law under § 924(e) in an analysis of the elements of a crime under the force clause of § 16); *United States v. Johnson*, 880 F.3d 226, 234 (5th Cir. 2018) ("precedent regarding ACCA's definition of a violent felony is directly applicable to the Guidelines definition

1. *Villegas-Hernandez and Progeny*

In *Villegas-Hernandez*, the Fifth Circuit began its analysis of the Texas assault statute under the categorical approach by first explaining that "the term 'force' has a specific meaning and, 'when used in the statutory definition of a 'crime of violence,' is 'synonymous with destructive or violent force.'" *Id.* at 878-79 (quoting *United States v. Landeros–Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001)). Because use of force must be "an element" of the offense, assault would satisfy the definition of "crime of violence" in § 16(a) "only if a conviction for that offense could not be sustained without proof of the use of 'destructive or violent' force." *Id.* at 879. The Fifth Circuit explained that the "bodily injury" required under the assault statute is "physical pain, illness, or any impairment of physical condition." *Id*. (quoting Tex. Penal Code § 1.07(a)(8)). The court noted that the "bodily injury" required by the assault statute "could result from any of a number of acts, without use of 'destructive or violent force', [such as] making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." *Id*. Because the prosecution would not need to show use of physical force to convict under these scenarios, the Fifth Circuit concluded that use of force was not a element of the offense, so assault did not qualify as a "crime of violence" under § 16(a). *Id.* In so finding, the Fifth Circuit recalled its prior *en banc* holdings in *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (*en banc*), that "'[t]here is ... a difference between a defendant's causation of injury and the ... use of [physical] force,'" and that "'the intentional causation of injury does not necessarily involve the use of force.'" *Id*. at 880-81.

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of a crime of violence").

The Fifth Circuit subsequently considered whether a California terroristic threat statute had as an element the threatened use of physical force and was therefore a "crime of violence" for purposes of § 2L1.2 of the Sentencing Guidelines, which is in relevant part identical to ACCA's force clause. *See United States v. De La Rosa–Hernandez*, 264 F. App'x 446, 447-49 (5th Cir. 2008). Applying the categorical approach, the court found that "[a]s in *Villegas*[*-Hernandez*], a defendant could violate [the California statute, which criminalized threatening to commit a crime that would result in death or great bodily injury to another person], by threatening either to poison another or to guide someone intentionally into dangerous traffic, neither of which involve 'force', as that term is defined by our court." *Id*. at 449. Because it was possible to obtain a conviction under the statute without proof of the threatened use of physical force, the Fifth Circuit found that it was not an element of the offense, so it was not a crime of violence.[7] *Id*.

More recently, in *United States v. Rico-Mejia*, 859 F.3d 318, 321 (5th Cir. 2017), the Fifth Circuit again considered whether a "terroristic threatening" statute had the threatened use of physical force as an element and was a crime of violence under § 2L1.2. The court found that even if the district court correctly resorted to the modified categorical approach in analyzing the Arkansas "terroristic threatening" statute, which made it an offense to threaten to cause death or serious bodily injury to another person, the offense could not constitute a crime of violence under *Villegas–Hernandez* and *De La Rosa–Hernandez* because a person could cause physical injury without using physical force. *Id.* at 322-23.

[7] Although a categorical approach was used in *De La Rosa-Hernandez*, and a modified categorical approach is used for the Texas robbery offense, the analysis of the threat element in that case still provides guidance for the analysis of the threat element for robbery. As discussed, the categorical or modified categorical approach is used to determine the elements of the offense for the prior conviction. Once the elements are determined, the analysis of whether the use or threatened use of physical force is an element of the offense is the same regardless of the approach used to determine the elements of the offense.

2. *Castleman and Voisine*

The Government argues that the Supreme Court's decisions in *United States v. Castleman*, 134 S.Ct. 1405 (2014), and *Voisine v. United States*, 136 S.Ct. 2272 (2016), undermined the Fifth Circuit's holding in *Villegas-Hernandez* that a statutory element of causing bodily injury does not necessarily include the use of physical force. (*See* doc. 12 at 11- 15, 17.) This argument has recently been expressly rejected by the Fifth Circuit, however:

> The Government responds that [*Villegas-Hernandez* and its progeny] have been overruled by *United States v. Castleman*, ___ U.S. ___, 134 S.Ct. 1405, 1414, 188 L.Ed.2d 426 (2014), which held that a defendant's guilty plea to having "intentionally or knowingly cause[d] bodily injury" to the mother of his child constituted "the use of physical force" required for a misdemeanor crime of domestic violence as defined in 18 U.S.C. § 921(a)(33)(A). The Government points out that as part of the Supreme Court's reasoning in that decision, it applied a definition of "use of physical force" that was much broader than that described in the above cases – one that could involve harm caused both directly and indirectly and that would include administering poison or similar actions. *Id*. at 1413–15. ...
>
> The Government's contention regarding *Castleman* must be rejected. By its express terms, *Castleman*'s analysis is not applicable to the physical force requirement for a crime of violence, which "suggests a category of violent, active crimes" that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context. 134 S.Ct. at 1411 n.4 (noting that "Courts of Appeals have generally held that mere offensive touching cannot constitute the 'physical force' necessary to a 'crime of violence' " and clarifying that "[n]othing in today's opinion casts doubt on these holdings, because ... 'domestic violence' encompasses a range of force broader than that which constitutes 'violence' simpliciter"). Accordingly, *Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence, and [the Arkansas terroristic threat statute] cannot constitute a crime of violence ... because it lacks physical force as an element.

Rico-Mejia, 859 F.3d at 322-23.[8]

Subsequently, in *Reyes-Contreras*, the Fifth Circuit noted the Government's argument that

[8] This Court also rejected this argument in *Fennell,* on the Government's motion for reconsideration. 2016 WL 4702557.

"indirect force is sufficient, [and that *Castleman* had] overruled Fifth Circuit precedent requiring destructive or violent force by interpreting the use-of-force clause in 18 U.S.C. § 921(a)(33)(A)(ii) to encompass the common-law definition, which includes offensive touching and indirect applications of force." 882 F.3d at 123. It also noted, however, its prior holdings in *Rico-Mejia* as well as *United States v. Calderon-Pena*, 383 F.3d 254, 260 (5th Cir. 2004), "in which the *en banc* court expressly held that an offense that can be committed without 'any bodily contact (let alone violent or forceful contact)'" does not have physical force as an element." *Id*. As the Fifth Circuit acknowledged,

> [t]he government rightly points out that many circuits have rejected this view and have expanded *Castleman* to state that indirect causation of bodily injury may warrant a [crime of violence] enhancement. But *Castleman* does not on its own terms make this expansion, and a previous panel [in *Rico-Mejia*] declined to interpret it as doing so, thus binding us.

Id. This court is likewise bound by *Rico-Mejia*'s rejection of the Government's reliance on *Castleman*.[9]

In conclusion, the Court finds that the Fifth Circuit's rationale in *Villegas-Hernandez* for finding that a person can cause bodily injury without the use of physical force for purposes of the assault statute applies equally to the nearly identical bodily injury element of the robbery statute. As noted in *Fennell*, "the same definition of 'bodily injury' applies to simple robbery, and neither this definition nor the statutory language for assault or robbery alludes to the use of force or makes force an implicit or explicit element of the crimes. The focus instead is on bodily injury, which does not necessarily require the use of force." 2016 WL 4491728 at *6. *Fennell* found that regardless of whether the robbery statute is divisible or indivisible, it "is broad enough to entail even the slightest use of force that results in relatively minor physical contacts and injuries, and the degree

[9] The Government filed a motion for rehearing *en banc* in *Reyes-Contreras* on April 5, 2018.

or character of the physical force exerted is irrelevant," so "it covers conduct that does not involve the type of 'violent force' contemplated by the ACCA." *Id.* Because there is a set of facts that would support a conviction under the bodily injury element without proof of the use of force, and the use of force is not a fact necessary to support a conviction under that element, the use of force is not an element of the Texas robbery statute. *See id.*

As for the threat element, the Fifth Circuit applied its rationale in *Villegas-Hernandez* to find that a person can threaten to cause bodily injury without threatening the use of physical force for purposes of the terroristic threat statutes at issue in *De La Rosa-Hernandez* and *Rico-Mejia*. Its reasoning applies equally to the similar threat element of the Texas robbery statute.[10] Because there is also a set of facts that would support a conviction under the threat element without proof of the threatened use of force, and the threatened use of force is not a fact necessary to support a conviction under that element, the threatened use of force is also not an element of Texas robbery.

Since neither the use of force nor the threatened use of force is an element of the Texas robbery statute, a conviction under that statute does not qualify as a violent felony under ACCA's force clause.[11] Because Texas robbery is no longer a violent felony after *Johnson*, the enhancement of Movant's sentence under ACCA based in part on his four robbery convictions does not survive.[12]

---

[10] The threat elements of the California and Arkansas terroristic threat statutes are similar to the threat element of the Texas robbery statute. *See De La Rosa-Hernandez*, 264 F. App'x at 446 (quoting Cal. Penal Code § 422); *Rico-Mejia*, 859 F.3d at 322 (quoting Ark. Code Ann. § 5-13-301(a)(1)).

[11] The result is the same under the categorical approach, which requires that courts "focus solely on whether the elements of the crime of conviction include the use, attempted use, or threatened use of physical force against the person of another." *See Lerma*, 877 F.3d at 630. The relevant elements of robbery under the categorical approach are causing bodily injury and threatening to cause bodily injury. As discussed, neither element has the use or threatened use of physical force, so robbery is not a violent felony under the force clause.

[12] In a case on direct appellate review, the Fifth Circuit recently reconsidered prior case law and held that the Texas burglary statute is indivisible, it is not generic burglary under § 924(e)(2)(B)(ii), and a Texas burglary conviction cannot be the predicate for ACCA enhancement. *See United States v. Herrold*, 883 F.3d 517, 537 (5th Cir. 2018). Because Movant's robbery offenses are not violent felonies, he no longer has three or more earlier qualifying convictions under

V. RECOMMENDATION

The motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. § 2255 should be **GRANTED**, the sentence should be **VACATED**, and Movant should be re-sentenced.

SO RECOMMENDED this 18th day of June, 2018.

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

INSTRUCTIONS FOR SERVICE AND NOTICE OF RIGHT TO APPEAL/OBJECT

A copy of these findings, conclusions and recommendation shall be served on all parties in the manner provided by law. Any party who objects to any part of these findings, conclusions and recommendation must file specific written objections within 14 days after being served with a copy. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b). In order to be specific, an objection must identify the specific finding or recommendation to which objection is made, state the basis for the objection, and specify the place in the magistrate judge's findings, conclusions and recommendation where the disputed determination is found. An objection that merely incorporates by reference or refers to the briefing before the magistrate judge is not specific. Failure to file specific written objections will bar the aggrieved party from appealing the factual findings and legal conclusions of the magistrate judge that are accepted or adopted by the district court, except upon grounds of plain error. *See Douglass v. United Servs. Automobile Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996).

IRMA CARRILLO RAMIREZ
UNITED STATES MAGISTRATE JUDGE

ACCA. It is therefore unnecessary to reach the issue of whether burglary is a violent felony under the ACCA.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EDDIE LAMONT LIPSCOMB,	)	
Movant,	)	
vs.	)	**No. 3:16-CV-1500-M**
	)	**No. 3:07-CR-357-M**
	)	
UNITED STATES OF AMERICA,	)	
Respondent.	)	

ORDER ACCEPTING FINDINGS AND RECOMMENDATION OF THE UNITED STATES MAGISTRATE JUDGE

After reviewing the objections to the Findings, Conclusions, and Recommendation of the United States Magistrate Judge and conducting a *de novo* review of those parts of the Findings and Conclusions to which objections have been made, I am of the opinion that the Findings and Conclusions of the Magistrate Judge are correct and they are accepted as the Findings and Conclusions of the Court.

For the reasons stated in the Findings, Conclusions, and Recommendation of the United States Magistrate Judge, the motion to vacate, set aside or correct sentence filed under 28 U.S.C. § 2255 will be **GRANTED**, and the movant's sentence in **Cause No. 3:07-CR-357-M** will be corrected by separate judgment, on the papers only, Defendant having waived his right to appear. **This order shall also be docketed in the criminal case**.

SIGNED this 5th day of July, 2018.

BARBARA M. G. LYNN
CHIEF JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

v.

EDDIE LAMONT LIPSCOMB
Defendant.

§ **AMENDED JUDGMENT IN A CRIMINAL CASE**
Pursuant to Order Granting Defendant's 2255 Motion on July 5, 2018.
§
§
§ Case Number: **3:07-CR-00357-M(1)**
§ USM Number: **37236-177**
§ **Federal Public Defender**
§ Defendant's Attorney

THE DEFENDANT:

☐	pleaded guilty to count(s)	
☒	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	**Count 1 of the Indictment, file don November 28, 2007**
☐	pleaded nolo contendere to count(s) which was accepted by the court	
☐	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

Title & Section / Nature of Offense	**Offense Ended**	**Count**
18:922(g)(1) and 924(e)(1) Felon In Possession Of A Firearm	**07/05/2018**	**1**

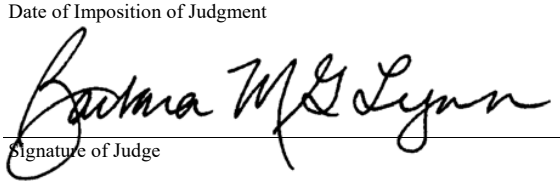
The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

July 5, 2018* (Date of Order granting § 2255 motion.)
Date of Imposition of Judgment



Signature of Judge

BARBARA M. G. LYNN
CHIEF UNITED STATES DISTRICT JUDGE
Name and Title of Judge

July 6, 2018
Date

DEFENDANT: EDDIE LAMONT LIPSCOMB
CASE NUMBER: 3:07-CR-00357-M(1)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

One-Hundred and Twenty (120) Months.

This sentence shall be served concurrently with any sentence imposed by Dallas County Criminal District Court 7 in Case No. F-0750120.

☒ **The court makes the following recommendations to the Bureau of Prisons:**

The Court directs the BOP to immediately recalculate the defendant's corrected sentence (120 months), as it appears he has fully served his sentence of imprisonment.

☒ The defendant is remanded to the custody of the United States Marshal.
☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ☐ a.m. ☐ p.m. on

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on
☐ as notified by the United States Marshal.
☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: EDDIE LAMONT LIPSCOMB
CASE NUMBER: 3:07-CR-00357-M(1)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **Three (3) Years.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. (*check if applicable*)
4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. ☐ You must participate in an approved program for domestic violence. (*check if applicable*)

You must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

DEFENDANT: EDDIE LAMONT LIPSCOMB
CASE NUMBER: 3:07-CR-00357-M(1)

STANDARD CONDITIONS OF SUPERVISION

1. the defendant shall not leave the judicial district without the permission of the court or probation officer;
2. the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. the defendant shall support his or her dependents and meet other family responsibilities;
5. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6. the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9. the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11. the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: EDDIE LAMONT LIPSCOMB
CASE NUMBER: 3:07-CR-00357-M(1)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide to the U.S. Probation Officer any requested financial information.

The defendant shall participate in a program (inpatient and/or outpatient) approved by the U.S. Probation Office for Treatment of narcotic, drug, or alcohol dependency, which will include testing for the detection of substance use or abuse. The defendant shall abstain from the use of alcohol and/or all other intoxicants during and after completion of treatment. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least $10 per month.

The defendant shall participate in workforce development programs and services involving activities relating to occupational and career development, including but not limited to assessments and testing, educational instruction training classes, career guidance, counseling, case management, and job search and retention services, as directed by the U.S. Probation Officer until successfully discharged from the program.

DEFENDANT: EDDIE LAMONT LIPSCOMB
CASE NUMBER: 3:07-CR-00357-M(1)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$100.00	$.00	$.00

☐ The determination of restitution is deferred until An *Amended Judgment in a Criminal Case (AO245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

☐ Restitution amount ordered pursuant to plea agreement $

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☒ the interest requirement is waived for the ☐ fine ☒ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: EDDIE LAMONT LIPSCOMB
CASE NUMBER: 3:07-CR-00357-M(1)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payments of $ _____ due immediately, balance due

☐ not later than , or

☐ in accordance ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal 20 *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:
It is ordered that the Defendant shall pay to the United States a special assessment of $100.00 for Count 1, which shall be paid immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several
See above for Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

REVISED SEPTEMBER 14, 2010
IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 09-10240

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

EDDIE LAMONT LIPSCOMB,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

Before KING, JOLLY, and STEWART, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

Eddie Lamont Lipscomb appeals his sentence enhancement under U.S.S.G. § 4B1.1, arguing that his instant conviction for possessing a firearm as a felon under 18 U.S.C. § 922(g) does not qualify as a crime of violence. Because Lipscomb pleaded guilty to a single-count indictment expressly charging him with possessing a sawed-off shotgun, a crime of violence, we affirm.

I.

Lipscomb pleaded guilty to a single-count indictment charging him with possessing a firearm as a felon, *see* 18 U.S.C. § 922(g), and charging him as an armed career criminal, *see* § 924(e). The indictment described the weapon as "a

Harrington and Richardson, model 88, 20 gauge shotgun, . . . as modified having a barrel of less than 18 inches in length, and overall length of less than 26 inches, a weapon commonly known as a 'sawed-off' shotgun."[1] Based on this plea of guilty to possessing a sawed-off shotgun as a felon and his prior offenses, his presentence report classified him as a career offender under § 4B1.1, subjecting him to an enhanced sentence totaling 292 to 365 months of imprisonment and three to five years of supervised release. Lipscomb objected. In addition to moving for a variance, Lipscomb argued that the § 4B1.1 career offender enhancement did not apply to him, because the instant offense was not a crime of violence. Specifically, he argued that the categorical method as set forth in *Taylor v. United States*, 495 U.S. 575 (1990), and progeny prevented the sentencing court from considering how the defendant committed the crime. Although the gun was, as alleged in the indictment, a sawed-off shotgun, his conviction was not for a crime of violence, he argues, because § 922(g) has no element requiring proof of a specific type of gun. Furthermore, the district court improperly relied on testimony from a police officer who described the weapon as a sawed-off shotgun.

The district court concluded that the § 922(g) conviction was a crime of violence and that the career offender provisions of § 4B1.1 applied. The district court did, however, grant a variance, sentencing Lipscomb to 240 months in

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[1] The indictment read:

> Felon in Possession of a Firearm
> (Violation of 18 U.S.C. § 922(g)(1) and 924(e)(1))
>
> On or about March 20, 2007, in the Dallas Division of the Northern District of Texas, the defendant, Eddie Lamont Lipscomb, having being [sic] convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess in and affecting interstate and foreign commerce a firearm, to wit: a Harrington and Richardson, model 88, 20 gauge shotgun, bearing serial number BA490014, as modified having a barrel of less than 18 inches in length, and overall length of less than 26 inches, a weapon commonly known as a "sawed-off" shotgun.
>
> In violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1).

prison and five years of supervised release. When asked by the government whether it would give the same sentence had § 4B1.1 not applied, the district court replied that it would want to reconsider its sentence if the enhancement did not apply. Lipscomb timely appealed.

II.

"Characterizing an offense as a crime of violence is a purely legal determination," which we review *de novo*. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008); *United States v. Guevara*, 408 F.3d 252, 261 n.10 (5th Cir. 2005).

Turning to this case, the Sentencing Guidelines call for an enhanced sentence for defendants who, like the defendant here, (1) are at least eighteen years old at the time of the instant conviction, (2) are currently being sentenced for a crime of violence or a controlled substance offense, and (3) have at least two prior convictions for either crimes of violence or controlled substance offenses. U.S.S.G. § 4B1.1(a). Lipscomb acknowledges that he meets criteria (1) and (3). The question in this case is whether Lipscomb's instant conviction is a crime of violence.

For our purposes today, a crime is a crime of violence if it is an "offense under federal . . . law, punishable by imprisonment for a term exceeding one year, that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another." § 4B1.2(a)(2).[2] To determine whether a crime is a crime of violence, we consider only "conduct 'set forth in the count of which the

---

[2] Section 4B1.2(a) provides, in full:
The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

defendant was convicted,'" but may not consider any other evidence to determine the conduct underlying the instant offense. *United States v. Fitzhugh*, 954 F.2d 253, 254 (5th Cir. 1992) (quoting U.S.S.G. § 4B1.2 Application Note 1). Therefore, the district court erred by considering testimony as to the weapon's characteristics to be relevant, but the error was harmless. As noted above, Lipscomb's single-count indictment, which the district court could consider, alleges that he possessed a sawed-off shotgun. The only remaining question is whether possessing such a weapon, "by its nature, presented a serious potential risk of physical injury." *United States v. Insaulgarat*, 378 F.3d 456, 467 (5th Cir. 2004). We think that the Sentencing Commission's commentary to § 4B1.2 answers that for us. *Stinson v. United States*, 508 U.S. 36, 44-45 (1993) (holding that commentary to the guidelines is "treated as an agency's interpretation of its own legislative rule").[3] "Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*i.e.*, a sawed-off shotgun . . .) is a crime of violence." U.S.S.G. § 4B1.2 Application Note 1.[4] Accordingly, as per the specific allegations of the indictment and his plea of guilty to those charges, Lipscomb's § 922(g) conviction is for a crime of violence.

Lipscomb argues otherwise, asserting that applying the categorical analysis his conviction under § 922(g) only required that the government prove that he possessed a gun—nothing more. We reject Lipscomb's argument that we must apply the categorical approach crafted by the Supreme Court in *Taylor* and its progeny.[5] Such a rule would require the sentencing court to use the

---

[3] Neither party challenges the Sentencing Commission's classification of the offense.

[4] Specifically, the weapon must be "a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length," which are the characteristics alleged in the indictment. 26 U.S.C. § 5845(a)(2).

[5] Today we are addressing a sentence under the Guidelines. We have, in some cases, used the Armed Career Criminal Act case law as a "guide" to determine a crime of violence

indictment only to determine the statutory phrase that is the basis of conviction. Thus, he argues, his conviction is only for possessing a "firearm," as the statute proscribes; his conviction is not for possessing a sawed-off shotgun, as the indictment's language charges. This argument ignores the fact that *Taylor* and its progeny were decided under the Armed Career Criminal Act and did not involve the application of—or even mention—the specific Guidelines commentary at issue here. The commentary, which applies in this case, specifically treats unlawful possession of a firearm by a felon as a crime of violence when the weapon is a sawed-off shotgun. *Id.* Lipscomb's proposed standard, if applied here, would render the commentary meaningless for § 922(g) offenses. We do not think the Sentencing Commission intended its commentary to have such an effect. Moreover, had the Sentencing Commission intended the

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under § 4B1.2, but never in a situation when that case law appeared to be inconsistent with the Sentencing Commission's binding commentary. *See, e.g.*, *United States v. Mohr*, 554 F.3d 604, 608-10 (5th Cir. 2009) (using *Begay v. United States*, 555 U.S. 137 (2008), to interpret the kinds of crimes that qualified under the "otherwise" clause). Our rule limiting district courts to the conduct charged in the indictment comes from the Sentencing Commission's commentary, not the Armed Career Criminal Act cases. *Fitzhugh*, 954 F.2d at 254.

Lipscomb also invokes *Guevara*, in which the court stated that the sentencing court could not consider "anything beyond what is present in the statute or alleged in the indictment, elements as to which, to convict, the jury must have found evidence beyond a reasonable doubt in any event" to find that the instant offense is a crime of violence under § 4B1.2(a)(2). 408 F.3d at 262 (citing *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) (en banc) (per curiam)). That statement was merely *dicta*. The issue in *Guevara* was whether a pre-*Booker* crime-of-violence determination under § 4B1.2(a) violated the defendant's Sixth Amendment rights by allowing the judge, not the jury, to find facts that enhanced his sentence. It is true that the court said neither § 4B1.2(a) (1) or (2) would cause Sixth Amendment problems, but only its analysis of 4B1.2(a)(1) was necessary to the holding. The court considered whether the crime was a crime of violence only under § 4B1.2(a)(1), "express[ing] no opinion whether it would qualify under § 4B1.2(a)(2)." *Id.* at 259. Therefore, *Guevara*'s comment on § 4B1.2(a)(2) was unnecessary to the case's disposition. *Calderon-Pena*, which *Guevara* cited, involved a different guideline, § 2L1.2, which considers only the elements of unenumerated offenses. It has neither a residual clause, which is at issue here, nor supplemental commentary. *See* U.S.S.G. § 2L1.2 Application Note 1. It is, therefore, not helpful in deciding the issue before us. Parenthetically, we also note that *Guevara* dealt with a conviction in which the jury was the fact finder, whereas here we are dealing with facts admitted through a plea of guilty.

sentencing court to be bound by the statute of conviction, its reference in Application Note 1 to the "*conduct* set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted" would be superfluous. *See id.* (emphasis added). Thus, applying the commentary of § 4B1.2, as we must, we hold that this conviction, resulting from a plea to an indictment count that specifically charged possession of a sawed-off shotgun as a felon, is for a crime of violence.

III.

To recap, we hold that for the purpose of § 4B1.2, a conviction is for a crime of violence when the defendant pleads guilty to an indictment count that alleges conduct that presents a serious potential risk of injury to another. Lipscomb, in pleading guilty to an indictment charging him with violating 18 U.S.C. § 922(g) by possessing a sawed-off shotgun—a crime of violence, according to the Guidelines commentary—did just that. The judgment of the district court is

AFFIRMED.

No. 09-10240

KING, Circuit Judge, concurring in the judgment:

I agree with Judge Jolly that Lipscomb's offense of conviction (his instant offense)—being a felon in possession, in violation of 18 U.S.C. § 922(g)(1)—was a "crime of violence," as defined by U.S.S.G. § 4B1.2(a)(2). Accordingly, I concur in the judgment affirming his sentence. However, I write separately for two reasons. First, I write to clarify my agreement with Judge Jolly that an elements-based categorical approach is inappropriate here. Second, I explain my disagreement with my colleagues' determination that the district court erred when it made a post-plea factual finding to determine that the gun Lipscomb possessed was a sawed-off shotgun as described in 26 U.S.C. § 5845(a).[1] Unlike my colleagues, I conclude that the district court committed no error in making that determination through a factual finding at sentencing.

In reaching his conclusion that a felon-in-possession conviction is not a crime of violence under § 4B1.2(a)(2), Judge Stewart applies the categorical approach outlined in *Taylor v. United States*, 495 U.S. 575 (1990), and its progeny. Under that approach, a sentencing court may "look only to the fact of conviction and the statutory definition of the . . . offense," *id.* at 602, except that, "whenever a statute provides a list of alternative methods of commission . . . [,] we may look to charging papers to see which of the various statutory alternatives are involved in the particular case," *United States v. Calderon-Pena*, 383 F.3d 254, 258 (5th Cir. 2004) (en banc) (per curiam). In making this determination where the conviction was reached by plea, "we may consider the statement of factual basis for the charge, a transcript of the plea colloquy or written plea agreement, or a record of comparable findings of fact

[1] This category of weapon is defined to include "(1) a shotgun having a barrel or barrels of less than 18 inches in length; [and] (2) a weapon made from a shotgun if such weapon as modified has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length." 26 U.S.C. § 5845(a)(1)–(2). The weapon Lipscomb possessed satisfied these criteria; the issue is whether the district court properly determined that fact.

adopted by the defendant upon entering the plea regarding the . . . offense[ ]." *United States v. Mohr*, 554 F.3d 604, 607 (5th Cir. 2009) (citing *Shepard v. United States*, 544 U.S. 13, 20 (2005)). Because 18 U.S.C. § 922(g)(1) forbids a felon such as Lipscomb from possessing *any* firearm, there is no "statutory alternative[]" forbidding *only* the possession of a sawed-off shotgun as described in 26 U.S.C. § 5845(a)(1)–(2). Accordingly, under Judge Stewart's view, there is no element of a § 922(g)(1) offense that presents a serious risk of physical injury to another, and being a felon in possession is thus not a crime of violence.

However, Judge Stewart's categorical approach cannot be the correct result because it is plainly inconsistent with the Application Notes following § 4B1.2. Those Application Notes unequivocally state that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun . . .) *is* a 'crime of violence,'" U.S.S.G. § 4B1.2 cmt. n.1 (emphasis added), and that the term "does not include the offense of unlawful possession of a firearm by a felon, *unless* the possession was of a firearm described in 26 U.S.C. § 5845(a)," *id.* (emphasis added). This commentary is authoritative on the subject. *Stinson v. United States*, 508 U.S. 36, 42–43 (1993); *United States v. Williams*, 610 F.3d 271, 293 n.29 (5th Cir. 2010) ("Commentary contained in U.S.S.G. application notes is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." (internal quotation marks omitted)). And for this commentary to have any meaningful effect,[2] it must be possible in at least *some* instances for a

[2] Judge Stewart indicates that there are state crimes expressly forbidding possession by felons of sawed-off shotguns of the dimensions described in 26 U.S.C. § 5845(a)(1)–(2), and that these are the only crimes of violence contemplated by the Application Notes to § 4B1.2. This token gesture gives no effect to the intentions of the drafters, who recognized that "Congress has determined that those firearms described in 26 U.S.C. § 5845(a) are inherently dangerous and when possessed unlawfully, serve only violent purposes." U.S.S.G. supp. app. C, amend. 674, at 134. The drafters approved of the decisions of "[a] number of courts [that] 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." *Id.* The

felon-in-possession conviction to constitute a crime of violence. But Judge Stewart's approach precludes that result; following his method would mean that a felon-in-possession conviction under 18 U.S.C. § 922(g)(1)—prior or instant—could *never* be classified as a crime of violence, no matter whether the gun possessed was a sawed-off shotgun as described in 26 U.S.C. § 5845(a)(1)–(2).

Nor is Judge Stewart's approach compelled by our precedent. In *Calderon–Pena*, we addressed whether a prior conviction for child endangerment under Texas law was a "crime of violence" under U.S.S.G. § 2L1.2(b) by "'ha[ving] as an element the use, attempted use, or threatened use of physical force against the person of another.'" 383 F.3d at 256 (quoting U.S.S.G. § 2L1.2 cmt. n.1(B)(ii) (2001)).[3] We reasoned that the "as an element" language required us to "look [solely] to the *elements* of the crime, not to the defendant's actual conduct in committing it." *Id.* at 257. Although the manner and means of Calderon–Pena's offense involved the use of physical force, we concluded that none of the statutory alternatives contained within the Texas definition of child endangerment had as an element the required use, attempted use, or threatened use of physical force. *Id.* at 260. In reaching this conclusion, we specifically compared the language at issue in § 2L1.2 to that in § 4B1.2(a). *See id.* at 258 n.6. We indicated that an elements-based approach was appropriate for § 4B1.2(a)(1) because it used the language "as an element," while the manner and means of committing an offense could properly be considered under

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drafters' obvious goal in amending the Application Notes is undermined by the strained interpretation of § 4B1.2(a)(2) that would find possession of a sawed-off shotgun to be a crime of violence only where it is a prior state conviction.

[3] The language in the current version of § 2L1.2 remains unchanged , but it is now located in Application Note 1(b)(iii).

§ 4B1.2(a)(2) because the latter provision used the phrase "involves conduct." *Id.*[4]

We applied *Calderon–Pena*'s discussion of § 4B1.2(a)(1) to an offense of conviction in *United States v. Guevara*, 408 F.3d 252 (5th Cir. 2005). We concluded that Guevara's offense of threatening to use a weapon of mass destruction, in violation of 18 U.S.C. § 2332a, was a crime of violence under § 4B1.2(a)(1) because it had, as an element, the threatened use of physical force. *Id.* at 259–60. We expressly declined to determine whether that instant offense would have qualified as a crime of violence under § 4B1.2(a)(2). *See id.* at 259 ("Because Guevara's conviction qualifies as a 'crime of violence' under § 4B1.2(a)(1), we express no opinion as to whether it would qualify under § 4B1.2(a)(2)."); *id.* at 260 n.6 ("We decline to engage in the more complicated analysis under § 4B1.2(a)(2), which under the 'otherwise clause' would require us to consider risk posed by hypothetical conduct."). As Judge Jolly notes, the *Guevara* court also indicated in dicta that a categorical approach would similarly be appropriate when applying § 4B1.2(a)(2) to instant offenses. *Id.* at 261–62.[5]

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[4] The relevant discussion consisted of the following:

> The criminal law has traditionally distinguished between the elements of an offense and the manner and means of committing an offense in a given case. Indeed, the Guidelines themselves recognize such a distinction. *Compare* U.S.S.G. § 4B1.2(a)(1) (2003) (using "as an element" language), *with id.* § 4B1.2(a)(2) (using the phrase "involves conduct"). The distinction is also recognized in the commentary to § 4B1.2. *See id.* § 4B1.2, cmt. n.1 (defining a "crime of violence" as an offense that either "has as an element the use, attempted use, or threatened use of physical force against the person of another"; *or* where the "conduct set forth . . . in the count of which the defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another").

Calderon–Pena, 383 F.3d at 258 n.6.

[5] We are free to disregard dicta from prior panel opinions when we find it unpersuasive. *See United States v. Gieger*, 190 F.3d 661, 665 (5th Cir. 1999) ("We find this dicta unpersuasive and contrary to section 3A1.1's text and we choose not to follow it."). As I explain below, I agree with Judge Jolly that we should do exactly that with regard to this

In my view, district courts are not limited to a strict, elements-based categorical approach when applying § 4B1.2(a)(2) to an instant offense. The relevant text refers to a defendant's "conduct" rather than to any particular "element" of the crime. *Compare* U.S.S.G. § 4B1.2(a)(1) ("has as an element . . .") *with* U.S.S.G. § 4B1.2(a)(2) ("involves conduct . . ."). I therefore agree with the *Calderon–Pena* court's discussion that this is a meaningful distinction. Thus, at a minimum, district courts may consider the sources of information deemed acceptable under the modified categorical approach articulated in *Shepard*.[6] In that case, the Supreme Court held that guilty pleas may establish predicate offenses under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e),[7] and indicated that a sentencing court was free to look to the transcript of plea colloquy or written plea agreement in determining "whether the plea had 'necessarily' rested on the fact" qualifying the conviction as a predicate offense. *Shepard*, 544 U.S. at 21; *see also Taylor*, 495 U.S. at 602 (indicating that a conviction could be narrowed "where a jury was actually required to find all the elements" qualifying the conviction as a predicate offense). Following *Shepard*,

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dicta from *Guevara*.

[6] District courts are, of course, limited to an elements-based categorical approach in determining whether a prior offense of conviction is a crime of violence under § 4B1.2(a)(1). *United States v. Garcia*, 470 F.3d 1143, 1147 (5th Cir. 2006). They are limited to the modified categorical approach when addressing whether a prior offense of conviction is a crime of violence under § 4B1.2(a)(2). *United States v. Rodriguez–Jaimes*, 481 F.3d 283, 286 (5th Cir. 2007). In determining whether an instant offense of conviction is a crime of violence under § 4B1.2(a)(1), the *Guevara* court indicated that a modified categorical approach was appropriate, but it based its decision solely on the elements of the offense at issue. *Guevara*, 408 F.3d at 259 ("We need not look to the indictment, the facts, or anything other than the statute to determine whether § 2332a contains an element that qualifies Guevara's crime as a crime of violence under the guidelines.").

[7] "'We have previously applied our holdings under the residual clause of the ACCA to analyze the definition of crimes of violence under § 4B1.2, and vice versa.'" *United States v. Hughes*, 602 F.3d 669, 673 n.1 (5th Cir. 2010) (quoting *United States v. Mohr*, 554 F.3d 604, 609 n.4 (5th Cir. 2009)).

then, we should at least determine whether the district court could properly consider anything that "necessarily" established that Lipscomb possessed a sawed-off shotgun as described in 26 U.S.C. § 5845(a)(1)–(2).

Judge Jolly concludes that Lipscomb, by pleading guilty to the indictment, also pleaded guilty to the dimensions of the firearm at issue. I agree with the general proposition that a defendant's plea may establish, for purposes of § 4B1.2(a)(2), the fact that a firearm is of the requisite length under 26 U.S.C. § 5845(a)(1)–(2). However, I disagree with Judge Jolly's conclusion that Lipscomb's plea sufficiently established that fact.

There is no dispute that the indictment specifically charged Lipscomb with possessing a weapon with the characteristics of a sawed-off shotgun as described in 26 U.S.C. § 5845(a)(1)–(2).[8] Nevertheless, at no point did Lipscomb specifically admit that the firearm he possessed had the characteristics that would bring it within the description contained in 26 U.S.C. § 5845(a)(1)–(2). He submitted a factual resume that admitted to the model, gauge, and serial number, but did not mention the length of the firearm or its barrel. At the plea colloquy, Lipscomb waived his right to have the indictment read to him, and those details were not read. The district court then asked Lipscomb whether he understood that he was "charged with one count of being a felon in possession of a firearm; that is, a model 88 20 gauge shotgun commonly known as a sawed-off shotgun?" Lipscomb replied affirmatively, but this exchange did not involve any discussion of length—the characteristic that can bring a firearm within the ambit of 26 U.S.C. § 5845(a)(1)–(2). Lipscomb also admitted to each of the elements of 18 U.S.C. § 922(g)(1), but, again, the length of the firearm and its

[8] The indictment charged that Lipscomb possessed "a Harrington and Richardson, model 88, 20 gauge shotgun bearing serial number BA490014, as modified having a barrel of less than 18 inches in length, and overall length of less than 26 inches, a weapon commonly known as a 'sawed-off' shotgun."

barrel were not mentioned. As a result, at sentencing, the district court expressly declined to find that the length aspect had been established through Lipscomb's plea, instead opting to make that determination by means of a factual finding based on testimony presented at sentencing.[9] It is for this reason that I cannot agree with Judge Jolly's conclusion that Lipscomb pleaded guilty to the length of the firearm when he pleaded guilty to the indictment.[10]

While I agree with Judge Jolly's conclusion that Lipscomb's sentence should be affirmed, I disagree with his view that the district court committed error (albeit harmless) by determining the length of the firearm through a factual finding at sentencing. Instead, I conclude that the district court was empowered to make the post-conviction factual finding that the firearm Lipscomb possessed was of the requisite length under 26 U.S.C. § 5845(a)(1)–(2). "Elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt. Sentencing factors, on the other hand, can be proved to a judge at sentencing by a preponderance of the evidence." *United States v. O'Brien*, 130 S. Ct. 2169, 2174 (2010) (citations omitted); *see also United States*

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[9] The district court ruled as follows:

> I think it is a close question as to whether Mr. Lipscomb admitted the length of the weapon in that plea colloquy. I didn't ask him specifically the length of the weapon. This could be defined as a sawed-off shotgun in lay terms if it was shorter than as originally manufactured. So I think that is a close question. But I don't have to determine that, because I am determining that I may and did receive evidence today before sentencing the defendant, and that I may consider that in determining what sentence is appropriate. Therefore, I find as a factual matter that it was a sawed-off shotgun. It is a sawed-off shotgun of the dimensions specified in the indictment, and that that means that it is a crime of violence.

[10] An alternative possibility suggested but not directly addressed by Judge Jolly's opinion is a holding that Lipscomb's act of pleading guilty to the indictment necessarily entailed pleading guilty to all of the facts in the indictment, including the length of the firearm. Our circuit has yet to hold that pleading guilty to an indictment entails an admission of all the facts contained in the indictment, *see United States v. Morales–Martinez*, 496 F.3d 356, 359 (5th Cir. 2007), and, as I explain below, we need not do so here.

v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) ("The sentencing judge is entitled to find by a preponderance of the evidence all the facts relevant to the determination of a Guideline sentencing range . . . ."). Here, the panel has unanimously rejected the proposition that the characteristics set out in 26 U.S.C. § 5845(a)(1)–(2) are elements of 18 U.S.C. § 922(g)(1). As a general matter, then, there was no obstacle to the district court making a factual finding as to the length of the firearm Lipscomb possessed.[11]

Nor would we be the first circuit to permit such fact-finding under § 4B1.2(a)(2). In *United States v. Riggans*, the Tenth Circuit was faced with an instant offense of bank larceny. 254 F.3d 1200, 1203 (10th Cir. 2001). The defendant had committed the crime in a manner that "present[ed] a serious potential risk of physical injury to others," but he argued "that the district court was required to evaluate bank larceny only in the abstract." *Id.* The district court rejected that contention and considered the underlying facts of the offense. *Id.* On appeal, the Tenth Circuit affirmed, concluding that the justification for the categorical approach—avoiding ad hoc mini-trials over past convictions—was absent "'when the court is examining the conduct of the defendant in the instant offense.'" *Id.* at 1204 (quoting *United States v. Walker*, 930 F.2d 789, 794 (10th Cir. 1991), *superseded on other grounds as stated in Stinson v. United States*, 508 U.S. 36, 39 n.1 (1993)). Accordingly, the district court had not erred in

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[11] I note that the Application Notes to § 4B1.2 require that conduct elevating an offense to a crime of violence must be charged in the indictment. *See* U.S.S.G. § 4B1.2 cmt. n.1 ("Other offenses are included as 'crimes 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." (emphasis added)); *accord United States v. Charles*, 301 F.3d 309, 313 (5th Cir. 2002) (en banc) ("[I]n determining whether an offense is a crime of violence under § 4B1.2 or § 4B1.1, we can consider only conduct set forth in the count of which the defendant was convicted, and not the other facts of the case." (internal quotation marks omitted) (quoting *United States v. Fitzhugh*, 954 F.2d 253, 254 (5th Cir. 1992))). Here, the indictment expressly charged Lipscomb with possessing a sawed-off shotgun as described in 26 U.S.C. § 5845(a)(1)–(2).

undertaking a conduct-specific inquiry into the facts of conviction during sentencing. *Id.*[12]

I agree with that conclusion,[13] and I would hold here that a district court, after accepting a defendant's plea of guilty to the charge of being a felon in possession, may make a factual finding as to the characteristics of the firearm possessed, provided that those characteristics were charged in the indictment. This approach is consistent with the Supreme Court's decision in *Taylor*, which discussed three factors supporting a categorical approach to the 18 U.S.C. § 924(e) crime-of-violence determination for prior convictions: (1) statutory language; (2) legislative history; and (3) "the practical difficulties and potential unfairness" of ad hoc mini-trials. 495 U.S. at 600–01. Here, those factors weigh in favor of allowing the district court to make a factual finding as to the characteristics of the firearm Lipscomb possessed. First, the statutory language refers to "conduct" rather than "elements." *See Calderon-Pena*, 383 F.3d at 258 n.6. Second, the Application Notes were specifically amended to make possession of a firearm with the characteristics set forth in 26 U.S.C. § 5845(a) a crime of violence—something not possible under a straightforward categorical approach. *See* U.S.S.G. supp. app. C, amend. 674, at 134. Finally, there is no danger of an ad hoc mini-trial when the conduct at issue was charged in the indictment for the instant conviction. *See Riggans*, 254 F.3d at 1203–04. Thus, the factors that weighed against factual findings in *Taylor* weigh in support of them here.

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[12] The *Riggans* court also took the broad view that district courts are not limited to conduct charged in the indictment in making § 4B1.2(a)(2) factual findings at sentencing. 254 F.3d at 1204. As discussed above, this view is in direct conflict with *Charles* and the Application Notes to § 4B1.2.

[13] Other circuits disagree. *See United States v. Piccolo*, 441 F.3d 1084, 1087 (9th Cir. 2006) (applying the categorical approach under § 4B1.2(a)(2) to an instant offense of conviction); *United States v. Martin*, 215 F.3d 470, 473–74 (4th Cir. 2000) (same).

For the foregoing reasons, I concur in the judgment.

No. 09-10240

CARL E. STEWART, Circuit Judge, dissenting:

Eddie Lamont Lipscomb appeals the sentence imposed after he pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). Lipscomb argues that the district court erred by relying on the testimony of a police officer at sentencing to establish that his instant offense was a crime of violence pursuant to United States Sentencing Guideline (U.S.S.G.) § 4B1.1, because consideration of such testimony is precluded by the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990). The majority opinion rejects Lipscomb's argument that we must apply the categorical approach, and instead relies on the Sentencing Commission's commentary to U.S.S.G. § 4B1.2 to affirm the conviction and sentence. For the following reasons, I respectfully dissent.

I. FACTUAL AND PROCEDURAL BACKGROUND

Lipscomb was charged with possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1). The indictment specified that the firearm Lipscomb possessed was a sawed-off shotgun with an overall length less than 26 inches and a barrel length less than 18 inches.[1]

At the initial rearraignment proceeding, Lipscomb stated that he was undecided about pleading guilty, and the magistrate judge did not accept his guilty plea. At the second rearraignment proceeding, Lipscomb requested

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[1] The indictment stated in its entirety:

> Felon in Possession of a Firearm
> (Violation of 18 U.S.C. § 922(g)(1) and 924(e)(1))
> On or about March 20, 2007, in the Dallas Division of the Northern District of Texas, the defendant, Eddie Lamont Lipscomb, having being [sic] convicted of a crime punishable by imprisonment for a term exceeding one year, did knowingly and unlawfully possess in and affecting interstate and foreign commerce a firearm, to wit: a Harrington and Richardson, model 88, 20 gauge shotgun, bearing serial number BA490014, as modified having a barrel of less than 18 inches in length, and overall length of less than 26 inches, a weapon commonly known as a "sawed-off" shotgun. In [sic] violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1).

additional time to research a possible defense to the charge, and the district court granted Lipscomb a continuance. At the third rearraignment proceeding, Lipscomb finally pleaded guilty to the indictment without the benefit of a written plea agreement. In the amended factual resume that Lipscomb submitted, he admitted to possessing a shotgun, but did not admit to the length of the shotgun.

The presentence report (PSR) stated that Lipscomb was an armed career criminal pursuant to the Armed Career Criminal Act (ACCA), § 924(e)(1), and was therefore subject to an enhanced statutory sentence range. The PSR further stated that Lipscomb was a career offender under U.S.S.G. § 4B1.1 because, *inter alia*, Lipscomb's instant offense was a crime of violence. Pursuant to § 4B1.1, the PSR concluded that Lipscomb's base offense level was 37, and then applied a two-level reduction for acceptance of responsibility for a total offense level of 35. Based upon the offense level of 35 and criminal history category of VI, Lipscomb's Guidelines sentence range was 292 to 365 months of imprisonment and three to five years of supervised release.

While Lipscomb did not contest that he met the requirements for ACCA, he objected to his designation as a career offender under § 4B1.1. He asserted that his current offense was not a crime of violence because the determination of whether the offense is a crime of violence under § 4B1.1 must be made according to the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990). Lipscomb noted that possession of a firearm by a convicted felon is not a crime of violence unless the firearm is the type described in 26 U.S.C. § 5845(a), but acknowledged that a sawed-off shotgun with a barrel less than 18 inches in length is a firearm described in § 5845(a). He argued, however, that while the indictment alleged that he possessed a shotgun with a barrel less than 18 inches in length, the district court could not consider this allegation under the

categorical approach because the allegation regarding the barrel length was not necessary to prove the offense under the statute of conviction. In addition to objecting to the PSR, Lipscomb filed a motion for a downward variance from the Guidelines sentence range.

At sentencing, the Government presented testimony from a police officer that the shotgun Lipscomb possessed was less than 26 inches in length and had a barrel less than 18 inches in length. The district court ruled that it could make the factual determination at sentencing that the firearm was the type described in § 5845(a) and apply the career offender enhancement on that basis because the dispute concerned whether the present offense, not a prior offense, was a crime of violence. Accordingly, it overruled Lipscomb's objections and adopted the Guidelines sentence range calculations set forth in the PSR. The district court granted Lipscomb's motion for a downward variance,[2] and sentenced Lipscomb to 240 months of imprisonment and five years of supervised release. Lipscomb objected to the sentence and the district court overruled the objection. The Government inquired whether the district court would have imposed the same sentence even if it had granted Lipscomb's objection to the career offender enhancement, and the district court responded that it would then reconsider the sentence imposed.

Lipscomb appeals his sentence, challenging only the district court's determination that his instant offense, possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(e)(1), was a crime of violence.

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[2] The district court granted the downward variance on the grounds that Lipscomb did not actually own the shotgun and did not intentionally acquire the shotgun. Lipscomb attested that he got into a borrowed car, which he was driving at the time of his arrest, without knowing that there was a shotgun under the seat. The court stated that it "assume[d] for purposes of the proceeding that [Lipscomb] didn't necessarily know that the weapon was there, but [ ] probably should have" and that it had "serious doubts that [Lipscomb] actually owned, or had intentions to commit a crime with respect to the firearm at issue."

II. STANDARD OF REVIEW

A district court's interpretation or application of the Sentencing Guidelines is reviewed de novo, and its factual findings are reviewed for clear error. *United States v. Cisneros-Gutierrez*, 517 F.3d 751, 764 (5th Cir. 2008). Other than a defendant's age at the time of the present offense, "the determinations made in the course of a career offender classification are all questions of law." *United States v. Guevara*, 408 F.3d 252, 261 (5th Cir. 2005). Thus, "[c]haracterizing an offense as a crime of violence is a purely legal determination." *Id. at* 261 n.10.

III. DISCUSSION

Under § 4B1.1, a defendant is a career offender if:

> (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
>
> (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
>
> (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S.S.G. § 4B1.1(a). Lipscomb argues that his instant offense of conviction, under 18 U.S.C. § 922(g)(1),[3] did not qualify as a crime of violence as required by § 4B1.1(2).[4]

A "crime of violence" under § 4B1.1(a) is defined in § 4B1.2(a) as:

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

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[3] 18 U.S.C. § 922(g)(1) provides that:

> It shall be unlawful for any person– . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

[4] There is no dispute that Lipscomb satisfies § 4B1.1(1) and (3).

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a). Section 4B1.2(a) actually provides three separate definitions of "crime of violence." *United States v. Hughes*, 602 F.3d 669, 673 (5th Cir. 2010). First, "a crime qualifies if 'physical force against the person of another' is an element of the offense." *Id.* at 673–74 (citing *Johnson v. United States*, 130 S. Ct. 1265 (2010)). "Second, a crime qualifies if it is an enumerated offense: burglary, arson, or extortion." *Id.* at 674 (citing *Taylor*, 495 U.S. 575 (1990)). "Third, a crime qualifies if it fits the residual clause, which focuses on 'potential risk of physical injury to another.'" *Id.* (citing *Begay v. United States*, 553 U.S. 137 (2008)).

The application notes to § 4B1.2 specifically provide that "'[c]rime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a)." § 4B1.2 app. n.1. A shotgun modified so that it "has an overall length of less than 26 inches or a barrel or barrels of less than 18 inches in length" is a firearm described in § 5845(a). *See* 26 U.S.C. § 5845(a).

As Lipscomb's instant offense of possession of a firearm by a convicted felon does not have the use, attempted use, or threatened use of physical force as an element and is not an enumerated offense, the issue here is whether Lipscomb's present offense "otherwise involves conduct presenting a serious risk of injury to another" under the residual clause of § 4B1.2(a)(2). *See United States v. Serna*, 309 F.3d 859, 862 & n.6 (5th Cir. 2002) (holding that the Texas offense of possession of a prohibited weapon could only qualify as a crime of violence under the residual clause of § 4B1.2(a)(2)).

A. Applicability of the Categorical Approach to the Instant Offense

In making a determination that a *prior* offense is a crime of violence under § 4B1.2(a), it is axiomatic that courts must employ the categorical approach as set forth in *Taylor v. United States,* 495 U.S. 575, 602 (1990), and *Shepard v. United States*, 544 U.S. 13, 15 (2005), looking at the nature of the prior conviction and not the specific facts of the offense. *See United States v. Rodriguez-Jaimes*, 481 F.3d 283, 286 (5th Cir. 2007). In *United States v. Guevara*, we held that the categorical approach also applies to evaluating whether the *instant* offense is a crime of violence. 408 F.3d at 261–62 (citing *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004) (en banc)). We again applied the categorical approach to an instant offense in *United States v. Dentler*, holding that the instant offense had been wrongly classified as a crime of violence where the statute of conviction did not include violence as an essential element, even though the facts of the offense demonstrated violence and the jury made a specific finding of violence.[5] 492 F.3d 306, 314 (5th Cir. 2007).

Moreover, Application Note 2 to § 4B1.2 states that:

> Section 4B1.1 (Career Offender) expressly provides that the *instant and prior offenses* must be crimes of violence or controlled substance offenses of which the defendant was convicted. Therefore, in determining whether an offense is a crime of violence or controlled

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[5] In *Dentler*, the court relied on the categorical approach analysis and conclusions in *United States v. Jones*, 993 F.2d 58, 61–62 (5th Cir. 1993). *Jones* held that "the jury could convict Jones of count two [ACCA] only if it found he committed a crime of violence," but the subsection of the disjunctive statute charged in count one of the indictment did not include the essential element of violence. *Id.* at 62. The *Jones* court therefore reversed the ACCA conviction. *Id.* Although *Jones* evaluated whether the offense at issue was a crime of violence for purposes of applying ACCA, this court has consistently applied our crime of violence holdings under ACCA to analyze the definition of crimes of violence under § 4B1.2, and vice versa. *See United States v. Mohr*, 554 F.3d 604, 609 n.4 (5th Cir. 2009) (citing cases).

> substance for the purposes of § 4B1.1 (Career Offender), *the offense of conviction* (i.e., the conduct of which the defendant was convicted) is the focus of inquiry.

§ 4B1.2 app. n.2 (emphasis added). Thus, the Sentencing Guidelines anticipate that the evaluation of instant and prior offenses will be conducted in like manner applying the categorical approach. Further, evaluating prior offenses under the categorical approach, but not the instant offense, would lead to troubling and inconsistent results; specifically, during sentencing for the instant offense, a court might conclude that the offense was a crime of violence based on specific factual findings, but for the purposes of later determining whether that particular offense constitutes a prior crime of violence, the statute of conviction would speak for itself—under the categorical approach—that it is not a crime of violence. Accordingly, the rationale for applying the categorical approach to both the instant and prior offenses is sound and there is no justification for enabling such conflicting results.[6]

1. *Guevara Survives Booker*

The Government acknowledges *Guevara* and *Dentler*, but argues that the categorical approach is not applicable here because the sentencing in *Guevara* was held prior to *United States v. Booker*, 543 U.S. 220 (2005).[7] While the

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[6] The Fourth and Ninth Circuits have also held that "the crime-of-violence determination under U.S.S.G. § 4B1.2, a legal question, is properly decided under *Taylor*'s categorical analysis in cases of both prior and current offenses." *United States v. Piccolo*, 441 F.3d 1084, 1087 (9th 2005); *see United States v. Martin*, 215 F.3d 470, 472–75 (4th Cir. 2000). The Tenth Circuit, however, rejects the categorical approach in favor of "a conduct-specific inquiry" when considering the instant offense of conviction. *United States v. Riggans*, 254 F.3d 1200, 1203–04 (10th Cir. 2001).

[7] In *United States v. Booker*, the Supreme Court held that the then mandatory nature of the Sentencing Guidelines violated a defendant's Sixth Amendment rights, and the maximum sentence that a judge may impose must be determined solely on the basis of facts reflected in a jury verdict or admitted by the defendant. 543 U.S. 220 (2005).

sentencing in *Guevara* took place prior to *Booker*, this court affirmed the sentence post-*Booker* and clearly stated that the career offender determinations were made using the categorical approach and did not violate the Sixth Amendment under *Booker*—obviating any possibility that the holding in *Guevara* would be modified by *Booker*. *Guevara*, 408 F.3d at 261–62. Furthermore, the *Dentler* sentencing took place post-*Booker* and held that the district court plainly erred by not following the *Jones* court's previous application of the categorical approach with respect to the instant offense. *Dentler*, 492 F.3d at 313.

The Government also observes that, after *Booker*, district courts may now make factual findings necessary to support a career offender determination without violating the Sixth Amendment. Although post-*Booker* "the Sixth Amendment will not impede a sentencing judge from finding all facts relevant to sentencing," *United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2005), our caselaw nonetheless consistently requires courts to apply the categorical approach to Guidelines determinations as required by *Taylor* and its progeny—a line of authority distinct from *Booker*. *See, e.g., United States v. Mohr*, 554 F.3d 604, 607 (5th Cir. 2009) ("In determining whether an offense qualifies as a crime of violence under the residual clause, this Court applies the categorical approach set out in *Taylor* and *Shepard*.") (full citations omitted).

2. *Guevara Applies to Both §§ 4B1.2(a)(1) and (2)*

The Government alternatively asks the court to narrowly construe *Guevara* and *Dentler* to apply only to cases that involve whether an offense was a crime of violence under § 4B1.2(a)(1) because it had the use, attempted use, or threatened use of force as an element of the offense. Although both *Guevara* and *Dentler* did base their crime of violence determinations on the absence of a statutory element of violence or use of force, *Guevara*'s explicit holding precludes

such a construction. *Guevara* specifically held that the categorical approach applied to crime of violence determinations based upon enumerated offenses and the residual clause of § 4B1.2(a)(2), as well as crime of violence determinations based upon § 4B1.2(a)(1). 408 F.3d at 261–62. The *Guevara* court did not indicate that there were any exceptions to the use of the categorical approach, stating:

> Section 4B1.2(a)(2) instructs courts to consider the instant offense a crime of violence if it is "burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Our caselaw interpreting that provision has categorically forbidden courts from looking beyond the statute and the indictment in making this decision. Therefore, as is the case with § 4B1.2(a)(1), under § 4B1.2(a)(2) the sentencing court cannot base its crime-of-violence determination on anything beyond what is present in the statute or alleged in the indictment, elements as to which, to convict, the jury must have found evidence beyond a reasonable doubt . . . .

Id. at 261–62 (internal citations omitted).

3. *Application Note 1 and the Rules of Statutory Construction*

The Government also claims that *Guevara* and *Dentler* do not control here because Application Note 1 to § 4B1.2 does not implicate the "broad definition" of crime of violence. The Government relies on the venerable principle that "in most contexts, a precisely drawn, detailed statute pre-empts more general remedies." *Hinck v. United States*, 550 U.S. 501, 506 (2007) (internal quotation marks and citations omitted). The Government's argument rests on the false premise, however, that Sentencing Guidelines' application notes create new freestanding provisions. Application notes only clarify the Guidelines' provisions. *See United States v. Ollison*, 555 F.3d 152, 165 (5th Cir. 2007) (citing *Stinson v. United States*, 508 U.S. 36, 38 (1993)) ("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."). Unlawful possession of a sawed-off shotgun, like any crime of violence under § 4B1.2, must fall within the definition of either §§ 4B1.2(a)(1) or (a)(2)—that is, the crime must still either involve the use of force, be an enumerated offense, or fall within the residual clause.[8]

4. *Distinguishing ACCA from Career Offender Enhancements*

In *Guevara*, just as in the present case, the defendant challenged a career offender determination under § 4B1.1, not a determination under ACCA that enhanced his statutory maximum sentence. The Government, however, attempts to distinguish *Guevara* on the grounds that the line of cases from which *Guevara* evolved was based upon *Taylor* and *Shepard*, which involved ACCA determinations. The Government's attenuated distinction would require disavowing years of precedent. "The [ACCA] definition of 'violent felony' is identical to that of 'crime of violence' in the Guidelines context." *Mohr*, 554 F.3d at 609. The method used to categorize convictions has never turned on whether the determination will impact the statutory maximum; the same categorical approach applies under ACCA or § 4B1.2.[9] *See id.* at n.4 ("We have previously

[8] As explained above, unlawful possession of a sawed-off shotgun would only fall within the residual clause as an offense that "otherwise involves conduct that presents serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(2); *see Serna*, 309 F.3d at 862 & n.6.

[9] For the sake of clarity, I note that this court frequently also utilizes crime of violence determinations pursuant to U.S.S.G. § 2L1.2, for illegal reentry sentencing, to analyze the definition of crimes of violence under ACCA and § 4B1.2, and vice versa. *See United States v. Garcia*, 470 F.3d 1143, 1147 n.5 (5th Cir. 2006) (considering previous crime of violence holdings under § 2L1.2 for purposes of making a § 4B1.2(a)(1) crime of violence determination). Such comparisons are inappropriate, however, when addressing ACCA or § 4B1.2(a)(2) crime of violence determinations under the residual clause because Application Note 1(B)(iii) to § 2L1.2, defining crime of violence for purposes of § 2L1.2, does not contain a residual clause. *See United States v. Calderon-Pena*, 383 F.3d 254, 261 (5th Cir. 2004) (en banc) (recognizing this distinction between § 2L1.2 and § 4B1.2); *see also United States v. Charles*, 301 F.3d 309, 315–16 (5th Cir. 2002) (en banc) (DeMoss, J., specially concurring) ("I write separately to

applied our holdings under the residual clause of the ACCA to analyze the definition of crimes of violence under § 4B1.2, and vice versa"); *see also United States v. Hawley*, 516 F.3d 264, 271–72 (5th Cir. 2008) ("Section 4B1.2 of the Guidelines contains the same Otherwise Clause as § 924(e) in defining 'crime of violence'"); *Dentler*, 492 F.3d at 313.[10]

In my view, the Government's attempts to avoid the application of the categorical approach run afoul of this court's rulings in *Guevara* and *Dentler*, and the language of § 4B1.1. Both *Guevara* and § 4B1.1 expressly provide that the instant and prior offenses must be crimes of violence (or controlled substance offenses) of which the defendant was convicted, and that the categorical approach governs such determinations. Accordingly, the district court was required to apply the categorical approach in making its determination that Lipscomb's present offense was a crime of violence under § 4B1.2(a).

B. Application of the Categorical and Modified Categorical Approaches

I now turn to whether Lipscomb's present offense was a crime of violence when examined under the categorical and modified categorical approaches. *See Sojourner T v. Edwards*, 974 F.2d 27, 30 (5th Cir. 1992) (This court may "affirm the district court's judgment on any grounds supported by the record.").

"In determining whether an offense qualifies as a crime of violence under the residual clause, this Court applies the categorical approach" as set out in

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amplify the nature and extent of the confusion and ambiguities which exist as to the meaning of the term 'crime of violence'. . . . I can see no rational justification for a defined term such as 'crime of violence' . . . to have this many different meanings.").

[10] Other circuits have likewise extended the Supreme Court's ACCA rulings regarding the categorical approach to the Guidelines career offender enhancement context under § 4B1.2. *See United States v. McDonald*, 592 F.3d 808, 810–11 (7th Cir. 2010); *United States v. Furqueron*, F.3d 612, 614 (8th Cir. 2010); *United States v. Alexander*, 609 F.3d 1250, 1253, (11th Cir. 2010); *United States v. Dennis*, 551 F.3d 986, 988–89 (10th Cir. 2008); *Piccolo*, 441 F.3d at 1086.

Taylor and *Shepard*. *Mohr*, 554 F.3d at 607; *see also United States v. Insaulgarat*, 378 F.3d 456, 467 (5th Cir. 2004). Under the categorical approach, "we consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay*, 553 U.S. at 141; *see also James v. United States*, 550 U.S. 192, 201 (2007) ("[W]e look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction.") (internal quotations marks and citations omitted). "That is, we consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." *James*, 550 U.S. at 201. The court thereby avoids the practical difficulty of trying to ascertain whether the defendant's crime, "as committed on a particular occasion, did or did not involve violent behavior." *Chambers v. United States*, 129 S. Ct. 687, 690 (2009).

Although the strict categorical approach is the starting point of the analysis, it is not necessarily the ending point. Courts may look beyond the statutory definition and apply a "modified categorical approach" under limited circumstances. *Johnson*, 130 S. Ct. at 1273. As the Supreme Court recently explained in *Nijhawan v. Holder*:

> [S]ometimes a separately numbered subsection of a criminal statute will refer to several different crimes, each described separately. And it can happen that some of these crimes involve violence while others do not. . . . In such an instance, we have said, a court must determine whether an offender's prior conviction was for the violent, rather than the nonviolent [crime], by examining "the indictment or information and jury instructions," *Taylor*, *supra*, at 602, 110 S. Ct. 2143, or, if a guilty plea is at issue, by examining the plea agreement, plea colloquy or "some comparable judicial record" of the

> factual basis for the plea. *Shepard v. United States*, 544 U.S. 13, 26, 125 S. Ct. 1254, 161 L. Ed.2d 205 (2005).

129 S. Ct. 2294, 2299 (2009); *see also Johnson*, 130 S. Ct. at 1273. Consistent with *Nijhawan* and *Johnson,* this court has explained that "[w]hen a defendant is convicted under a statute that contains disjunctive subsections, the court may look to the charging documents 'to determine by which method the crime was committed in a particular case. . . .'" *Mohr*, 554 F.3d at 607 (quoting *United States v. Riva*, 440 F.3d 722, 723 (5th Cir. 2006)).

Accordingly, I begin with whether the offense of conviction, 18 U.S.C. § 922(g), contains multiple crimes. *See Hughes*, 602 F.3d at 676. Section 922(g) contains multiple crimes; parsing the language of the statute produces at least twenty separate offenses. *See* 18 U.S.C. § 922(g). Applying the modified categorical approach for the purpose of determining "which statutory phrase was the basis for the conviction," *Johnson*, 130 S. Ct. at 1273, I look to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information," *Shepard*, 544 U.S. at 26. The language of the indictment narrows the offense to "[i]t shall be unlawful for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year to possess a firearm in or affecting interstate and foreign commerce."

Ordinarily, this court would next turn to evaluating whether the conviction constitutes a crime of violence because it is "roughly similar" to the enumerated offenses in § 4B1.2(a). *See Begay*, 553 U.S. at 143; *United States v. Harrimon*, 568 F.3d 531, 534–35 (5th Cir. 2009). Here, however, such analysis is unnecessary in light of the specific instructions of Application Note 1 to § 4B1.2. *See Ollison*, 555 F.3d at 165 (citing *Stinson*, 508 U.S. at 38)

("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."). As noted above, Application Note 1 provides that possession of a firearm by a convicted felon is not a crime of violence unless the firearm possessed was a firearm described in § 5845(a). *See* U.S.S.G. § 4B1.2, app. n.1.

Thus, the pertinent issue becomes whether anything that the district court was allowed to consider under the categorical approach or modified categorical approach demonstrated that the firearm possessed by Lipscomb was a firearm described in § 5845(a). The Government argues that the district court could have looked to Lipscomb's admissions under oath[11] or to the indictment's allegations that the firearm was a shotgun with an overall length less than 26 inches and barrel length less than 18 inches.[12]

But in accordance with *Nijhawan* and *Johnson*, under the modified categorical approach the court's consideration of the indictment and other judicial documents must end upon ascertaining "which statutory phrase (contained within a statutory provision that covers several different generic crimes)" covered the conviction. *Nijhawan*, 129 S. Ct. at 2303. The modified approach provides no license for further consideration of the indictment or judicial documents.

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[11] Even if the district court had considered Lipscomb's plea colloquy and factual resume, the record shows that while Lipscomb admitted that the firearm was a sawed-off shotgun, he never admitted that the barrel length of the firearm was less than 18 inches or that the overall length was less than 26 inches.

[12] The Government argues that by pleading guilty to the indictment, Lipscomb necessarily admitted all the factual allegations contained in the indictment. This court has not yet had cause to address that contentious question, nor does the court have reason to reach the issue here. *See United States v. Morales-Martinez*, 496 F.3d 356, 359 (5th Cir. 2007).

Consequently, the court may consider only the elements contained within the statutory definition of the crime. *James*, 550 U.S. at 201. The relevant statutory phrase of § 922(g)(1) has three elements: (1) the defendant had a prior conviction of a crime punishable by imprisonment for a term exceeding one year; (2) he knowingly possessed a firearm; (3) the firearm was in or affecting interstate commerce. 18 U.S.C.§ 922(g)(1). Nothing in the felon in possession statute mentions the characteristics of the weapon, and the language of the statute is as far as the categorical approach extends. Anything further would be a prohibited inquiry into "the specific conduct of this particular offender." *James*, 550 U.S. at 202. The Government's arguments are therefore without merit because (1) after determining the relevant statutory provision, the court may not delve further into the indictment or plea colloquy under the modified categorical approach, and (2) the type of firearm possessed is not an element of a conviction for possession of a firearm by a convicted felon under § 922(g)(1) pursuant to the categorical approach.

Although the Government argues that the type of weapon was an essential element of conviction because it would have been required to prove that Lipscomb possessed the firearm described in the indictment at trial, this court has in fact reached the contrary conclusion. *See United States v. Guidry*, 406 F.3d 314, 322 (5th Cir. 2005) (no fatal variance between the indictment and the proof offered at trial when the indictment alleged possession of a 9mm Kurz and the evidence at trial showed the defendant possessed a .380-caliber pistol because the type of weapon possessed was not an essential element of the offense); *United States v. Munoz*, 150 F.3d 401, 417 (5th Cir. 1998) (no constructive amendment where government identified the firearm as a 12-gauge shotgun and the evidence showed that it was a 20-gauge; gauge of shotgun was not an essential element of the charged offense).

The Government further argues that by holding that the categorical approach precludes a court from making factual findings regarding the weapon at issue in the § 922(g)(1) conviction for purposes of § 4B1.2, this court entirely undermines the § 5845(a) exception included in Application Note 1. I disagree. A felon in possession of a short-barreled shotgun (or another type of firearm specified in § 5845(a)) may qualify for career offender enhancements based on state convictions. *See, e.g.*, ALA. CODE 1975 § 13A-11-63; MO. REV. STAT. § 571.020; TENN. CODE ANN. § 39-17-1302; TEX. PEN. CODE § 46.05; *see also Serna*, 309 F.3d at 862-63. Moreover, Application Note 1 does not support an exception to the categorical approach in cases involving unlawful possession of a firearm described in 26 U.S.C. § 5845(a). Application Note 1 only states that "'crime of violence' does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a)." U.S.S.G. § 4B1.2, app. n.1. It does not address the application of the categorical approach to these offenses.

To summarize, in determining whether an offense is a crime of violence for the purposes of § 4B1.1, under the categorical and modified categorical approach, the offense of conviction should be the focus of inquiry. The indictment and other judicial documents listed in *Shepard* may be relied upon only to prove facts necessary to the conviction, *Shepard*, 544 U.S. at 20–21, or for purposes of discerning under which statutory phrase of a disjunctive statute the defendant was convicted, *Johnson*, 130 S. Ct. at 1273. Because the testimony at sentencing on which the district court relied in determining that Lipscomb's instant offense involved a firearm described in § 5845(a) was not evidence that may be considered under the categorical approach, I would hold that the district court's reliance on that testimony was erroneous. Further, the court could not have considered the allegations in the indictment or the plea colloquy for purposes of

establishing the characteristics of the weapon because those characteristics were not necessary to determine "which statutory phrase was the basis for conviction" under § 922(g)(1). *Id.*

III. CONCLUSION

For the reasons discussed, the district court erred in concluding that Lipscomb's instant crime was a crime of violence and sentencing him as a career offender on that basis. I would vacate the sentence and remand to the district court for resentencing. Because the majority opinion adopts a contrary result, I respectfully dissent.