

No.

IN THE
SUPREME COURT OF THE UNITED STATES

No.

IN THE SUPREME COURT OF THE UNITED STATES

FRANCISCO BERNABE GONZALES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To the United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-11292

United States Court of Appeals
Fifth Circuit

FILED

December 11, 2017

Lyle W. Cayce
Clerk

D.C. Docket No. 4:13-CR-206-1

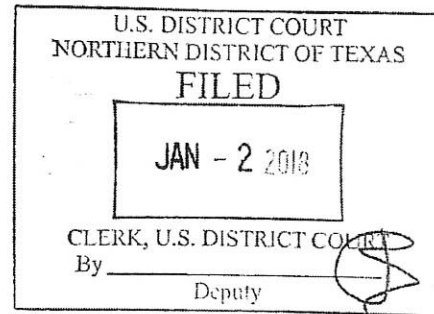
UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

FRANCISCO BERNABE GONZALES,

Defendant - Appellant



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

Before JONES, SMITH, and PRADO, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by
counsel.

It is ordered and adjudged that the sentence imposed by the District
Court is affirmed.



Certified as a true copy and issued
as the mandate on Jan 02, 2018

Attest: *Lyle W. Cayce*
Clerk, U.S. Court of Appeals, Fifth Circuit

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-11292

United States Court of Appeals
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FILED

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UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

FRANCISCO BERNABE GONZALES,

Defendant - Appellant

Appeals from the United States District Court
for the Northern District of Texas
USDC No. 4:13-CR-206-1

Before JONES, SMITH, and PRADO, Circuit Judges.

PER CURIAM:*

Francisco Bernabe Gonzales pled guilty to one count of conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846. He appeals the procedural and substantive reasonableness of his sentence. Because we find no reversible error, we AFFIRM.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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I. BACKGROUND

In December 2013, Gonzales pled guilty to one count of conspiracy to possess with intent to distribute a controlled substance in violation of 21 U.S.C. § 846. The presentence report (“PSR”) calculated a total offense level of 31¹ and a criminal history category of VI. The base offense level was 32. The PSR added two levels for possession of a firearm in furtherance of drug-trafficking and subtracted three levels for acceptance of responsibility.

The PSR stated that Gonzales was a career offender under U.S.S.G. § 4B1.1(b) for two prior felony convictions for crimes of violence: Burglary of a Habitation and Evading Arrest with a Vehicle. This finding did not affect Gonzales’s offense level because the offense level was greater than the career offender level. However, it did affect his criminal history category. His total criminal history score of 8 would have given him a criminal history category of IV. However, because the PSR found that he was a career offender under U.S.S.G. § 4B1.1(b), he had a criminal history category of VI. With a total offense level of 31, this meant the sentencing guidelines recommended a range of 188 to 235 months imprisonment. Gonzales objected to the career offender finding, arguing that evading arrest with a vehicle is not a crime of violence. The district court overruled the objection and sentenced Gonzales to 235 months of imprisonment with a three year term of supervised release.

Gonzales appealed. This court affirmed the district court judgment in March 2015. *United States v. Gonzales*, 598 Fed. App’x. 311 (5th Cir. 2015) (*cert. granted, judgment vacated*, 136 S. Ct. 84 (2015)). Two months later, the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015). *Johnson* held that the residual clause of the Armed Career Criminal Act

¹ In at least one paragraph, the PSR mistakenly stated the total offense level was 32, which the court corrected in its ruling.

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“ACCA”) was unconstitutionally vague. *Id.* at 2557, 2563. The Supreme Court granted certiorari to Gonzales and remanded this case to this court “for further consideration in light of *Johnson*.” *Gonzales v. United States*, 136 S. Ct. 84 (2015). This court remanded to the district court, stating only: “IT IS ORDERED that appellant’s opposed motion to remand case for resentencing is GRANTED.”

The third addendum to the PSR concluded that the residual clause to the “crime of violence” definition in the guidelines, U.S.S.G. § 4B1.2(a)(2), must be invalid because this circuit treated cases involving the residual clauses of the ACCA and § 4B1.2(a)(2) interchangeably. *See United States v. Moore*, 635 F.3d 774, 776 (5th Cir. 2011). This meant Gonzales could not be a career offender and lowered his criminal history category to IV, giving him a guideline imprisonment range of 151 to 188 months. The district court disagreed and cited this court’s decision, *In re Arnick*, 826 F.3d 787 (5th Cir. 2016), which noted that *Johnson* did not address the constitutionality of the sentencing guidelines. A fourth addendum to the PSR followed the district court’s reasoning and found that Gonzales was a career offender with a criminal history category of VI, giving him a guidelines imprisonment range of 188 to 235 months.

The Government and Gonzales objected to the third addendum to the PSR because it applied the 2013 guidelines (those in effect at the time of original sentencing) rather than the 2015 guidelines (those in effect at the time of resentencing). Under the 2015 guidelines, Gonzales’ base offense level would be 30 instead of 32. This would result in a lower guideline range of 151 to 188 months. The 2015 guidelines also got rid of the residual clause of U.S.S.G. § 4B1.2(a)(2), which would lower Gonzales’ criminal history category as noted above. If both amendments were applied to Gonzales, he would have a guideline imprisonment range of 121 to 151 months. The fourth addendum

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to the PSR rejected these arguments and continued to apply the 2013 guidelines.

At the sentencing hearing, the district court adopted the PSR as amended. The court again sentenced Gonzales to 235 months imprisonment and 3 years supervised release. A few months later, the Supreme Court upheld the constitutionality of the residual clause in U.S.S.G. § 4B1.2(a)(2). *Beckles v. United States*, 137 S. Ct. 886, 897 (2017).

II. STANDARD OF REVIEW

We review a district court's interpretation of the sentencing guidelines and our remand orders *de novo*. *United States v. Amieva-Rodriguez*, 874 F.3d 898, 903 (5th Cir. 2017); *Janvey v. Alguire*, 847 F.3d 231, 245 (5th Cir. 2017). We apply a harmless error standard of review to procedural errors in applying the guidelines. *United States v. Ortiz-Chavira*, 873 F.3d 473, 474-75 (5th Cir. 2017).

We review arguments not raised to the district court for plain error. *United States v. Wikkerink*, 841 F.3d 327, 331 (5th Cir. 2016). Under this standard, "when there was (1) an error below, that was (2) clear and obvious, and that (3) affected the defendant's substantial rights, a court of appeals has the *discretion* to correct it but no obligation to do so." *United States v. Galvan Escobar*, 872 F.3d 316, 319 (5th Cir. 2017) (emphasis in original) (internal quotation marks omitted). In order to show that a sentencing error affected the defendant's substantial rights, the defendant must show that "the error increased the term of a sentence, such that there is a reasonable probability of a lower sentence on remand." *Id.* at 319 (internal quotation marks omitted). "If the first three prongs are satisfied, we remedy the error 'only if it seriously affected the fairness, integrity or public reputation of the judicial proceedings.'" *Id.* at 320 (citation omitted).

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III. ANALYSIS

The parties dispute the meaning of this court's remand order following the Supreme Court's remand in light of *Johnson*. As noted above, this court stated only: "IT IS ORDERED that appellant's opposed motion to remand case for resentencing is GRANTED." Gonzales argues that, taken in combination with the Supreme Court's remand, this mandate implied that the district court should have applied *Johnson* during resentencing. But even if the district court erred in interpreting its duty on remand, the error was harmless. Because the Supreme Court ruled in *Beckles* that this guideline is not constitutionally infirm, *Beckles*, 137 S. Ct. at 897, this court will not require the district court to resentence under a rule that is now demonstrably incorrect, nor could we order the district court to rule at odds with *Beckles*. Therefore, the district court's application of the career offender guideline must be affirmed.

Gonzales contends the sentence on remand was erroneous because the court failed to consider his post offense rehabilitation efforts. We reject this argument because the third addendum to the PSR specifically referenced Gonzales's educational courses, GED certificate, and the fact that he had no disciplinary actions while in custody. The court adopted the findings in the PSR. The fact that the court did not explicitly mention specific § 3553(a) factors "does not mean that it did not consider them." *United States v. Evans*, 587 F.3d 667, 673 (5th Cir. 2009).

Gonzales asserts the court erred on remand by failing to apply the 2015 guidelines. When a sentence is remanded because it violated the law, the district court is to apply the same version of the guidelines that was in effect at the time of the original sentencing. 18 U.S.C. §§ 3742(g)(1), 3742(f)(1). We hold that the district court did not err by reading our mandate as a remand for

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a sentence “imposed in violation of law.” Consequently, the district court did not err by applying the 2013 guidelines.

Gonzales argues that, even if the 2015 guidelines do not apply, the district court erred in failing to apply Amendment 798 because it is retroactive. Because Gonzales failed to raise this argument to the district court, we review for plain error. Amendment 798 struck the residual clause of the crime of violence definition in U.S.S.G. § 4B1.2(a)(2). This has none of the characteristics of a change that, according to our case law, is retroactive rather than substantive and thus prospective. *United States v. Solis*, 675 F.3d 795, 797-98 (5th Cir. 2012) (noting that the following are evidence that an amendment is clarifying and therefore retroactive: the Sentencing Commission has expressly stated it is clarifying, the amendment is listed in U.S.S.G. § 1B1.10(c) as being retroactively applicable, and the “amendment alters the language of commentary to a guideline rather than the language of the guideline itself.” (citation omitted)). Gonzales cannot avail himself of Amendment 798.

Gonzales also argues that the district court erred by not considering Amendments 782 or 798 under 18 U.S.C. § 3553. First, these amendments were both discussed before the court at the resentencing hearing. In fact, the district court took pains to have both parties agree Gonzales could assert Amendment 782 in a later motion under 18 U.S.C. § 3582(c)(2). Second, Gonzales has failed to point to any caselaw that would require the district court to consider subsequent amendments to the guidelines under this section. Therefore, the district court did not err even if it did not consider these amendments under § 3553.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.

Supreme Court of the United States

No. 14-9996

FRANCISCO BERNABE GONZALES,

Petitioner

v.

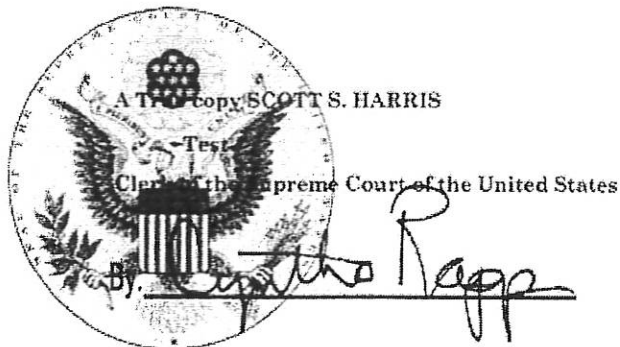
UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI to the United States Court
of Appeals for the Fifth Circuit.

THIS CAUSE having been submitted on the petition for writ of certiorari
and the response thereto.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this
Court that the motion of petitioner for leave to proceed *in forma pauperis* and the petition
for writ of certiorari are granted. The judgment of the above court is vacated, and the case
is remanded to the United States Court of Appeals for the Fifth Circuit for further
consideration in light of *Johnson v. United States*, 576 U. S. ____ (2015).

October 5, 2015



IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-10503

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

FRANCISCO BERNABE GONZALES,

Defendant - Appellant

Appeal from the United States District Court for the
Northern District of Texas, Fort Worth

Before PRADO, OWEN, and GRAVES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellant's opposed motion to remand case for
resentencing is GRANTED.

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF TEXAS
3 FORT WORTH DIVISION

4 UNITED STATES OF AMERICA,) CASE NO. 4:13-CR-206-A
5 Government,)
6 VERSUS) FORT WORTH, TEXAS
7 FRANCISCO BERNABE GONZALES,) AUGUST 19, 2016
8 Defendant.) 9:21 A.M.

9
10 VOLUME 1 OF 1
11 TRANSCRIPT OF RESENTENCING
12 BEFORE THE HONORABLE JOHN McBRYDE
13 UNITED STATES DISTRICT COURT JUDGE

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Proceedings reported by mechanical stenography, transcript
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I N D E X

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P R O C E E D I N G S

August 19, 2016 - 9:21 a.m.

THE COURT: Okay. I'm next calling for sentencing -- actually, it's a resentencing, in Case Number 4:13-CR-206-A. It's United States of America versus Francisco Bernabe Gonzales.

And Mr. Bradford is here for the government, and Ms. Knight's here for the defendant.

I'll have the defendant state his full name for the record.

THE DEFENDANT: Francisco Bernabe Gonzales.

THE COURT: Okay. Your case has a little longer history than some of them.

You appeared before me -- let me get the exact date -- I guess it was on December 30, 2013, when you entered a plea of guilty to the offense charged by a one-count indictment charging you with conspiracy to possess with intent to distribute a controlled substance, and then we went through the usual presentencing process.

And then there was a sentencing hearing on April 18, 2014, and you were sentenced to a term of imprisonment of 235 months, and that was the top of the advisory guideline range calculated at that time.

And then you appealed from that sentence to the Fifth Circuit, and then on March 24, 2015, the Fifth Circuit

1 issued an opinion affirming the sentence and -- the conviction
2 and sentence.

3 Then you filed a petition for writ of certiorari
4 with the Supreme Court, and that was on June 1, 2015, and then
5 on October 5, 2015, the Supreme Court issued an order granting
6 your petition for writ of certiorari and an opinion vacating
7 the opinion of the Fifth Circuit affirming this Court's
8 judgment, and said that they were doing that for further
9 consideration in light of the Supreme Court's decision in
10 Johnson versus United States.

11 And then an attorney -- and I don't know that it was
12 Ms. Knight, it may have been another attorney -- filed a
13 motion with the Fifth Circuit asking that the case be remanded
14 to this Court for resentencing, and then on October 26, 2015,
15 the Fifth Circuit remanded the case for resentencing, and
16 that's led up to where we are.

17 Ms. -- and, of course, we're here today for that
18 resentencing.

19 Ms. Knight, did you and your client receive in a
20 timely manner the third and fourth addenda to the Presentence
21 Report?

22 MS. KNIGHT: Yes, Your Honor.

23 THE COURT: And did both of you read those items and
24 then discuss them with each other?

25 MS. KNIGHT: Yes.

1 THE COURT: Okay. Now, there were some objections
2 to the third addendum, and I believe both of the objections
3 had to do with whether the probation officer should apply
4 the -- use the guidelines in effect at the time of the
5 original sentencing, or should the probation officer have used
6 the guidelines in effect at the time of this resentencing.

7 I believe that was your objection, wasn't it,
8 Mr. Bradford?

9 MR. BRADFORD: Your Honor, the -- I believe the
10 nature of the government's objection was that the Supreme
11 Court's holding in Johnson affected the use of the prior
12 conviction against the defendant and would, therefore, affect
13 his guideline calculations.

14 And in light of the Beckles opinion pending before
15 the Supreme Court, the government felt that it would be
16 prudent to take that line of reasoning. The authorities cited
17 by the Court in its orders of the Fifth Circuit, and the
18 resentencing to this Court having been made by the Fifth
19 Circuit, the precedent in this circuit is that the holding in
20 Johnson did not affect the sentencing guidelines.

21 And at this time the government has no basis in law
22 for its objection to the PSR, however, felt that it was
23 prudent for the Court to consider withholding the sentencing
24 until after the decision in Beckles, however, at this time, as
25 cited by the Court, the law in this circuit is inapposite to

1 the government's stance in its objection, and, therefore, the
2 government does not pursue that objection at this time.

3 *THE COURT:* Okay. Did I accurately describe what
4 the objection was you made on behalf of the defendant?

5 *MS. KNIGHT:* Your Honor, I think that what happened
6 was the government did file an objection to the third addendum
7 asking the Court to use the lower --

8 *THE COURT:* Okay. Well, we've already dealt with
9 that. I want to talk about your objections.

10 *MS. KNIGHT:* Yes, of course. Our objection is that
11 the career offender enhancement should not apply to
12 Mr. Gonzales.

13 *THE COURT:* Okay. And you agree that your objection
14 is not good under Fifth Circuit law at this time?

15 *MS. KNIGHT:* I do not, Your Honor. I would like to
16 address with the Court the Court's most recent order of
17 July 27th, 2016, which is docket number 111, in which the
18 Court tentatively concluded that the November 1st, 2013,
19 guidelines should apply in connection with the drug quantity
20 offense level.

21 Now, the Court's position on that is that the
22 guidelines in effect at the time of the original sentencing
23 apply, but that position also affects the objections pertinent
24 to the issue of whether 4B1.2 properly applies in this case.

25 As the Court pointed out in its order, under 18 USC

1 3742, a sentence may be appealed on the basis that it was
2 imposed in violation of law or as the result of an incorrect
3 application of the sentencing guidelines.

4 If the Court of Appeals determines that the sentence
5 was imposed in violation of law or as the result of an
6 incorrect application of the sentencing guidelines, the case
7 will be remanded for further sentencing proceedings.

8 And, for sentencing upon remand under 3742(g), the
9 district court, in a case which is remanded pursuant to
10 subsection (f)(1) or (f)(2) shall use the original guidelines
11 in effect at the time of the original sentencing.

12 Now, the Court's position in its order was that the
13 2013 guidelines apply for purposes of drug quantities, so it
14 appears the Court has acknowledged that the basis for this
15 matter being remanded must be because the sentence was imposed
16 in violation of the law or as the result of an incorrect
17 application of the guidelines.

18 In the same order, the Court took the position that
19 there was not an incorrect application of the guidelines or a
20 violation of the law because the Fifth Circuit in Arnick has
21 held that Johnson does not address Section 4B1.2(a)(2) of the
22 guidelines.

23 Arnick actually found that a circuit split exists on
24 this issue and that, quote, the Supreme Court has not decided
25 the question. The Fifth Circuit has further clarified this

1 holding in its revised opinion in a petition for panel
2 rehearing in the case United States versus Jeffries, Cause
3 Number 14-51250, document number 00513613898, revised on
4 July 28th, 2016.

5 In that opinion, the Fifth Circuit court stated that
6 in Arnick, the Court ruled that, quote, the Supreme Court has
7 not applied Johnson versus United States to the career
8 offender sentencing guidelines definition in the United States
9 Sentencing Guidelines Section 4B1.2.

10 Now, in this case, the case was remanded by the
11 Supreme Court for further consideration in light of Johnson
12 and, as noted in the Defendant's Sentencing Memorandum, was
13 remanded by the Court of Appeals. And though this Court did
14 not address the -- in its most recent order, our Law of the
15 Case arguments in the sentencing memorandum, we reurge them
16 here.

17 And it seems to the defense that we cannot have it
18 both ways, Your Honor. If the case was remanded because of a
19 violation of law or an incorrect guideline application, in
20 which case the old drug quantity guidelines do apply, the
21 Court cannot find that the original sentence was lawful or a
22 correct application of the guidelines for purposes of the
23 career offender provision.

24 If the case was remanded under any other provision
25 of 3742, for instance, (a)(3) or (a)(4), then the new drug

1 quantity guidelines must apply and the amendments to Section
2 4B1.2 effective as of August 1st, 2016, must also apply.

3 At this point we reurge our objection that the
4 career offender provision is not properly applied in this
5 case, in accordance with our arguments in the sentencing
6 memorandum as well as the statements made in the United States
7 Sentencing Commission supplement to the 2015 guidelines
8 manual.

9 The commission's role in sentencing was set forth in
10 or discussed by the United States Supreme Court in Rita versus
11 United States, 551 U.S. 338, 348 to 350, U.S. 2007, describing
12 the role and wisdom of the sentencing commission.

13 The Court said that 28 USC Section 991(b) indicates
14 that one of the commission's basic objectives is to assure the
15 meeting -- assure the meeting of the purposes of sentencing as
16 set forth in Section 3553(a)(2). The provision adds that the
17 commission must seek to provide certainty and fairness in
18 sentencing and to avoid unwarranted sentencing disparities,
19 end quote.

20 So, in regard to our objection to the application of
21 the career offender provision as to Mr. Gonzales, we object to
22 the residual clause of the section being applied for his
23 conviction of evading arrest in a vehicle as noted in the PSR
24 at paragraph 41.

25 The sentencing commission has stricken this from the

1 amendment to Section 4B1.2 that was effective as of
2 August 1st. In its amendment, the commission stated, quote,
3 the commission determined that the residual clause at Section
4 4B1.2 implicates many of the same concerns cited by the
5 Supreme Court in Johnson and, as a matter of policy, amends
6 Section 4B1.2(a)(2) to strike the clause. Removing the
7 residual clause has the advantage of alleviating the
8 considerable application difficulties associated with that
9 clause, as expressed by judges, probation officers, and
10 litigants. Furthermore, removing the clause will alleviate
11 some of the ongoing litigation and uncertainty resulting from
12 the Johnson decision.

13 Additionally, Your Honor, as noted by Mr. Bradford
14 in the government's response to the motion to remand that was
15 pending at the Fifth Circuit before the case was remanded,
16 filed on October 26, 2015, at pages 4 through 7, the
17 government noted that the Department of Justice's position was
18 that Johnson's constitutional holding regarding ACCA's
19 residual clause applies to the identically worded residual
20 clause of Section 4B1.2(a)(2). Therefore, the government
21 agrees that it would be error to classify Gonzales's
22 conviction for evading arrest with a vehicle as a crime of
23 violence under Section 4B1.2(a)(2)'s residual clause.

24 The government went on to state that application of
25 a vague guideline conflicts with the proper role of the

1 guidelines in providing a uniform baseline for sentencing.
2 Under the advisory guidelines system, district courts are
3 still required to begin all sentencing proceedings by
4 correctly calculating the applicable guidelines range and to
5 use the guidelines as the starting point and the initial
6 benchmark for sentencing.

7 Your Honor, we also object to the burglary
8 conviction being a qualifying conviction for the purpose of
9 the career offender section. In particular, the Johnson court
10 was troubled by the inclusion of burglary as an example of a
11 residual clause crime because even if the physical injury was
12 remote from the criminal act, it may not qualify.

13 The Johnson court went on to say, how remote is too
14 remote? Once again, the residual clause yields no answer.
15 That quote is taken from United States versus
16 Gonzalez-Longoria, 2016 United States Appeals Court, LEXIS
17 14460, at *33-34.

18 The defendant objects to the conclusion that his
19 prior Texas conviction for burglary of a habitation noted at
20 paragraph 40 of the PSR constitutes a crime of violence.

21 Texas burglary may be committed by entering a
22 premises without the intent to commit a further crime, which
23 falls outside the definition of a crime of violence.

24 *THE COURT:* Ms. Knight, let me interrupt you a
25 minute.

1 You have filed written objections, and that's what
2 we're focusing on, your written objections. Frankly, I've had
3 a hard time following what you're saying, how they tie into
4 your written objections. Let's focus on your written
5 objections.

6 *MS. KNIGHT:* And the written objection, Your Honor,
7 is that the career offender provision is not properly applied
8 in this case because neither of the two convictions noted in
9 the PSR are qualifying convictions.

10 The state of the law with regard to the Johnson
11 issue is obviously in flux as is the state of the law --

12 *THE COURT:* Okay. Have you stated your position in
13 the written objections?

14 *MS. KNIGHT:* I have not clarified our position on
15 the burglary conviction, which I'm trying to do here.

16 *THE COURT:* Pardon? I'm sorry, I didn't --

17 *MS. KNIGHT:* I have not clarified our position with
18 regard to the burglary conviction, which I am trying to do
19 here, and will do so quickly.

20 *THE COURT:* Okay. If your objection is that the
21 vagueness concept that was applied in Johnson to a statute is
22 applicable to the career offender guideline, I overrule that
23 objection because the Fifth Circuit has held to the contrary,
24 and so far, I'm obligated to follow what the Fifth Circuit
25 does, so let's move on.

1 What other objection do you have?

2 *MS. KNIGHT:* I am trying to move on, Your Honor.
3 With all due respect, the burglary conviction comes under the
4 enumerated offense clause in Section 4B1.2, which has also
5 changed.

6 *THE COURT:* Okay. I'm overruling that objection
7 that -- what is it, 4B1.2(a) --

8 *MS. KNIGHT:* Yes.

9 *THE COURT:* -- is unconstitutionally vague, and that
10 the offenses that he was held accountable for as crimes of
11 violence in causing him to be a career offender were not
12 properly applied. I'm overruling that objection.

13 Do you have some other objection you're pursuing?

14 *MS. KNIGHT:* I understand, Your Honor.

15 For record purposes, I would argue that pursuant to
16 *Mathis versus United States*, 136 S. Court, Supreme Court 2243,
17 2248, *United States* 2016, that pursuant to *Mathis*, the
18 burglary conviction no longer qualifies as a qualifying
19 conviction either.

20 This objection is currently foreclosed by Fifth
21 Circuit case law, as stated in *United States versus Herrold*,
22 813 F.3d 595, February 12th, 2016, but we contend that *Herrold*
23 has subsequently been overruled by *Mathis*, and we thus
24 preserve this objection for appeal.

25 *THE COURT:* Okay. Well, I overrule that objection.

1 I understand you're preserving it for appeal.

2 Does that take care of all of your objections? Have
3 I ruled on all of them?

4 MS. KNIGHT: That takes care of the written
5 objections, Your Honor.

6 THE COURT: Okay. Okay. And I think in my July 27,
7 2016, order, I highlighted the reasons I've ruled as I have on
8 the objections.

9 Okay. There being no further objections to the
10 Presentence Report, the Court adopts as the fact findings of
11 the Court the facts set forth in the Presentence Report as
12 modified or supplemented by any of the addenda and any facts
13 I've found from the bench. The Court adopts as the
14 conclusions of the Court the conclusions expressed in the
15 Presentence Report as modified or supplemented by any of the
16 addenda and any of the conclusions I've expressed from the
17 bench.

18 The Court concludes that the total offense level is
19 31; that the Criminal History Category is VI; that the
20 guideline advisory guideline range is 188 to 235 months; that
21 the supervised release range is 3 years to life; and that the
22 fine range is \$15,000 to \$1 million; and that a special
23 assessment of \$100 is mandatory.

24 Okay. At this time, Ms. Knight, you can make
25 whatever statement you would like to make on behalf of

1 Mr. Gonzales.

2 MS. KNIGHT: Your Honor, only we would reurge all of
3 the arguments made in our sentencing memorandum, including the
4 Court's -- we would ask the Court to consider the post-offense
5 rehabilitation under the 3553(a) factors.

6 THE COURT: Okay. Do you have anything else you
7 wish to say?

8 MS. KNIGHT: No.

9 THE COURT: Mr. Gonzales, do you -- you do go by the
10 surname Gonzales, or is it Bernabe?

11 THE DEFENDANT: Gonzales.

12 THE COURT: You have the right to make any statement
13 or presentation you would like to make on the subject of
14 mitigation, that is, the things you think the Court should
15 take into account in determining what sentence to impose, or
16 on the subject of sentencing more generally, and at this time
17 I'll invite you to do that.

18 THE DEFENDANT: No, Your Honor, I'm all right.

19 THE COURT: You don't have anything you want to say?

20 THE DEFENDANT: I'm just nervous.

21 MS. KNIGHT: He said he's just nervous, Your Honor.

22 Do you have anything else to say?

23 No, Your Honor.

24 THE COURT: He doesn't have anything he wants to
25 say?

1 MS. KNIGHT: No, Your Honor.

2 THE COURT: I don't -- I'm a little bit concerned
3 about one issue that neither attorney has addressed, and that
4 is his ability to claim relief under Amendment 782 of the
5 guidelines. I don't think he could have claimed it while his
6 case was on appeal. I think he -- if he had filed a motion
7 while his case was on appeal up until now, it would be
8 dismissed.

9 I don't know of any reason why he can't -- I assume
10 he will appeal from whatever ruling the Court makes in here,
11 based on what Ms. Knight's already said, and so I doubt if he
12 would be able to file a motion under Amendment 782 while that
13 appeal is pending. I don't know of any reason why he could
14 not, once the appellate process has been resolved, if he does
15 appeal, why he couldn't file a motion under 782.

16 Do you know, Mr. Bradford, of any reason why he
17 could not?

18 MR. BRADFORD: No, Your Honor.

19 THE COURT: Do you know of any reason why he could
20 not, after an appeal is concluded, if there is an appeal, file
21 a motion under 782?

22 MS. KNIGHT: I do not at this time, Your Honor.

23 THE COURT: Okay. Well, I'm going to assume that he
24 has that right, and at that time, of course, I would take into
25 account whatever factors the Court should take into account in

1 determining whether the sentence should be reduced by virtue
2 of that amendment.

3 We are sentencing under the guidelines that were in
4 effect in 2013. I guess it was November 1, 2013, that it went
5 into effect.

6 And the sentence I imposed before is one that I
7 carefully considered, and I thought it was appropriate under
8 the circumstances then, and I have no reason to think it's not
9 an appropriate sentence, and I've again evaluated it from a
10 standpoint of what a sentence under 18 United States -- that
11 properly considers the factors under 18 United States Code
12 Section 3553(a) should be, and I've concluded that the
13 sentence of imprisonment of 235 months is an appropriate
14 sentence that satisfies and is consistent with the factors
15 contemplated by that statute.

16 And that would be combined with a term of supervised
17 release of -- let me find the exact -- of 3 years, and that
18 would be combined with an obligation to pay a special
19 assessment of \$100.

20 I think a sentence of that kind is one that does
21 adequately and appropriately address all the factors the Court
22 should consider in sentencing under 18 United States Code
23 Section 3553(a), so that's the sentence I'm going to impose.

24 The Court orders and adjudges that the defendant be
25 committed to the custody of the Bureau of Prisons to serve a

1 term of imprisonment of 235 months.

2 I'm also ordering that he serve a term of supervised
3 release of 3 years, and, of course, that starts when he has
4 completed his sentence of imprisonment.

5 Now, the conditions of that supervised release will
6 be the same conditions I imposed at the original sentencing.
7 Let me find that so I can -- it will be the same conditions
8 that are set forth in the judgment in a criminal case that was
9 signed in this case on April 18, 2014.

10 And those conditions are the standard conditions of
11 supervision that are set forth in that judgment, and, of
12 course, will be set forth in the judgment I issue in this case
13 at the resentencing, with one change.

14 Paragraph 4 of the standard conditions of
15 supervision in the April 18, 2014, judgment was that the
16 defendant shall not leave the judicial district without
17 permission of the Court or the probation officer.

18 I'm going to change that so in the judgment I'm
19 doing in this case it will be that the defendant shall not
20 leave the judicial district where he's being supervised
21 without the permission of the Court or the probation officer.

22 In addition to those standard conditions, the
23 defendant will be subject to these conditions:

24 He shall not commit another federal, state, or local
25 crime.

1 He shall not possess illegal controlled substances.

2 He shall cooperate in the collection of DNA as
3 directed by the probation officer as authorized by the Justice
4 for All Act of 2004.

5 He shall refrain from any unlawful use of a
6 controlled substance, and shall submit to one drug test within
7 15 days of release from imprisonment and at least two periodic
8 drug tests thereafter, as directed by the probation officer
9 pursuant to the mandatory drug testing provision of the 1994
10 Crime Bill.

11 The defendant shall participate in a program
12 approved by the probation officer for treatment of narcotic or
13 drug or alcohol dependency that will include testing for the
14 detection of substance use, and he shall abstain from the use
15 of alcohol and all other intoxicants during and after
16 completion of that treatment, and he'll contribute to the cost
17 of those services at the rate of at least \$50 a month.

18 Mr. Gonzales, you, as you know, have the right to
19 appeal from the sentence I've imposed, and that appeal is to
20 the United States Court of Appeals for the Fifth Circuit.

21 You have the right to appeal in forma pauperis, that
22 means without any cost to you, if you qualify for it. You
23 have the right to have the clerk of court file a notice of
24 appeal for you, and the clerk would do that forthwith, if you
25 were to specifically request it.

1 You and your attorney have been given a form, and I
2 think you signed this same form earlier, but I want the two of
3 you -- that defines certain rights and obligations in
4 reference to an appeal. If you haven't already done so, I
5 want you and Ms. Knight to review that and be sure you
6 understand it, and once both of you are satisfied you
7 understand it, I want both of you to sign it and return it to
8 the court coordinator.

9 Has that been done, Ms. Knight?

10 MS. KNIGHT: Yes, sir.

11 THE COURT: Okay. The defendant's remanded to
12 custody, and the attorneys are excused.

13 MS. KNIGHT: For record purposes, Your Honor, we
14 object to the procedural and substantive reasonableness of the
15 sentence.

16 *(End of Proceedings)*

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REPORTER'S CERTIFICATE

I, Debra G. Saenz, CSR, RMR, CRR, certify that the foregoing is a true and correct transcript from the record of proceedings in the foregoing entitled matter.

I further certify that the transcript fees format comply with those prescribed by the Court and the Judicial Conference of the United States.

Signed this 28th day of November, 2016.

/s/ Debra G. Saenz

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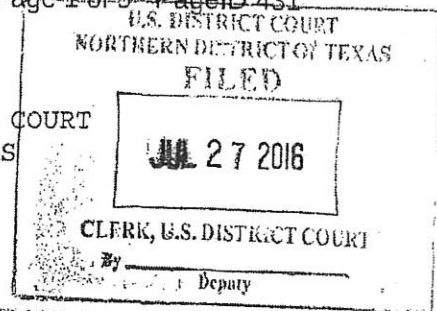
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IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION



UNITED STATES OF AMERICA

§

VS.

§

§ NO. 4:13-CR-206-A

§

FRANCISCO BERNABE GONZALES

§

ORDER

In a footnote on page 3 of the order the court issued on June 6, 2016, in the above-captioned case the court made known that:

The court tentatively has concluded that the Supreme Court's decision in Johnson v. United States, 135 S. Ct. 2551 (2015) does not enter into the resentencing of Gonzales. The Fifth Circuit has held that the Sentencing Guidelines are not subject to a challenge of unconstitutional vagueness. See United States v. Wilson, 622 F. App'x 393, 405 n.51 (5th Cir. 2015); see also United States v. Pearson, 910 F.2d 221, 223 (5th Cir. 1990) (citing United States v. Jones, 905 F.2d 867 (5th Cir. 1990)). The court anticipates issuing a further order on this subject between now and the date of sentencing.

Doc. 108 at 3 n. 1.

The Fifth Circuit now has issued a direct holding that Johnson v. United States, 576 U.S. ___, 135 S. Ct. 2551 (2015), does not address §4B1.2(a)(2) of the Guidelines. In re Arnick, ___ F.3d ___, No. 16-10328, 2016 WL 3383487, at *1 (5th Cir. June 17, 2016) (explaining that: "Johnson did not address Section 4B1.2(a)(2) of the Guidelines. Nor has the Supreme Court held that a Guidelines enhancement that increases the Guidelines range

implicates the same due process concerns as a statute that increases a statutory penalty." [citation omitted]).¹

To whatever extent Gonzales advances the proposition that he should not be treated at sentencing as a Career Offender within the meaning of USSG §4B1.1, the court tentatively has concluded, for the reasons given above, that Gonzales is mistaken and that he should be treated as a Career Offender at resentencing.

Thus, the court's tentative conclusion is that the probation officer was incorrect in the Third Addendum to the Presentence Report in not treating defendant FRANCISCO BERNABE GONZALES ("Gonzales") as a Career Offender within the meaning of USSG §4B1.1. As a Career Offender, Gonzales's Criminal History Category should be VI.

The court ORDERS that the probation officer issue an addendum showing offense level calculations and sentencing ranges

¹The sentencing memorandum Gonzales delivered to the court on July 26, 2016, notes that the Supreme Court has granted review in Beckles v. United States, 2016 U.S. LEXIS 4142 (June 27, 2016), that bears on the issue of applicability of Johnson to USSG §4B1.2(a)(2). That grant of review does not, of course, change the law of the Fifth Circuit. And, the law of the Fifth Circuit as it now exists appears to be that no part of USSG §4B1.2(a) is subject to a constitutional vagueness challenge. Nor does the court agree with the argument that Gonzales seems to advance in his sentencing memorandum that there already has been a decision by the Supreme Court or the Fifth Circuit that Johnson applies to this case. There has been no such decision. The Supreme Court remanded the case to the Fifth Circuit "for further consideration in light of Johnson" Def.'s Sentencing Mem., Ex. A. The Fifth Circuit remanded the case to this court for resentencing, with no instructions as to whether Johnson did or did not apply. Id., Ex. B. The court takes the Fifth Circuit's remand to be a passing on to this court of the instruction of the Supreme Court that there be "further consideration in light of Johnson." After having further considered in light of Johnson, when at the same time considering applicable Fifth Circuit law, the court has concluded that Johnson does not apply to the sentencing in this case.

with Gonzales being treated as a Career Offender within the meaning of USSG §4B1.1.

Both the government and Gonzales have objected to the probation officer's use of a Base Offense Level of 32 in the Third Addendum to the Presentence Report. The 32 Base Offense Level was a correct offense level at the time of Gonzales's sentencing. Doc. 42 at 6, ¶ 21.² The probation officer used the November 1, 2013 Guidelines Manual. Id., ¶ 20. Section 2D1.1(c)(4) of that Manual prescribed a Base Offense Level of 32 if the offense involved between 50 grams and 150 grams of methamphetamine (actual). The offense report attributed to Gonzales for sentencing purposes 90.8 net grams of methamphetamine (actual). Id., ¶ 21.

The government suggests in its objection to the Third Addendum that the Guidelines in effect at the time of resentencing should control. It does not cite any authority for that proposition. If the Guidelines Manual that went into effect November 1, 2015, were the controlling Manual, the Base Offense Level would be 30 instead of 32. USSG §2D1.1(c)(5). However, the government cited no authority for its belief that the November 1, 2015 Guidelines Manual should apply to Gonzales's

²The "Doc. ____" references are to the numbers assigned to the referenced items on the docket in this Case No: 4:13-CR-206-A.

resentencing. The pertinent statute seems to contemplate that upon resentencing "the court shall apply the guidelines . . . that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by way of Act of Congress that were in effect on such date." 18 U.S.C. § 3742(g)(1).

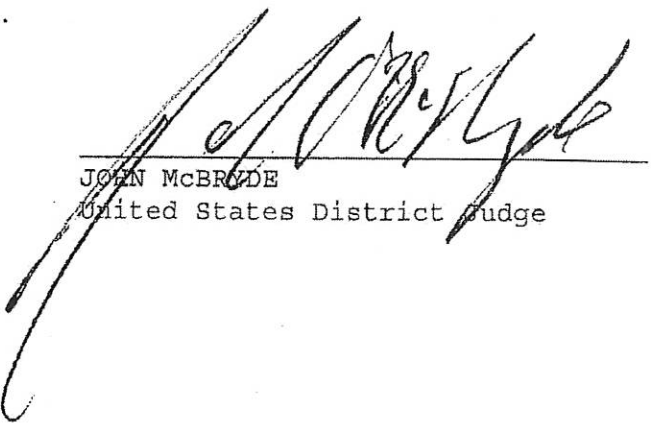
Gonzales urges in support of his objection to the Third Addendum to the Presentence Report that the court is required to use the November 1, 2015 Guidelines Manual at resentencing pursuant to USSG §1B1.11. However, Gonzales fails to provide any explanation as to what there is about §1B1.11 that would require the court to use the November 1, 2015 Guidelines Manual at resentencing. The court is not persuaded that there is anything in that Guidelines section applicable to Gonzales's resentencing.

For the reasons stated above, the court tentatively has concluded that the probation officer correctly used a Base Offense Level of 32, as prescribed by the November 1, 2013 Guidelines Manual, and that the objections by the government and Gonzales thereto are without merit.

If the government or Gonzales persists in its or his objection to the probation officer's use of a Base Offense Level of 32,

The court ORDERS that whichever persists in such an objection file a memorandum at least five business days prior to the date of sentencing providing the court whatever arguments and authorities support the position that the probation officer did not use the correct Base Offense Level.

SIGNED July 27, 2016.



JOHN McBRIDE
United States District Judge

UNITED STATES SENTENCING COMMISSION

SUPPLEMENT TO THE **2015 GUIDELINES MANUAL**



AUGUST 1, 2016

This supplement incorporates the amendment to §4B1.1 (Career Offender) and §4B1.2 (Definitions of Terms Used in Section 4B1.1), effective August 1, 2016. The amended guidelines, as set forth in this document, supersede the versions set forth in the 2015 *Guidelines Manual* (light blue with white lettering) and, together with the rest of the 2015 *Guidelines Manual*, constitute the operative *Guidelines Manual* effective August 1, 2016.

UNITED STATES SENTENCING COMMISSION
ONE COLUMBUS CIRCLE, NE
SUITE 2-500, SOUTH LOBBY
WASHINGTON, DC 20002-8002
(202) 502-4500
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August 1, 2016

Re: **Definition of Crime of Violence**

Amendment to §4B1.1, effective August 1, 2016

Amendment to §4B1.2, effective August 1, 2016

To all recipients of the *Guidelines Manual*:

The United States Sentencing Commission promulgated an amendment to the definition of “crime of violence” at §4B1.2. **The Commission established an effective date of August 1, 2016, for this amendment.**

The Commission decided to promptly take action on this policy matter in light of ongoing litigation in this area across the nation and the added uncertainty resulting from the Supreme Court’s recent decision in *Johnson v. United States*. While the *Johnson* decision did not address sentencing guidelines, the statutory language the Court found unconstitutionally vague in the Armed Career Criminal Act (often referred as the “residual clause”) is identical to language used in the “career offender” guideline. The amendment is a result of a multi-year study prompted by concerns and problems relating to the definition of “crime of violence.” The Commission made its decision to promulgate this amendment after a public hearing, the review of extensive public comment, and a careful examination of the data available on recidivism and the risk of violence to make sure the sentencing enhancement captures the most dangerous offenders.

The amendment eliminates the residual clause in the career offender guideline definition of “crime of violence.” In its place, the amendment revises the list of specific enumerated offenses that qualify as a “crime of violence.” While a few select definitions are provided, the list revised by the amendment continues to rely on long-existing case law for purposes of defining enumerated offenses. Although “burglary of a dwelling” is deleted as an enumerated offense, the amendment provides an upward departure provision in §4B1.2 to address certain cases in which the instant offense or a prior felony conviction was any burglary offense involving violence that did not otherwise qualify as a “crime of violence.”

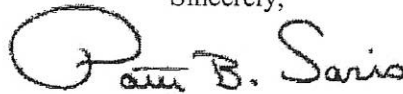
In addition, the amendment adds a downward departure provision in §4B1.1 (Career Offender) for cases in which one or both of the defendant’s “two prior felony convictions” is

based on an offense that is classified as a misdemeanor at the time of sentencing for the instant federal offense.

This document contains the amendment to §4B1.1 and §4B1.2, as well as a statement of the reasons for the amendment. Upon the **August 1, 2016**, effective date, the amended guidelines, as set forth in this document, will supersede the versions of §§4B1.1 and 4B1.2 set forth in the 2015 *Guidelines Manual* (light blue with white lettering), and, together with the rest of the 2015 *Guidelines Manual*, will constitute the operative *Guidelines Manual*.

Please contact the Commission if we can provide further assistance.

Sincerely,

A handwritten signature in black ink that reads "Patti B. Saris". The signature is written in a cursive style with a large, looped initial "P".

Patti B. Saris

The telephone number for the **USSC HelpLine** is (202) 502-4545. The hours of operation are from 8:30 a.m. to 5 p.m., Eastern time, Monday through Friday. The *Guidelines Manual* and other Commission publications and information are also available on the Commission's web site at **www.ussc.gov**. On the web site, for example, you will find the **Interactive Sourcebook of Federal Sentencing Statistics** and the new **Quick Facts** publication series.

UNITED STATES SENTENCING COMMISSION

SUPPLEMENT TO THE 2015 GUIDELINES MANUAL

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Commissioner, *Ex-officio*

This supplement incorporates the amendment to §4B1.1 (Career Offender) and §4B1.2 (Definitions of Terms Used in Section 4B1.1), effective August 1, 2016. The amended guidelines, as set forth in this document, supersede the versions set forth in the 2015 *Guidelines Manual* (light blue with white lettering) and, together with the rest of the 2015 *Guidelines Manual*, constitute the operative *Guidelines Manual* effective August 1, 2016.

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AMENDED GUIDELINES*

*For guidelines other than those shown in this supplement, see the main volume of the 2015 Guidelines Manual.

§4B1.1. Career Offender

- (a) 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.
- (b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory MaximumOffense Level*

(1) Life	37
(2) 25 years or more	34
(3) 20 years or more, but less than 25 years	32
(4) 15 years or more, but less than 20 years	29
(5) 10 years or more, but less than 15 years	24
(6) 5 years or more, but less than 10 years	17
(7) More than 1 year, but less than 5 years	12.

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

- (c) If the defendant is convicted of 18 U.S.C. § 924(c) or § 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:
 - (1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).
 - (2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of—
 - (A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and
 - (B) the guideline range determined using the table in subsection (c)(3).

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

<u>§3E1.1 Reduction</u>	<u>Guideline Range for the 18 U.S.C. § 924(c) or § 929(a) Count(s)</u>
No reduction	360-life
2-level reduction	292-365
3-level reduction	262-327.

CommentaryApplication Notes:

1. Definitions.—"Crime of violence," "controlled substance offense," and "two prior felony convictions" are defined in §4B1.2.
2. "Offense Statutory Maximum".—"Offense Statutory Maximum," for the purposes of this guideline, refers to the maximum term of imprisonment authorized for the offense of conviction that is a crime of violence or controlled substance offense, including any increase in that maximum term under a sentencing enhancement provision that applies because of the defendant's prior criminal record (such sentencing enhancement provisions are contained, for example, in 21 U.S.C. § 841(b)(1)(A), (B), (C), and (D)). For example, in a case in which the statutory maximum term of imprisonment under 21 U.S.C. § 841(b)(1)(C) is increased from twenty years to thirty years because the defendant has one or more qualifying prior drug convictions, the "Offense Statutory Maximum" for that defendant for the purposes of this guideline is thirty years and not twenty years. If more than one count of conviction is of a crime of violence or controlled substance offense, use the maximum authorized term of imprisonment for the count that has the greatest offense statutory maximum.
3. Application of Subsection (c).—
 - (A) In General.—Subsection (c) applies in any case in which the defendant (i) was convicted of violating 18 U.S.C. § 924(c) or § 929(a); and (ii) as a result of that conviction (alone or in addition to another offense of conviction), is determined to be a career offender under §4B1.1(a).
 - (B) Subsection (c)(2).—To determine the greater guideline range under subsection (c)(2), the court shall use the guideline range with the highest minimum term of imprisonment.
 - (C) "Otherwise Applicable Guideline Range".—For purposes of subsection (c)(2)(A), "otherwise applicable guideline range" for the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) is determined as follows:
 - (i) If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) does not qualify the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined using: (I) the Chapter Two and Three offense level for that count(s); and (II) the appropriate criminal history category determined under §§4A1.1 (Criminal History Category) and 4A1.2 (Definitions and Instructions for Computing Criminal History).

- (ii) *If the count(s) of conviction other than the 18 U.S.C. § 924(c) or 18 U.S.C. § 929(a) count(s) qualifies the defendant as a career offender, the otherwise applicable guideline range for that count(s) is the guideline range determined for that count(s) under §4B1.1(a) and (b).*
- (D) *Imposition of Consecutive Term of Imprisonment.*—In a case involving multiple counts, the sentence shall be imposed according to the rules in subsection (e) of §5G1.2 (Sentencing on Multiple Counts of Conviction).
- (E) *Example.*—The following example illustrates the application of subsection (c)(2) in a multiple count situation:

The defendant is convicted of one count of violating 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug trafficking offense (5 year mandatory minimum), and one count of violating 21 U.S.C. § 841(b)(1)(B) (5 year mandatory minimum, 40 year statutory maximum). Applying subsection (c)(2)(A), the court determines that the drug count (without regard to the 18 U.S.C. § 924(c) count) qualifies the defendant as a career offender under §4B1.1(a). Under §4B1.1(a), the otherwise applicable guideline range for the drug count is 188-235 months (using offense level 34 (because the statutory maximum for the drug count is 40 years), minus 3 levels for acceptance of responsibility, and criminal history category VI). The court adds 60 months (the minimum required by 18 U.S.C. § 924(c)) to the minimum and the maximum of that range, resulting in a guideline range of 248-295 months. Applying subsection (c)(2)(B), the court then determines the career offender guideline range from the table in subsection (c)(3) is 262-327 months. The range with the greatest minimum, 262-327 months, is used to impose the sentence in accordance with §5G1.2(e).

4. *Departure Provision for State Misdemeanors.*—In a case in which one or both of the defendant's "two prior felony convictions" is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in §4A1.3(b)(3)(A).

Background: Section 994(h) of Title 28, United States Code, mandates that the Commission assure that certain "career" offenders receive a sentence of imprisonment "at or near the maximum term authorized." Section 4B1.1 implements this directive, with the definition of a career offender tracking in large part the criteria set forth in 28 U.S.C. § 994(h). However, in accord with its general guideline promulgation authority under 28 U.S.C. § 994(a)-(f), and its amendment authority under 28 U.S.C. § 994(o) and (p), the Commission has modified this definition in several respects to focus more precisely on the class of recidivist offenders for whom a lengthy term of imprisonment is appropriate and to avoid "unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . ." 28 U.S.C. § 991(b)(1)(B). The Commission's refinement of this definition over time is consistent with Congress's choice of a directive to the Commission rather than a mandatory minimum sentencing statute ("The [Senate Judiciary] Committee believes that such a directive to the Commission will be more effective; the guidelines development process can assure consistent and rational implementation for the Committee's view that substantial prison terms should be imposed on repeat violent offenders and repeat drug traffickers." S. Rep. No. 225, 98th Cong., 1st Sess. 175 (1983)).

Subsection (c) provides rules for determining the sentence for career offenders who have been convicted of 18 U.S.C. § 924(c) or § 929(a). The Career Offender Table in subsection (c)(3) provides a sentence at or near the statutory maximum for these offenders by using guideline ranges that correspond to criminal history category VI and offense level 37 (assuming §3E1.1 (Acceptance of Responsibility) does not apply), offense level 35 (assuming a 2-level reduction under §3E1.1 applies), and offense level 34 (assuming a 3-level reduction under §3E1.1 applies).

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendments 47 and 48); November 1, 1989 (see Appendix C, amendments 266 and 267); November 1, 1992 (see Appendix C, amendment 459); November 1, 1994 (see Appendix C, amendment 506); November 1, 1995 (see Appendix C, amendment 528); November 1, 1997 (see Appendix C, amendments 546 and 567); November 1, 2002 (see Appendix C, amendment 642); November 1, 2011 (see Appendix C, amendment 758); August 1, 2016 (see Appendix C, amendment 798).

§4B1.2. Definitions of Terms Used in Section 4B1.1

- (a) 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 murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).
- (b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.
- (c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (*i.e.*, two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*.

CommentaryApplication Notes:1. Definitions.—For purposes of this guideline—

“Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

“Forcible sex offense” includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

“Extortion” is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance (21 U.S.C. § 841(c)(1)) is a “controlled substance offense.”

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance (21 U.S.C. § 843(a)(6)) is a “controlled substance offense.”

Maintaining any place for the purpose of facilitating a drug offense (21 U.S.C. § 856) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”

Using a communications facility in committing, causing, or facilitating a drug offense (21 U.S.C. § 843(b)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”

A violation of 18 U.S.C. § 924(c) or § 929(a) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense”. (Note that in the case of a prior 18 U.S.C. § 924(c) or § 929(a) conviction, if the defendant also was convicted of the underlying offense, the sentences for the two prior convictions will be treated as a single sentence under §4A1.2 (Definitions and Instructions for Computing Criminal History).)

“Prior felony conviction” means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant’s eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult).

2. *Offense of Conviction as Focus of Inquiry.—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 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.*
3. *Applicability of §4A1.2.—The provisions of §4A1.2 (Definitions and Instructions for Computing Criminal History) are applicable to the counting of convictions under §4B1.1.*
4. *Upward Departure for Burglary Involving Violence.—There may be cases in which a burglary involves violence, but does not qualify as a “crime of violence” as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a “crime of violence.” In such a case, an upward departure may be appropriate.*

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 (see Appendix C, amendment 49); November 1, 1989 (see Appendix C, amendment 268); November 1, 1991 (see Appendix C, amendment 433); November 1, 1992 (see Appendix C, amendment 461); November 1, 1995 (see Appendix C, amendment 528); November 1, 1997 (see Appendix C, amendments 546 and 568); November 1, 2000 (see Appendix C, amendment 600); November 1, 2002 (see Appendix C, amendments 642 and 646); November 1, 2004 (see Appendix C, amendment 674); November 1, 2007 (see Appendix C, amendment 709); November 1, 2009 (see Appendix C, amendment 736); November 1, 2015 (see Appendix C, amendment 795); August 1, 2016 (see Appendix C, amendment 798).

SUPPLEMENT TO THE 2015 SUPPLEMENT TO APPENDIX C

This supplement to the 2015 supplement to Appendix C presents the amendment to §§4B1.1 (Career Offender) and 4B1.2 (Definitions of Terms Used in Section 4B1.1), effective August 1, 2016.

The format under which the amendment is presented in Appendix C, including the 2015 supplement to Appendix C and this supplement, is designed to facilitate a comparison between previously existing and amended provisions, in the event it becomes necessary to reference the former guideline, policy statement, or commentary language. For amendments to the guidelines, policy statements, and official commentary effective November 1, 2015, and earlier, see Volumes I, II, and III of Appendix C and the 2015 supplement to Appendix C.

AMENDMENT

798. Amendment: The Commentary to §4B1.1 captioned “Application Notes” is amended by inserting at the beginning of Note 1 the following new heading: “Definitions.—”; by inserting at the beginning of Note 2 the following new heading: ““Offense Statutory Maximum.—”; and by inserting at the end the following new Note 4:

- “4. Departure Provision for State Misdemeanors.—In a case in which one or both of the defendant’s ‘two prior felony convictions’ is based on an offense that was classified as a misdemeanor at the time of sentencing for the instant federal offense, application of the career offender guideline may result in a guideline range that substantially overrepresents the seriousness of the defendant’s criminal history or substantially overstates the seriousness of the instant offense. In such a case, a downward departure may be warranted without regard to the limitation in §4A1.3(b)(3)(A).”.

Section 4B1.2(a) is amended by striking paragraph (2) as follows:

- “ (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.”,

and inserting the following:

- “ (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).”.

The Commentary to §4B1.2 captioned “Application Notes” is amended—

in Note 1 by inserting “Definitions.—” as a heading before the beginning of the note; by striking the second and third undesignated paragraphs as follows:

- “ ‘Crime of violence’ includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of

credit, and burglary of a dwelling. Other offenses are included as ‘crimes of violence’ if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (*i.e.*, expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

‘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). Where the instant offense of conviction is the unlawful possession of a firearm by a felon, §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), §4B1.4 (Armed Career Criminal) will apply.”

and inserting the following new paragraphs:

“ ‘Forcible sex offense’ includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

‘Extortion’ is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.”;

and by striking the fifth undesignated paragraph as follows:

“ Unlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (*e.g.*, a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a ‘crime of violence’.”;

in Note 2, at the beginning of the note, by inserting the following new heading: “Offense of Conviction as Focus of Inquiry.—”;

in Note 3, at the beginning of the note, by inserting the following new heading: “Applicability of §4A1.2.—”;

and by inserting at the end the following new Note 4:

“4. Upward Departure for Burglary Involving Violence.—There may be cases in which a burglary involves violence, but does not qualify as a ‘crime of violence’ as defined in §4B1.2(a) and, as a result, the defendant does not receive a higher offense level or higher Criminal History Category that would have applied if the burglary qualified as a ‘crime of violence.’ In such a case, an upward departure may be appropriate.”.

Reason for Amendment: This amendment is a result of the Commission's multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction (e.g., "crime of violence," "aggravated felony," "violent felony," "drug trafficking offense," and "felony drug offense") and the impact of such definitions on the relevant statutory and guideline provisions (e.g., career offender, illegal reentry, and armed career criminal). As part of this study, the Commission considered feedback from the field, including conducting a roundtable discussion on these topics and considering the varying case law interpreting these statutory and guideline definitions. In particular, the Commission has received extensive comment, and is aware of numerous court opinions, expressing a view that the definition of "crime of violence" is complex and unclear. The amendment is informed by this public comment and case law, as well as the Supreme Court's recent decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), regarding the statutory definition of "violent felony" in 18 U.S.C. § 924(e) (commonly referred to as the "Armed Career Criminal Act" or "ACCA"). While not addressing the guidelines, that decision has given rise to significant litigation regarding the guideline definition of "crime of violence." Finally, the Commission analyzed a range of sentencing data, including a study of the sentences relative to the guidelines for the career offender guidelines. See U.S. Sent'g Comm'n, *Quick Facts: Career Offenders* (Nov. 2015) (highlighting the decreasing rate of within range guideline sentences (27.5% in fiscal year 2014), which has been coupled with increasing rates of government (45.6%) and non-government sponsored below range sentences (25.9%)).

The amendment makes several changes to the definition of "crime of violence" at §4B1.2 (Definitions of Terms Used in Section 4B1.1), which, prior to this amendment, was defined as any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that

- has as an element the use, attempted use, or threatened use of physical force against the person of another ("force clause" or "elements clause"), see §4B1.2(a)(1);
- is murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or involves the use of explosives ("enumerated offenses"), see §4B1.2(a)(2) and comment. (n.1); or
- otherwise involves conduct that presents a serious potential risk of physical injury to another ("residual clause"), see §4B1.2(a)(2).

The "crime of violence" definition at §4B1.2 is used to trigger increased sentences under several provisions in the Guidelines Manual, the most significant of which is §4B1.1 (Career Offender). See also §§2K1.3, 2K2.1, 2S1.1, 4A1.1(e), 7B1.1. The career offender guideline implements a directive to the Commission set forth at 28 U.S.C. § 994(h), which in turn identifies offenders for whom the guidelines must provide increased punishment. Tracking the criteria set forth in section 994(h), the Commission implemented the directive by identifying a defendant as a career offender if (1) the defendant was at least eighteen years old at the time he or she committed the instant offense of conviction; (2) the instant offense is a felony that is 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. Where these criteria are met, the directive at section 994(h), and therefore §4B1.1, provides for significantly higher sentences under the guidelines, such that the guideline range is "at or near the maximum [term of imprisonment] authorized." Commission data shows that application of §4B1.1 resulted in an increased final offense

level, an increased Criminal History Category, or both for 91.3 percent of defendants sentenced under the career offender guideline in fiscal year 2014. See U.S. Sent'g Comm'n, Quick Facts: Career Offenders (Nov. 2015) (46.3% of career offenders received an increase in both final offense level (from an average of 23 levels to 31 levels) and criminal history category (from an average of category IV to category VI); 32.6% had just a higher final offense level (from an average of 23 levels to 30 levels); and 12.4% had just a higher Criminal History Category (from an average of category IV to category VI)).

Residual Clause

First, the amendment deletes the “residual clause” at §4B1.2(a)(2). Prior to the amendment, the term “crime of violence” in §4B1.2 included any offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” In Johnson, the Supreme Court considered an identical residual clause relating to the statutory definition of “violent felony” in the Armed Career Criminal Act. The Court held that using the “residual clause” to classify an offense as a “violent felony” violated due process because the clause was unconstitutionally vague. See Johnson, 135 S. Ct. at 2563. While the Supreme Court in Johnson did not consider or address the sentencing guidelines, significant litigation has ensued regarding whether the Supreme Court’s holding in Johnson should also apply to the residual clause in §4B1.2. Compare United States v. Matchett, 802 F.3d 1185 (11th Cir. 2015) (rejecting the argument that the residual clause in §4B1.2 is unconstitutionally vague in light of Johnson) and United States v. Wilson, 622 F. App’x 393, 405 n.51 (5th Cir. 2015) (in considering the applicability of Johnson, noting “[o]ur case law indicates that a defendant cannot bring a vagueness challenge against a Sentencing Guideline”), with United States v. Taylor, 803 F.3d 931 (8th Cir. 2015) (finding that previous circuit precedent holding that the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful after Johnson); United States v. Madrid, 805 F.3d 1204, 1211 (10th Cir. 2015) (holding that that the residual clause of §4B1.2(a)(2) is void for vagueness); United States v. Harbin, 610 F. App’x 562 (6th Cir. 2015) (finding that defendant is entitled to the same relief as offenders sentenced under the residual clause of the ACCA); and United States v. Townsend, __ F. App’x __, 2015 WL 9311394, at *4 (3d Cir. Dec. 23, 2015) (remanding for resentencing in light of the government’s concession that, pursuant to Johnson, the defendant should not have been sentenced as a career offender).

The Commission determined that the residual clause at §4B1.2 implicates many of the same concerns cited by the Supreme Court in Johnson, and, as a matter of policy, amends §4B1.2(a)(2) to strike the clause. Removing the residual clause has the advantage of alleviating the considerable application difficulties associated with that clause, as expressed by judges, probation officers, and litigants. Furthermore, removing the clause will alleviate some of the ongoing litigation and uncertainty resulting from the Johnson decision.

List of Enumerated Offenses

With the deletion of the residual clause under subsection (a)(2), there are two remaining components of the “crime of violence” definition – the “elements clause” and the “enumerated offenses clause.” The “elements clause” set forth in subsection (a)(1) remains unchanged by the amendment. Thus, any offense under federal or state law, punishable by imprisonment for a term exceeding one year, qualifies as a “crime of violence” if it has as an element the use, or attempted use, or threatened use of physical force against the person

of another. Importantly, such an offense may, but need not, be specifically enumerated in subsection (a)(2) to qualify as a crime of violence.

The “enumerated offense clause” identifies specific offenses that qualify as crimes of violence. In applying this clause, courts compare the elements of the predicate offense of conviction with the elements of the enumerated offense in its “generic, contemporary definition.” As has always been the case, such offenses qualify as crimes of violence regardless of whether the offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another. While most of the offenses on the enumerated list under §4B1.2(a)(2) remain the same, the amendment does revise the list in a number of ways to focus on the most dangerous repeat offenders. The revised list is based on the Commission’s consideration of public hearing testimony, a review of extensive public comment, and an examination of sentencing data relating to the risk of violence in these offenses and the recidivism rates of career offenders. Additionally, the Commission’s revisions to the enumerated list also consider and reflect the fact that offenses not specifically enumerated will continue to qualify as a crime of violence if they satisfy the elements clause.

As amended, the enumerated offenses include murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c). For easier application, all enumerated offenses are now included in the guideline at §4B1.2; prior to the amendment, the list was set forth in both §4B1.2(a)(2) and the commentary at Application Note 1.

Manslaughter, which is currently enumerated in Application Note 1, is revised to include only voluntary manslaughter. While Commission analysis indicates that it is rare for involuntary manslaughter to be identified as a predicate for the career offender guideline, this change provides that only voluntary manslaughter should be considered. This is also consistent with the fact that involuntary manslaughter generally would not have qualified as a crime of violence under the “residual clause.” See *Begay v. United States*, 553 U.S. 137 (2008) (limiting crimes covered by the ACCA residual clause to those roughly similar in kind and degree of risk posed as the enumerated offenses, which typically involve “purposeful, violent, and aggressive conduct”).

The amendment deletes “burglary of a dwelling” from the list of enumerated offenses. In implementing this change, the Commission considered that (1) burglary offenses rarely result in physical violence, (2) “burglary of a dwelling” is rarely the instant offense of conviction or the determinative predicate for purposes of triggering higher penalties under the career offender guideline, and (3) historically, career offenders have rarely been rearrested for a burglary offense after release. The Commission considered several studies and analyses in reaching these conclusions.

First, several recent studies demonstrate that most burglaries do not involve physical violence. See Bureau of Justice Statistics, *National Crime Victimization Survey, Victimization During Household Burglary* (Sept. 2010) (finding that a household member experienced some form of violent victimization in 7% of all household burglaries from 2003 to 2007); Richard S. Culp et al., *Is Burglary a Crime of Violence? An Analysis of National Data 1998-2007*, at 29 (2015), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/248651.pdf> (concluding that 7.6% of burglaries between 1998 and 2007 resulted in actual violence or threats of violence, while actual

physical injury was reported in only 2.7% of all burglaries); see also United States Department of Justice, Federal Bureau of Investigation, Uniform Crime Report, Crime in the United States (2014) (classifying burglary as a “property crime” rather than a “violent crime”). Second, based upon an analysis of offenders sentenced in fiscal year 2014, the Commission estimates that removing “burglary of a dwelling” as an enumerated offense in §4B1.2(a)(2) will reduce the overall proportion of offenders who qualify as a career offender by less than three percentage points. The Commission further estimates that removing the enumerated offense would result in only about five percent of offenders sentenced under USSG §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) receiving a lower base offense level than would currently apply. Finally, a Commission analysis of recidivism rates for career offenders released during calendar years 2004 through 2006 indicates that about five percent of such offenders were rearrested for a burglary offense during the eight years after their release.

In reaching this conclusion, the Commission also considered that courts have struggled with identifying a uniform contemporary, generic definition of “burglary of dwelling.” In particular, circuits have disagreed regarding whether the requirement in Taylor v. United States, 495 U.S. 575, 598 (1990), that the burglary be of a “building or other structure” applies in addition to the guidelines’ requirement that the burglary be of a “dwelling.” Compare United States v. Henriquez, 757 F.3d 144, 148-49 (4th Cir. 2014); United States v. McFalls, 592 F.3d 707 (6th Cir. 2010); United States v. Wenner, 351 F.3d 969 (9th Cir. 2003) with United States v. Ramirez, 708 F.3d 295, 301 (1st Cir. 2013); United States v. Murillo-Lopez, 444 F.3d 337, 340 (5th Cir. 2006); United States v. Rivera-Oros, 590 F.3d 1123 (10th Cir. 2009); United States v. McClenton, 53 F.3d 584 (3d Cir. 1995); United States v. Graham, 982 F.2d 315 (8th Cir. 1992).

Although “burglary of a dwelling” is deleted as an enumerated offense, the amendment adds an upward departure provision to §4B1.2 to address the unusual case in which the instant offense or a prior felony conviction was any burglary offense involving violence that did not otherwise qualify as a “crime of violence.” This departure provision allows courts to consider all burglary offenses, as opposed to just burglaries of a dwelling, and reflects the Commission’s determination that courts should consider an upward departure where a defendant would have received a higher offense level, higher Criminal History Category, or both (e.g., where the defendant would have been a career offender) if such burglary had qualified as a “crime of violence.”

Finally, the amendment adds offenses that involve the “use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or an explosive material as defined in 18 U.S.C. § 841(c)” to the enumerated list at §4B1.2(a)(2). This addition is consistent with long-standing commentary in §4B1.2 categorically identifying possession of a firearm described in 26 U.S.C. § 5845(a) as a “crime of violence,” and therefore maintains the status quo. The Commission continues to believe that possession of these types of weapons (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) inherently presents a serious potential risk of physical injury to another person. Additionally, inclusion as an enumerated offense reflects Congress’s determination that such weapons are inherently dangerous and, when possessed unlawfully, serve only violent purposes. See also USSG App. C, amend. 674 (eff. Nov. 1, 2004) (expanding the definition of “crime of violence” in Application Note 1 to §4B1.2 to include unlawful possession of any firearm described in 26 U.S.C. § 5845(a)).

Enumerated Offense Definitions

The amendment also adds definitions for the enumerated offenses of forcible sex offense and extortion. The amended guideline, however, continues to rely on existing case law for purposes of defining the remaining enumerated offenses. The Commission determined that adding several new definitions could result in new litigation, and that it was instead best not to disturb the case law that has developed over the years.

As amended, “forcible sex offense” includes offenses with an element that consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. Consistent with the definition in §2L1.2 (Unlawfully Entering or Remaining in the United States), this addition reflects the Commission’s determination that certain forcible sex offenses which do not expressly include as an element the use, attempted use, or threatened use of physical force against the person of another should nevertheless constitute “crimes of violence” under §4B1.2. *See also* USSG App. C, amend. 722 (eff. Nov. 1, 2008) (clarifying the scope of the term “forcible sex offense” as that term is used in the definition of “crime of violence” in §2L1.2, Application Note 1(B)(iii)).

The new commentary also provides that the offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c), or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States. This addition makes clear that the term “forcible sex offense” in §4B1.2 includes sexual abuse of a minor and statutory rape where certain specified elements are present.

“Extortion” is defined as “obtaining something of value from another by the wrongful use of (i) force, (ii) fear of physical injury, or (iii) threat of physical injury.” Under case law existing at the time of this amendment, courts generally defined extortion as “obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats” based on the Supreme Court’s holding in *United States v. Nardello*, 393 U.S. 286, 290 (1969) (defining “extortion” for purposes of the Hobbs Act). Consistent with the Commission’s goal of focusing the career offender and related enhancements on the most dangerous offenders, the amendment narrows the generic definition of extortion by limiting the offense to those having an element of force or an element of fear or threats “of physical injury,” as opposed to non-violent threats such as injury to reputation.

Departure Provision at §4B1.1

Finally, the amendment adds a downward departure provision in §4B1.1 for cases in which one or both of the defendant’s “two prior felony convictions” is based on an offense that is classified as a misdemeanor at the time of sentencing for the instant federal offense.

An offense (whether a “crime of violence” or a “controlled substance offense”) is deemed to be a “felony” for purposes of the career offender guideline if it is punishable by imprisonment for a term exceeding one year. This definition captures some state offenses that are punishable by more than a year of imprisonment, but are in fact classified by the state as misdemeanors. Such statutes are found, for example, in Colorado, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont.

The Commission determined that the application of the career offender guideline where one or both of the defendant's "two prior felony convictions" is an offense that is classified as a misdemeanor may result in a guideline range that substantially overrepresents the seriousness of the defendant's criminal history or substantially overstates the seriousness of the instant offense. While recognizing the importance of maintaining a uniform and consistent definition of the term "felony" in the guidelines, the Commission determined that it is also appropriate for a court to consider the seriousness of the prior offenses (as reflected in the classification assigned by the convicting jurisdiction) in deciding whether the significant increases under the career offender guideline are appropriate. Such consideration is consistent with the structure used by Congress in the context of the Armed Career Criminal Act. See 18 U.S.C. § 921(a)(20) (providing, for purposes of Chapter 44 of Title 18, that "crime punishable by imprisonment for a term exceeding one year" does not include a State offense classified as a misdemeanor and punishable by two years or less). It is also consistent with the court's obligation to account for the "nature and circumstances of the offense and the history and characteristics of the defendant." See 18 U.S.C. § 3553(a)(1).

Effective Date: The effective date of this amendment is August 1, 2016.