

# Nothing is a crime of violence anymore

The impact of *Johnson, Mathis, Pawlak, Beckles, etc.*

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**WARNING**

**MASS  
CONFUSION  
AHEAD**

If you're not confused, you're not paying attention. - Tom Peters

Reminder of what started all this crap

### 18 U.S.C. § 924(e)

- Has, as an element the use, attempted use, or threatened use of force against the person of another
- Is burglary, arson, or extortion, [or] involves the use of explosives
- Otherwise involves conduct that presents a serious potential risk of physical injury to another

Reminder of what started all this crap

### Johnson v. United States 135 S.Ct. 2551 (2015)

- Has, as an element the use, attempted use, or threatened use of force against the person of another
- Is burglary, arson, or extortion, [or] involves the use of explosives
- ~~Otherwise involves conduct that presents a serious potential risk of physical injury to another~~

## DEALING WITH WHAT'S LEFT

**HAS AS AN  
ELEMENT THE  
USE OF  
PHYSICAL  
FORCE**

## IT MUST BE AN ELEMENT OF THE OFFENSE

What  
constitutes an  
“element”?

**Mathis v. United States**

**136 S.Ct. 2243 (2016)**

“Elements are the ‘constituent parts’ of a crime's legal definition—the things the ‘prosecution must prove to sustain a conviction.’”

## Be careful of the language of the state statute

Ohio statutes use the phrase “cause serious physical harm”

*United States v. Anderson*, 695 F.3d 390 (6<sup>th</sup> Cir. 2012)

## IT MUST BE PHYSICAL FORCE

What is physical force?

*Johnson v. United States*

130 S.Ct. 1265 (2010)

“the phrase “physical force” means violent force—that is, force capable of causing physical pain or injury to another person.”

## Examples where force did not qualify

Aggravated assault with a deadly weapon – New Mexico conviction – *United States v. Rede-Mendez*, 680 F.3d 552 (6<sup>th</sup> Cir. 2012)

Aggravated assault – Tennessee conviction – *United States v. McMurray*, 653 F.3d 367 (6<sup>th</sup> Cir. 2011)

## IT MUST BE AGAINST THE PERSON OF ANOTHER

Offenses that involve force against property do not count

Examples:

O.R.C. 2911.13 Breaking and Entering

O.R.C. 2903.21 Aggravated Menacing

18 U.S.C. § 2113 Bank Robbery

18 U.S.C. § 1951 Hobbs Act Robbery and Extortion

## DEALING WITH WHAT'S LEFT

**BURGLARY**

**ARSON**

**EXTORTION**

**USE OF  
EXPLOSIVES**

## BURGLARY

It must be the “generic form” of the offense

“unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” – *Taylor v. United States*, 495 U.S. 575 (1990).

## UNITED STATES v. MATHIS, 136 S.Ct. 2243 (2016)

Prior to Mathis – if the state burglary statute was broader than the generic version of burglary, use Shepard documents to determine if your client committed the “generic form” of the offense

Mathis holding – “The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means. If they are elements, the court should do what we have previously approved: review the record materials to discover which of the enumerated alternatives played a part in the defendant’s prior conviction, and then compare that element (along with all others) to those of the generic crime. See *ibid*. But if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.”

## IT MUST BE AN ELEMENT OF THE OFFENSE

1. Look to state law – does it treat the offenses as one offense or multiple – if multiple are elements
2. If different facts require different punishments – is an element
3. Are the facts “illustrative examples” of committing the offense? – is a means
4. If can’t tell from any of the above, pull the charging document – if it lists the “laundry list” despite the facts of the case, are likely means



UNITED STATES v. MATHIS, 136 S.Ct. 2243 (2016)

- Does the state burglary statute capture conduct beyond the generic form of the offense?
- If yes, is the additional conduct elements or means to commit an element?
- If an element, use modified categorical approach to determine which offense
- If a means, you are done, cannot be used

UNITED STATES v. MATHIS, 136 S.Ct. 2243 (2016)

**THE GOOD NEWS – OHIO  
BURGLARIES APPEAR TO BE  
KNOCKED OUT AFTER *MATHIS***



## 2911.12 Burglary; trespass in a habitation when a person is present or likely to be present

(A) No person, by force, stealth, or deception, shall do any of the following:

(1) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense;

(2) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure that is a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present, with purpose to commit in the habitation any criminal offense;

(3) Trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, with purpose to commit in the structure or separately secured or separately occupied portion of the structure any criminal offense.

(B) No person, by force, stealth, or deception, shall trespass in a permanent or temporary habitation of any person when any person other than an accomplice of the offender is present or likely to be present.

(C) As used in this section, "occupied structure" has the same meaning as in section 2909.01 of the Revised Code.

(D) Whoever violates division (A) of this section is guilty of burglary. A violation of division (A)(1) or (2) of this section is a felony of the second degree. A violation of division (A)(3) of this section is a felony of the third degree.

(E) Whoever violates division (B) of this section is guilty of trespass in a habitation when a person is present or likely to be present, a felony of the fourth degree.

## O.R.C. 2909.01

C) "Occupied structure" means any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

(1) It is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied and whether or not any person is actually present.

(2) At the time, it is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.

(3) At the time, it is specially adapted for the overnight accommodation of any person, whether or not any person is actually present.

(4) At the time, any person is present or likely to be present in it.

## AND THE REST

ARSON

EXTORTION

USE OF EXPLOSIVES

**And then there are the  
Sentencing Guidelines**

U.S.S.G. §4B1.1 and more!

## U.S.S.G. 4B1.2 as it existed until August of 2016

(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 burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

## U.S.S.G. 4B1.2 as it existed until August of 2016

### Application note 1

“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.

## UNITED STATES V. PAWLAK 822 F.3d 902 (6<sup>th</sup> Cir. 2016)

First – the Sentencing Guidelines are subject to constitutional vagueness challenges

Second – because the language is identical, the Career Offender “residual clause” is also unconstitutionally vague per *Johnson*

## U.S.S.G. 4B1.2 as it existed until August of 2016

### Application note 1

“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, **arson, extortion**, extortionate extension of credit, and **burglary of a dwelling**.

## WHAT DOES *JOHNSON/PAWLAK* EFFECT?

U.S.S.G. § 4B1.2 – Career Offender

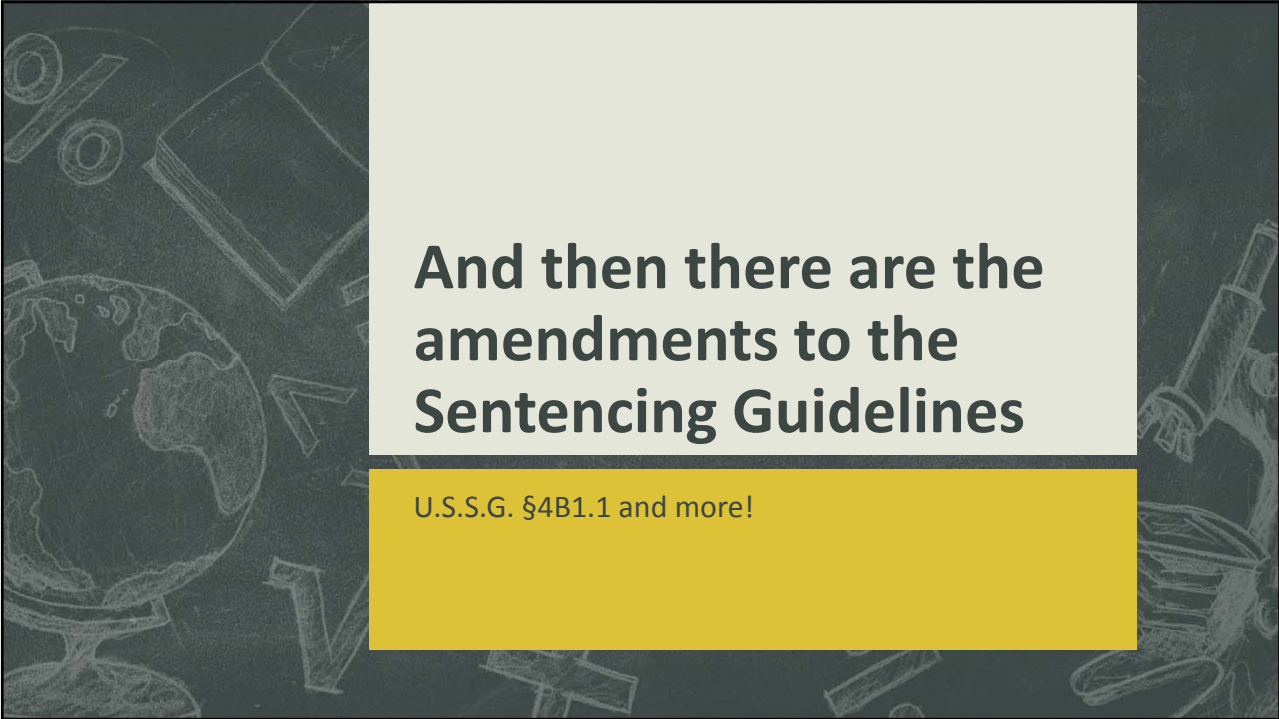
U.S.S.G. § 2K2.1 – priors to enhance a  
possession of firearm case

U.S.S.G. § 2L1.2 – illegal re-entry?

## BUT *BECKLES v. UNITED STATES* 135 S.Ct. 2928

Cert granted on

1. Does *Johnson* apply to the Guidelines?
2. If so, does it apply retroactively?
3. In light of *Johnson*, is being a felon in possession of a firearm a crime of violence?



## And then there are the amendments to the Sentencing Guidelines

U.S.S.G. §4B1.1 and more!

(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).



## Other challenges in light of Johnson/Mathis

But wait! There's more! If you act, now, we will throw in . . .

## 18 U.S.C. § 16

18 U.S.C.A. § 16

§ 16. Crime of violence defined

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.



## When is this definition used?

- Immigration cases
- 21 U.S.C. § 841(1)(b)(7) cases
- Domestic violence cases
- Gender motivated violence cases

*Shuti v. Lynch*, 828 F.3d  
440 (6<sup>th</sup> Cir. 2016)

Determining whether a particular offense is an aggravated felony is already “quite complex.” [ ] The INA's residual definition of “crime of violence” makes that inquiry hopelessly indeterminate.

**Lynch v. Dimaya 15-1498**

## 18 U.S.C. § 924(c)(3)(B)

This statute defines what constitutes a crime of violence for an 18 U.S.C. § 924(c) conviction

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

There are significant differences making the definition of “crime of violence” in § 924(c)(3)(B) narrower than the definition of “violent felony” in the ACCA residual clause. Whereas the ACCA residual clause merely requires conduct “that presents a serious potential risk of physical injury to another,” § 924(c)(3)(B) requires the risk “that physical force against the person or property of another may be used in the course of committing the offense.” *Id.* (emphasis added). Risk of physical force against a victim is much more definite than risk of physical injury to a victim. Further, by requiring that the risk of physical force arise “in the course of” committing the offense, the language of § 924(c)(3)(B) effectively requires that the person who may potentially use physical force be the offender. Moreover, § 924(c)(3)(B) requires that the felony be one which “by its nature” involves the risk that the offender will use physical force. None of these narrowing aspects is present in the ACCA residual clause.

***United States v. Taylor*, 814  
F.3d 340 (6<sup>th</sup> Cir. 2016)**

AND FINALLY, JUST TO CONFUSE YOU SOME MORE

*United States v. Hinkle*, --- F.3d -  
--, 2016 WL 4254372 (5<sup>th</sup> Cir.  
2016)

Using the *Mathis*  
divisible/means test, a prior  
Texas conviction for delivery  
of heroin is not a controlled  
substance offense

6<sup>th</sup> Circuit case on point (prior to *Mathis*)

*United States v. Evans*, 699 F.3d 858 (6<sup>th</sup> Cir.  
2012)

because a conviction under § 2925.03(A)(1)  
requires an intent to sell a controlled  
substance, such a conviction under the  
statute for an offer to sell is properly  
considered an attempt to transfer a  
controlled substance, which is a “controlled  
substance offense” under the Guidelines.

## BOTTOM LINE

- Don't be fooled by the title
- Dig deep
- Don't be afraid to challenge a prior

Thanks for listening – go have some lunch!

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