

Johnson v. United States: Its Impact and Application

CJA Panel Training Seminar, January 23, 2016

Johnson v. United States,
135 S. Ct. 2551 (June 26, 2015) (Scalia, J.)

- Does possession of a sawed-off shotgun involve conduct that presents a “serious potential risk of physical injury to another”?
- The “residual clause” of the Armed Career Criminal Act.
- “[T]he wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” 135 S. Ct. at 2557.
- “Increasing a defendant’s sentence under the clause denies due process of law.” *Id.*
- “Void for vagueness.” *Id.* at 2562.

THE RESIDUAL CLAUSE

- 18 U.S.C. 924(e): 15-year mandatory minimum for defendants with three priors “for a **violent felony** or a **serious drug offense**, or both, committed on occasions different from one another.”
- “[T]he term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year ... that –
 - “(i) **has as an element** the use, attempted use, or threatened use of **physical force against the person of another**; or
 - “(ii) is **burglary, arson, or extortion, involves use of explosives,** or **otherwise involves conduct that presents a serious potential risk of physical injury to another.**”
- 924(e)(2)(B).

VIOLENT FELONIES NO MORE

- Conspiracy offenses of all kinds
- Resisting arrest
- Prison-break escape
- Aggravated and simple vehicular flight
- Attempted burglary

VIOLENT FELONIES NO MORE?

- Aggravated assault
- Robbery
- Kidnapping
- Manslaughter
- Murder

THE CATEGORICAL APPROACH

- Courts “may **look only to the statutory definitions** – i.e., the elements – of a defendant’s prior offenses, and not to the particular facts underlying those convictions.” *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013).
- Courts “must assume that the ... conviction rested upon nothing more than **the least of the acts criminalized** by [the statute].” *Rojas v. Attorney General*, 728 F.3d 203, 214 (3d Cir. 2013) (en banc).
- Offense is a “categorical” match only if all of the conduct covered by a statute, “including the **most innocent conduct**,” matches or is narrower than the definition in the ACCA. *United States v. Brown*, 765 F.3d 185 188-89 (3d Cir. 2014).

FAILED DEFINITIONS OF “VIOLENT” CRIME

- Sentencing Guideline **4B1.2**: Dramatically enhanced Guidelines range for “career offenders” based on predicate convictions for “crimes of violence.”
- **18 U.S.C. 924(c)(3)**: Five-year mandatory consecutive sentence for use of a firearm in a “crime of violence.”
- **18 U.S.C. 16**: Defining “crime of violence” as relevant to immigration offenses.

JOHNSON: DUE PROCESS LIMITATIONS

- A defendant is deprived of due process when punished “under a criminal law so vague that it **fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.**” 135 S. Ct. at 2556.
- Note: due process does *not* mean that a statute is unconstitutional only if it is “vague in all its applications.” *Id.* at 2361.

'ORDINARY CASE' INQUIRY

- “**Two features** of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause ... **ties the judicial assessment of risk to a judicially imagined ‘ordinary case’ of a crime**, not to real-world facts or statutory elements.” 135 S. Ct. at 2557.
- “At the same time, the residual clause **leaves uncertainty about how much risk it takes** for a crime to qualify as a violent felony. It is one thing to apply an imprecise ‘serious potential risk’ standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction,” i.e., the “ordinary case” of an offense prosecuted under a particular statute. *Id.* at 2558.

'ORDINARY CASE' INQUIRY

- *Held*, “[b]y combining **indeterminacy about how to measure the risk** posed by a crime with **indeterminacy about how much risk** it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.” 135 S. Ct. at 2558.
- “Nine years’ experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise. Each of the uncertainties in the residual clause may be tolerable in isolation, but ‘their sum makes a task for us which **at best could be only guesswork.**’ Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution’s guarantee of due process.” *Id.* at 2560.

JOHNSON & CAREER OFFENDER GUIDELINE

- U.S.S.G. 4B1.2(a): definition of “crime of violence” for purposes of career offender Guidelines enhancement.
- Same residual clause as ACCA: “otherwise involves conduct that presents a serious potential risk of physical injury to another.”
- “[T]he language of the residual clause in the ACCA is identical to the language in the Guidelines’ career offender enhancement.... Because of this, we have previously stated that ‘authority interpreting one is generally applied to the other.’ The Government concedes that, pursuant to Johnson, Townsend should not have been sentenced as a career offender.... We agree.” *United States v. Townsend*, No. 14-3652, 2015 WL 9311394, at *4 (3d Cir. Dec. 23, 2015).

WHAT REMAINS

- “[T]he term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year ... that –
 - “(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
 - “(ii) is burglary, arson, or extortion, involves use of explosives, ~~or otherwise involves conduct that presents a serious potential risk of physical injury to another.”~~
- 18 U.S.C. 924(e)(2)(B).

REMAINING DEFINITION 1: ELEMENT OF PHYSICAL FORCE

- (i) **has as an element** the use, attempted use, or threatened use of **physical force against the person of another**
- Not satisfied if there is “**any set of facts**” that “would secure a conviction under the statute without proof of the intentional use of force against the person of another.” *United States v. Velasco*, 465 F.3d 633, 638 (5th Cir. 2006).

ELEMENT OF FORCE: INCHOATE OFFENSES

- North Carolina offense of conspiracy to commit robbery with a dangerous weapon.
 - “In order to be convicted of a North Carolina conspiracy offense, a defendant must be shown to have ‘entered into an unlawful confederation for the criminal purposes alleged.’... [T]he commission of an overt act is not an essential element of a North Carolina criminal conspiracy.”
- *United States v. White*, 571 F.3d 365 (4th Cir. 2009). *Held*, conspiracy to commit armed robbery does not have element of physical force. *Id.* at 369.
- Tricky question of meaning of ‘attempted use of physical force.’

ELEMENT OF FORCE ≠ CAUSATION OF INJURY

- “A person is guilty of aggravated assault if he:
 - “(1) Attempts to **cause serious bodily injury** to another, or causes such injury purposely or knowingly or under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury.”
- N.J. Stat. Ann. 2C:12b-1
- Petitioner Carol Bond placed “caustic substances on objects the woman was likely to touch, including her mailbox, car door handle, and front doorknob. Bond's victim suffered a minor burn on her hand.”
- Note: much of existing “element of physical force” authority comes from U.S.S.G. § 2L1.2 cases (illegal reentry guideline).

ELEMENT OF FORCE ≠ CAUSATION OF INJURY

- Clear examples of assault offenses: injuring another by poison, laying a trap, luring into harm's way, depriving a ward of care
- Poisoning
 - *United States v. Andino-Ortega*, 608 F.3d 305, 311 (5th Cir. 2010) (Texas offense of causing injury to a child).
 - *United States v. Torres-Miguel*, 701 F.3d 165, 168-69 (4th Cir. 2012) (California offense of “willfully threatening to commit a crime that would result in death or great bodily injury”).

ELEMENT OF FORCE ≠ CAUSATION OF INJURY

- Laying a trap
 - *United States v. Perez-Vargas*, 414 F.3d 1282, 1286 (10th Cir. 2005) (knowingly or recklessly causes bodily injury to another person or with criminal negligence he causes bodily injury to another person by means of a deadly weapon) (Colorado assault).
- Luring into harm's way
 - *Chrzanoski v. Ashcroft*, 327 F.3d 188, 195 (2d Cir. 2003) (physical injury may be caused "by guile, deception, or even deliberate omission" rather than "physical force") (Connecticut assault)

ELEMENT OF FORCE ≠ CAUSATION OF INJURY

- Caution
 - *United States v. Horton*, 461 F. App'x 179 (3d Cir. 2012)
(presuming summarily that statute requiring causation of bodily injury means statute has element of use of force).
 - *Horton* rejected: *United States v. Martinez-Flores*, 720 F.3d 293, 300 n.9 (5th Cir. 2013).
 - At least preserve issue.

ELEMENT OF FORCE ≠ USE OF DEADLY WEAPON

- Many aggravated assault statutes reach certain conduct with a deadly weapon.
- “A person is guilty of aggravated assault if he ... attempts to cause or intentionally or knowingly causes bodily injury to another with a deadly weapon.” 18 Pa. C. S. 2702(a)(4).
- *Commonwealth v. Raybuck*, 915 A.2d 125, 129 (Pa. Super. 2006) (construing sentencing enhancement for use of “deadly weapon” to reach defendant’s placement of **mouse poison** in food prepared for husband).

ELEMENT OF FORCE ≠ USE OF DEADLY WEAPON

- “A person is guilty of aggravated assault if he:
- “(2) Attempts to cause or purposely or knowingly causes injury to another with a deadly weapon.”
- N.J. Stat. Ann. 2C:12-1b(2).
 - “Deadly weapon means any firearm **or other** weapon, device, instrument, **material or substance**, whether animate or inanimate, which in the manner it is used or is intended to be used, is known to be capable of producing death or serious bodily injury or which in the manner it is fashioned would lead the victim reasonably to believe it to be capable of producing death or serious bodily injury.”
- N.J. Stat. Ann. 2C:11-1c.

REQUIREMENT OF INTENTIONAL CONDUCT

- To qualify as violent felony, offense must involve “purposeful, violent, and aggressive conduct.” *Begay v. United States*, 553 U.S. 137 (2008) (New Mexico DUI not violent felony).
- “Begay’s prohibition on counting reckless crimes as crimes of violence applies only in residual clause cases.” *United States v. Marrero*, 743 F.3d 389, 398 (3d Cir. 2014).
- Marrero did not address element-of-force provision.
- Something of an open question as to whether the intentionality requirement applies to the force clause.

REQUIREMENT OF INTENTIONAL CONDUCT

- Argue that *Begay* requirement of purposeful, aggressive, and violent behavior applies to element-of-force clause as well.
 - Other Circuits have held that the **element-of-force clause requires *intentional* use of force.**
 - *Garcia v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006) (New York reckless assault in the second degree not crime of violence)
 - *United States v. McMurray*, 653 F.3d 367, 375 (6th Cir. 2011) (Tennessee aggravated assault).
 - *Flores-Lopez v. Holder*, 685 F.3d 857, 864 (9th Cir. 2012) (California resisting officer).

REQUIREMENT OF INTENTIONAL CONDUCT

- Supreme Court has suggested requirement of intentionality while reserving question. *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (element-of-physical-force prong not satisfied by strict liability DUI offense).
- Third Circuit has indicated that use-of-force definition requires showing of more than recklessness. *Oyebanji v. Gonzales*, 418 F.3d 260, 263-64 (3d Cir. 2005).
- See also *United States v. Forehand*, 386 F. App'x 174, 178 (3d Cir. 2010) (stating, in opinion construing 924(e) element-of-physical-force clause, that “[a] crime which is a violent felony ‘typically involves purposeful, violent, and aggressive conduct’”).

REQUIREMENT OF 'VIOLENT FORCE'

- Also argue that the prong does not reach offenses defined to require merely recklessness because the prong requires “violent” force:
 - “We think it clear that in the context of a statutory definition of ‘violent felony,’ the phrase ‘physical force’ means violent force — that is, force capable of causing physical pain or injury to another person.”
 - “When the adjective ‘violent’ is attached to the noun ‘felony,’ its connotation of strong physical force is even clearer.”
- *Johnson v. United States*, 559 U.S. 133, 140 (2010).

'SLIGHT FORCE' ROBBERY

- *In re Sealed Case*, 548 F.3d 1085 (D.C. Cir. 2008).
 - “Whoever ... by sudden or stealthy seizure or snatching ... shall take from the person or immediate actual possession of another anything of value, is guilty of robbery[.]”
 - *Held*, not a crime of violence.
- “A person is guilty of robbery if, in the course of committing a theft, he ... physically takes or removes property from the person of another by force however slight.” 18 Pa. C. S. § 3701(a)(1)(v).

RESISTING ARREST

- *United States v. Aparico-Soria*, 740 F.3d 152 (4th Cir. 2012) (en banc): Maryland offense of resisting arrest does not have element of physical force because force requires “is no more than the type of de minimis force constituting an offensive touching.”
- *United States v. Flores-Cordero*, 723 F.3d 1095 (9th Cir. 2013): Arizona resisting arrest does not have element of physical force because “the use of minimal force is sufficient.”
- *Abrogated, United States v. Stinson*, 592 F.3d 460 (3d Cir. 2010) (Pennsylvania resisting arrest).

REMAINING DEFINITION 2:
“IS BURGLARY,” “ROBBERY,” “KIDNAPPING” ETC.

- ACCA: “is burglary, arson, or extortion, [or] involves use of explosives.”
- New career offender guideline (8/1/2016): is “murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of [certain firearms such as sawed-off shotguns] or explosive material[.]”
- Existing career offender guideline: limited to burglary of a dwelling, arson, extortion, or offenses involving use of explosives.

“GENERIC” APPROACH

- “We believe that Congress meant by ‘burglary’ the generic sense in which the term is now used in the criminal codes of most States.” *Taylor v. United States*, 495 U.S. 575, 598 (1990).
- “[W]e compare the elements of the crime of conviction to the generic form of the offense as defined by the States, learned treatises, and the Model Penal Code.” *United States v. Marrero*, 743 F.3d 389, 399 (3d Cir. 2014).
- “[I]f the statute **sweeps more broadly than the generic crime**, a conviction under that law cannot constitute a conviction of the generic offense. “ 743 F.3d at 400.

“GENERIC” APPROACH – EXCLUDED OFFENSES

- NJ aggravated assault: 2C:12-1b
 - (1) Attempts to cause **serious bodily injury** to another, or causes such injury purposely or knowingly or **under circumstances manifesting extreme indifference to the value of human life recklessly causes such injury**; or
 - ***
 - (7) Attempts to cause significant bodily injury to another or causes **significant bodily injury** purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life recklessly causes such significant bodily injury[.]

“GENERIC” APPROACH – EXCLUDED OFFENSES

- NJ aggravated assault: 2C:12-1b(1).
 - “Extreme indifference” assault: reckless causation of serious bodily injury “**under circumstances manifesting extreme indifference to the value of human life.**”
- *Held*, broader than the generic, contemporary meaning of aggravated assault. *United States v. Garcia-Jimenez*, 807 F.3d 1079 (9th Cir. 2015).
 - “Thirty-three states and the District of Columbia do not punish as aggravated assaults offenses committed with only extreme indifference recklessness.” 807 F.3d at 1085.
 - “[T]he federal generic definition of aggravated assault does not incorporate a mens rea of extreme indifference recklessness.” *Id.* at 1087.

“GENERIC” APPROACH – EXCLUDED OFFENSES

- NJ aggravated assault: 2C:12-1b(7).
 - “Attempts to cause significant bodily injury to another or causes **significant bodily injury** purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life recklessly causes such significant bodily injury[.]”
- *Held*, broader than the generic, contemporary meaning of aggravated assault. *United States v. Martinez-Flores*, 720 F.3d 293 (5th Cir. 2013).

“GENERIC” APPROACH – EXCLUDED OFFENSES

- NJ aggravated assault: 2C:12-1b(7): “Significant bodily injury”
- Per MPC, “serious bodily injury” = “bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or **protracted loss or impairment** of the function of any bodily member or organ.”
- Per 2C:11-1d, “significant bodily injury” = “bodily injury which creates a **temporary loss** of the function of any bodily member or organ or temporary loss of any one of the five senses.”
- “Serious bodily injury is a common aggravating factor that elevates simple assault to aggravated assault and is part of the contemporary, generic meaning of aggravated assault.” *Martinez-Flores*, 720 F.3d at 299.

“GENERIC” APPROACH – EXCLUDED OFFENSES

- Delaware third-degree arson:
 - “A person is guilty of arson in the third degree when the person **recklessly damages a building** by intentionally starting a fire or causing an explosion.”
- 11 Del. C. § 801.
- *Held*, broader than generic, contemporary meaning of arson. *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013).

“GENERIC” APPROACH – EXCLUDED OFFENSES

- Delaware third-degree arson: 11 Del. C. § 801.
 - Under Delaware statute, a “defendant need not have had ‘the purpose of’ destroying property, as specifically required ... to constitute the generic crime of arson.”
 - “For example, Delaware’s law is broad enough to cover a defendant who lawfully lights a cigarette or sets a bonfire on his own property and is merely reckless as to whether the fire might spread and damage an adjoining building. The generic crime ... is not so broad.”
- *Brown v. Caraway*, 719 F.3d at 590.

“GENERIC” APPROACH – STATE DECISIONAL LAW

- Held, criminal attempt under N.J. law broader than generic form of attempt. *United States v. Garcia-Jimenez*, 807 F.3d 1079 (9th Cir. 2015).
- Argue: No N.J. attempt offense qualifies under enumerated offense clause.
- New Jersey law provides that a person is guilty of attempt if he:
 - Purposely does or omits to do anything which, under the circumstances as a reasonable person would believe them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.
- N.J. Stat. Ann. 2C:5-1a(3).

“GENERIC” APPROACH – STATE DECISIONAL LAW

- New Jersey law does not incorporate the “probable desistance” test. *State v. Fornino*, 539 A.2d 301, 304 (N.J. Super Ct. App. Div. 1988).
- Probable desistance test: Defendant’s actions must “unequivocally demonstrate that the crime will take place unless interrupted by independent circumstances.” *Garcia-Jimenez*, 807 F.3d at 1088.
- “Because New Jersey has eliminated the probable desistance test, New Jersey’s definition of attempt is broader than the federal definition.” *Id* at 1088.

U.S.S.G. 4B1.2: PRE- AND POST-AMENDMENT CHALLENGES

- “Commentary
- “Application Notes
 - *“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.”*
 - *“‘Crime of violence’ includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion....”*
- U.S.S.G. § 4B1.2 comment. n.1.

U.S.S.G. 4B1.2: PRE- AND POST-AMENDMENT CHALLENGES

- Where “commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline.” *Stinson v. United States*, 508 U.S. 36, 43 (1993).
- Argue that commentary’s enumeration of extra offenses was tied to the now void residual clause.
- Therefore, with the elimination of the residual clause, the enumeration no longer has any basis in the guideline itself.
- The commentary is inconsistent with the guideline as it now stands, so commentary’s enumeration of additional offenses is without force.

U.S.S.G. 4B1.2: PRE- AND POST-AMENDMENT CHALLENGES

- *Peugh v. United States*, 133 S. Ct. 2072 (2013): The **Ex Post Facto Clause** is violated when a defendant is sentenced under a version of the Guidelines promulgated after he committed his criminal acts, and the new version provides a higher Sentencing Guidelines range than the version in place at the time of the offense.
- *United States v. Saferstein*, 673 F.3d 237, 244 (3d Cir. 2012): “[T]he ex post facto clause requires that a sentencing court apply the **Guidelines Manual in effect at the time the offense was committed if retroactive application of the later Manual would result in harsher penalties.**”

SECTION 924(c): ARMED 'CRIME OF VIOLENCE' MANDATORY 5/7/10 YEARS CONSECUTIVE

- “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.**”
- 18 U.S.C. 924(c)(3).
- Same “categorical” approach applies. *United States v. Butler*, 496 F. App’x 158, 161 (3d Cir. 2012).

SECTION 924(c): ARMED 'CRIME OF VIOLENCE' MANDATORY 5/7/10 YEARS CONSECUTIVE

- *Held, void for vagueness. United States v. Edmundson*, –F. Supp. 3d –, 2015 WL 9582736 (D. Md. Dec. 30, 2015).
- “As with the ACC residual clause, the § 924(c) residual clause requires the court to **imagine what the ‘ordinary case’ of the predicate crime involves** in the abstract (level one indeterminacy) and then to engage in **conjecture about whether the amount of risk the ordinary case involves constitutes a “substantial risk”** that physical force against the person or property of another may be used in the course of committing the predicate offense (level two indeterminacy).” 2015 WL 9582736 at *4.
- “This is exactly the same dual indeterminacy that was fatal to the ACC residual clause.” *Id.* at *4.

SECTION 924(c) – EXCLUDED OFFENSES

- Federal murder-for-hire statute
 - Whoever travels in or causes another (including the intended victim) to travel in interstate or foreign commerce, or uses or causes another (including the intended victim) to use the mail or any facility of interstate or foreign commerce, with intent that a murder be committed in violation of the laws of any State or the United States as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value, or who conspires to do so, [shall be punished as provided].”
- 18 U.S.C. 1958(a).

18 U.S.C. 16: IMMIGRATION OFFENSES

- “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.**”
- *Held*, void for vagueness. *United States v. Vivas-Ceja*, 808 F.3d 719, 722-23 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015).

18 U.S.C. 16: IMMIGRATION OFFENSES

- *United States v. Vivas-Ceja*, 808 F.3d 719, 722-23 (7th Cir. 2015): “*Johnson* concluded that the indeterminacy of both parts of the residual clause’s categorical approach – the ‘ordinary case’ inquiry and the ‘risk’ inquiry – rendered the clause unconstitutionally vague. Because § 16(b) requires the identical indeterminate two-step approach, it too is unconstitutionally vague.”
- *Dimaya v. Lynch*, 803 F.3d 1110 , 1120 (9th Cir. 2015): “As with ACCA, section 16(b) ... requires courts to 1) measure the risk by an indeterminate standard of a ‘judicially imagined “ordinary case,”’ not by real world-facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial. Together, under *Johnson*, these uncertainties render the ... provision unconstitutionally vague.”

TAKEAWAY

- “[T]he term ‘violent felony’ means any crime punishable by imprisonment for a term exceeding one year ... that –
 - “(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
 - “(ii) is burglary, arson, or extortion, involves use of explosives, ~~or otherwise involves conduct that presents a serious potential risk of physical injury to another.~~”
- 924(e)(2)(B).