

# SELECTED CATEGORICAL APPROACH CASES

## ACCA FORCE CLAUSE

### **ISSUE #1: Violent Force Requirement**

*See United States v. Castleman*, 134 S. Ct. 1405, 1412 (2014) (reinforcing that “hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling” or “a squeeze of the arm that causes a bruise” not violent).

*But see Jones v. United States*, 870 F.3d 750 (8th Cir. 2017) (relying solely on “capable of causing physical injury or pain” language to hold that Wisconsin battery of a law enforcement officer that criminalized throwing urine on eyes was violent physical force).

### **Assault and Batteries That Do Not Require Violent Physical Force.**

*United States v. Bell*, 158 F. Supp. 3d 906 (N.D. Cal. 2016) (assault on a law enforcement officer not a violent felony)

*United States v. Johnson*, 559 U.S. 133 (2010) (Florida battery not a violent felony)

*United States v. Montes-Flores*, 736 F.3d 357 (4<sup>th</sup> Cir. 2013) (S.C. assault and battery of a high and aggravated nature not a violent felony)

*United States v. Holloway*, 630 F.3d 252 (1st Cir. 2011) (Massachusetts simple assault and battery not a violent felony)

*United States v. Lattanzio*, 232 F. Supp. 3d 220 (D. Mass. 2017) (Massachusetts assault and battery with a dangerous weapon not a violent felony)

*United States v. Fish*, 758 F.3d 1 (1<sup>st</sup> Cir. 2014) (same)

*United States v. Royal*, 731 F.3d 333 (4<sup>th</sup> Cir. 2013) (Maryland second degree assault not a violent felony)

*United States v. Carthorne*, 726 F.3d 503 (4<sup>th</sup> Cir. 2013) (Virginia assault on a police officer)

*United States v. Braun*, 801 F.3d 1301 (11<sup>th</sup> Cir. 2015) (Florida battery on a pregnant woman).

### **Resisting Arrest Statutes That Do Not Require Violent Physical Force.**

*United States v. Aparico-Soria*, 740 F.3d 152 (4<sup>th</sup> Cir. 2014) (en banc) (Maryland)

*United States v. Flores-Cordero*, 723 F.3d 1085 (9<sup>th</sup> Cir. 2013) (Arizona)

*United States v. Almenas*, 553 F.3d 27 (1<sup>st</sup> Cir. 2009) (Massachusetts)

*United States v. Lee*, 821 F.3d 1124 (9<sup>th</sup> Cir. 2016) (California)

*Davis v. United States*, 205 F. Supp.3d 715 (D. S. C. 2016) (South Carolina resisting arrest with assault on an officer)

### **Robbery Statutes That Do Not Require Violent Physical Force.**

*United States v. Bell*, 158 F. Supp.3d 906 (N.D. Cal. 2016) (federal robbery of government property not a violent felony because “violence” can be accomplished by de minimis force)

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### Robbery Statutes, cont.

*United States v. Winston*, 850 F.3d 677 (4th Cir. 2017) (Virginia robbery not a violent felony because “violence” can be accomplished by de minimis force – i.e., “physical jerking”).

*United States v. Gardner*, 823 F.3d 793 (4th Cir. 2016) (North Carolina robbery not a violent felony because “force” can be accomplished by de minimis force, i.e., pushing someone to the ground).

*United States v. Eason*, 829 F.3d 633 (8th Cir. 2016) (court could not conclude that degree of physical force required under Arkansas requires violent force).

*United States v. Starks*, 861 F.3d 306 (1st Cir. 2017); *United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts armed robbery requirement of “force and violence” can be accomplished by de minimis force).

*United States v. Mulhern*, 854 F.3d 87 (1st Cir. 2017) (under Maine robbery, “any physical force suffices to satisfy physical force element”).

*United States v. Geozos*, \_\_ F.3d \_\_, 2017 WL 3712155 (9th Cir. 2017) (“force” (even when victim resists) under Florida statute can be committed by minimal force, for example, by tug-of-war with victim over purse).

*United States v. Yates*, 866 F.3d 723 (6th Cir. 2017) (minimal force sufficient to constitute Ohio robbery).

*States v. Castro-Vasquez*, 802 F.3d 28 (1st Cir. 2015) (under Puerto Rico robbery

statute, “violence or intimidation” can be accomplished by “slightest use of force”).

*United States v. Strickland*, 860 F.3d 1224 (9th Cir. 2017) (under Oregon robbery, “physical force with intent of preventing or overcoming resistance” can be committed by minimal force, for example by purse snatching).

*United States v. Walton*, 881 F.3d 768 (9th Cir. 2018) (Alabama armed robbery can be violated with yanking of purse or pushing victim just enough to knock off balance and weapon does not have to be used).

*United States v. Jones*, 887 F.3d 884 (9th Cir. 2017) (Arizona armed robbery can be violated by de minimis force without use of weapon).

*In re Sealed Case*, 548 F.3d 1085 (D.C. 2008) (under D.C. robbery, “force or violence” defined by statute to include purse-snatching offenses: “sudden or stealthy seizure or snatching”). Note: same argument excludes similar offenses, such as “larceny from the person” or “pickpocketing.”

*Branch v. United States*, 203 F. Supp. 3d 992 (W. D. Wisc. 2016) (Wisconsin robbery)

*United States v. Batista*, 2017 WL 2651717 (W. D. Va. 2017) (New York robbery)

*United States v. Johnson*, 220 F. Supp. 3d 264 (E.D.N.Y. 2016) (New York robbery)

*United States v. Avery*, 2017 WL 29667 (D. Nev. 2017) (Nevada robbery)

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*Thrower v. United States*, 234 F. Supp. 3d 372 (E.D.N.Y. 2017) (New York robbery)

*United States v. Singleton*, 2017 WL 1508955 (E. D. Pa. April 26, 2017) (Pennsylvania robbery)

*United States v. King*, \_\_\_ F. Supp.3d \_\_\_, 2017 WL 1506766 (D. N. M. 2017) (New Mexico robbery)

*United States v. Martin*, Case No. 14-4779 (4<sup>th</sup> Cir. Sept. 16, 2016) (Maryland robbery, upon government's concession, court found it is not a "violent felony" but no reasoning given);

*United States v. Wilson*, 249 F. Supp.3d 305 (D.D.C. 2017) (Maryland robbery)

### **Federal Kidnapping Does Not Require Violent Force**

*United States v. Jenkins*, 849 F.3d 390 (7<sup>th</sup> Cir. 2017) (federal kidnapping does not have a force requirement because it can be accomplished by deception).

*United States v. Taylor*, 848 F.3d 476 (1<sup>st</sup> Cir. 2017) (government admits that federal kidnapping does not require violent physical force).

*United States v. Bustos*, 2016 WL 6821853 (E.D. Cal. Nov. 17, 2016) (federal kidnapping does not have element of violent force because it can be accomplished by trickery or deceit);

*United States v. Rubio*, 2016 WL 6821854 (E. D. Cal. Nov. 17, 2016) (same).

*United States v. Hughes*, 716 F.2d 234, 239 (4<sup>th</sup> Cir. 1983) (noting that a kidnapper may "use[] deceit and trickery to accomplish his purpose rather than overt force")

*United States v. Wills*, 234 F.3d 174, 177 (4<sup>th</sup> Cir. 2000) ("By its terms, § 1201(a) criminalizes kidnappings accomplished through physical, forcible means and also by nonphysical, nonforcible means.");

### **Federal Hostage Taking Does Not Require Violent Force**

*United States v. Carrion-Caliz*, 944 F.2d 220 (5<sup>th</sup> Cir. 1991)

*United States v. Si Lu Tian*, 339 F.3d 143 (2<sup>d</sup> Cir. 2003) (hostage taking can be accomplished by deception)

*Hernandez v. United States*, 2016 WL 8078311 (S. D. Fla. 2016) (federal hostage taking requires no use or threatened use of force)

### **Kidnapping / False Imprisonment/ Hostage Taking Statutes That Do Not Require Violent Physical Force**

*Delgado-Hernandez v. Holder*, 697 F.3d 1125 (9<sup>th</sup> Cir. 2012) (California kidnapping does not satisfy force clause because restraint can be accomplished through "any means of instilling fear" even through deception).

*United States v. Martinez-Romero*, 817 F.3d 917 (5<sup>th</sup> Cir. 2016) (Florida kidnapping does not require force or threat of force).

*United States v. Moreno-Florean*, 542 F.3d 445, 450-52 (5<sup>th</sup> Cir. 2008) (determining that California kidnapping statute did not include physical force as an element because the crime could be accomplished through non-physical means).

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*United States v. Gonzalez-Perez*, 472 F.3d 1158 (11th Cir. 2012) (Florida false imprisonment does not satisfy force clause because restraint can be accomplished “secretly”).

*United States v. Sherbondy*, 865 F.2d 996 (9th Cir. 1988) (Model Penal Code definition of kidnapping does not require force because it covers kidnapping by trickery or deceit).

*United States v. Marquez-Lobos*, 697 F.3d 759 (9th Cir. 2012) (Arizona kidnapping, which includes abduction of minor, requires lack of consent by lawful abduction but no use or threat of force).

*United States v. Phelps*, 17 F.3d 1334 (10th Cir. 1994) (Missouri kidnapping does not require force or threat of force).

*United States v. Cervantes-Blanco*, 594 F.3d 576 (5th Cir. 2007) (Colorado kidnapping does not require force or threat of force because can be accomplished by deceit).

*United States v. Williams*, 110 F.3d 50 (9th Cir. 1997) (Oregon kidnapping does not require force or threat of force because it can be committed by deception).

*United States v. Najera-Mendoza*, 683 F.3d 627 (5th Cir. 2012) (Oklahoma kidnapping can be committed by *de minimis* force; therefore, not “crime of violence” under force clause).

**Sex Offenses Based on Absence of Legally Valid Consent do not Qualify Under the Force Clause.**

### Statutory Rape

*United States v. Degeare*, 884 F.3d 1241 (10th Cir. 2018) (Oklahoma sodomy with minor)

*United States v. Rangel-Castaneda*, 709 F.3d 373 (4th Cir. 2013) (Tennessee aggravated statutory rape)

*United States v. Daye*, 571 F.3d 225 (2d Cir. 2009) (Vermont statutory rape)

*United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015) (Texas aggravated sexual assault of a child).

### Involuntary or Incompetent Consent

*United States v. Degeare*, 884 F.3d 1241 (10th Cir. 2018) (Oklahoma sodomy with mentally ill person)

*United States v. Shell*, 789 F.3d 335 (4th Cir. 2015) (North Carolina second-degree rape of victim who is “mentally disabled, mentally incapacitated, or physically helpless”)

*United States v. Davis*, 875 F.3d 592 (11th Cir. 2017) (Alabama “sexual abuse by forcible compulsion”).

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### Offenses with a Weapon Element do not Qualify Under Force Clause if no Active Use of Weapon is Required.

*United States v. Titties*, 852 F.3d 1257 (10th Cir. 2017) (Oklahoma pointing a firearm at another statute did not qualify under force clause because it can be done for “whimsy, humor, prank”).

*United States v. Walker*, 2017 WL 2501072 (D. Kan. 2017) (Kansas armed robbery can be accomplished by de minimis force and no active use required of weapon - it can be concealed).

*United States v. Werle*, 815 F.3d 614 (9th Cir. 2016) (Washington riot statute not a crime of violence because weapon need not be used but just “readily available”).

*United States v. Walton*, 881 F.3d 768 (9th Cir. 2018) (Alabama armed robbery can be violated with yanking of purse or pushing victim just enough to knock off balance and weapon does not have to be used).

*United States v. Jones*, 887 F.3d 884 (9th Cir. 2017) (Arizona armed robbery can be violated by *de minimis* force without use of weapon).

*United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016); *United States v. Starks*, 861 F.3d 306 (1st Cir. 2017); (Mass. armed robbery not violent felony because weapon need not be “fired, employed to effectuate robbery, used in a threatening manner, or even generally or openly displayed”).

*United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017) (Florida armed robbery not a violent felony because weapon can be concealed during robbery).

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## ISSUE #2: Force Against Person Requirement

*United States v. O'Connor*, 874 F.3d 1147 (10<sup>th</sup> Cir. 2017) (Hobbs Act robbery includes force against property; therefore, not qualifying offense under force clause);

*But see, United States v. Harper*, 869 F.3d 624 (8<sup>th</sup> Cir. 2017) (finding federal bank robbery crime of violence without addressing property argument).

*United States v. Bowman*, 873 F.3d 1035 (8<sup>th</sup> Cir. 2017) (18 U.S.C. § 924(c) conviction for use of firearm in connection with crime of violence can be done by force against property).

*United States v. Miranda-Zarco*, 836 F.3d 899 (8<sup>th</sup> Cir. 2016) (Missouri armed criminal action can be done by using weapon against property).

*United States v. McMillan*, 863 F.3d 1053 (8<sup>th</sup> Cir. 2017) (Minnesota third degree riot includes force against property).

*United States v. Navarro*, 2016 WL 1253830 (E.D. Wash. 2016) (Washington state first and second-degree robbery includes threatening injury to property; therefore, cannot qualify).

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### ISSUE #3: Using Force v. Causing Injury

#### Assault Statutes that did not Qualify Under Force Clause

*Whyte v. Lynch*, 807 F.3d 463 (1<sup>st</sup> Cir. 2015) (Connecticut assault requiring intentionally causing physical injury) (post-*Johnson*); *Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003).

*Matter of Guzman-Polanco*, 26 I & N Dec. 713 (BIA 2016) (Puerto Rico aggravated battery requiring intentional infliction of physical injury) (post-*Johnson*).

*United States v. Jordan*, 812 F.3d 1183 (8th Cir. 2016) (Arkansas aggravated assault requiring engaging in conduct that creates substantial danger of death or serious physical injury to another) (post-*Johnson*).

*United States v. Zuniga-Soto*, 527 F.3d 1110, 1125 n.3 (10th Cir. 2008) (Texas aggravated assault requiring intentionally causing physical injury). *See also United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006).

*United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005) (Colorado assault requiring defendant to cause bodily injury using a deadly weapon).

*United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10th Cir. 2008) (Colorado assault by drugging).

*United States v. Martinez-Flores*, 720 F.3d 293, 299 (5th Cir. 2013) (New Jersey aggravated assault requiring a defendant to cause significant bodily injury)

*United States v. Gomez-Hernandez*, 680 F.3d 1171 (9th Cir. 2012) (Arizona aggravated assault requiring attempt to cause injury with use of dangerous weapon).

*United States v. Hernandez-Castellanos*, 287 F.3d 876, 881 (9th Cir. 2002) (Arizona endangerment requiring action that creates risk of imminent death or physical injury).

*United States v. Brown*, 249 F. Supp.3d 287 (D. D. C. 2017) (North Carolina assault with dangerous weapon with intent to kill) (post-*Johnson*).

*United States v. Fisher*, 2017 WL 1426049 (E. D. Pa. 2017) (Pennsylvania aggravated assault) (post-*Johnson*).

#### Threat Statutes that did not Qualify Under Force Clause

*United States v. Rico-Mejia*, 859 F.3d 318 (5<sup>th</sup> Cir. 2017) (Arkansas terroristic threats: threatening an act that results in serious physical injury or death) (post-*Johnson*).

#### Child Abuse Statutes that did not Qualify Under Force Clause

*United States v. Gomez*, 690 F.3d 194 (4<sup>th</sup> Cir. 2012) (child abuse resulting in physical injury).

*United States v. Andino-Ortega*, 608 F.3d 305 (5th Cir. 2010) (causing physical injury to a child).

*United States v. Lopez-Patino*, 391 F.3d 1034, 1037 (9th Cir. 2004) (causing child physical injury does not require use of force).

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### Manslaughter Statutes that did not Qualify Under Force Clause

*United States v. Reyes-Contreras*, 882 F.3d 113 (5th Cir. 2018) (Missouri manslaughter) (post-*Johnson*).

*United States v. Garcia-Perez*, 779 F.3d 278 (5th Cir. 2015) (Florida manslaughter).

### Murder Statutes that did not Qualify Under Force Clause

*United States v. Hernandez*, 831 F.3d 284 (5th Cir. 2016) (Florida second degree attempted murder).

*United States v. Watts*, 2017 WL 411341 (D. Kan. Jan. 31, 2017) (Missouri second degree felony murder).

*United States v. Martinez*, Case No. 07-cr-00236-REB-1 (D. Co. Feb. 1, 2017) (Nevada second degree murder)

*United States v. Nicks*, Case No. WJM-15-0321 (D. Co. April 4, 2016) (Colorado second degree murder)

*United States v. McCutcheon*, Case No. JFM-15-654 (D. Md. Aug. 24, 2016) (attempted Maryland second degree murder).

### BEWARE OF *CASTLEMAN*

*United States v. Castleman*, 134 S. Ct. 1405 (2014) (For purposes of 18 U.S.C. § 922(g)(9) “misdemeanor crime of domestic violence” definition “force” includes common law offensive touching, unlike “violent physical force” in *ACCA/Johnson* 2010)

### Decisions holding *Castleman* applies to ACCA/career offender/16(a) force clause:

*United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017).

*United States v. Rice*, 813 F.3d 704 (8th Cir. 2016).

*United States v. Schaffer*, 818 F.3d 796 (8th Cir. 2016).

*United States v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017).

*United States v. Burns-Johnson*, 864 F.3d 313 (4th Cir. 2017).

*United States v. Reid*, 861 F.3d 523 (4th Cir. 2017).

*In re Irby*, 858 F.3d 231 (4th Cir. 2017);

*United States v. Chapman*, 866 F.3d 129 (3d Cir. 2017).

*United States v. Ellison*, 866 F.3d 129 (1st Cir. 2017).

*United States v. Edwards*, 857 F.3d 420 (1st Cir. 2017).

*United States v. Hill*, 832 F.3d 135 (2d Cir. 2016).

*United States v. United States v. Waters*, 823 F.3d 1062 (7th Cir. 2016).

*United States v. Haldemann*, 664 F. Appx. 820 (11th Cir. 2016).

*Hernandez v. Lynch*, 831 F.3d 1127 (9th Cir. 2016).



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Decisions holding *Castleman* does not apply to ACCA/career offender/§16(a) force clause:

*United States v. Reyes-Contreras*, 882 F.3d 113 (5th Cir. 2018).

*United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017).

*Whyte v. Lynch*, 807 F.3d 463 (1st Cir. 2015).

*United States v. McNeal*, 818 F.3d 141 n.10 (4th Cir. 2016).

*United States v. Glover*, 681 Fed. Appx. 432 (6th Cir. 2017).

*In re Guzman-Polanco*, 26 I & N Dec. 713 (BIA 2016).

*United States v. Fennell*, 2016 WL 4702557 (N. D. Tex. Sept. 8, 2016).

*United States v. Hill*, 225 F. Supp. 3d 328 (W. D. Penn. 2016).

*United States v. Villanueva*, 191 F. Supp. 3d 178 (D. Conn. 2016).

*United States v. Watts*, 2017 WL 411341 (D. Kan. Jan. 31, 2017).

*United States v. Fisher*, 2017 WL 1426049 (E. D. Pa. 2017).

*United States v. Brown*, 2017 WL 1383640 (D.D.C. 2017).

*United States v. Butler*, 253 F. Supp.3d 133 (D. D. C. 2017).

*United States v. Rice*, 813 F.3d 704 (8<sup>th</sup> Cir. 2016) (see dissent rejecting government's *Castleman* theory).

## SELECTED CATEGORICAL APPROACH CASES

### ISSUE #5: Intentional Force v. Reckless Conduct

#### Helpful pre-*Johnson* cases:

*United States v. Armijo*, 651 F.3d 1226 (10th Cir. 2011) (Colorado manslaughter has reckless mens rea).

*United States v. Zuniga-Soto*, 527 F.3d 1110 (10th Cir. 2008) (Texas offense of assaulting public servant has reckless mens rea).

*United States v. Boose*, 739 F.3d 1185 (8th Cir. 2014) (reckless driving);

*Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006) (assault requiring defendant to recklessly cause serious physical injury using a deadly weapon).

*United States v. McMurray*, 653 F.3d 367, 374-75 (6th Cir. 2011) (aggravated assault requiring defendant to recklessly cause serious bodily injury).

*Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc) (assault statute requiring reckless physical injury to another).

*United States v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) (child endangerment can be satisfied with reckless mens rea).

*Purohit v. Holder*, 441 Fed. Appx. 458 (9th Cir. 2011) (voluntary manslaughter has reckless mens rea).

#### Helpful post-*Johnson* cases

*United States v. Bennett*, 868 F.3d 1 (1st Cir. 2017) (Maine aggravated assault that has reckless mens rea).

*United States v. Windley*, 864 F.3d 36 (1st Cir. 2017) (Massachusetts assault and battery with dangerous weapon can be violated recklessly).

*United States v. Kennedy*, 881 F.3d 14 (1st Cir. 2018) (Massachusetts assault and battery with dangerous weapon can be violated recklessly).

*United States v. Middleton*, 883 F.3d 485 (4th Cir. 2018) (S.C. involuntary manslaughter can be violated recklessly).

*United States v. Fields*, 863 F.3d 1012 (8th Cir. 2017) (Missouri second degree assault has reckless mens rea).

*United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015) (California robbery does not require intentional use of force).

*United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts assault and battery with dangerous weapon has reckless mens rea).

*United States v. Barcenas-Yanez*, 826 F.3d 752 (4th Cir. 2016) (Texas aggravated assault offense can be violated with reckless mens rea).

*United States v. Benally*, 843 F.3d 350 (9th Cir. 2016) (federal involuntary manslaughter has gross negligence mens rea).

*United States v. Hernandez*, 831 F.3d 284 (5th Cir. 2016) (Government agrees Florida second degree murder does not have intentional mens rea).

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*United States v. Johnson*, 227 F. Supp. 3d 1078 (N.D. Cal. 2016) (federal arson has reckless *mens rea*).

*United States v. Hill*, 225 F. Supp. 3d 328 (W.D. Pa. 2016) (Pennsylvania simple assault has reckless *mens rea*).

*United States v. Watts*, 2017 WL 411341 (D. Kan. 2017) (Missouri second degree murder has reckless *mens rea*).

*United States v. Sabetta*, 221 F. Supp. 3d 210 (D.R.I. 2016) (Rhode Island assault with a dangerous weapon has reckless *mens rea*).

*United States v. Wehunt*, 230 F. Supp.3d 838 (E.D. Tenn. 2017) (Tennessee aggravated assault has a reckless *mens rea*).

*United States v. Moore*, 203 F. Supp.3d 854 (N.D. Ohio 2016) (Ohio aggravated robbery has reckless *mens rea*).

*United States v. Butler*, 253 F. Supp.3d 133 (D. D. C. 2017) (D.C. assault with a dangerous weapon).

### Threats Offenses with Missing Intentional Mens Rea.

See *United States v. King*, 979 F.2d 801, 803 (10<sup>th</sup> Cir. 1992) (threat under force clause “means both an *intent* to use force and a communication of that threat”).

*Culp v. United States*, 2016 WL 5400395 (D. Utah Sept. 27, 2016) (Utah witness tampering can be committed without any intent to threaten force).

*United States v. Doriety*, Case No. C16-0924-JCC (W. D. Wash. Nov. 10, 2016) (federal unarmed bank robbery is not

“crime of violence” under “force” clause because no intent to use force or communication of that threat required).

*United States v. Knox*, 2017 WL 347469 (W. D. Wash. Jan. 24, 2017) (same).

*United States v. Yockel*, 320 F.3d 818 (8<sup>th</sup> Cir. 2003) (federal bank robbery can be violated without intentional threat of force) See also, *United States v. Kelley*, 412 F.3d 1240 (11<sup>th</sup> Cir. 2005); *United States v. Woodrup*, 86 F.3d 359 (4<sup>th</sup> Cir. 1996).

**But see** *United States v. Harper*, 869 F.3d 624 (8<sup>th</sup> 2017) (finding that federal bank robbery satisfies intentional mens rea). See also, *United States v. McNeal*, 818 F.3d 141 (4<sup>th</sup> Cir. 2016) (same); (*United States v. Armour*, 840 F.3d 904 (7<sup>th</sup> Cir. 2016) (same); *In re Sams*, 830 F.3d 1234 (11<sup>th</sup> Cir. 2016) (same).

**Beware: *Voisine v. United States*, 136 S. Ct. 2272 (2016)** (Force clause for purposes of § 922(g)(9) misdemeanor crime of domestic violence only requires mens rea of recklessness.)

**HOWEVER:** *Voisine* recognized (by citation to footnote in *Castleman*) that all courts of appeals have held that use of force for purposes of ACCA/career offender/16(a)/924(c) force clause must be intentional; *Voisine* does nothing to disturb these rulings.

### Courts applying *Voisine* to ACCA/Guidelines/16(a) force clause.

*United States v. Verwiebe*, 874 F.3d 258 (6<sup>th</sup> Cir. 2017).

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*United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016).

*United States v. Pam*, 867 F.3d 1191 (10th Cir. 2017).

*United States v. Hammons*, 862 F.3d 1052 (10th Cir. 2017).

*United States v. Howell*, 838 F.3d 489 (5th Cir. 2016).

*United States v. Mendez-Henriquez*, 847 F.3d 214 (5th Cir. 2017).

***But see* decisions holding that *Voisine* is inapposite to ACCA/career offender/16(a) force clause.**

*United States v. Bennett*, 868 F.3d 1 (1st Cir. 2017) (rule of lenity means *Voisine* does not apply to ACCA force clause – but opinion withdrawn due to death of defendant).

*United States v. Windley*, 864 F.3d 36 (1st Cir. 2017) (same).

*United States v. Fields*, 863 F.3d 1012 (8th Cir. 2017) (*Voisine* doesn't apply to all reckless offenses).

*United States v. Middleton*, 883 F.3d 485 (4th Cir. 2018) (concurrency holding that *Voisine* doesn't apply to ACCA force clause).

*United States v. Lattanzio*, 232 F. Supp. 3d 220 (D. Mass. 2017) (*Voisine* inapposite to ACCA force clause).

*United States v. Dancy*, 2017 WL 1227913 (D. Mass. 2017); (same).

*United States v. Johnson*, 227 F. Supp. 3d 1078 (N. D. Cal. 2016) (same).

*United States v. Sabetta*, 221 F. Supp.3d 210 (D. R. I. 2016) (same).

*United States v. Fennell*, 2016 WL 4702557 (N. D. Tex. Sept. 8, 2016) (same).

*Jefferson v. United States*, 2016 WL 6023331 (S. D. Ala. Oct. 13, 2016) (same).

*United States v. Fisher*, 2017 WL 1426049 (E. D. Pa. 2017) (same).

*United States v. Brown*, 249 F. Supp. 287 (D.D.C. 2017) (same).

*Broadbent v. United States*, 2016 WL 5922302 (D. Utah Oct. 11, 2016) (*Voisine* inapposite to career offender force clause);

*United States v. Wehunt*, 230 F. Supp.3d 838 (E. D. Tenn. 2017) (same).

*United States v. Hill*, 225 F. Supp. 3d 328 (W. D. Penn. 2016) (same).

*United States v. Butler*, 253 F. Supp.3d 133 (D. D. C. 2017) (same).

*Jaramillo v. United States*, 2016 WL 5947265 (D. Utah Oct. 13, 2016) (same).

## SELECTED CATEGORICAL APPROACH CASES

### INCHOATE OFFENSES

#### **Conspiracies Never Qualify as Violent Felonies Under the Force Clause**

##### Pre-*Johnson* cases:

*United States v. White*, 571 F.3d 365 (4th Cir. 2009).

*United States v. Gore*, 636 F.3d 728 (5th Cir. 2011).

*United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007).

*United States v. King*, 979 F.2d 801 (10th Cir. 1992).

##### Post-*Johnson* cases:

*United States v. Gonzalez-Ruiz*, 794 F.3d 832 (7th Cir. 2015) (finding conspiracy to commit armed robbery not violent felony).

*United States v. Melvin*, No. 13-4857 (4th Cir. Oct. 20, 2015) (finding conspiracy to commit robbery with a dangerous weapon not a violent felony).

*United States v. Smith and Merritte*, 2016 WL 2901661 (D. Nev. 2016) (conspiracy to commit Hobbs Act robbery not crime of violence under 924(c) force clause).

*United States v. Luong*, 2016 WL 1588495 (E.D. Cal. 2016) (conspiracy to commit Hobbs Act robbery not crime of violence under 924(c) force clause).

*United States v. Edmundson*, 153 F. Supp.3d 857 (D. Md. 2015) (conspiracy to commit Hobbs Act robbery not crime of violence under 924(c) force clause).

*United States v. Baires-Reyes*, 191 F. Supp. 3d 1046 (N. D. Cal. 2016) (conspiracy to commit Hobbs Act robbery

not crime of violence under 924(c) force clause).

*Duhart v. United States*, 2016 WL 4720424 (S. D. Fla. Sept. 9, 2016) (conspiracy to commit Hobbs Act robbery not crime of violence under 924(c) force clause).

*United States v. Benitez*, 2017 WL 2271504 (S.D. Fla. 2017).

*United States v. Hunter*, 2017 WL 3159985 (D. Nev. 2017).

#### **Non-Generic Attempts do not Qualify as as Violent Felonies under Enumerated Offenses Clause.**

*United States v. James*, 550 U.S. 192 (2007);

*United States v. Gonzalez-Monterroso*, 745 F.3d 1237 (9th Cir. 2014) (Delaware attempt is not generic because no real “substantial step” required);

*United States v. Garcia-Jimenez*, 807 F.3d 1079 (9th Cir. 2015) (generic attempt requires “probable desistance” – defendant’s actions indicate that crime will take place unless interrupted by independent circumstances).

*United States v. Reid*, 769 F.3d 990 (8th Cir. 2014) (Missouri attempt can be committed merely with preparatory steps, for example by merely possessing materials to be employed in commission of offense – not generic);

*But see United States v. Alexander*, 809 F.3d 1029 (8th Cir. 2016) and *United States v. Scott*, 818 F.3d 424 (8th Cir. 2016) (finding Missouri attempted second

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degree assault qualifies under force clause).

*Montoya v. United States*, 2016 WL 6810727 (D. Utah Nov. 17, 2016) (Utah attempted murder only requires “preparatory steps;” thus, not generic attempt qualifying under “force” clause).

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### Cases Explaining Policy Disagreements with Career Offender Guideline.

*United States v. Boardman*, 528 F.3d 86,  
87 (1st Cir. 2008)

*United States v. Sanchez*, 517 F.3d 651,  
662-65 (2d Cir. 2008)

*United States v. McLean*, 331 F. App'x  
151, 152-53 (3d Cir. 2009)

*United States v. Clay*, 787 F.3d 328 (5th  
Cir. 2015)

*United States v. Michael*, 576 F.3d 323,  
327-28 (6th Cir. 2009)

*United States v. Corner*, 598 F.3d 411, 416  
(7th Cir. 2010) (*en banc*)

*United States v. Gray*, 577 F.3d 947, 950  
(8th Cir. 2009)

*United States v. Mitchell*, 624 F.3d 1023,  
1028-30 (9th Cir. 2010)

*United States v. Bailey*, 622 F.3d 1, 10-11  
(D.C. Cir. 2010)

## SELECTED CATEGORICAL APPROACH CASES

### 18 U.S.C. § 924(c) RESIDUAL CLAUSE

#### Cases holding §924(c) void for vagueness

*United States v. Cardena*, 842 F.3d 959 (7th Cir. 2016).

*United States v. Jackson*, 865 F.3d 946 (7th Cir. 2017) (cert pending).

*United States v. Jenkins*, 849 F.3d 390 (7th Cir. 2017) (cert pending).

*United States v. Baires-Reyes*, 191 F. Supp.3d 1046 (9th Cir. 2016).

*United States v. Smith and Merritte*, 2016 WL 2901661 (D. Nev. 2016).

*United States v. Luong*, 2016 WL 1588495 (E.D. Cal. 2016).

*United States v. Lattanaphom*, 159 F. Supp.3d 1157 (E.D. Cal. 2016).

*United States v. Bell*, 158 F. Supp.3d 906 (N.D. Cal. 2016).

*United States v. Edmundson*, 153 F. Supp.3d 857 (D. Md. 2015).

*Duhart v. United States*, 2016 WL 4720424 (S. D. Fla. Sept. 9, 2016).

*United States v. Shumilo*, 2016 WL 6302524 (Cent. Dist. Cal. Oct. 24, 2016).

#### Cases holding 924(c) is NOT void for vagueness

*United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016) (holding that § 924(c) residual clause is not void for vagueness – but holding in conflict with *Shuti*) (cert pending).

*United States v. Hill*, 832 F.3d 135 (2d Cir. 2016).

*United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016) (cert pending).

*United States v. Jones*, 854 F.3d 737 (5th Cir. 2017) – Cert denied.

*Ovalles v. United States*, 861 F.3d 1257 (11th Cir. 2017).

*United States v. Eshetu*, 863 F.3d 946 (D. C. 2017) (§ 924(c) not void for vagueness).



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### 18 U.S.C. §924(c) FORCE CLAUSE

#### Conspiracies:

*United States v. Smith and Merritte*, 2016 WL 2901661 (D. Nev. 2016) (conspiracy to commit Hobbs Act robbery not crime of violence under force clause). *See also*, *United States v. Luong*, 2016 WL 1588495 (E.D. Cal. 2016) (same)

*United States v. Edmundson*, 153 F. Supp.3d 857 (D. Md. 2015) (same);

*United States v. Baires-Reyes*, 191 F. Supp.3d 1046 (N. D. Cal. 2016) (same);  
*Duhart v. United States*, 2016 WL 4720424 (S. D. Fla. Sept. 9, 2016) (same);

*United States v. Benitez*, 2017 WL 2271504 (S.D. Fla. 2017);

*United States v. Hunter*, 2017 WL 3159985 (D. Nev. 2017) (same);

*Alvarado v. United States*, 2016 WL 6302517 (Cent. D. Cal. Oct. 14, 2016) (RICO conspiracy not crime of violence under force clause);

#### Kidnapping

*United States v. Jenkins*, 849 F.3d 390 (7<sup>th</sup> Cir. 2017) (federal kidnapping does not have a force requirement because it can be accomplished by deception);

*United States v. Bustos*, 2016 WL 6821853 (E.D. Cal. Nov. 17, 2016) (federal kidnapping does not have element of violent force because it can be accomplished by trickery or deceit);

*United States v. Rubio*, 2016 WL 6821854 (E. D. Cal. Nov. 17, 2016) (same)

#### Hostage Taking:

*Hernandez v. United States*, 2016 WL 8078311 and 8078310 (S. D. Fla. 2016) (federal hostage taking requires no use or threatened use of force);

*Juan Becerra-Perez v. United States*, CR 04-0235 (C.D. Cal. Feb. 15, 2017) (same).

#### Federal Assault

*United States v. Bell*, 158 F. Supp. 3d. 906 (N.D. Cal. 2016) (federal assault can be accomplished by *de minimis* force).

#### Arson

*United States v. Johnson*, 227 F. Supp. 3d 1078 (N. D. Cal. 2016) (can be accomplished recklessly).

#### Murder for Hire

*United States v. Bowman*, 873 F.3d 1035 (8<sup>th</sup> Cir. 2017) (indicating that murder for hire does not have an element the use, attempted use, or threatened use of force).

*United States v. Herr*, 2016 WL 6090714 (D. Mass. 2016).

#### Unhelpful cases regarding §924(c)

*United States v. Hill*, 832 F.3d 135 (2<sup>d</sup> Cir. 2016) (924(c) (Using *Castleman* to find that Hobbs Act robbery is a § 924(c) “crime of violence” under force clause and also finding that residual clause is not unconstitutionally void); *see also*

*In re St. Fleur*, 824 F.3d 1337 (11<sup>th</sup> Cir. 2016) (Hobbs Act robbery qualifies as a § 924(c) “crime of violence” under force clause)

*United States v. Hubert*, 883 F.3d 1319 (11<sup>th</sup> Cir. 2018) (same).

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*United States v. House*, 825 F.3d 381 (8th Cir. 2016) (same).

*United States v. Anglin*, 846 F.3d 954 (7th Cir. 2017) (same).

*United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016) (same).

*United States v. Gooch*, 850 F.3d 285 (6th Cir. 2017) (same).

*United States v. Howard*, 650 Fed. Appx. 466 (9th Cir. 2016) (same).

*United States v. McNeal*, 818 F.3d 141 (4th Cir. 2016) (finding that federal bank robbery qualifies as a § 924(c) “crime of violence” under force clause).

*United States v. Armour*, 840 F.3d 904 (7th Cir. 2016) (same).

*In re Sams*, 830 F.3d 1234 (11th Cir. 2016) (same).

*In re Hines*, 824 F.3d 1334 (11th Cir. 2016) (same).

*United States v. Evans*, 848 F.3d 242 (4th Cir. 2016) (federal carjacking qualifies as a “crime of violence” under a § 924(c) force clause).

*United States v. Taylor*, 814 F.3d 340 (6th Cir. 2016) (finding (924(c) residual clause not void).

*United States v. Prickett*, 839 F.3d 697 (8th Cir. 2016) (same).