The Johnson & Johnson Problem: The Supreme Court Limited the Armed Career Criminal Act's "Violent Felony" Provision—and Our Children Are Paying

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The *Johnson & Johnson* Problem: The Supreme Court Limited the Armed Career Criminal Act’s “Violent Felony” Provision—and Our Children Are Paying

Abstract

The Armed Career Criminal Act and United States Sentencing Guidelines prescribe sentence enhancements based upon a defendant’s prior convictions. In particular, these federal sentencing tools contain violent felony provisions that outline the requirements a state criminal statute must satisfy for a conviction to constitute a violent felony, making the convicted person eligible for a federal sentence enhancement. However, the Supreme Court’s holdings in *Johnson v. United States*, 559 U.S. 133 (2010) and *Johnson v. United States*, 135 S. Ct. 2551 (2015) severely limited the scope of both sentencing tools’ violent felony provisions, making it more difficult for certain crimes to carry the threat of a federal sentence enhancement. This is particularly the case for state child abuse laws. From a policy perspective, state legislatures draft child abuse laws to encompass a broad range of conduct in an effort to punish and deter every degree of child abuse, from minor to egregious and violent conduct. Unfortunately, this broad language also ensures repeat violent child abusers fall outside the now-limited reach of a federal sentence enhancement and permits earlier release of convicts with long histories of child abuse and molestation. This Comment posits that the *Johnson* decisions dismantled the effectiveness of state child abuse laws in keeping children safe from repeat abusers. As such, reform is needed and the *Johnson* holdings did not leave legislatures without recourse: the case law that developed in the wake of these holdings provides a template for legislatures to draft more effective child abuse laws and remedy the *Johnson and Johnson* problem before its ripple effects reach our children.
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I. INTRODUCTION

What is the difference between an unarmed man who gives a bank cashier
a note that says, “give me your money,” and a man charged with sexual battery
of a child? The man convicted of the unarmed bank robbery is dramatically
closer to an enhanced prison sentence than the man who sexually abused the
child.\(^1\) The explanation for such a morally unsatisfying result lies within the

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\(^1\) Compare United States v. McBride, 826 F.3d 293, 295–96 (6th Cir. 2016) (holding that un-
armed bank robbery pursuant to 18 U.S.C. § 2113(a) is a violent crime under the Federal Sentencing...
murky waters of statutory interpretation and federal sentencing statutes.\textsuperscript{2} There are two federal sentencing tools that have the power to greatly enhance a prison sentence based on a defendant’s prior offenses: the Armed Career Criminal Act (ACCA)\textsuperscript{3} and the Federal Sentencing Guidelines (Guidelines).\textsuperscript{4} Repeat offenders who are convicted of multiple “violent felonies” under the ACCA, or “crimes of violence” under the Guidelines, are designated as “Career Criminals” or “Career Offenders” and are eligible for enhanced prison sentences.\textsuperscript{5} For example, if a man intentionally launched a vehicle into the air three times in Indiana, he would not achieve a career offender status, but if he was convicted of armed assault with intent to murder in Massachusetts three times, he would undeniably be designated as a career offender.\textsuperscript{6}

Guidelines, and thus the defendant was eligible for a sentence enhancement), with United States v. Harris, 608 F.3d 1222, 1232–33 (11th Cir. 2010) (holding that sexual battery of a child under the age of sixteen, pursuant to Florida Statute § 800.04(3), is not a violent felony under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1), and thus the defendant was not eligible for a sentence enhancement).

2. See Jessica A. Roth, The Divisibility of Crime, 64 DUKE L.J. ONLINE 95, 100–02 (2015) (discussing the different standards of review lower state and federal courts need to apply to determine if a crime makes a defendant eligible for a sentence enhancement and noting that the confusion in applying these standards has resulted in a circuit split).


4. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. SENTENCING COMM'N 2016) [hereinafter USSG]. Both the ACCA and the Guidelines provide for federal sentence enhancements for repeat offenders. See 18 U.S.C. § 924(e); USSG § 4B1.1(a). The ACCA prescribes a fifteen-year minimum sentence to felons in possession of a firearm who have at least three prior violent felony convictions or felony drug offenses. 18 U.S.C. § 924(e). To constitute a violent felony under the ACCA, the statute the defendant was convicted under must fall within the scope of the ACCA’s “violent felony” definition. Id.; see Samantha Rutsky, United States v. Mobley: Another Failure in Crime of Violence Analysis, 47 AKRON L. REV. 851, 856 (2014); infra Section II.A.1. Similar to the ACCA, the Guidelines offer a sentencing range that is enhanced based on a defendant’s prior convictions. USSG § 4B1.1(a). If a defendant has a total of three violent crime or felony drug convictions, he is designated as a “Career Offender.” Id.; see Rutsky, supra, at 854. Like the ACCA, the statute the defendant was convicted under must fall within the scope of the Guidelines “crime of violence” definition. USSG § 4B1.1(a) cmt. n.1. However, the Guidelines’ sentencing range is more advisory than that prescribed by the ACCA, and a judge may (theoretically) depart from the Guidelines’ prescribed sentence. See infra Section II.A.2.

5. See Rutsky, supra note 4, at 854–56. If convicted pursuant to the ACCA, the defendant is designated as an “Armed Career Criminal.” 18 U.S.C. § 924(e). If convicted pursuant to the Guidelines, the defendant is designated as a “Career Offender.” USSG § 4B1.1(a). The term “career offender” throughout this Comment refers to any defendant who was designated either an Armed Career Criminal under the ACCA or a Career Offender under the Guidelines.

The idea behind these sentencing regimes is to keep violent “career” criminals off the streets—generally, a socially acceptable purpose. As such, it is not ethically unsettling for certain crimes, such as armed assault, to subject offenders to a sentence enhancement, while others, such as vehicular flight, impose lighter punishments. The problem is, there are crimes our society is deeply concerned about that are slipping through the cracks. For example, many state child abuse laws are written too broadly to fall within the new scope of the ACCA or the Guidelines. Recent Supreme Court precedent has forced courts all over the country to evaluate the components of state criminal statutes to determine which crimes make defendants eligible for an enhanced prison sentence. This process unveiled a tragic flaw in laws enacted to pro-

“ACCA predicate offense[]” under the force clause).

7. See U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS 1, 2–3 (Aug. 2016) [hereinafter 2016 REPORT TO CONGRESS], http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RTC-Career-Offenders.pdf?page=6 (finding that criminals who have committed a violent offense, as defined by the ACCA or the Guidelines, “generally have a more serious and extensive criminal history . . . and are more likely to commit another violent offense in the future”).

8. See id.


10. See infra Part IV. For the purposes of this Comment, child abuse laws encompass a broad array of state statutes that are enacted to protect children and can be violated through neglect or willfully harming children, whether through abuse, sexual assault, or other forms of endangerment. See Hollie Hendrikson & Kate Blackman, State Policies Addressing Child Abuse and Neglect, NAT’L CONF. OF ST. LEGISLATURES 1, 2 (Aug. 2015), http://www.ncl.org/Portals/1/Documents/Health/State Policies_ChildAbuse.pdf.

11. See Johnson II, 135 S. Ct. at 2557 (holding that the residual clause used to determine a “violent felony” in the ACCA is unconstitutionally vague). This case began a ripple effect across the country of prisoners petitioning to the courts regarding past convictions that hinged on this now-void residual clause. See, e.g., United States v. Ladwig, 192 F. Supp. 3d 1153, 1163 (E.D. Wash. 2016) (finding that, after the Supreme Court’s holding in Johnson II, Washington’s second-degree rape statute no longer constitutes a violent felony under the ACCA); see also Leah M. Litman, Resentencing in the Shadow of Johnson v. United States, 28 FED. SENT’G REP. 45, 45–47 (2015) (discussing the prisoners who have valid “Johnson claims” to challenge their sentence enhancements under the ACCA and the Guidelines); Stephen R. Sady & Gillian R. Schroff, Johnson: Remembrance of Illegal Sentences Past, 28 FED. SENT’G REP. 58, 61–62 (2015) (outlining the procedural mechanisms prisoners have to demand a review of their sentence enhancement in light of Johnson II). See generally Jaime M. Nies, Retrospective Effect of Johnson v. U.S., 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015). Holding that “Residual Clause” of Armed Career Criminal Act (ACCA) is Unconstitutional, 13 A.L.R. FED. 3D ART. 3 (2016) (discussing cases that addressed the retroactive effect of Johnson II).
tect children—they keep repeat offenders outside the reach of sentence enhancements. ¹²

However, as federal courts flurry to analyze the components of various state criminal statutes, legislatures have the unique opportunity to learn how courts interpret statutes and designate certain crimes as worthy of sentence enhancements. ¹³ This Comment posits that the cases following Johnson I ¹⁴ and Johnson II ¹⁵ provide a framework for legislatures to draft child abuse laws that ensure perpetrators who violently abuse children are eligible for federal sentence enhancements. ¹⁶ Part II of this Comment provides a background of the ACCA and the Guidelines. ¹⁷ It discusses the authority of both of these federal sentencing tools and breaks down the relevant provisions that are used to determine if a defendant is eligible for a sentence enhancement. ¹⁸ Part II also discusses how prisoners can legally challenge a sentence enhancement. ¹⁹ Part II concludes by outlining the analysis federal courts use to determine if a prisoner’s prior conviction still falls within the scope of the ACCA or the Guidelines to justify the prisoner’s sentence enhancement. ²⁰ Part III discusses

¹² See, e.g., Ramirez v. Lynch, 810 F.3d 1127, 1138 (9th Cir. 2016) (holding that felony child endangerment under California Penal Code 273(a) is not a violent felony under the ACCA, and thus is not a predicate offense that can lead to a career offender designation); Kirk v. United States, No. 4:05CR52-GHD-DAS, 2016 WL 6476963, at *7–9 (N.D. Miss. Nov. 1, 2016) (vacating a defendant’s prison sentence because his two prior Georgia convictions for child molestation no longer constitute crimes of violence under the Guidelines, even though the defendant “clearly exhibited violent and dangerous behavior” (emphasis in original)); United States v. Lance, 208 F. Supp. 3d 879, 885 (E.D. Tenn. 2016) (holding that “Defendant’s Tennessee conviction for rape of a child” does not qualify as a crime of violence under USSG § 4B1.2).

¹³ See Sady & Schroff, supra note 11, at 58. Sady and Schroff note that changes in the scope of the ACCA or other sentencing tools force courts to revisit prior convictions that resulted in sentence enhancements to ensure that prisoners are not serving illegal sentences. Id. at 58–59. This requires courts to determine if prisoners’ prior state convictions fall within the current scope of the respective federal sentencing tools, an analysis that permits legislatures to see how their statutes are judicially interpreted in relation to sentence enhancements. Id.; see also infra Parts IV–V.


¹⁶ See infra Parts IV–V.

¹⁷ See infra Section II.A; see also 2016 REPORT TO CONGRESS, supra note 7, at 48–49 (discussing the similarities and differences between the ACCA and the Guidelines’ crime-of-violence definitions).

¹⁸ Seeinfra Section II.A.

¹⁹ See infra Section II.B.

²⁰ See infra Section II.C; see also Rutsky, supra note 4, at 859–61 (discussing the approaches courts use to determine if a crime falls within the scope of the ACCA’s “violent felony” provision or the Guidelines’ “crime of violence” provision).
the statutory impact of the Supreme Court’s holdings in Johnson I and Johnson II on the ACCA and the Guidelines.\textsuperscript{21} Namely, it will discuss the newly defined elements of the “force clause,” the elimination of the “residual clause,” and the amendments to the “enumerated offenses clause”—all clauses within the ACCA’s “violent felony” provision and the Guidelines’ “violent crime” provision.\textsuperscript{22}

Part IV begins by discussing how the Court’s holdings in Johnson I and Johnson II affected repeat offenders’ eligibility for sentence enhancements.\textsuperscript{23} Part IV reviews the reasoning federal courts in the Eleventh, Sixth, and Eighth Circuits used to determine that certain child abuse laws do not qualify for sentence enhancements in light of Johnson I and Johnson II.\textsuperscript{24} It will also discuss the public importance in ensuring child abuse laws fall within the scope of the ACCA or the Guidelines.\textsuperscript{25} The cases reviewed in Part IV demonstrate a pattern of federal court reasoning that legislatures can capitalize on to amend current child protection laws or draft new ones.\textsuperscript{26} Lastly, Part V provides a guideline for legislatures to address the Johnson and Johnson problem and discusses how these statutes should be worded to ensure criminals who repeatedly and intentionally abuse children are eligible for sentence enhancements.\textsuperscript{27} Part VI concludes.\textsuperscript{28}

II. BACKGROUND

A. The ACCA and the Guidelines

This Comment discusses two federal sentencing tools—both prescribe sentence enhancements based upon a defendant’s prior convictions.\textsuperscript{29} First,

\textsuperscript{21} See infra Part III.
\textsuperscript{22} See infra Part III.
\textsuperscript{23} See infra Part IV.
\textsuperscript{24} See infra Part IV.
\textsuperscript{25} See infra Part IV.
\textsuperscript{26} See infra Parts IV–V.
\textsuperscript{27} See infra Part V.
\textsuperscript{28} See infra Part VI.
\textsuperscript{29} See 18 U.S.C. § 924(e) (2006); USSG § 4B1.1(a). The most notable difference between these two sentencing tools is that the ACCA mandates a fifteen-year minimum sentence, while the Guidelines advise the courts on sentencing ranges. \textit{Armed Career Criminal or Career Offender? What’s the Difference?}, FAMILIES AGAINST MANDATORY MINIMUMS (Aug. 24, 2015), http://famm.org/armed-career-criminal-vs-career-offender. An offender will be convicted pursuant to the ACCA, as opposed to the Guidelines, if he or she was unlawfully in possession of a firearm. \textit{Id.; see also} Rutsky, \textit{supra}
the ACCA prescribes a sentence enhancement if a defendant is found in possession of a firearm and has three prior convictions for a “violent felony” or a “serious drug offense,” as defined by the ACCA’s provisions.  

Similarly, the Guidelines provide a sentence enhancement for defendants convicted of a “crime of violence” or “controlled substance offense” if they have two prior felony convictions for a “crime of violence” or a “controlled substance offense,” as defined by the Guidelines’ provisions. This Comment limits its discussion to the ACCA’s “violent felony” definition and the Guidelines’ “crime of violence” definition, collectively referred to as the “violent felony provisions.”  

1. The Violent Felony Provisions

Under the ACCA, a violent felony is defined as:

[A]ny 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. . . .

However, the Supreme Court’s 2015 decision in Johnson II rendered the final clause—“or otherwise involves conduct that presents a serious potential risk

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30. 18 U.S.C. § 924(e)(1); see William Wray Jr., *Why Logic, Experience, and Precedent Compel the Demise of Mandatory Sentencing Statutes*, 18 Roger Williams U. L. Rev. 139, 142–43 (2013) (discussing the ACCA and its sentence enhancement provisions for armed career criminals); see also United States v. Dixon, 805 F.3d 1193, 1199 (9th Cir. 2015) (vacating and remanding the district court’s finding that the defendant had three previous “violent felony” convictions under the ACCA).


32. See 18 U.S.C. § 924(e); USSG § 4B1.1(a). Each statute has its own definition of what constitutes a violent felony and felony drug offense. Compare 18 U.S.C. § 924(e)(2)(B); with USSG § 4B1.2(a). However, the Guidelines’ “crime of violence” definition is nearly identical to the ACCA’s “violent felony” definition, and courts apply the same analysis to the definitions’ identically-worded clauses. See Rutsky, supra note 4, at 856 (“[C]ourts have interpreted crime of violence and violent felony as interchangeable terms.”).

of physical injury to another”—unconstitutionally vague. Thus, to constitute a violent felony under the ACCA, a crime must fall within the scope of clause (i) or be “burglary, arson, or extortion, [or] involve[] use of explosives.”

Similarly, under the Guidelines, a crime of violence is defined as:

[ A]ny 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).  

As in the ACCA, prior to Johnson II, the Guidelines included the phrase “or otherwise involves conduct that presents a serious potential risk of physical injury to another,” but the Federal Sentencing Commission removed it in 2016. The first clause in both the ACCA’s definition and the Guidelines’ definition is referred to as the “force clause.” The second clause in both definitions is referred to as the “enumerated felonies clause,” and the last clause, which was removed from both definitions, is referred to as the “residual clause.”

34. § 924(e)(2)(B)(ii).
35. See Johnson v. United States, 135 S. Ct. 2551, 2557, 2563 (2015) (holding that the ACCA’s residual clause is “unconstitutionally vague” and that “imposing an increased sentence under the residual clause of the [ACCA] violates the Constitution’s guarantee of due process”).
36. 18 U.S.C. § 924(e)(2)(B); see Johnson II, 135 S. Ct. at 2563.
37. USSG § 4B1.2(a).
38. USSG app. C supp., amend. 798 (comparing the Guidelines’ previously existing and amended violent felony provisions).
39. See Wray, supra note 30, at 143 (using the terms “Force Clause,” “Enumerated Felonies Clause,” and “Residual Clause”). The force clause is also referred to as the “elements clause.” See, e.g., United States v. Owens, 672 F.3d 966, 968 (11th Cir. 2012); Sentencing Guidelines for United States Courts, 81 Fed. Reg. 4741, 4742 (proposed Jan. 27, 2016) (hereinafter FEDERAL REGISTER NOTICE) (referring to the first provision of the crime of violence definition as the “elements clause”).
40. See Wray, supra note 30, at 143.
41. See generally Holman, supra note 9 (discussing the difficulty for federal courts to interpret the residual clause and the clause’s impact on sentencing laws, and suggesting an interpretation of the clause in light of the Supreme Court’s holding in Begay v. United States, 553 U.S. 137 (2008), abrogated by Johnson II, 135 S. Ct. 2551). The residual clause has caused much confusion in the field of sentence enhancements because of its broad language. Id. at 213. In Begay, “the Supreme Court
2. The Authority of the Guidelines

While both the ACCA and the Guidelines are federal sentencing tools, courts are permitted to depart from the Guidelines, making them more advisory than the ACCA.\(^{42}\) Although there is debate regarding the authority of the Guidelines, the Guidelines permit federal courts to classify defendants as career offenders and issue sentence enhancements.\(^{43}\) Thus, whether the Guidelines are advisory or mandatory is irrelevant for the purpose of understanding what statutory construction warrants a sentence enhancement for repeat offenders.\(^{44}\) Further, most federal courts use the same analysis to determine if a violation of a criminal statute constitutes a violent felony pursuant to the ACCA or a violent crime pursuant to the Guidelines.\(^{45}\) Because the same

limited this residual clause to crimes that involve ‘purposeful, violent, and aggressive’ conduct.” Holman, supra note 9, at 211. However, this holding was followed by Johnson II, which nullified the ACCA’s residual clause altogether. See Johnson II,135 S. Ct. 2557.

42. See Booker v. United States, 543 U.S. 220, 266–67 (2005). In Booker, the Supreme Court held that courts could use discretion when applying the Guidelines, yet its advisory nature is still debated, and courts rarely depart from the Guidelines’ sentencing range. See id.; Regina Stone-Harris, How to Vary from the Federal Sentencing Guidelines Without Being Reversed, 19 Fed. Sent’g REP. 183, 183–85 (2007) (noting that, despite the Supreme Court holding that the Guidelines are advisory, courts are still bound in some ways to the Guidelines’ sentencing ranges). Prior to Booker, “sentencing rules [were] mandatory and impose[d] binding requirements on all sentencing judges.” Booker, 543 U.S. at 233. However, even after Booker, the Court in Molina-Martinez v. United States noted: “Even if the sentencing judge sees a reason to vary from the Guidelines, ‘if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense the basis for the sentence.’” 136 S. Ct. 1338, 1345 (2016) (emphasis in original) (quoting Peugh v. United States, 569 U.S. 530, 542 (2013)). The Court in Molina-Martinez also noted that the “Guidelines’ central role in sentencing means that an error related to the Guidelines can be particularly serious,” and a “retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence.” Id. at 1345–46 (quoting Peugh, 569 U.S. at 544). All this is to say, the authority of the Guidelines and a court’s limited ability to delineate from the Guidelines’ sentencing range are contested issues. See Stone-Harris, supra, at 183. Despite the debate, the Guidelines still advise (albeit, strongly advise) judges on a defendant’s sentence—as “the Guidelines require the judge to state the specific reasons for imposing a sentence outside the applicable sentencing range”—and designate defendants as career offenders based on the type of offense committed. Sentencing Guidelines, 40 GEO. L.J. ANN. REV. CRIM. PROC. 711, 734–45 (2011).

43. USSG § 4B1.1; see also Amy Baron-Evans et al., Deconstructing the Career Offender Guideline, 2 CHARLOTTE L. REV. 39, 40 (2010) (discussing the authority of the Guidelines: “Sentences recommended by the career offender guideline are among the most severe . . . ”).

44. See Litman, supra note 11, at 46–47. Litman notes that, although judges are not “required to impose a sentence within the recommended guidelines range . . . [m]any more defendants are subjected each year to the career offender Guideline than to the ACCA.” Id. She also notes that courts interpret the Guidelines and ACCA’s violent crime provisions the same and apply the same inquiry to both to determine if a conviction constitutes a violent felony. Id. at 46.

45. See Baron-Evans, supra note 43, at 71 (noting that courts of appeal treat “violent felony” and
analysis is used, what is a violent felony in the context of the ACCA typically is a crime of violence in the context of the Guidelines. 46 Accordingly, cases involving the Guidelines are equally as helpful as those involving the ACCA to determine what statutory language permits an enhanced prison sentence for repeat child abusers. 47

Another characteristic that distinguishes the Guidelines from the ACCA is the "Application Notes" that are tied to specific provisions of the Guidelines. 48 The Application Notes are sometimes referred to as "commentary" and aid the courts in interpreting the Guidelines' provisions. 49 The relevant commentary tied to the Guidelines' "crime of violence" definition is:

"crime of violence" in the ACCA and the Guidelines the same because the Supreme Court's precedent "indicate[s] that the definitions are close enough that precedent under the former must be considered in dealing with the latter" (quoting United States v. Polk, 577 F.3d 515, 519 n.1 (3d Cir. 2009)); see also United States v. Terrell, 593 F.3d 1084, 1087 n.1 (9th Cir. 2010) ("The definition of 'violent felony' under the ACCA is nearly identical to the definition of 'crime of violence' under § 4B1.2 of the Guidelines, so we have interpreted these provisions in a 'parallel manner,'" and "the analysis applies equally to § 4B1.2 [and the ACCA]." (quoting United States v. Jennings, 515 F.3d 980, 990 n.11 (9th Cir. 2008)); James v. United States, 550 U.S. 192, 206 (2007) (stating that the Guidelines' "definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony'"), overruled on other grounds by Johnson II, 135 S. Ct. 2551.

46. See Rutsky, supra note 4, at 856. The exception to this is each statute's enumerated offenses clause. Id. at 857. These clauses list offenses that per se constitute a "violent felony" or "crime of violence." See Wray, supra note 30, at 144–46. As the ACCA has a different (and shorter) list of offenses than the Guidelines, these convictions are not interchangeable. See Holman, supra note 9, at 238–39. For example, a defendant can be convicted for a "forcible sex offense" pursuant to the Guidelines' enumerated offenses clause, but this would not constitute a violent felony under the ACCA, because "forcible sex offense" is not one of the offenses enumerated in the ACCA. Compare 18 U.S.C. § 924(e)(2)(B)(ii) (2006) (enumerating the crimes that constitute a violent felony as "burglary, arson, or extortion," or those "involving use of explosives"), with USSG § 4B1.2(a)(2) (enumerating the crimes that constitute a crime of violence as including "a forcible sex offense"). Instead, the sentencing court would have to determine if the "forcible sex offense" statute is within the scope of the ACCA's "force clause." See infra Section III.A (explaining the new scope of the force clause).

47. See Rutsky, supra note 4, at 856; see also United States v. Tyler, 580 F.3d 722, 724 n.3 (8th Cir. 2009) ("Although the Gordon court was analyzing whether an offense constituted a 'violent felony' under the Armed Career Criminal Act, we employ the same test to decide whether an offense constitutes a 'crime of violence' under the Sentencing Guidelines because the definitions of 'violent felony' and 'crime of violence' are virtually identical." (citing United States v. Gordon, 557 F.3d 623, 626 (8th Cir. 2009))

48. USSG § 4B1.2; see Baron-Evans, supra note 43, at 88–90 (discussing the Application Notes of the Guidelines, referring to this section as the Guidelines' "commentary"). Baron-Evans discusses how the Commission, purported with drafting and amending the Guidelines, used the commentary to expand the scope of the Guidelines. Id.

49. See USSG § 1B1.7 (discussing the Guidelines' commentary sections and how the courts are to use the commentary when deciding a defendant's sentence); Stinson v. United States, 113 S. Ct. 1913, 1915 (1993) (discussing the purpose of the Guidelines' commentary and the commentary's authority in sustaining a conviction based on the offenses listed in the commentary).
“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.50

Although the Guidelines’ commentary is purposed with interpreting or explaining a specific section, it “is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline.”51 The commentary of the Guidelines’ “crime of violence” definition carries the same authority as the actual text of the Guidelines.52

If a crime constitutes a violent felony pursuant to the ACCA or the Guidelines, it counts as one of the two or three necessary offenses that make a repeat offender eligible for a sentence enhancement—these crimes are often referred to as “predicate offenses.”53 Even if an offender intentionally abuses children more than three times, the offender might still be ineligible for an enhanced federal prison sentence because the statute criminalizing the conduct does not fall within the scope of the violent felony provisions.54

50. USSG § 4B1.2 cmt. n.1. This revision was largely in response to Johnson II. See Remarks of Chief Judge Patti B. Saris, U.S. Sent’g Comm’n 1, 3 (Dec. 9, 2016), http://www.ussc.gov/sites/default/files/pdf/Amendment-process/public-hearings-and-meetings/20161209/remarks.pdf.
51. Stinson, 113 S. Ct. at 1915. The purpose of the commentary is to “interpret the guideline,” “suggest circumstances which . . . may warrant departure from the guidelines,” and “provide background information.” USSG § 1B1.7.
52. See Baron-Evans, supra note 43, at 88–90.
53. Predicate Offense, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “predicate offense” as “[a]n earlier offense that can be used to enhance a sentence levied for a later conviction. Predicate offenses are defined by statute and are not uniform from state to state”). For example, pursuant to the ACCA, if a felon is found illegally in possession of a firearm and has three predicate offenses of either a “violent felony” or “serious drug offense,” he will be sentenced as an Armed Career Criminal and be subject to a minimum sentence of fifteen years. 18 U.S.C. § 924(e); see Holman, supra note 9, at 215–17.
54. See Myn S. Reyes, Mandatory Restitution for Enticing a Minor for Sexual Purposes: Additional Punishment or Compensation for the Victim?, 24 Am. U. J. Gender Soc. Pol’y & L. 401, 429 (2016). It should be noted that many states have their own recidivism laws, so even if a repeat offender is ineligible for an enhanced prison sentence at a federal prison, the offender may be caught in the state’s recidivism net. See Anthony Nagorski, Arguments Against the Use of Recidivist Statutes That Contain Mandatory Minimum Sentences, 5 U. St. Thomas J.L. & Pub. Pol’y 214, 216–19 (2010). However, states’ recidivism laws alone are insufficient to protect children from repeat offenders. See
In order to properly write child abuse statutes, legislatures must understand the analysis used by federal courts to determine which offenses constitute a violent felony pursuant to the ACCA or the Guidelines, including the Guidelines’ commentary.\textsuperscript{55} The most opportune time to study the federal courts’ analysis of these sentencing laws is when prisoners petition a sentence enhancement under the ACCA or the Guidelines and allege that one of their prior convictions does not constitute a predicate offense.\textsuperscript{56} The case law produced from these prisoner petitions outlines what sentencing courts look for in a criminal statute to make an offender eligible for an enhanced prison sentence.\textsuperscript{57}

B. How Prisoners Challenge Sentence Enhancements

When challenging a sentence enhancement, prisoners can either directly appeal their career-offender designation or file a Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255, more commonly referred to as a “2255 Petition.”\textsuperscript{58} A direct appeal is heard by the respective circuit court, while a 2255 Petition is heard by the district court that issued the original sentence.\textsuperscript{59}

David Schultz, No Joy in Mudville Tonight: The Impact of “Three Strike” Laws on State and Federal Corrections Policy, Resources, and Crime Control, 9 CORNELL J.L. & PUB. POL’Y 557, 559, 572, 579, 580 (2000) (noting the “infrequent use of three strikes laws by twenty two states” and that “the lack of the use of the [three strike] law in all but one jurisdiction” has prevented states from realizing the intended benefits, one of which is apprehending “habitual violent offenders”).

\textsuperscript{55} See Jennifer Lee Koh, The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime, 26 GEO. IMMIGR. L.J. 257, 286–89 (2012) (noting the divide between legislatures drafting statutes and judges interpreting statutes, specifically in cases involving the violent felony provisions of the ACCA and the Guidelines, because of the complex statutory interpretation these laws require).


\textsuperscript{58} Id. at 1620–22 (discussing the legal paths prisoners can take to challenge a prison sentence, specifically referencing sentences under the ACCA). Gabay outlines the procedural limitations on prisoners challenging their sentences, including: the statute of limitations placed on direct appeals, the procedural challenges of filing successive 2255 Petitions, and the impact a change in substantive law has on a prisoner’s right to legally challenge a sentence enhancement. Id. at 1622–24.

\textsuperscript{59} Id. at 1621 n.71, 1623. If the time for direct appeal expired or inmates already lost on direct
When appeals or 2255 Petitions are filed in response to a change in substantive law, courts must revisit the petitioner’s conviction to determine if the change in law affected the conviction.\textsuperscript{60} \textit{Johnson I} and \textit{Johnson II} had this exact effect.\textsuperscript{61} The Court’s holdings in these cases limited the scope of the ACCA’s violent felony provision, thereby also limiting the scope of the Guidelines’ violent crime provision.\textsuperscript{62} As such, many prisoners previously convicted of a violent felony under either of these statutes are entitled to a review of their conviction.\textsuperscript{63} Now, if a court finds that a prisoner’s past conviction no longer constitutes a predicate offense under the ACCA or Guidelines, the prisoner is eligible for resentencing or release.\textsuperscript{64} Although many of these petitions are being rightfully granted,\textsuperscript{65} prisoners convicted of child abuse are eluding a sentence enhancement—not because the offense was non-
violent, but because of poorly written statutes.\textsuperscript{66} For example, statutory rape in Tennessee, sexual assault of a minor in Vermont, child molestation in Georgia, and taking indecent liberties with a child in Kansas no longer constitute predicate offenses in light of Johnson II, regardless of whether these offenses were committed violently.\textsuperscript{67}

Despite the negative impact the Johnson holdings had on statutes purported with protecting children, the prisoner appeals filed in the wake of these cases provide a template for state legislatures to draft more effective child abuse statutes.\textsuperscript{68} With each appeal filed in response to Johnson I or Johnson II, courts around the country must meticulously work through the same analysis to determine which crimes constitute violent felonies under the ACCA or the Guidelines.\textsuperscript{69} Through this process, federal courts are simultaneously creating a roadmap for legislatures to draft child abuse statutes that will yield a


\textsuperscript{67} See Lance, 208 F. Supp. at 885 (finding that statutory rape no longer constitutes a crime of violence under the Guidelines after the Supreme Court’s holding in Johnson II; thus, offenders are no longer eligible for federal sentence enhancements); Daye, 571 F.3d at 237–38 (holding that sexual assault of a minor under Vermont law constituted a violent felony within the meaning of the ACCA), abrogated by Johnson II, 135 S. Ct. 2551 (2015); Kirk, 2016 WL 6476963, at *9 (holding that child molestation under Georgia law no longer constitutes a violent felony under the ACCA in light of Johnson II); Sylva, 2016 WL 7320917, at *5 (finding that taking indecent liberties with a child under Kansas law no longer constitutes a violent felony under the ACCA in light of Johnson II).

\textsuperscript{68} Cf. Howard A. Davidson, Confronting Child Abuse, 12 UPDATE ON L. RELATED EDUC. 21, 23 (1988) (“Existing laws and regulations should be reviewed to see how they could protect children without resorting to overbroad and imprecise language.”). Because most courts determine if a defendant’s prior conviction constitutes a “violent felony” or “crime of violence” behind “closed doors,” a court’s reasoning as to why certain statutes fall within the scope of the ACCA or the Guidelines is not readily available to legislatures, making the fallout from Johnson II a prime season for legislatures to openly observe how courts determine what constitutes a predicate offense for sentencing enhancement purposes. See, e.g., Fugitt v. United States, No. C16-5423-RBL, 2016 WL 5373121, at *4 (W.D. Wash. Sept. 26, 2016) (“When a sentencing court accepts a stipulation that a defendant’s prior convictions constitute violent felonies under the ACCA, typically no record exists explaining whether his prior convictions fit the elements clause, the enumerated offenses clause, or the residual clause. The court makes the final determination, but the parties evaluate the relationship between the defendant’s prior convictions and the violent felony clauses behind closed doors.”).

\textsuperscript{69} See DeLong, supra note 64 listing the holdings from direct appeals or 2255 Petitions that were filed in light of Johnson I and II, categorizing the holdings according to the challenged criminal statutes, and recording which statutes no longer constitute violent felonies within the ACCA or the Guidelines.)
sentence enhancement for offenders who have intentionally used physical force against children.\textsuperscript{70}

C. How Federal Courts Determine if a Prior Crime Constitutes a Violent Felony

Each time a federal court reviews these direct appeals or 2255 Petitions filed in response to \textit{Johnson I} or \textit{Johnson II}, legislatures get a glimpse of how criminal statutes are interpreted.\textsuperscript{71} Reviewing the federal courts’ analysis in these cases reveals which statutory phrasing places certain criminal conduct within the scope of a career offender designation, and which phrasing sweeps too broadly and excuses egregious crimes from sentence enhancements.\textsuperscript{72} Courts use two approaches to determine if a criminal statute constitutes a violent felony within the ACCA or the Guidelines: the “categorical approach” and the “modified categorical approach.”\textsuperscript{73}

1. The “Categorical Approach”

The categorical approach is used for “indivisible” criminal statutes.\textsuperscript{74} These are statutes with a defined set of elements that, if satisfied, render a conviction.\textsuperscript{75} In indivisible statutes, a specific element may include various

\textsuperscript{70} See Holman, supra note 9, at 213. After \textit{Johnson II}, courts must determine if the prior crime fits within the scope of the two remaining clauses. See Sady & Schroff, supra note 11, at 58 (noting the potentially “profound effects” of the Supreme Court’s holding in \textit{Johnson II} because it limited the scope of the ACCA).

\textsuperscript{71} See DeLong, supra note 64.

\textsuperscript{72} See, e.g., United States v. Gomez, 690 F.3d 194, 201–03 (4th Cir. 2012) (resentencing the defendant because her child abuse conviction for burning the bottoms of her baby’s feet did not constitute a violent felony due to the statute’s broad language); Holman, supra note 9, at 213.

\textsuperscript{73} Taylor v. United States, 495 U.S. 575, 576–77 (1990) (establishing the categorical approach and a deviation of the categorical approach, and discussing when each approach should be used to determine if a crime constitutes a predicate offense for the purpose of a sentence enhancement). Although Justice Scalia did not use the term “modified categorical approach” in Taylor, the approach became termed as such over time. \textit{Id.}; Nick Poli, \textit{Three Strikes and You’re Out . . . Maybe: “Violent Felonies” and the Armed Career Criminal Act} in United States v. Vann, 54 B.C. L. REV. E-SUPPLEMENT 201, 204–05 (2013).

\textsuperscript{74} Descamps v. United States, 570 U.S. 254, 257–58 (2013). This was the first time the Court made the formal distinction between divisible and indivisible statutes. Roth, supra note 2, at 105; see also Ted Koehler, \textit{Assessing Divisibility in the Armed Career Criminal Act}, 110 MICH. L. REV. 1521, 1536 (2012) (noting that “divisibility is a prerequisite for departing from the categorical approach” and applying the modified categorical approach).

\textsuperscript{75} Descamps, 570 U.S. at 283 (2013) (Alito, J., dissenting) (discussing the majority’s “distinction
ways of being satisfied, but regardless of how the element is satisfied, the conviction and penalty are the same.\(^{76}\) When applying the categorical approach, courts look at the elements of the criminal statute in question and compare its elements with the federal sentencing laws’ violent felony provisions.\(^{77}\) The elements of the criminal statute in question must be “the same as, or narrower than” the corresponding elements of the violent felony provision.\(^{78}\) The criminal statute cannot punish conduct that qualifies as a violent felony and conduct that does not.\(^{79}\) If the statute “criminalizes a broader swath of conduct,” then the crime is not a categorical match—it “fail[s] to satisfy [the] categorical test”—and does not constitute a violent felony.\(^{80}\) Under this approach, courts will not consider the facts of the offense: “the prior conviction must be a violent felony as a matter of law—not just a felony committed in a violent manner in that particular case.”\(^{82}\)

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76. Kari Hong, The Absurdity of Crime-Based Deportation, 50 U.C. DAVIS L. REV. 2067, 2102–03 (2017) (“Put another way, a divisible statute is one that creates several different crimes. An indivisible statute, by contrast, simply enumerates the different manners by which a singular crime can be committed.”); see also infra note 82.

77. Descamps, 570 U.S. at 257–58 (applying the categorical approach to the ACCA); Holman, supra note 9, at 216; see also DeLong, supra note 64 (listing courts that applied the categorical approach to determine if criminal convictions also constituted violent felonies for the purpose of sentence enhancements).

78. Descamps, 570 U.S. at 257.

79. United States v. Gnijeda, 581 F.3d 1186, 1189 (9th Cir. 2009); Descamps, 570 U.S. at 257–58.

80. Descamps, 570 U.S. at 258; see also Roth, supra note 2, at 100 (“If that offense swept no more broadly (or was narrower) than the generic version of the offense, then a conviction for the prior offense categorically would count as an ACCA predicate felony.”).

81. Taylor v. United States, 495 U.S. 575, 599–601 (1990). Even if the crime was unambiguously committed through violence, the facts will not be considered in determining if the crime constitutes a predicate offense for sentence enhancements purposes. See Poli, supra note 73, at 205–06; Koh, supra note 55, at 260 (“Significantly, the traditional categorical approach avoids inquiry into the conviction’s underlying facts.”).

82. Holman, supra note 9, at 213. David C. Holman, author of Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act, gives the example of witness tampering to explain how courts use the categorical approach to determine if the violation of a specific statute constitutes a violent crime. Id. To commit witness tampering, a person must induce another to testify falsely or not testify at all, an act that does not require the use of violence. Id. However, one can easily commit the crime in a violent way, such as killing witnesses to prevent their testimony from being heard. Id. Yet, that level of violence “does not make the crime legally or categorically violent because the government never had to prove an element of violence to secure a conviction.” Id. Thus, a court that convicts the defendant in the above scenario for witness tampering could not simultaneously convict the defendant of a violent felony because the witness tampering statute does not categorically match the violent felony provision of either the ACCA or the Guidelines. Id.
2. The “Modified Categorical Approach”

Courts use the “modified categorical approach” when the defendant violates a divisible statute, which is a statute that includes two or more alternative elements, including one that satisfies the violent felony provision and one that does not.83 In attempting to explain this approach, the Court in Descamps v. United States gives the example of a burglary statute that “involves entry into a building or an automobile,” stating, “[i]f one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not,” then the statute is divisible.84 The sentencing court can then incorporate a “limited class of documents . . . to determine which alternative formed the basis of the defendant’s prior conviction.”85 The court can only consult certain documents commonly referred to as “Shepard-approved documents,”86 which include, inter alia, “charging documents, plea agreements, transcripts of plea colloquies, judicial findings of fact and conclusions of law, jury instructions, and verdict forms.”87 The court then “compare[s] the elements of the crime of conviction (including the alternative element used in the

83. Descamps, 570 U.S. at 257 (“We have previously approved . . . the ‘modified categorical approach’—when a prior conviction is for violating a so-called ‘divisible statute.’”); see Koh, supra note 55, at 286 (noting that “courts agree that consulting the record of conviction is permissible where the statute of prior conviction is ‘divisible’”).

84. Descamps, 570 U.S. at 257. The term “generic offense” or “generic crime” means “the offense as commonly understood.” Id.

85. Id. The range of documents that can be accessed by the courts was largely in debate until Shepard v. United States, which limited the types of documents courts are permitted to consult to determine which part of a statute the defendant violated. 544 U.S. 13, 16 (2005); see also Roth, supra note 2, at 103–04.

86. United States v. Maria-Acosta, 780 F.3d 1244, 1251 (9th Cir. 2015). The Shepard Court added much-needed boundaries to the unwieldy modified categorical approach. See Roth, supra note 2, at 103–104. There, Petitioner Shepard argued that his four prior burglary convictions fell outside the scope of the ACCA, and further argued that the trial court was not permitted to access police reports or complaint applications to determine if his guilty pleas regarding the burglaries fell within the ACCA’s definition of “generic burglary.” Shepard, 544 U.S. at 16. The Court reasoned that it was appropriate to apply the modified categorical approach to determine if Shepard’s priors constituted violent felonies; however, police reports and complaint applications are not the type of outside documents that the trial court may consult when applying the modified categorical approach. See id. at 17–22.

87. United States v. Vann, 660 F.3d 771, 778 (4th Cir. 2011); see Diuia M. Page, Forcing the Issue: An Examination of Johnson v. United States, 65 U. MIAMI L. REV. 1191, 1202–03 (2011) (clarifying the modified categorical approach). Page notes that “many circuits [used] the modified categorical approach inappropriately. For example, a court could look at a trial record to determine if the crime committed was a violent felony, or the court could look at the documents to determine if the individual acted violently when he committed the crime.” Id. However, “the second inquiry goes beyond the sentencing court’s allowable fact finding scope.” Id. at 1203; see also Shepard, 544 U.S.
case)” with the violent felony provision, as it would do under the categorical approach.⁸⁸ After the Supreme Court’s decision in Descamps, courts may not apply the modified categorical approach when the prior conviction has a single, indivisible set of elements—the court is only permitted to look at the elements of the crime and may not consult outside documents relating to the conviction.⁸⁹

The difficulty of determining which approach is appropriate in analyzing predicate offenses resulted in a fractured spread of district court opinions, and eventually, a circuit split.⁹⁰ Needless to say, statutory interpretation, the categorical and modified categorical approach, and divisible and indivisible statutes all yield tangled opinions from the courts that are dense, confusing, and not always accurate.⁹¹ To etch out a clear path of statutory reform for child abuse laws, it is imperative to understand how federal courts determine if the violation of a child abuse statute constitutes a violent felony within the meaning of the ACCA or the Guidelines, thereby making repeat child abusers eligible for federal sentence enhancements.⁹²

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at 16; Poli, supra note 73, at 205–06.

⁸⁸ Descamps, 570 U.S. at 257.

⁸⁹ Id. at 260–61; see supra notes 71–82 and accompanying text. Prior to the elimination of the residual clause, courts also needed to work through the Begay analysis to determine if the crime constituted a violent felony, a different analysis than the categorical approach. See supra note 41. This approach instructed the federal courts to consider whether the prior crime was “purposeful, violent, and aggressive,” an approach that examined “the ‘ordinary’ or ‘typical’ commission of the statutory offense,” rather than the elements of the offense. See Holman, supra note 9, at 214. This approach clearly conflicted with the categorical approach, which only assesses the elements of the statutes, not the surrounding facts or circumstances of how the crime is typically committed. Id.

⁹⁰ Descamps, 570 U.S. at 260 (granting certiorari “to resolve a Circuit split on whether the modified categorical approach applies to [indivisible] statutes” as it applies to divisible statutes). The circuit split was between the Ninth and Sixth Circuits, which held that the modified categorical approach may only be applied to divisible statutes, and the First and Second Circuits, which held the opposite. Id. at 260 n.1; see also 2016 REPORT TO CONGRESS, supra note 7, at 49–51 (discussing the complications in applying the categorical approach to determine what constitutes a violent felony for purposes of sentence enhancements).

⁹¹ See Koh, supra note 55, at 286–87 (discussing the disagreements among federal courts on how and when to apply the modified categorical approach, and addressing “two areas of conflict in the modified categorical approach”). Since its inception, when and how to apply the modified categorical approach has been a contentious issue for the courts, and prior to Johnson I, many circuit courts were using it inappropriately. See Page, supra note 87, at 1202–03.

⁹² See Roth, supra note 2, at 102 (discussing the importance of statutory construction to ensure a crime constitutes a violent felony within the meaning of the ACCA and the Guidelines).
III. THE NEW SCOPE OF THE VIOLENT FELONY PROVISIONS

A. Johnson I and the New “Force Clause”

In March of 2010, the Supreme Court in Johnson I limited the meaning of the term “physical force” within the context of the ACCA’s force clause.\(^\text{93}\) “[T]he Court rejected the established common-law meaning of ‘force,’ which included even the slightest offensive touching”—a meaning many circuits relied on to include certain crimes within the scope of the ACCA or the Guidelines.\(^\text{94}\) The Court built off its prior holding in Leocal v. Ashcroft\(^\text{95}\) and defined “physical force” as “violent force—that is, force capable of causing physical pain or injury to another person.”\(^\text{96}\) The Court reasoned that “[e]ven by itself, the word ‘violent’ in § 924(c)(2)(B) connotes a substantial degree of force.”\(^\text{97}\) The Court concluded that “mere unwanted touching” is not enough to constitute “physical force.”\(^\text{98}\) This holding restricted the statutory language capable

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93. Johnson I, 559 U.S. 133, 138-40 (2010). It is a question of federal law, not state law, to determine the meaning of each clause. Id. at 138. Other than Congress, the Supreme Court is the highest authority capable of defining the terms of each clause. Id. ("The meaning of 'physical force' in [the ACCA] is a question of federal law, not state law."). In Johnson I, Petitioner Johnson appealed the Eleventh Circuit’s holding that a Florida battery conviction constituted a violent felony under the ACCA. Id. at 137-38. The argument hinged on whether the element of "touch[ing] or strik[ing]" within Florida’s battery statute satisfied the level of force required by the ACCA’s violent felony definition. Id. at 137. The Court held that it did not and reversed the Eleventh Circuit’s holding. Id. at 145.

94. United States v. Owens, 672 F.3d 966, 970 (11th Cir. 2012) (noting that its past decisions regarding the force clause in the ACCA and the Guidelines used the common law meaning of “force” to determine what crimes constituted violent felonies, and finding the Johnson I decision limited the types of crimes that would make an offender eligible for a sentence enhancement); see also Johnson I, 559 U.S. at 139-40. The Court’s decision to abandon the common-law definition of "force" and adopt a more limited definition was critiqued by Justice Alito and other legal scholars as an inappropriate deviation from the standard canons of statutory interpretation. Id. at 146-47 (Alito, J., dissenting); see also Page, supra note 87, at 1203–04. The common law definition encompassed a broader range of conduct and many circuits were forced to revisit past decisions because certain crimes, such as state battery, no longer constituted a violent felony under the revised force clause. See, e.g., Owens, 672 F.3d at 972.


96. Johnson I, 559 U.S. at 140 (emphasis in original).

97. Id. (referring to the ACCA’s “violent felony” definition codified at 18 U.S.C. § 924(c)(2)(B) (2006)).

98. Id. at 142. It is interesting to note that the Court in Johnson I used the existence of the residual clause to support its holding. Id. The dissent argued that requiring criminal statutes to have “violent force” as an element will render convictions of many state felony-battery statutes outside the scope of the ACCA if these statutes cover both violent force and unwanted physical contact. Id. at 151–52 (Alito, J., dissenting). The Court countered the dissent’s argument by reasoning that the modified
of constituting a violent felony within the context of the ACCA.\textsuperscript{99} As a result, federal courts applied this holding to the force clause of both the ACCA and the Guidelines.\textsuperscript{100}

Prior to \textit{Johnson I}, the Supreme Court in \textit{Leocal v. Ashcroft} reviewed the ACCA’s “force clause” and reasoned that the phrase “‘use . . . of physical force against the person or property of another’—most naturally suggests a higher degree of intent than negligent or merely accidental conduct.”\textsuperscript{101} The majority of circuit courts interpreted \textit{Leocal} to suggest that proving an element of recklessness is not enough to meet the elements of the force clause—the crime must require proof that the offender acted with intent and was not merely reckless.\textsuperscript{102} In light of \textit{Leocal} and \textit{Johnson I}, a crime constitutes a violent felony under the force clause only if the statute has “as an element the use of violent force,” meaning “force capable of causing physical pain or injury to another person,” and the offense requires a higher mental component than negligence.\textsuperscript{103}

B. \textit{Johnson II} and the End of the Residual Clause

In 2015, the Supreme Court, in \textit{Johnson II},\textsuperscript{104} invalidated the residual clause in the ACCA’s “violent felony” definition.\textsuperscript{105} The Court found that the

\textsuperscript{99} See Page, supra note 87, at 1210 (critiquing the Court’s decision to limit the force clause in \textit{Johnson I}).

\textsuperscript{100} \textit{Id.} at 1196; see supra note 45.

\textsuperscript{101} \textit{Leocal v. Ashcroft}, 543 U.S. 1, 9 (2004).

\textsuperscript{102} See, e.g., United States v. McMurray, 653 F.3d 367, 374 (6th Cir. 2011) (relying on \textit{Leocal} to find that “reckless conduct does not constitute a ‘crime of violence’”); United States v. Torres-Villalobos, 487 F.3d 607, 616 (8th Cir. 2007) (same); Fernandez-Ruiz v. Gonzalez, 466 F.3d 1121, 1130 (9th Cir. 2006) (en banc) (same); United States v. Portela, 469 F.3d 496, 499 (6th Cir. 2006) (same); Oyebanji v. Gonzalez, 418 F.3d 260, 264–65 (3d Cir. 2005) (same); Bejarano-Urrutia v. Gonzalez, 413 F.3d 444, 447 (4th Cir. 2005) (same).

\textsuperscript{103} \textit{Johnson I}, 559 U.S. at 140, 142.

\textsuperscript{104} \textit{Johnson II}, 135 S. Ct. 2551. The Government argued that Johnson was eligible for an enhanced federal sentence under the ACCA’s violent felony provision because he had three prior felony offenses, including firearm possession. \textit{Id.} at 2556. Johnson argued, and the Court agreed, that the ACCA’s residual clause is unconstitutionally vague. \textit{Id.} at 2556–60.

\textsuperscript{105} \textit{Id.} at 2563.
residual clause was unconstitutionally vague because it failed to give notice of what crimes could result in federal sentence enhancements, and thus violated a criminal defendant’s due process.\(^{106}\) Following Johnson II, the United States Sentencing Commission removed the residual clause from the “crime of violence” definition because it “determined that the residual clause . . . implicates many of the same concerns cited by the Supreme Court in Johnson [II] . . ."\(^ {107}\) The amendment became effective on August 1, 2016.\(^ {108}\) Accordingly, the current violent felony provisions of the ACCA and the Guidelines are limited to a force clause and an enumerated offenses clause.\(^ {109}\)

In addition to eliminating the residual clause in the aftermath of Johnson II, the United States Sentencing Commission amended the enumerated offenses clause and added to the Application Notes of the Guidelines’ “crime of violence” definition.\(^ {110}\) These amendments resulted in yet another change to the scope of the “crime of violence” provision.\(^ {111}\)

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106. Id. at 2557.
107. Federal Register Notice, supra note 39, at 4743 (providing notice to Congress of the amendments the Sentencing Commission made to the Guidelines, which became effective August 1, 2016).
108. See U.S. Sentencing Guidelines Manual, app. C supp., amend. 798 (U.S. Sentencing Comm’n 2016). It is notable that the Supreme Court held in Beckles v. United States, 137 S. Ct. 886 (2017), that the Guidelines are not subject to void for vagueness challenges, thus the residual clause of the Guidelines is not void. Id. at 897. However, the Court’s holding only impacts prisoners who were sentenced under the residual clause of the Guidelines prior to the August 1, 2016 amendment. See Leah M. Litman & Shaqueer Rahman, What Lurks Below Beckles, 111 NW. U.L. Rev. 555, 562–63 (2017). The United States Sentencing Commission’s decision to eliminate the residual clause in 2016 impacts any future determinations of what constitutes a predicate offense. Id.; see also Federal Register Notice, supra note 39, at 4743. As such, this Comment focuses on the current provisions of both the ACCA and the Guidelines and assesses what statutes fall within confines of these present-day provisions. See Litman & Rahman, supra, at 562–63 (noting that Beckles impacts prisoners sentenced before the Sentencing Commission amended the Guidelines in 2016: “It also matters little that the Sentencing Commission deleted the Guideline’s residual clause in a recent amendment because the Commission did not apply that amendment retroactively. Therefore, defendants who were sentenced before that amendment became effective on August 1, 2016 would still be subject to the residual clause . . .” (emphasis in original)).
109. See 18 U.S.C. § 924(e)(1) (2012); USSG § 4B1.2(a); Federal Register Notice, supra note 39, at 4743 (“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.’”); see also supra notes 45–46 and accompanying text (noting that the same analysis is applied to both the ACCA’s violent felony provision and the Guidelines’ crime of violence provision to determine if a crime constitutes a predicate offense for sentence enhancement purposes).
110. See USSG app. C supp., amend 798; Federal Register Notice, supra note 39, at 4743.
111. See Federal Register Notice, supra note 39, at 4743–45. See generally DeLong, supra note 64 (discussing the changes in law that impact the scope of the ACCA’s violent felony provision).
C. The Enumerated Offenses Clause and the Guidelines’ Application Notes

Although Johnson I and Johnson II did not directly impact the ACCA’s enumerated offenses clause, the Federal Sentencing Commission amended the Guidelines’ enumerated offenses clause in light of Johnson II.112

Prior to Johnson II, the Guidelines’ “violent crime” provision included the enumerated offenses of: burglary, arson, extortion, offenses involving the use of explosives, or conduct that presents a serious potential risk of physical injury to another.113 After the 2016 revision, the enumerated offenses clause was amended to include: “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).”114 In addition, the United States Sentencing Commission amended the Application Notes by moving some of the previously listed offenses to the enumerated offenses clause and expanding on which crimes fall within the definition of a “forcible sex offense.”115

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112. See USSG app. C supp., amend. 798; Federal Register Notice, supra note 39, at 4743–45 (discussing the changes made to the enumerated offenses clause and the additions to the corresponding commentary). Under the current version of the ACCA, the enumerated offenses clause does not include child endangerment, abuse, or sexual abuse crimes. See 18 U.S.C. § 924(c)(1). However, the Guidelines listed “forcible sexual offenses” in its enumerated clause, which “includes offenses with an element that consent to the conduct is not given or is not legally valid.” Federal Register Notice, supra note 39, at 4744. Further, the new commentary includes sexual abuse of a minor and statutory rape within the enumerated offense of “forcible sexual offenses” so long as the statute under state law includes an element of force. Id. The Guidelines’ expansion on forcible sexual offenses provides more protection than the ACCA’s limited enumerated offenses clause and, accordingly, if the offense in question is a sexual offense against a child, the Guidelines provide a greater opportunity for courts to prescribe sentence enhancements to child predators. USSG § 4B1.2(ii) cmt. n.1; see also Reyes, supra note 54, at 404–11 (discussing the ramifications of Johnson II for sexual abuse victims); Sady & Shnoff, supra note 11, at 58–60.

113. See USSG app. C supp., amend. 798.

114. USSG § 4B1.2(a). Prior to Johnson II, the Guidelines defined a violent crime as:

[A]ny 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 . . .; [2] is murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortive extension of credit, burglary of a dwelling, or involves the use of explosives . . .; or [3] otherwise involves conduct that presents a serious potential risk of physical injury to another.

USSG app. C supp., amend. 798 (citations omitted).

115. USSG app. C supp., amend. 798. The United States Sentencing Commission based its revisions on court cases that revealed confusion over the application of certain provisions, the holding in Johnson II, analysis of offenders sentenced in 2014, and studies demonstrating that some convictions (namely, burglary of dwelling and involuntary manslaughter) typically did not involve physical violence. Id.
Because the enumerated offenses clause lists specific crimes, unlike the force clause, the categorical approach is applied in a slightly different manner.116 Under the categorical approach, the sentencing court compares “the elements of the crime of conviction” to “the elements of the generic crime.”117 If the defendant is convicted under the state counterpart for one of the enumerated offenses listed (aggravated assault, for example),118 then the court compares the elements of the state statute to the elements of “generic” aggravated assault.119 However, the ACCA and the Guidelines fail to define most of the enumerated crimes and offer little guidance on how to determine the elements of the “generic” offenses.120 Although the enumerated crimes are “familiar concepts” in criminal law,121 states define these offenses differently, and, without a general definition of these offenses, the courts lack a rubric to properly apply the categorical approach.122 Once the sentencing court over-

116. See Holman, supra note 9, at 216. The categorical approach is more “straightforward in its application” to the force clause than the enumerated offenses clause. Id. The prior crime of conviction must have as an element the use or attempted use of force, as clarified by Leocal and Johnson I. See id.; see also supra note 103 and accompanying text.

117. Descamps v. United States, 570 U.S. 254, 257 (2013); see also Federal Register Notice, supra note 39, at 4743; Roth, supra note 2, at 100 (explaining how the categorical approach is applied to the enumerated offenses clause, noting that “only prior convictions falling within the generic version of the offense” fall within the purview of the enumerated offenses clause).

118. USSG § 4B1.2(a)(2).

119. See Holman, supra note 9, at 216; Roth, supra note 2, at 100; see also United States v. Mayer, 162 F. Supp. 3d 1080, 1084 (D. Or. 2016) (describing how courts use the categorical approach to determine if an offense constitutes a violent felony through the enumerated offenses clause, making that specific offense a “‘categorical’ match” to the offense listed in the enumerated offenses clause). The court in Mayer used the common example of burglary. Mayer, 162 F. Supp. 3d at 1084. It explained that “[a] prior burglary conviction is a ‘categorical’ match if its statutory definition substantially corresponds to ‘generic burglary’ by including ‘the basic elements’ of the generic offense.” Id. (quoting Taylor v. United States, 495 U.S. 575, 599, 602 (1990)); see also United States v. Cisneros, 826 F.3d 1190, 1194 (9th Cir. 2016) (holding that “Oregon’s burglary statute is not a categorical match to generic burglary, because the Oregon statute defines building more broadly than does generic burglary and therefore criminalizes more conduct than generic burglary”).

120. See Federal Register Notice, supra note 39, at 4744 (stating that the Guidelines “rely on existing case law for purposes of defining the enumerated offenses”); 2016 Report to Congress, supra note 7, at 51 (“A . . . concern has arisen with respect to determining the ‘generic’ meaning of offenses, which can differ . . . .”); Holman, supra note 9, at 216.

121. Holman, supra note 9, at 216.

122. See 2016 Report to Congress, supra note 7, at 51; Roth, supra note 2, at 100 (“[T]here is a great deal of variation in how the several states define [the enumerated offenses].”). The United States Sentencing Commission remedied this shortcoming for several of the enumerated offenses by listing a federal statute to compare to the conviction in question. See USSG § 4B1.2(a)(ii) (listing “unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C.
comes this hurdle in the categorical analysis, and if it finds the prior conviction is a categorical match with the enumerated counterpart, the conviction constitutes a predicate offense.\textsuperscript{123}

Both Johnson I and Johnson II limited the types of crimes that previously fell within the scope of the ACCA and the Guidelines—crimes that previously warranted sentence enhancements for repeat offenders.\textsuperscript{124} In the aftermath of these cases, prisoners appealed their sentence enhancements and alleged that they were wrongfully sentenced because one or more of their predicate offenses no longer constituted a violent felony.\textsuperscript{125} Unfortunately, many of the

\textsuperscript{123} See Holman, supra note 9, at 215–17. Pursuant to the Guidelines, the collective enumerated offenses are: "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 18 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c)." USSG § 4B1.2. The Guidelines encompass more offenses than the ACCA and thus are the widest net to constitute a predicate offense. See Baron-Evans, supra note 43, at 88–90. However, even if a defendant is convicted of committing one of the enumerated offenses against a child, the state statute that the defendant is convicted under must still be a categorical match to fall within the scope of the Guidelines. See Roth, supra note 2, at 100; supra Section II.C.

\textsuperscript{124} See DeLong, supra note 64 (cataloguing the state crimes that no longer constitute violent felonies in light of revisions to the ACCA and the Guidelines); Sady & Schroff, supra note 11, at 58–59 (discussing the implications of Johnson II on state convictions that previously warranted sentence enhancements under the ACCA or the Guidelines, and outlining specific convictions that no longer constitute violent crimes); supra Section II.C.

\textsuperscript{125} See Leah M. Litman, The Exceptional Circumstances of Johnson v. United States, 114 Mich. L. Rev. First Impressions 81, 81 (2016) [hereinafter Exceptional Circumstances] ("Since Johnson . . . courts have been sorting out which of the currently incarcerated defendants who were sentenced under [the] ACCA’s residual clause may be resentenced."); Litman, supra note 11, at 45–47 (discussing the prisoners who have a valid “Johnson claim” after Johnson II). The prisoners allege that their violent felony convictions pursuant to either the ACCA or the Guidelines hinged on the existence of the residual clause, and that without the residual clause they would not be convicted of a violent felony. See, e.g., Movant’s Reply Brief in Support of Motion for Authorization Pursuant to 28
repeat offenders who received vacated or reduced sentences were previously convicted under state child abuse laws.\textsuperscript{126}

IV. THE FALLOUT FROM \textit{JOHNSON I} AND \textit{JOHNSON II}: CHILD ABUSE STATUTES THAT FALL OUTSIDE THE SCOPE OF FEDERAL SENTENCE ENHANCEMENTS

\textit{Johnson I} and \textit{Johnson II} had troubling ramifications for state criminal statutes that punished both violent and non-violent conduct.\textsuperscript{127} In his dissent to the Court’s holding in \textit{Johnson I}, Justice Alito prophetically noted that the holding would result in excusing repeat offenders who committed crimes that legislatures viewed as violent from receiving sentence enhancements.\textsuperscript{128} Indeed, in response to \textit{Johnson I}, the Second, Fourth, and Eleventh Circuits held

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\item U.S.C. \textsection \textsection 2255(b)(2) at 4, In re Marcus Crandell, No. 16-620 (4th Cir. Aug. 25, 2016), 2016 WL 4501101, at *4.
\item See supra note 12 (listing cases where prisoners convicted for crimes against children had their sentences vacated or reduced because the criminal statute was too broad to constitute a categorical match to the ACCA or Guidelines’ violent felony provisions).
\item See Koehler, supra note 74, at 1548–49 (noting that crimes that can be committed both violently and non-violently will “not amount to ACCA predicates” because they are too broad); Britteny Fieger, \textit{Syntax or Experience: What Should Determine if Sex Trafficking Qualifies as a Crime of Violence?}, 81 Mo. L. Rev. 1215, 1237 (2016) (noting that crimes, such as sex trafficking, that previously fell within the purview of the ACCA and Guidelines’ residual clauses, no longer constitute crimes of violence if the statute punishes both violent and non-violent conduct). This Comment discusses three cases to demonstrate the analysis federal courts are mandated to work through to determine whether a violation of a statute constitutes a predicate offense under the ACCA or the Guidelines. See infra Section IV.A. Although this Comment only examines three cases, it provides guidance on the analysis every federal court will work through when determining if a crime constitutes a violent felony. See infra Section IV.A. The statutory reform suggested in this Comment will not affect past offenders, but it will impact any future offenders. See Gabay, supra note 57, at 1615–17, 1620–24. Reforming or amending child abuse laws to allow a separate conviction for violent offenders will ensure that anyone who uses violence against a child will be eligible for sentence enhancements. See Davidson, supra note 68, at 23 (calling for child abuse laws to be drafted with more specificity to warrant more accurate sentences for child abusers).
\item See \textit{Johnson I}, 559 U.S. 133, 151–52 (2010) (Alito, J., dissenting). Justices O’Connor and Alito lamented the recent holdings regarding the statutory interpretation of prior crimes for the purposes of sentence enhancements under the Guidelines and the ACCA, well aware that violent offenders would be excused from enhanced penalties. See Shepard v. United States, 544 U.S. 13, 35–36 (O’Connor, J., dissenting) (objecting to the categorical approach’s “overscrupulous regard for formality,” which “forces the . . . sentencing court to feign agnosticism about clearly knowable facts” and “cannot be squared with the ACCA’s twin goals of incapacitating repeat violent offenders, and of doing so consistently notwithstanding the peculiarities of state law” (emphasis in original)); Descamps v. United States, 570 U.S. 254, 293 (2013) (Alito, J., dissenting) (“The Court’s holding will . . . frustrate fundamental ACCA objectives” such as ensuring “that violent, dangerous recidivists would be subject to enhanced penalties . . .”).
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that violations of specific child abuse statutes, ranging from child endangerment to aggravated sexual assault of a child, no longer satisfied the force clause because such statutes lacked an element of violent force.\footnote{See United States v. Van Mead, 773 F.3d 429, 437 (2d Cir. 2014) (holding that statutory rape under New York law “falls outside the scope of § 4B1.2” because it does not have an element of violent force and cannot be redeemed by the residual clause, thus it “is not categorically a ‘crime of violence’ pursuant to that Guidelines provision”); United States v. Owens, 672 F.3d 966, 972 (11th Cir. 2012) (holding that second-degree rape under Alabama law does not constitute a violent felony within the meaning of the ACCA); United States v. Gomez, 690 F.3d 194, 203 (4th Cir. 2012) (holding that child abuse under Maryland law does not constitute a violent felony within the meaning of the Guidelines); United States v. Harris, 608 F.3d 1222, 1233 (11th Cir. 2010) (holding that because Florida’s sexual battery of a child statute, “viewed categorically, imposes strict liability and covers such a broad range of conduct, we cannot say that a violation of it” constitutes a violent felony within the meaning of the ACCA).}

Judges then relied on the residual clause to salvage the child abuse statutes that did not meet the elements of the newly revised force clause, unaware that their holdings would soon be unhinged.\footnote{See, e.g., United States v. Velázquez, 777 F.3d 91, 98 (1st Cir. 2015); United States v. Terry, 494 F. App’x 991, 997 (11th Cir. 2012) (upholding the district court’s sentence enhancement because Owens and Harris did not preclude the court from finding that a Florida conviction for lewd and lascivious battery on a minor constituted a crime of violence under the residual clause). The court in Terry found it appropriate to apply the modified categorical approach, which allowed the court to look beyond the elements of the statute and find that the defendant’s violation of Florida’s statute constituted a violent felony under the residual clause, although it would not constitute a violent felony under the force clause. Terry, 494 F. App’x. at 997. The facts of the case reveal the type of conduct that is shielded from the scope of the ACCA and the Guidelines in light of Johnson II: Terry, the defendant “went into a 14-year-old’s bedroom and forced her to have sex with him. Further . . . a medical evaluation of the victim showed that she had ‘tearing, abrasion[s] and lacerations near her vagina.’” Id. at 992 (alteration in original). After the nullification of the residual clause, crimes such as this will not constitute predicate offenses, and defendants like Terry will elude sentence enhancements. See infra notes 131–32 and accompanying text.} After Johnson II, multiple circuit courts, along with many district courts, were forced to vacate or abrogate past decisions that held certain child abuse laws constituted violent felonies under the residual clause.\footnote{See, e.g., Ramirez v. Lynch, 810 F.3d 1127, 1138 (9th Cir. 2016) (holding that child abuse under California law does not constitute a “crime of violence” in light of Johnson II); Howard v. United States, 754 F.3d 608, 609–10 (8th Cir. 2014) (holding that first-degree carnal abuse was a violent felony conviction within the meaning of the ACCA), vacated, 135 S. Ct. 2927 (2015); United States v. Gomez, 690 F.3d 194, 203 (4th Cir. 2012) (vacating the sentence of a woman who was convicted for burning the bottoms of her baby’s feet, because the child abuse statute she was convicted under no longer constituted a violent felony); United States v. Daye, 571 F.3d 225, 237 (2d Cir. 2009) (holding that sexual assault of a minor under Vermont law constituted a violent felony within the meaning of the ACCA), abrogated by Johnson II, 135 S. Ct. 2551 (2015). The Arkansas statute in Howard involved a person over the age of eighteen engaging in sexual intercourse with a person less than fourteen years old. Howard, 754 F.3d at 609–10.} Thus, the offenders in these cases were not eligible for sentence enhancements, even though many of them violated child
abuse statutes by using physical force against a child.\textsuperscript{132}

The most effective way to ensure child abusers are eligible for sentence enhancements in light of \textit{Johnson I} and \textit{Johnson II} is to redraft or amend child abuse statutes to fall within the scope of the ACCA or the Guidelines.\textsuperscript{133} Reviewing cases of direct appeals or 2255 Petitions filed in light of \textit{Johnson I} and \textit{Johnson II} are essential for this type of statutory construction.\textsuperscript{134} The analysis used by federal courts to determine which offenses constitute a violent felony within the meaning of the ACCA or the Guidelines is relevant and helpful in: (1) revealing the type of terminology that designates a crime as a predicate offense, and (2) guiding statutory reform to ensure wilful violations of child abuse laws fall within the scope of sentence enhancements.\textsuperscript{135}

\textbf{A. Failing the Force Clause After Johnson I}

After several rounds of appeal, the Eleventh Circuit\textsuperscript{136} vacated a judgment against a man who had twelve convictions for illegal sexual acts with children,\textsuperscript{137} because the Court found that second-degree rape and second-degree sodomy under Alabama law did not constitute violent felonies in light of \textit{Johnson I}.\textsuperscript{138} In \textit{United States v. Owens}, defendant Owens was first sentenced as a career criminal by a district court because he was in possession of a firearm

\textsuperscript{132} See Berman, supra note 56; supra note 131.

\textsuperscript{133} See Koehler, supra note 74, at 1548–49 (noting that criminal statutes should “avoid overinclusiveness” because such statutes will not constitute predicate offenses).

\textsuperscript{134} See Litman & Rahman, supra note 108, at 577–79. When a prisoner challenges a Guideline sentence or an ACCA sentence based on \textit{Johnson II}, the courts compare the statute of conviction with the enumerated offenses clause and the force clause to determine if the conviction still constitutes a predicate offense under either the ACCA or the Guidelines. \textit{Id}. at 579. This process “explain[s] how [the] ACCA’s language (and the Guideline[s]’ language) should be applied, as a matter of statutory interpretation.” \textit{Id}. The residual clause is not coming back, so the only way to recover what was lost in \textit{Johnson II}, regarding the eligibility of child abuse statutes to prescribe sentence enhancements, is to draft or amend statutes with \textit{Johnson I} and \textit{Johnson II} in mind. See infra Section V.A.

\textsuperscript{135} See Davidson, supra note 68, at 23 (“Existing laws and regulations should be reviewed to see how they could protect children without resorting to overbroad and imprecise language. Less subjectivity is needed, and clearer guidance is required . . . . Wherever possible, catchall phrases like ‘without proper care’ or ‘injurious to the child’s welfare’ should be replaced with specific kinds of mistreatment . . . .”)

\textsuperscript{136} United States v. Owens, 672 F.3d 966 (11th Cir. 2012).

\textsuperscript{137} \textit{Id}. at 968. “Owens had[d] ten convictions for rape in the second degree and two convictions for sodomy in the second degree . . . .” \textit{Id}. Both statutes under which Owens was convicted protected children between the ages of twelve and sixteen. \textit{Id}. at 968–69.

\textsuperscript{138} \textit{Id}. at 971–72.
in violation of 18 U.S.C. § 924(e), and he had more than three prior violent felony convictions. Indeed, Owens had “ten convictions for rape in the second degree and two convictions for sodomy in the second degree, all under Alabama law,” which the district court found constituted violent felonies under the ACCA. After losing his appeal to the Eleventh Circuit, Owens appealed to the Supreme Court, which granted Owens’ petition for a writ of certiorari, vacated the judgment, and remanded his case to the circuit court in light of its decision in Johnson I. The Eleventh Circuit then vacated its past decision after applying the new, limited definition of the force clause to Alabama’s statutes.

Comparing the Eleventh Circuit’s analysis regarding second-degree rape before and after Johnson I demonstrates how Johnson I limited the force clause. The court first looked at the statute of prior conviction: pursuant to Alabama Code § 13A-6-62, second-degree rape entails a person of sixteen years or older engaging in sexual intercourse with a member of the opposite sex who is between the ages of twelve and sixteen, “so long as the offender is two years older than the victim.” According to the Alabama Code, sexual

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140. Owens, 672 F.3d at 967–68.
141. Id. at 968. The district court sentenced Owens to 293 months’ imprisonment. Id.
144. Owens, 672 F.3d at 972.
145. See infra notes 146–54 and accompanying text; see also Page, supra note 87, at 1197–202. Johnson I was the result of the Supreme Court granting certiorari to an Eleventh Circuit decision. Id. Page walks through the original Johnson I case from the trial court to the Supreme Court’s reversal, detailing the arguments on both sides of the force clause interpretation. Id.
146. Owens, 672 F.3d at 968–69. Although the Eleventh Circuit changed its holding regarding second-degree sodomy—first finding it constituted a violent felony and then finding it did not constitute a violent felony after Johnson I—the court analyzed Alabama’s second-degree rape statute more closely; thus, for the sake of brevity, this Comment will only review the second-degree rape analysis. See id. Further, second-degree sodomy was viewed as a lesser crime because a violation of this statute did not require penetration, only “sexual gratification.” ALA. CODE § 13A-6-64 (2016). Second-degree sodomy entails a person of sixteen years or older engaging in deviate sexual intercourse with another person between the ages of twelve and sixteen. Id. The Alabama Code defines “deviate sexual intercourse” as “[a]ny act of sexual gratification between persons not married to each other involving the sex organs of one person and the mouth or anus of another.” § 13A-6-60(2). A violation of either statute is a Class B felony in Alabama. §§ 13A-6-64(b), 13A-6-62(b).
intercourse "has its ordinary meaning and occurs upon any penetration, however slight; emission is not required." Additionaly, under Alabama law, a person under the age of sixteen "is legally deemed incapable of consenting to sexual intercourse." Under past Eleventh Circuit precedent, "physical force" within both the ACCA and the Guidelines was defined as "power, violence, or pressure directed against a person consisting in a physical act." Following this interpretation, the Eleventh Circuit held that "a person cannot engage in non-consensual sexual penetration with another without exerting some level of physical force." As Alabama's second-degree rape statute by definition can only be violated through non-consensual penetration pursuant to Eleventh Circuit precedent, it constituted a violent felony under the ACCA's force clause. However, after Johnson I, Owens appealed to the Supreme Court, which vacated and remanded the Eleventh Circuit's decision because Johnson I defined "physical force" more narrowly than the Eleventh Circuit did. The court concluded that because an offender did not need to use violent physical force against the victim to violate the Alabama second-degree rape statute, the violation of this statute did not constitute a violent felony under the force clause. According to the rules of statutory interpretation, the Eleventh Circ-

147. § 13A-6-60(1).
148. Owens, 672 F.3d at 969; see also § 13A-6-70(c)(1).
149. Owens, 672 F.3d at 969 (quoting United States v. Ivory, 475 F.3d 1232, 1235 (11th Cir. 2007), abrogated by Owens, 672 F.3d 966).
150. Id. (quoting Ivory, 475 F.3d at 1235).
151. Id. In Owen's first appeal before the Eleventh Circuit, the court reasoned that Alabama's second-degree rape statute also constituted a violent felony under the residual clause because nonconsensual sex with a minor always involved the use of physical force against the minor. United States v. Owens, 363 F. App'x. 696, 697 (11th Cir. 2010), vacated, 562 U.S. 1056 (2010). However, on remand, the Eleventh Circuit concluded it would be "intellectually dishonest" to use the residual clause to salvage its former holding because this finding would not comport with Johnson I's definition of "violent felony." Owens, 672 F.3d at 970. The court reasoned that because the statutes were strict liability offenses and the prosecutor did not need to prove mens rea, they could not fall within the scope of the residual clause. Id. at 972. As Johnson II eliminated the residual clause, it is no longer a vehicle to enhance prison sentences for violent offenders, thus this argument is moot and will not be addressed. See supra Section III.B.
153. Owens, 672 F.3d at 970–71.
154. Id. at 972.
circuit came to the correct conclusion, but the holding undoubtedly offends common sense.\textsuperscript{155} Owens did not merely have one conviction of second-degree rape, but ten—at the time of resentencing, he had a total of twelve convictions for illegal sexual acts with children.\textsuperscript{156} The limited scope of the force clause allows repeat child abusers like Owens to evade a federal sentence enhancement, despite a dozen convictions of child sexual abuse.\textsuperscript{157}

In a similar case, \textit{United States v. Velázquez}, First Circuit Judge Selya declined to cast Maine’s statute regulating gross sexual assault of a minor outside the purview of the Guidelines’ sentence enhancements, reasoning that “intimate sexual contact by an adult with a young child” is conduct that by “common-sense” constitutes willingness to use violence against a minor.\textsuperscript{158} The First Circuit reasoned that:

Typically, the offense conduct of a child molester demonstrates a willingness to impose himself on a person who is smaller, weaker, and inexperienced. Such a predator ... places a known and identifiable victim at serious risk. What is more, by engaging in intimate sexual acts with a child, the perpetrator inevitably places himself in a position to inflict harmful, even deadly, physical force on a vulnerable victim. Seen in this light, sexual offenses against children are not dissimilar to crimes that are unarguably crimes of violence, such as kidnapping and forcible rape. Cf. 18 U.S.C. § 2241 (classifying sexual acts with children under 12 alongside forcible rape as a form of “aggravated sexual abuse”).\textsuperscript{159}

Judge Selya’s argument reiterates the point that, although these child

\textsuperscript{155} See United States v. Velázquez, 777 F.3d 91, 98–99 (1st Cir. 2015) (explaining why sexual offenses against children under the age of fourteen should be considered violent felonies for the purposes of sentence enhancements). In \textit{Velázquez}, the First Circuit salvaged Maine’s statute through the now-void residual clause and affirmed a sentence enhancement given to a twenty-nine-year-old man who engaged in a sexual act with a twelve-year old. \textit{Id.} at 99–100.

\textsuperscript{156} Owens, 672 F.3d at 968. Unfortunately, none of his twelve convictions constitute predicate offenses after \textit{Johnson I}. \textit{Id.} at 972.

\textsuperscript{157} \textit{Id}. As a result of Owens, Owens’s career offender designation was removed and his case was remanded so he could be given a dramatically shorter prison sentence. \textit{Id}

\textsuperscript{158} \textit{Velázquez}, 777 F.3d at 98. Similar to Alabama’s second-degree rape statute, Maine’s gross sexual assault of a child statute is violated by a person who engages in a sexual act with a minor under the age of fourteen, and who is at least ten years older than the victim. \textit{Id.} at 93.

\textsuperscript{159} \textit{Id}. (internal citations omitted) (emphasis added).
abuse statutes do not typically satisfy the force clause as demonstrated in _Owens_, these offenses result in—or have a high potential of resulting in—the use of violence, even sexual violence, against children.160 Unfortunately, the _Velázquez_ Court was only able to find that Maine’s gross sexual assault statute constituted a violent felony under the residual clause, a vehicle no longer available to the courts.161 As Judge Selya rightly noted, many child abuse statutes inherently place the child victim in a vulnerable position—highly susceptible to violence—yet offenders who repeatedly violate statutes such as Alabama’s second-degree rape statute and Maine’s gross sexual assault of a minor statute will no longer be eligible for sentence enhancements as a result of _Johnson I_ and _Johnson II_.162

After the Eleventh Circuit’s holding in _Owens_, the Sixth Circuit in _United States v. Gomez_ held that a child abuse conviction under Maryland law does not constitute a crime of violence in light of _Johnson I_, vacating a woman’s sentence who “admitted that, to punish her son, she had burned the bottoms of his feet with a candle.”163 In _Gomez_, the defendant challenged her sentence enhancement, arguing that the sentencing court wrongly applied the modified categorical approach to determine if her prior child abuse conviction satisfied the elements of the force clause.164 The district court reasoned that the Maryland child abuse statute “is broad enough to encompass crimes of violence under some circumstances,” which permitted the court to consult outside documents to “determine what kind of child abuse conviction this was.”165 The

160. See id.; see also Reyes, supra note 54, at 421 (noting that “[s]exual activity with a minor is inherently harmful behavior,” but the use of force is often not an element in the statutes).
161. See _Velázquez_, 777 F.3d at 96–99; supra Section III.B.
162. See supra Sections III.A–B.
163. United States v. Gomez, 690 F.3d 194, 196 (4th Cir. 2012). The case references USSG § 2L1.2(b), which is the sentence enhancement provision for immigration and deportation cases. _Gomez_, 690 F.3d at 195. In turn, this provision in the Guidelines refers to a nearly identical definition for “crime of violence” as the definition in USSG § 4B1.2. USSG § 2L1.2 cmt. n.2. Further, the court notes that it treats the instant “crime of violence” definition under the Guidelines and “violent felony” definition under the ACCA the same in determining what constitutes a predicate offense: “We rely on precedents evaluating whether an offense constitutes a crime of violence under the Guidelines interchangeably with precedents evaluating whether an offense constitutes a violent felony under the ACCA, because the two terms have been defined in a manner that is substantively identical.” _Gomez_, 690 F.3d at 197 (internal citation and quotation marks omitted) (emphasis added). As such, the analysis applied in _Gomez_ closely mirrors the analysis applied by courts determining if a conviction constitutes a violent felony under the ACCA. See id.
164. _Gomez_, 690 F.3d at 195.
165. Id. at 196–97.
Sixth Circuit found the district court erred because the statute in question punished both forceful and non-forceful conduct and the statute was “indivisible,” which meant the modified categorical approach could not be used to determine if Gomez violated the statute in a forceful way.\textsuperscript{166} The reasoning in \textit{Gomez} demonstrates the stringent standards required for child abuse laws to fall within the scope of the force clause: it is not enough to prove that the perpetrator used force or violence against a child, the statute must be a clear categorical match, or yield itself to the modified categorical approach and contain an element of force that satisfies the \textit{Johnson I} definition, two standards that child abuse laws do not often satisfy.\textsuperscript{167}

In reaching its conclusion in \textit{Gomez}, the Sixth Circuit first reviewed Maryland’s then-existing child abuse statute, which rendered a conviction if the definition of “abuse” was satisfied.\textsuperscript{168} According to former section 35C of Maryland’s Penal Code, “abuse” was defined as:

(i) The sustaining of physical injury by a child as a result of cruel or inhumane treatment or as a result of a malicious act by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member, under circumstances that indicate that the child’s health or welfare is harmed or threatened thereby; or (ii) Sexual abuse of a child, whether physical injuries are sustained or not.\textsuperscript{169}

It is undisputed that Gomez’s conduct constituted abuse as defined in subsection (i).\textsuperscript{170} Indeed, the facts demonstrate physical force was used, but the facts of the conviction may not be consulted to determine if a prior conviction constitutes a violent felony.\textsuperscript{171} Regarding the divisibility of the statute, the

\textsuperscript{166} \textit{Id.} at 196.
\textsuperscript{167} \textit{Id.} at 199–201; see also Page, supra note 87, at 1210 (critiquing the \textit{Johnson I} decision and its resulting interpretation of the force clause as unnecessarily limiting the sentencing court’s discretion).
\textsuperscript{168} See \textit{Gomez}, 690 F.3d at 200–01 (analyzing Maryland’s former child abuse statute, which was codified at MD. CODE, art. 27, § 35C). Maryland’s child abuse statute has since been amended and recodified. See MD. CODE, CRIM. LAW § 3-601 (2017).
\textsuperscript{169} \textit{Gomez}, 690 F.3d at 201.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} See \textit{id.} at 198 (“Under the modified categorical approach, . . . we generally do not consider the particular facts disclosed by the record of conviction.” (quoting Shepard v. United States, 544 U.S. 13, 17 (2005))); see also Roth, supra note 2, at 117. Roth summarizes that, when determining if a conviction constitutes a predicate offense for federal sentence enhancement purposes, the courts can use either the categorical approach, which requires courts to “look at the elements of the prior offense
court found that the use of physical force is not required to violate the statute because "a defendant may be found guilty of physical child abuse by committing an affirmative act or by neglecting to act, neither of which necessarily requires the use of physical force against a child." 172 It then found that the statute contains no divisions between affirmative action and neglecting to act, so that a defendant cannot receive a different conviction if he affirmatively used physical force against the victim. 173 The court then concluded that because subsection (ii) of the statute is "indivisible," the facts of the conviction may not be consulted to determine if the crime constituted a violent felony. 174 It continued to find that a violation of the statute does not constitute a violent felony because "there is no divisible use-of-force element under [the statute]." 175 In other words, because Maryland’s child abuse statute does not require the use of physical force, it cannot constitute a violent felony under the force clause. 176

Further, the court noted that Maryland’s legislatures intended an expansive statute in order to "cover a wide range of conduct," stating that "the gravamen of child abuse under § 35C is the breach of custodial or familial trust[,] and not the particular manner in which the child was abused." 177 Unfortunately, in its attempt to protect children from a broader range of abuse, Maryland’s child abuse statute, and many similar statutes across the country, allow repeat offenders to evade sentence enhancements because of the loose statutory language. 178 Owens and Gomez illustrate that structuring statutes to permit the application of the modified categorical approach and understanding

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of conviction rather than the underlying conduct," or the modified categorical approach, which permits courts to "consult certain underlying judicial materials, to determine the basis for a conviction"—neither approach permits the court to assess the underlying facts of the conviction. Roth, supra note 2, at 117; see also Poli, supra note 73, at 205–06.

172. Gomez, 690 F.3d at 201.
173. Id. The court did note that the statute is divisible as to physical abuse and sexual abuse, but is not divisible as to forceful conduct and non-forceful conduct. Id.
174. Id. at 202.
175. Id. at 203.
176. Id. at 200–03.
177. Id. at 201–02 (internal quotation marks and citations omitted).
178. See id.; Wray, supra note 30, at 143–44 (critiquing the force clause as being "[v]iolently [u]nderinclusive," and discussing the ramifications of Johnson I for crimes that lack an element of force, but are "based on violent behavior."). It is undisputed that Gomez used the type of violent force to abuse her child that Johnson I requires for a crime to constitute a violent felony under the force clause, but the rules governing statutory interpretation disallow Gomez’s crime to fall within the purview of the ACCA or the Guidelines. Gomez, 690 F.3d at 200–03. The court in Gomez only noted that the district court concluded that Gomez’s conduct was forceful within the meaning of the force
the requirements of the force clause are imperative to drafting child abuse statutes that “cover a wide range of conduct” and constitute predicate offenses for the purposes of sentence enhancements. The urgency to apply these methods and restructure child abuse statutes set in after Johnson II nullified the last proverbial leg for child abuse statutes to stand on in the realm of federal sentence enhancements.

B. The Nullification of the Residual Clause

Of the few child abuse laws that constituted violent felonies in the pre-Johnson II era, the elimination of the residual clause stripped these enhancement tools of any ability to award sentence enhancements to repeat child abusers. Since Johnson II, district courts in the Eighth, Ninth, Fifth, and Sixth Circuits have held that certain child rape and molestation statutes no longer constitute violent felonies. In the wake of Johnson II, hundreds of 2255 clause, but did not affirm this conclusion. Id. at 197. However, the inference is not a difficult one to make—should the conviction rest solely on the facts, it is clear that intentionally burning a child’s feet constitutes the use of violent force because it is “force capable of causing physical pain or injury to” the child. See Johnson I, 559 U.S. 133, 140 (2010).

179. See Gomez, 690 F.3d at 201; see also Davidson, supra note 68, at 23.

180. See Reyes, supra note 54, at 425–26 (discussing the negative implications Johnson II will have on children who have been sexually abused). Reyes notes that most sexual abuse statutes enacted to protect children do not have an explicit element of force, but “[s]exual activity with a minor is inherently harmful behavior.” Id. at 421. As such, the residual clause provided a “catchall” for the crimes that lacked an element of force. See id. at 425–26; Matthew T. Merryman, Between Scalia and Charybdis, a Residual Odyssey: Examining the Ambiguous Path Past a 10-Year Maximum, 23 KAN. J.L. & PUB. POL’Y 120, 121 (2013) (noting that “[t]he residual clause acts as a catchall” clause, and is often turned to if a prior crime fails to constitute a predicate offense under the force clause or the enumerated offenses clause). Unfortunately, if victims of sexual abuse cannot show their offenders committed a violent felony within the meaning of the ACCA, they have very little chance of gaining monetary restitution from their abusers. Reyes, supra note 54, at 411–12 (noting that the statute that permitted victims of sexual abuse to collect restitutionary relief from their abusers is nearly identical to the ACCA’s violent felony provision, and courts applied the same analysis to both statutes).


182. See Fugitt v. United States, No. C16-5423-RBL, 2016 WL 5373121, at *6 (W.D. Wash. Sept. 26, 2016) (granting petitioner’s 2255 Petition because Washington’s first-degree child molestation statute “could only have qualified under the residual clause” and without that conviction, he did not have three prior violent felony convictions); United States v. Lance, 208 F. Supp. 3d 879, 883–85 (E.D. Tenn. 2016) (granting the defendant’s objection to the use of his previous conviction for purposes of his sentencing because rape of a child under Tennessee law does not qualify as a crime of violence under the force clause or enumerated offenses clause); Kirk v. United States, No. 4:05CR52-
Petitions were filed challenging the validity of prior convictions that hinged on the residual clause. These post-\textit{Johnson II} cases are particularly helpful in demonstrating the full and current analysis that courts work through to determine what constitutes a violent felony within the meaning of the ACCA and the Guidelines. Two cases that address the revised force clause, the application of the modified categorical approach, and the Guidelines’ amended enumerated offenses are \textit{United States v. Sylva}\textsuperscript{185} and \textit{United States v. Lance}.\textsuperscript{186}

In \textit{Sylva}, the court vacated Petitioner Sylva’s sentence enhancement under the ACCA because his prior Kansas conviction for indecent liberties with a child no longer constituted a violent felony in light of \textit{Johnson II}.\textsuperscript{187} The court first determined whether the statute was divisible or indivisible.\textsuperscript{188} The Kansas law at the time of Sylva’s conviction defined indecent liberties with a child to include any of the following conduct with a child under the age of sixteen:

\begin{footnotesize}
\begin{itemize}
    \item See, e.g., \textit{United States v. Winston}, 850 F.3d 677, 683–85 (4th Cir. 2017) (looking to the force clause and enumerated offenses clause to determine if a prisoner’s prior robbery conviction still constitutes a violent felony in light of \textit{Johnson I} and \textit{Johnson II}; \textit{Exceptional Circumstances}, supra note 125, at 81 (noting that courts have been faced with numerous prisoner petitions alleging that they are serving illegal sentences in light of \textit{Johnson II}). With every petition, a court must determine if the prior conviction falls within the enumerated offenses clause or the force clause by looking at the text of the statute under which the prisoner was convicted. See, e.g., \textit{Winston}, 850 F.3d at 683; United States v. Harris, 844 F.3d 1260, 1263–68 (10th Cir. 2017); \textit{see also} Roth, supra note 2, at 102 (stating that “the text of the criminal statute that provides the basis for a defendant’s prior conviction assumes paramount importance” when assessing whether a violation of the statute falls within the purview of the ACCA or the Guidelines).
    \item \textit{Sylva}, 2016 WL 7320917, at *5.
    \item \textit{Lance}, 208 F. Supp. 3d at 885.
    \item \textit{Sylva}, 2016 WL 7320917, at *5.
    \item See id. at *4.
\end{itemize}
\end{footnotesize}
(a) Sexual intercourse; or
(b) any lewd fondling or touching of the person of either the child or
the offender, done or submitted to with the intent to arouse or to sat-
isfy the sexual desires of either the child or the offender, or both; or
(c) soliciting the child to engage in any lewd fondling or touching of
the person of another with the intent to arouse or satisfy the sexual
desires of the child, the offender or another. 189

These three subsections represent three alternative means by which the
offense can be committed, rendering the statute divisible. 190 The court rightly
concluded that the modified categorical approach should be applied to deter-
mine “which of the alternative means constitute a basis for Sylva’s convic-
tion.” 191 Even under the modified categorical approach, the defendant’s actual
conduct may not be considered to make this determination, only the “charging
documents, plea agreement, jury instructions, or comparable judicial rec-
ords.” 192 Through the consultation of these records, the court determined “that
Sylva was found guilty by a jury of ‘unlawfully, knowingly, wilfully and fe-
loniously engag[ing] in sexual intercourse with a child . . . under the age of 16
years . . . with the intent to arouse or satisfy his sexual desires,’” which the
court summed up as statutory rape. 193 The court then noted, “the Eighth Cir-
cuit has consistently held that statutory rape convictions constitute a crime of
violence under the residual clause of the ACCA and [the Guidelines].” 194

189. Id. (quoting State v. Peltier, 819 P.2d 628, 635 (Kan. 1991)).
190. Id.
191. Id.
192. Id.
193. Id. at *4–5 (finding Sylva violated subsection (b)). The court referenced the Presentence Re-
port (PSR) to support its finding, but does not discuss which charging papers helped the court deter-
mine under which subsection of Kansas’ statutory rape statute the jury convicted Sylva. Id. at *4.
194. Id. at *5 (citing United States v. Dawn, 685 F.3d 790, 796–97 (8th Cir. 2012)). The court in
Dawn held that all the crimes listed in Arkansas’ over-expansive second-degree sexual assault statute
constituted crimes of violence because they included a substantial risk of physical force, or an element
of force, and the crimes were similar in risk to the enumerated offenses. See Dawn, 685 F.3d at 796–
98. The statute listed four alternative means of convicting a defendant of second-degree sexual assault.
Id. at 796. The problem with this holding is that the court never parsed out which subsections of the
statute fell within the force clause or the residual clause. See id. at 796–98. Although the court noted
that the first subsection of the statute, which penalized sexual contact “by forcible compulsion,” had
an element of physical force and is a crime of violence under the force clause, it concluded its analysis
by finding that the second-degree sexual assault statute is “categorically a crime of violence,” citing
the residual clause. Id. at 796, 798. This holding will undoubtedly result in district courts vacating
prisoners’ sentences that have predicate offenses of statutory rape or child molestation because these
convictions hinged on the residual clause. See, e.g., Sylva, 2016 WL 7320917, at *4–5; Kirk v. United
Without looking at the statutory definition of “sexual intercourse” to determine if it contained an element of force, the court concluded that, under Eighth Circuit precedent, statutory rape could no longer constitute a crime of violence in light of *Johnson II*.195

This decision demonstrates the devastating impact that *Johnson II* had in jurisdictions, like the Eighth Circuit, where binding precedent holds that statutory rape, and similar crimes involving sexual interaction with a minor, constitute violent felonies solely under the residual clause.196 The Eighth Circuit reasoned that child molestation and other sexual offenses involving minors are crimes of violence “because ‘[s]exual contact between parties of differing physical and emotional maturity carries a substantial risk that physical force may be used in the course of committing the offense.’”197 Thus, it held that sexual offenses involving minors penalize the type of conduct that the residual clause encompassed.198 The Eighth Circuit’s reasoning is sound: felony child molestation and statutory rape can be committed using physical force, and these crimes should constitute predicate offenses for offenders who use physical force to sexually abuse a child.199 However, the broad nature of these

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196. See id.; see also Serena M. Holder, *Resolving the Post-Begay Maelstrom: Statutory Rape as a Violent Felony Under the Armed Career Criminal Act*, 60 CLEV. ST. L. REV. 507, 525 (2012) (stating that, under the residual clause, “most courts were willing to find that statutory rape” constituted a violent felony because “it is well-settled that most ‘indecent sexual contact crimes perpetrated by adults against children categorically present a serious potential risk of physical injury’” (quoting United States v. Cadieux, 500 F.3d 37, 45 (1st Cir. 1998))); Holder notes that many circuits found that statutory rape constituted a violent felony solely under the residual clause. See id. After *Johnson II*, this “safe harbor” is cut off and courts are forced to cast sex crimes against minors outside the purview of the ACCA and the Guidelines. See id.; Norah M. Roth, *It’s Not Rape-Rape: Statutory Rape Classification Under the Armed Career Criminal Act*, 85 ST. JOHN’S L. REV. 1653, 1668–71 (2011) (hereinafter N. Roth) (discussing societal and legal implications of a court’s viewing statutory rape as a lesser offense than rape, particularly in regards to ACCA sentence enhancements).
197. *Dawn*, 685 F.3d at 796 (alteration in original) (quoting United States v. Banks, 514 F.3d 769, 780 (8th Cir. 2008)); see also United States v. Scudder, 648 F.3d 630, 634 (8th Cir. 2011) (“Child molestation . . . involves sexual contact between parties of differing maturity, and it presents a serious potential risk that the molester will use physical force on the child.”); United States v. Mincks, 409 F.3d 898, 900 (8th Cir. 2005).
198. See *Dawn*, 685 F.3d at 796.
199. See Holder, supra note 196, at 522–23; N. Roth, supra note 196, at 1668–71; Reyes, supra note 54, at 429 (arguing that crimes against children, especially sexual crimes, should always be viewed as “violent”). Holder argues that, although sex crimes against minors fall within the scope of the ACCA’s residual clause, such crimes also satisfy the force clause because “[t]he disparity in power, influence, and physical stature that exists in many adult-minor relationships can easily foster an atmosphere in which forceful, violent, or aggressive behavior will be utilized to ensure compliance.”
statutes led courts to use the “catch-all” residual clause to ensure violators are eligible for sentence enhancements under the ACCA and the Guidelines.\textsuperscript{200} Unfortunately, the safe harbor of the ACCA’s residual clause was eliminated by Johnson II, and the result has been that sentence enhancements are unavailable for repeat child abusers.\textsuperscript{201}

Similar to the court in Sylva, the court in United States v. Lance was tasked with determining whether Petitioner Lance’s prior conviction for rape of a child under Tennessee law constituted a crime of violence under the Guidelines.\textsuperscript{202} In Lance, the court first held that Johnson II applies to the Guidelines’ crime of violence definition, and accordingly, Lance’s child rape conviction may only “qualify as a ‘crime of violence’ either if it satisfies the use-of-force clause or if its elements match the elements of the generic definition of one of the enumerated offenses.”\textsuperscript{203} The court then identified the elements of Tennessee’s “rape of a child” statute: “(a) Rape of a child is the unlawful sexual penetration of a victim by the defendant or the defendant by a victim, if such victim is less than thirteen (13) years of age. (b) Rape of a child is a Class A felony.”\textsuperscript{204} The term “sexual penetration” was defined at the time of conviction as: “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of the victim’s, the defendant’s, or any other person’s body, but emission of semen is not required.”\textsuperscript{205}

Holder, supra note 196, at 522.

\textsuperscript{200} See Pfeifer, supra note 127, at 1220–26. Pfeifer states that “courts have . . . all concluded criminal sexual activity with a minor is categorically a violent crime,” supporting this claim with several circuit court cases finding convictions for statutory rape, sex trafficking of a minor, and other similar offenses constituted predicate offenses under the ACCA or Guidelines’ violent crime provisions. Id. at 1223. Unfortunately, Pfeifer notes, the majority of these holdings hinged on the ACCA’s residual clause, and after Johnson II, the courts no longer have the residual clause to rely on. Id. at 1222; see also Reyes, supra note 54, at 410–22.

\textsuperscript{201} See supra note 12; see also Alexandra Hunstein Roffman, The Evolution and Unintended Consequences of Legal Responses to Childhood Sexual Abuse: Seeking Justice and Prevention, 34 CHILD. LEGAL RTS. J. 301, 306 (2014) (describing past cases of child abuse, in two of which “[t]he perpetrators were both prior offenders who had served only finite sentences and, despite both making statements preceding the events indicating that they planned to commit the crimes, the community had no means of tracking their whereabouts” (emphasis added)).


\textsuperscript{203} Id. at 882

\textsuperscript{204} Id. at 883 (quoting TENN. CODE ANN. § 39-13-522 (1992)). The only substantive change to Tennessee’s rape of a child statute since 1992 is the requirement that the victim be more than three years old. See TENN. CODE ANN. § 39-13-522 (2018). The legislatures concurrently enacted § 39-13-531, which punished the rape of a child under the age of three. 2006 Tenn. Pub. Acts. ch. 890 § 23.

\textsuperscript{205} Lance, 208 F. Supp. 3d at 883 (quoting TENN. CODE ANN. § 39-13-501(7) (1989)).
The court held that the “the statute is indivisible for purposes of the present analysis” and applied the categorical approach, beginning with the force clause. \(^{206}\)

Citing Johnson I, the court held that “rape of a child . . . does not qualify as a crime of violence under the use-of-force clause.” \(^{207}\) The court reasoned that sexual penetration, by Tennessee’s definition, can occur through any “intrusion, however slight”; \(^{208}\) thus, one can be convicted of child rape without using physical force or causing pain to another, meaning the statute does not require an element of force. \(^{209}\) The court then turned to the enumerated offenses clause to determine if the statute was a categorical match to a “forcible sex offense,” which was listed in the Guidelines Application Notes at the time of Lance’s sentencing. \(^{210}\)

Like many of the enumerated offenses, the court found “[t]here is no authoritative statement of the generic definition of ‘forcible sex offenses’ in the Sixth Circuit.” \(^{211}\) Lance argued that the court should adopt the Johnson I definition of “force” to define “forcible,” which would require the statute to have an element of violent force. \(^{212}\) The court agreed with Lance’s argument, and held that the child-rape conviction did not qualify as a “crime of violence” under the force clause or the enumerated offenses clause because it did not have an element of violent force. \(^{213}\) The court even observed that the current

\(^{206}\) Id.

\(^{207}\) Id. at 884. However, there is a strong argument that any sexual act against a minor, regardless of consent, involves an element of force because of the disparity in power between the minor and the adult. See Holder, supra note 196, at 523. Holder argues that “[b]ecause minors cannot [legally] give consent, statutory rapes are arguably on equal footing with rapes involving the use or threat of physical force—the perpetrator continues with the act although they have not received any legally-recognized consent.” Id. Even if the minor consents to the sexual conduct, permitting this “consent-in-fact” to move statutory rape from a violent felony to a non-violent felony “would fly in the face of the intent behind every statutory rape statute” and would be the equivalent of saying “that persons under the age of sixteen cannot consent, except when they do consent.” Id. at 524 (quoting Aguilar v. Gonzales, 438 F.3d 86, 90 (1st Cir. 2006)).

\(^{208}\) Lance, 208 F. Supp. 3d at 883 (quoting TENN. CODE ANN. § 39-13-501(7)).

\(^{209}\) Id. The court also found that Sixth Circuit precedent supported its conclusion, but used it as secondary support. Id. at 884.

\(^{210}\) Id. Lance was convicted in 1995. Id. at 880–81.

\(^{211}\) Id. at 884. At the time of Lance’s conviction, the Guidelines had not yet been amended, and “forcible sex offense” was not defined as it is in the current version of the Guidelines. See id.; U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1. (U.S. SENTENCING COMM’N 2016).

\(^{212}\) Lance, 208 F. Supp. 3d at 884.

\(^{213}\) Id. at 885.
definition of “forcible sex offense” in the revised Guidelines\(^\text{214}\) covers state law convictions for sexual abuse of a minor “only if the sexual abuse of a minor . . . would have been an offense under [18 U.S.C. §] 2241(c).”\(^\text{215}\) Section 2241(c) requires the victim to be under the age of twelve, which is not required under the Tennessee child abuse statute, leading the court to conclude that, even under the current Guidelines, Lance’s prior child rape conviction did not constitute a violent felony because the statute was indivisible and did not require an element of force.\(^\text{216}\)

Johnson I dramatically limited the scope of the force clause, compelling courts to turn to the residual clause to make recidivist child abusers eligible for sentence enhancements.\(^\text{217}\) Indeed, it became a widespread judicial practice to find that sexual crimes against children constituted crimes of violence under the residual clause.\(^\text{218}\) Courts reasoned that a violation of child abuse statutes presented a serious potential risk of physical injury to the child because of the disparity in power and age.\(^\text{219}\) Now, courts are forced to cast child abuse laws outside the purview of federal sentence enhancements, despite the abuse being undeniably violent, as it was in Sylva, or involving the rape of a minor, as in Lance.\(^\text{220}\) Sylva and Lance are two of many cases that demonstrate the urgency for legislatures to undertake statutory reform of child abuse laws to protect our children against recidivist offenders.\(^\text{221}\)

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214. See USSG app. C supp., amend. 798.
215. Lance, 208 F. Supp. 3d at 885 (emphasis and alteration in original); USSG § 4B1.2 cmt. n.1. But see Holder, supra note 196, at 523–24 (arguing that long-standing legal assumptions warrant finding statutory rape and sex crimes against minors to meet the definition of the force clause). Holder does not address the post-Johnson I definition of “force,” but argues that common sense, societal concerns, and legal precedent all weigh in favor of finding that crimes involving sexual conduct with minors constitute violent felonies and should warrant federal sentence enhancements. See id. at 521–24.
216. See Lance, 208 F. Supp. 3d at 885.
217. See supra notes 66–67 (listing cases that held violations of child abuse laws constituted violent felonies or crimes of violence under the residual clause); see also Holder, supra note 196, at 524–26 (explaining why sex crimes against minors fit within the residual clause and pose a serious risk of physical injury to minors).
218. See Holder, supra note 196, at 525; supra notes 127–31 and accompanying text.
219. See supra notes 177–78 and accompanying text (explaining why legislatures draft expansive child abuse statutes); supra note 182 (listing cases from the Eighth, Ninth, Fifth, and Sixth Circuits that reduced or vacated the sentence enhancements of child abusers because, due to the broadness of the statute or nonexistence of an element of violent force, their convictions relied on the residual clause).
221. See supra note 182. Further, there are many cases where the defendant’s conviction was made
V. REDRAFTING CHILD ABUSE LAWS: A SIMPLE GUIDELINE

The Supreme Court claimed that the modified categorical approach would prevent violent offenders from eluding sentence enhancements.\textsuperscript{222} However, many statutes purposed with protecting children fall short of the complicated statutory construction required to make violent offenders eligible for sentence enhancements.\textsuperscript{223} Indeed, a multitude of federal courts found that child abuse laws, such as sexual molestation, statutory rape, and child abuse, no longer constitute violent felonies after Johnson \textit{I} and Johnson \textit{II}, although all of the statutes can be violated through the use of violent force.\textsuperscript{224} This strongly implies that these statutes were not drafted with federal sentencing in mind.\textsuperscript{225}

pursuant to the residual clause of the ACCA or the Guidelines. \textit{See}, e.g., United States v. Velázquez, 777 F.3d 91 (1st Cir. 2015); United States v. Terry, 494 F. App’x. 991, 992, 997 (11th Cir. 2012) (finding that the defendant’s conviction for lewd and lascivious battery of a minor constituted a violent felony under the now-void residual clause and noting that the victim had “tearing, abrasion[s] and lacerations near her vagina” (alteration in original)); United States v. Altsman, 89 F. App’x. 357, 360–61 (3d Cir. 2004) (holding that under Pennsylvania law, attempted kidnapping constitutes a violent felony under the residual clause of the ACCA); Cadieux v. United States, 350 F. Supp. 2d 275, 284–85 (D. Me. 2004) (holding that a defendant’s conviction under Massachusetts law for indecent assault and battery on a child under fourteen constituted a violent felony under the residual clause). Defendants in these cases can challenge their prior conviction just as the petitioners in\textit{ Lance, Kirk, Sylva,} and\textit{ Fugitt} did. \textit{See} Gabay, \textit{supra} note 57, at 1620–24.

\textsuperscript{222} \textit{Johnson I}, 559 U.S. 133, 144 (2010). The Government and dissent in \textit{Johnson I} argued that limiting the scope of the ACCA would render convictions under overly broad statutes outside the scope of the ACCA even if the defendant violated the statute in a violent way. \textit{See id}. The Court responded by saying: “This exaggerates the practical effect of our decision . . . [because] the ‘modified categorical approach’ that we have approved permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record.” \textit{Id} (internal citation omitted).

\textsuperscript{223} \textit{See}, e.g., Ramirez v. Lynch, 810 F.3d 1127, 1138 (9th Cir. 2016) (holding that child abuse under California law does not constitute a “crime of violence” because the statute “is not a divisible statute” and “[u]nder the categorical approach” it punishes a broader range of conduct than the “crime of violence” definition); United States v. Gomez, 690 F.3d 194, 201 (4th Cir. 2012) (holding that child abuse under Maryland law does not constitute a crime of violence under the Guidelines because the statute is “not divisible into forceful or nonforceful acts,” despite noting that one could violate the statute through “cruel or inhumane treatment” of a child or “malicious acts”).

\textsuperscript{224} \textit{See}, e.g., Ramirez, 810 F.3d at 1138 (holding that child abuse under California law does not constitute a “crime of violence”); United States v. Owens, 672 F.3d 966 (11th Cir. 2012) (holding that second-degree rape and second-degree sodomy of a minor under Alabama law do not constitute violent felonies under the ACCA); Gomez, 690 F.3d at 202–03 (holding that child abuse under Maryland law does not constitute a crime of violence under the Guidelines); \textit{Lance}, 208 F. Supp. 3d at 885 (holding that rape of a child does not constitute a crime of violence within the meaning of the Guidelines); \textit{see also} Koehler, \textit{supra} note 74, at 1548–49 (“Most formally indivisible statutes will not amount to ACCA predicates . . . even though the defendant could have violated that statute in a way that would amount to a crime of violence.”).

\textsuperscript{225} \textit{See} Koh, \textit{supra} note 55, at 286–87 (“Indeed, legislatures do not draft criminal statutes with the
Despite the Supreme Court’s assurance that violent repeat offenders would still be eligible for sentence enhancements, child abuse statutes repeatedly fall short of the language required for a violation of these statutes to constitute a predicate offense.\textsuperscript{226}

The first step a court takes to determine if a crime constitutes a violent felony is determining the statute’s divisibility.\textsuperscript{227} If a statute is indivisible, the court will apply the categorical approach; if it is divisible, the court will apply the modified categorical approach.\textsuperscript{228} Once the court narrows in on the exact section of the statute under which the defendant was convicted, it determines if that statutory conviction is within the scope of the violent felony definition.\textsuperscript{229} There are two ways child abuse statutes can fall within this scope: the force clause and the enumerated offenses clause.\textsuperscript{230} Legislatures must draft child abuse statutes with this process in mind.\textsuperscript{231}

A. Drafting Indivisible Statutes: An Unlikely Remedy

The simplest way to ensure that child abuse violations constitute predicate offenses is to draft a narrow, indivisible statute that satisfies the force clause or tracks one of the enumerated offenses.\textsuperscript{232} Regarding the force clause, an
indivisible statute must require "the use, attempted use, or threatened use of physical force against another person."233 Because the statute is indivisible, it cannot punish any conduct beyond the use of physical force (i.e., it cannot punish neglect or mere touching).234 This is an unrealistic remedy because legislatures draft child abuse statutes to encompass a broad array of conduct.235 The policy reasoning behind this motive is simple: protect children from every form of abuse.236 Broad statutes deter and punish any conduct that results in harm to children.237 These statutes do not focus on the means, but to draft the particular statute that served as the basis of the conviction"); 2016 REPORT TO CONGRESS, supra note 7, at 53 (stating that an offense "qualifies as a 'crime of violence' if it has as an element the use, attempted use, or threatened use of physical force against the person of another" or is an enumerated offense); see also Davidson, supra note 68, at 23 (emphasizing the importance for legislatures to apply to higher level of scrutiny when drafting child abuse laws, specifically noting the need to draft child abuse statutes that are specific, without using "catchall phrases").


234. See Descamps v. United States, 570 U.S. 254, 261 (2013); United States v. Lance, 208 F. Supp. 3d 879, 883 (E.D. Tenn. 2016) (referring to the term "however slight" as an indication that force is not required to violate the statute); see also Koehler, supra note 74, at 1549 ("Almost all ways of violating a statute would have to qualify as a crime of violence in order for the defendant's conviction to be classified as an ACCA predicate under a formally indivisible statute."); Roth, supra note 2, at 100 ("If that offense swept no more broadly (or was narrower) than the generic version of the offense, then a conviction for the prior offense categorically would count as an ACCA predicate felony."") (emphasis in original); supra Section II.C.1.

235. See United States v. Gomez, 690 F. 3d 194, 201 (4th Cir. 2012) (noting the reasons legislatures write broad child abuse statutes is to cover a large scope of conduct that is harmful to children); Jennifer Lynn Thompson, Criminal Child Abuse, FAM. ADVOC., Spring 2011, at 20, 22 (noting that "rape statutes have been drafted very broadly to include a number of acts," and legislatures are "working to" expand the scope of other child abuse laws to warrant a conviction from "simple neglectful or reckless acts"); see also Koehler, supra note 74, at 1549 (noting that over-inclusive statutes are more lenient to criminal defendants and rarely constitute ACCA predicate offenses).

236. See Steven Cobos, Child Abuse, 8 J. JUV. L. 452, 453 (1984) ("[T]he legislative purpose underlying [child abuse] statutes is to protect the physical, mental, and emotional well being of children."); Pfleger, supra note 127, at 1237–38 (noting the tension between drafting statutes that make it easy to convict sexual abusers and simultaneously make those abusers eligible for sentence enhancements under the ACCA or the Guidelines); Thompson, supra note 235, at 22. See generally John E.B. Myers, A Short History of Child Protection in America, 42 FAM. L.Q. 449 (2008) (providing a historical overview of child protection laws in America).

237. See Thompson, supra note 235, at 22; see also Elizabeth Ann Gibbons, Surveying Massachusetts' Child Abuse Laws: The Best Protection for Children?, 26 SUFFOLK U. L. REV. 107, 107–10 (1992). Gibbons notes that child abuse laws need to "provide broader protection for children," advocating for statutes that punish conduct beyond physical child abuse. Id. at 107. Gibbons argues for broad statutes to balance the state interests in preserving the family unit and protecting the child. Id. Although Gibbons agrees that child abusers have a "propensity" to continue in their abuse, she does not address sentencing concerns for repeat offenders. See id. at 108–09. But see Davidson, supra note 68, at 23 (calling for more precise language in child abuse laws).
on the end—they aim to protect children from harm, not only to punish offenders based on how they commit that harm.\footnote{See Cobos, supra note 236, at 453; Koh, supra note 55, at 286–87. Even before Johnson I and Johnson II, child abuse statutes lacked the statutory construction to constitute violent felonies within the meaning of the ACCA and the Guidelines. See, e.g., United States v. Thornton, 554 F.3d 443, 449 (4th Cir. 2009) (holding that a conviction for statutory rape under Virginia law does not constitute a violent felony within the meaning of the ACCA); United States v. Teague, 469 F.3d 205, 208 (1st Cir. 2006) (holding that the “Texas crime of child endangerment is not categorically a ‘crime of violence’ for ACCA purposes”). Legislatures unknowingly drafted statutes that cover a wide array of conduct in exchange for statutes that satisfy the standards of the ACCA and the Guidelines. See Davidson, supra note 68, at 23–24 (noting that one of the “most critical legal areas” in preventing child abuse is “evaluating whether the penalty structure for child abuse-related homicide, severe physical abuse, and sexual maltreatment sufficiently reflects the gravity of these offenses”). This is an unnecessary exchange—broad statutes can also be drafted with sentence enhancements in mind for violent and repeat offenders. See infra Section V.B.} Thus, drafting an indivisible statute that categorically satisfies the force clause severely limits the ability of these statutes to fulfill the purpose for which they are drafted.\footnote{See Gibbons, supra note 237, at 107–10; N. Dickon Reppucci & Carrie S. Fried, Child Abuse and the Law, 69 UMKC L. REV. 107, 109 (2000) (discussing state child abuse laws and finding that “states with broader definitions” give more deference to child protective service workers). Reppucci also comments on the broad and sometimes vague nature of child abuse laws. See Reppucci, supra note 239, at 109.}

The same reasoning applies to drafting indivisible statutes that satisfy the enumerated offenses clause.\footnote{See Pfleger, supra note 127, at 1237 (emphasizing the importance for Congress to address ambiguity in sex trafficking statutes and noting that, because “the crime could be committed by fraudulent means alone,” without violence, it cannot qualify as a crime of violence as it is not a categorical match).} The only enumerated offense that could act as a counterpart to child abuse statutes is the “forcible sex offense,” which is found in the Guidelines.\footnote{See U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (U.S. SENTENCING COMM’N 2016); see also United States v. Lance, 208 F. Supp. 3d 879, 884 (E.D. Tenn. 2016).} This enumerated offense covers state law convictions for sexual abuse of a minor “only if the sexual abuse of a minor . . . would have been an offense under [18 U.S.C. § 2241(c)].”\footnote{USSG § 4B1.2 cmt. n.1.} Section 2241(c) requires the victim to be either under the age of twelve or under the age of sixteen if the offender is four years older and the offense was committed by force or “other means” (offender renders the victim unconscious or drugs the victim against his or her will).\footnote{18 U.S.C. § 2241(b), (c) (2007).} For an indivisible state statute to constitute a forcible sex offense under the Guidelines, it can penalize the conduct punished in Section 2241(c) only, but nothing more.\footnote{See Descamps v. United States, 570 U.S. 254, 276–77 (2013); see also Roth, supra note 2, at
reasons drafting an indivisible statute that falls within the purview of the force clause is an unlikely remedy, drafting aggravated sexual abuse statutes that mirror the conduct of Section 2241(c) is an unrealistic solution for state legislatures who want to draft child abuse statutes to encompass a broad range of conduct. 245

Thus, the most realistic solution to the Johnson and Johnson problem is for legislatures to understand how to draft divisible statutes that contain alternative means of conviction that distinctly satisfy the force clause. 246

B. “Fitting” the Force Clause Through the Modified Categorical Approach

State legislatures want child abuse statutes to encompass a broad range of conduct for several public policy reasons: to ensure offenders are punished, to deter potential offenders, and to protect children from both intentional and unintentional harm. 247 Overly broad statutes will satisfy all these ends—but they will also keep repeat offenders outside the reach of the ACCA and the Guidelines. 248 The only possibility for an overly broad statute to constitute a violent felony is if the statute is divisible and the court can successfully apply

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245. See Thompson, supra note 235, at 22 ("In many jurisdictions, rape statutes have been drafted very broadly to include a number of acts that fit the definition."); see also Gibbons, supra note 237, at 107 (defining "child abuse" according to the terms used by state legislatures); Roffman, supra note 201, at 303. Roffman comments on the broadening definition of "child abuse," specifically focusing on the definition of "child sexual abuse." Roffman, supra note 201, at 303.

246. See Roth, supra note 2, at 102 ("The text of the criminal statute that provides the basis for a defendant’s prior conviction assumes paramount importance. Whenever a defendant’s prior conviction is based on a textually indivisible statute that is broader than the generic version of an ACCA felony, that conviction will not count for ACCA [or Guidelines] purposes, with no exceptions." (emphasis added)).


248. See, e.g., Pfleger, supra note 127, at 1237-38 (noting that "the broad interpretations of [the federal sex trafficking statute], while helpful when convicting sex traffickers, make it difficult to fit sex trafficking within the force clause"); see also United States v. Gomez, 690 F.3d 194, 201 (4th Cir. 2012) (noting that the reason the Maryland legislature wrote broad child abuse statutes was to cover a large scope of conduct that is harmful to children); Koehler, supra note 74, at 1549 (noting that "broadly written statutes" do not amount to ACCA predicates because "it is unlikely that all or almost all ways of violating such a broad, inclusive statute would be violent").
the modified categorical approach. As explained in earlier sections, confusion over the applicability of the modified categorical approach and the divisibility of statutes has plagued the courts since its inception. Despite this unsettled debate, the following outlines a general roadmap to provide a starting point for legislatures to draft effective child abuse laws.

The text of a divisible statute “expressly identifies several ways in which a violation may occur.” It is permissible for the statute to “encompass[] multiple categories of offense conduct—some of which would constitute a violent felony and some of which would not.” This is precisely why divisible statutes, as opposed to indivisible statutes, further the policies behind child abuse laws. These categories act as alternative elements that, if satisfied, each alone would amount to a conviction under the statute. For example, a clearly divisible child rape statute would criminalize sexual intercourse with a person under the age of sixteen and list the means of accomplishing this

249. See Koh, supra note 55, at 286–87 (noting the rarity of legislatures drafting divisible statutes and the difficulty for courts to appropriately apply the modified categorical approach).

250. See supra Section II.C.2. See generally Roth, supra note 2 (discussing the different approaches courts have used to find that a statute is divisible). Roth offers a more in-depth analysis of the modified categorical approach and the confusion it wreaks upon the court system. See id. at 102–05. She notes that even Justice Kagan’s opinion in Descamps described the purpose and application of the modified categorical approach as “all but resolve[d].” Id. at 102 (quoting Descamps v. United States, 570 U.S. 254, 260 (2013)).

251. See infra notes 252–73 and accompanying text.

252. Koehler, supra note 74, at 1536; see also Koh, supra note 55, at 286 (noting that “courts agree that the modified categorical approach may be used ‘where the statute of prior conviction is divisible’”).

253. United States v. Smith, 544 F.3d 781, 786 (7th Cir. 2008); see 2016 Annual National Seminar, supra note 227, at 1 (defining a divisible statute).

254. There are three clear points that warrant this conclusion: (1) child abuse statutes are broadly written to encompass a wide range of conduct, and are generally indivisible; (2) broad, over-inclusive and indivisible statutes rarely constitute predicate offenses; (3) if child abuse statutes were drafted with more specificity and yielded themselves to the modified categorical approach, repeat offenders would be eligible for sentence enhancements. See Thompson, supra note 235, at 22 (stating that the legislatures draft child abuse statutes to cover a broad range of conduct, and noting a shift for legislatures to eliminate the mens rea requirement in child abuse statutes); Koehler, supra note 74, at 1548–49 (“Most formally indivisible statutes will not amount to ACCA predicates . . . even though the defendant could have violated that statute in a way that would amount to a crime of violence.”); Davidson, supra note 68, at 23 (“Existing laws and regulations should be reviewed to see how they could protect children without resorting to overbroad and imprecise language.”).

255. See 2016 Annual National Seminar, supra note 227, at 1; Koehler, supra note 74, at 1536; Koh, supra note 55, at 286; Roth, supra note 2, at 101. To be convicted under a divisible statute, the jury must find that the defendant’s conduct satisfied a specific alternative element, rather than finding that, generally, the defendant’s conduct violated the statute, without specifying how they violated the statute. See, e.g., Ramírez v. Lynch, 810 F.3d 1127, 1133–34 (9th Cir. 2016).
conduct in separate subsections of the statute (for example: (a) through violent force; (b) through unwanted touching; (c) through mere touching). This hypothetical statute would be indivisible if it combined all the subsections into one list, without differentiating between the means of committing the sexual intercourse.

However, a divisible statute alone is not enough for child abuse to constitute a violent felony, as demonstrated in Gomez. Legislatures must provide an alternative element that satisfies the force clause for a court to apply the modified categorical approach to child abuse statutes. Accordingly, one of the alternative elements must be the use of force, meaning violent force that is capable of causing physical injury. California’s child abuse statute, California Penal Code § 273a(a), provides a template to demonstrate the statutory changes that will ensure a child abuse statute is divisible and contains an alternative element that satisfies the force clause. Section 273a(a) provides:

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256. See Koh, supra note 55, at 286 (using the example of a burglary statute); see also Rebecca Sharpless, Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law, 62 U. MIAMI L. REV. 979, 996-97 (2008) (discussing the divisibility of statutes and application of the modified categorical approach).

257. See Roth, supra note 2, at 101.

258. United States v. Gomez, 690 F.3d 194, 201 (4th Cir. 2012); see also United States v. Cabrera-Umanzor, 728 F.3d 347, 352 (4th Cir. 2013) (“General divisibility, however, is not enough; a statute is divisible for purposes of applying the modified categorical approach only if at least one of the categories into which the statute may be divided constitutes, by its elements, a crime of violence.”). The court in Gomez reasoned that the statute was divisible, but not divisible between forceful conduct and non-forceful conduct: “[The statute] can be divided into two categories: physical abuse and sexual abuse. Moreover, physical abuse can be divided further into subcategories: cruel or inhumane treatment, and malicious acts. But, notably, it is not divisible into forceful or nonforceful acts.” Gomez, 690 F.3d at 201.

259. See Roth, supra note 2, at 98–104 (discussing the Supreme Court’s introduction to the analytic term “alternative elements” and how these form the basis of divisible statutes); Cabrera-Umanzor, 728 F.3d at 352.

260. Johnson I, 559 U.S. 133, 140 (2010); see also Pfleger, supra note 127, at 1237 (explaining that sex trafficking under the Trafficking Victims Protection Act does not constitute a violent felony under the force clause because it can “be committed by force, fraud, or coercion.” (emphasis in original)). Pfleger notes that the statute penalizes the act of sex trafficking if committed through force or fraudulent means. Pfleger, supra note 127, at 1237. Because the statute that Pfleger references does not break up into alternative elements the ways sex trafficking can be committed, the statute is indivisible. See id.

261. See CAL. PENAL CODE § 273a(a) (2016); see also Thompson, supra note 235, at 22 (noting that legislatures are attempting to draft child abuse statutes that encompass a broader range of conduct). The broad language of California’s felony child abuse statute led the Ninth Circuit in Ramirez v. Lynch to hold that a violation of the statute did not constitute a crime of violence under the Guidelines. 810 F.3d 1127, 1138 (9th Cir. 2016).
Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment . . . 262

In 2016, the Ninth Circuit held in Ramirez v. Lynch that section 273a(a) was indivisible and not a categorical match to the Guidelines’ crime of violence definition.263 It first noted that, although this statute provides four alternative means for violating the statute,264 it does not clearly distinguish the four means as alternative elements to commit the offense, and a conviction does not require proving which of the four ways the statute was violated.265 Accordingly, the court concluded that the statute is indivisible.266 Further, the court reasoned, only the second prong (“inflicts . . . physical pain or suffering”) requires active, intentional conduct; the remaining three can be committed through passive or negligent conduct.267 Thus, the court concluded that the statute encompassed conduct that was beyond the scope of the Guidelines’ crime of violence definition because it can be violated through violent force and non-violent conduct, rendering it overly broad.268

However, small revisions to this statute can remedy the Johnson and Johnson problem that reared its head in Ramirez.269 The following statute

263. Ramirez, 810 F.3d at 1133–38; see also 2016 Annual National Seminar, supra note 227, at 1 (explaining how a statute can fall within the scope of the Guidelines’ crime of violence definition).
264. Ramirez, 810 F.3d at 1133–35. The court in Ramirez added bracketed numbers to demonstrate the four means of violating this statute. Id. at 1133.
265. See id. at 1135–36. The court explained that, in general practice, the jury only determines whether the defendant violated section 273a(a), without determining which of the four means embody the defendant’s conduct. See id. The court held that the four means did not represent four alternative ways to violate section 273a(a), making the statute indivisible. Id. at 1133–35.
266. Id. at 1135.
267. See id. at 1133.
268. Id. at 1133–34. Because most child abuse laws mirror the broad language of California’s felony child abuse statute, defendants convicted under such statutes will not be eligible for sentence enhancements after Johnson II. See Thompson, supra note 235, at 22 (commenting on the tendency for child abuse statutes to encompass a broad range of conduct); see also supra Part IV.
269. See Ramirez, 810 F.3d at 1138 (holding that felony child abuse under California law does not constitute a violent felony under the Guidelines); see also supra note 12 (listing cases that held child
properly divides the four means into alternative elements and emphasizes the required element of force:

Any person, who under circumstances or conditions likely to produce great bodily harm or death,
(i) willfully causes or permits any child to suffer, or
(ii) inflicts thereon unjustifiable physical pain through the use of force, or
(iii) inflicts thereon unjustifiable mental suffering
(iv) having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or
(v) willfully causes or permits that child to be placed in a situation where his or her person or health is endangered,
shall be punished by imprisonment . . . .

Separating the four means of violating the statute into five alternative elements, one of which must be proven for a conviction, clearly establishes the statute as divisible. Further, including "through the use of force" and limiting the element to physical pain satisfies the force clause. As such, if the facts indicate that a defendant intentionally used force to physically harm a child, a conviction can be rendered under subsection (2) that will make defendants eligible for federal sentence enhancements, should they repeat their behavior.

This is one of many state child abuse statutes that require revisions to ensure repeat child abusers are eligible for federal sentence enhancements. However, the proposed minor revision of section 273a(a) demonstrates that, despite the intricacies of statutory construction, it is possible to draft child

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270. See Ramirez, 810 F.3d at 1133–35 (discussing the statutory shortcomings of section 273a(a) in relation to constituting a crime of violence).
271. See id.; see also Pfleger, supra note 127, at 1237 (finding a human sex trafficking statute was indivisible because it listed alternative means of violating the statute, but not alternative elements, one of which must be proven).
272. See Ramirez, 810 F.3d at 1133–34; supra notes 96–100 and accompanying text (discussing the new scope of the force clause).
273. See Ramirez, 810 F.3d at 1133–34 (noting that the jury must find beyond a reasonable doubt that each element of the statute was violated, and noting that one of the elements must include the use of force). The Ninth Circuit noted that the key to constituting a violent felony is requiring the jury to agree upon the violation of a specific element of force, not just that the child was abused in one of the ways listed in the statute. See id. at 1134; see also Davidson, supra note 68, at 23.
274. See supra Part IV.
abuse statutes that contain “alternative elements” that fall within the scope of the ACCA and the Guidelines—even after Johnson I and Johnson II.275 Accordingly, the remedy to the Johnson and Johnson problem is not outside the reach of state legislatures;276 it can and should be remedied through understanding the complexities of the modified categorical approach and incorporating alternative elements that satisfy the requirements of the force clause so repeat child abusers are subject to enhanced penalties.277

VI. CONCLUSION

Johnson I and Johnson II drastically limited the court’s ability to prescribe sentence enhancements to offenders who repeatedly abuse children.278 The Court’s holding in these two cases cut off the well-worn paths that allowed child abuse to constitute a predicate offense for the purposes of sentence enhancements under the ACCA and the Guidelines.279 The result has been shorter sentences for offenders who have long histories of abusing children,280 along with offenders who have willfully harmed children through abuse or sexual molestation.281 Not only do these statutes now fail to prescribe enhanced penalties to these offenders, but they simultaneously fail to protect children from the offenders who evade enhanced prison sentences.282 However, the Johnson decisions provide rich case law for legislatures to draft more effective child abuse laws.283 Once legislatures acknowledge the need for statutory reform, amending child abuse laws can be accomplished by redrafting

275. See supra notes 270–73 and accompanying text.
276. See supra Part IV (discussing child abuse statutes that fall outside the scope of federal sentence enhancements in light of Johnson I and Johnson II).
277. See Davidson, supra note 68, at 23 (calling for legislatures to draft more specific child abuse laws); Koh, supra note 55, at 286–87 (noting the difficulty, but not impossibility, of legislatures drafting statutes with sentence enhancements in mind).
278. See supra Part III.
279. See supra note 12 (listing cases that held a child abuse law failed to constitute a violent felony in light of Johnson I or Johnson II).
280. See supra notes 163–79 and accompanying text.
281. See supra notes 136–62 and accompanying text.
282. See Gibbons, supra note 237, at 108 (“Two of the most troublesome components of child abuse are its proclivity for recurrence and its tendency to repeat from generation to generation.”) Gibbons discusses the cycle of child abuse and likelihood of past offenders being repeat offenders. Id.; see also Holder, supra note 196, at 530 (noting that casting statutory rape statutes outside the scope of federal sentence enhancements “will greatly reduce the protections against recidivist offenders afforded to minors by enhanced sentencing provisions”).
283. See supra Part V.
these statutes with divisibility in mind. Although effective reform is possible, the idealist cry to protect our children must battle the pragmatic force of the legislative process before this reform can be actualized—a battle that is not always won.

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284. See supra notes 270–73 and accompanying text.

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