CASE NO. 15-10283

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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UNITED STATES OF AMERICA, Plaintiff/Appellee, vs. GERALD LESLIE TATE, Defendant/Appellant.	D.C. No. 2:14-cr-384-APG-CWH (Nevada, Las Vegas)

Appeal from the United States District Court
for the District of Nevada

APPELLANT GERALD LESLIE TATE'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction in this case, pursuant to 18 U.S.C. § 3231, as district courts have original and exclusive jurisdiction over federal crimes. The district court issued final judgment on May 22, 2015, sentencing Appellant Gerald Tate to 120 months of incarceration and three years of supervised release. ER 1-13.

Mr. Tate filed a timely notice of appeal of the final judgment on May 28, 2015, challenging his sentence. ER 46-47. This Court has jurisdiction over Mr. Tate's appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which give federal circuit courts jurisdiction over all final decisions and sentences in the federal district courts.

ISSUES PRESENTED FOR REVIEW

I. Is remand for resentencing required under *Johnson v. United States*, 135 S. Ct. 2551 (2015), because Mr. Tate's California second degree robbery conviction is not a crime of violence under U.S.S.G. § 4B1.2?

II. Is Mr. Tate's 120-month sentence procedurally erroneous and substantively unreasonable?

A. Did the district court commit procedural error by using a preponderance of the evidence standard to apply two insufficiently proven sentencing enhancements?

1. Did the district court plainly err in using a preponderance of the evidence standard, when the two enhancements it applied had an extremely disproportionate effect on Mr. Tate's sentence?

2. Did the district court erroneously apply a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) when the government failed to prove Mr. Tate possessed the firearm in connection with Nevada Revised Statute § 200.481.2?

3. Did the district err in applying a two-level obstruction of justice enhancement under U.S.S.G § 3C1.1 when the government failed to prove Mr. Tate obstructed justice in the instant offense?

B. Is Mr. Tate's 120-month sentence substantively unreasonable because the district court failed to attribute proper weight to Mr. Tate's induction into a gang at age seven and gave improper weight to his pending state sentence and criminal history?

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND SENTENCING GUIDELINES

The relevant statutes and Sentencing Guidelines are provided in Appendix A, attached hereto.

STATEMENT OF THE CASE

A. Introduction

Most seven-year-olds are in first grade, learning how to spell and read small words, playing games like kickball and tag, and figuring out how to tie their own shoes. Appellant Gerald Tate was not blessed with the normalities of childhood.

When Mr. Tate was seven years old, he was "jumped" into[1] a notorious street gang.[2] Not long after, Mr. Tate became addicted to drugs, using marijuana for the first time at age ten. He dropped out of school in the seventh grade. Between the ages of thirteen and thirty-two, he was victimized by repeated shootings, suffering gunshot wounds to his head, ear, lower back, right thigh, left thigh, and right calf. He has attempted suicide numerous times, the first time at the age of fourteen. To this day, he suffers from untreated mental and emotional impairments.

Somehow, however, Mr. Tate has managed to survive. His family describes him as a good man and a caring father to his children, despite the challenges he has

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[1] Being "jumped in" "describes the initiation of a new gang member by current gang members (usually through physical assault)." *McCoy v. Stewart*, 282 F.3d 626, 630 n.4 (9th Cir. 2002); *see also United States v. Kamahele*, 748 F.3d 984, 994 (10th Cir. 2014) (getting "jumped in" to a gang occurs "when the recruit fights gang members to prove his toughness"); *United States v. Crenshaw*, 359 F.3d 977, 991 (8th Cir. 2004) (noting gang membership "earned by being 'jumped in[]"means to participate in a formal fight with an established gang member in front of witnesses).

[2] The name of the gang is withheld in this public filing, but is identified in the PSR at ¶ 84.

endured his whole life. When not in custody, he has worked as a construction worker, a stocker at Walmart, and a store owner.

Mr. Tate now faces a 10-year imprisonment term—the statutory maximum for firearm possession. This appeal raises constitutional challenges to this lengthy sentence under *Johnson v. United States*, 135 S. Ct. 2551 (2015), as well as to its procedural and substantive unreasonableness.

B. Charges and Guilty Plea

Mr. Tate was charged in the District of Nevada with one count of unlawful possession of two firearms on October 30, 2014, under 18 U.S.C. §§ 922(g)(1) and 924(a)(2). ER 339. His arrest was precipitated by a claim by his ex-girlfriend, Tiffany McCollum, that Mr. Tate hit her with what McCollum thought might be a firearm. PSR ¶ 6. Police executed a search warrant at an apartment Mr. Tate was sharing with several others and found the two firearms that underlie the instant indictment. PSR ¶ 17. Mr. Tate pled guilty to the firearm possession charge without a written plea agreement. ER 343.

C. Presentence Investigation Report

The probation office prepared a presentence investigation report (PSR) in preparation for sentencing. The initial PSR included the following guideline calculations:[3]

Base Offense level, U.S.S.G. § 2K2.1(a)(4)(A)	20
Stolen Firearm, U.S.S.G. § 2K2.1(b)(4)(A)	+ 2
Possession in Connection with Another Felony, U.S.S.G. § 2K2.1(b)(6)(B)	+ 4
Acceptance of Responsibility, U.S.S.G. § 3E1.1(a)	- 2
Acceptance of Responsibility, U.S.S.G. § 3E1.1(b)	- 1
Total Adjusted Offense Level	23

PSR ¶¶ 26-36, p. 34.

The PSR set the base offense level at 20, as Mr. Tate has a 2001 second degree robbery conviction in California, under California Penal Code 211. PSR ¶¶ 26, 40. The PSR indicated this conviction constituted a crime of violence under U.S.S.G. § 4B1.2.[4] PSR ¶ 26. For its part, the government argued an additional two-level

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[3] The 2014 Guidelines Manual was used in this case. PSR ¶ 25.

[4] Section 4B1.2 defines a crime of violence as:

> any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct

increase should have been included in the calculation for obstruction of justice under U.S.S.G. § 3C1.1. PSR p. 34.

Because the Supreme Court had not yet issued its opinion in *Johnson v. United States*, 135 S. Ct. 2551 (2015), Mr. Tate did not object to the base offense level. Mr. Tate did object to the inclusion of the obstruction enhancement, to the four-level enhancement under § 2K2.1(b)(6)(B) for possessing the firearm in connection with another felony, and to certain factual allegations in the PSR. PSR p. 34.

A revised PSR maintained the four-level increase under § 2K21.1(b)(6)(B) and added a two-level increase for obstruction of justice under § 3C1.1. PSR ¶¶ 28, 31, p. 35. The total adjusted offense level increased to 25. PSR ¶ 26. The PSR calculated 11 criminal history points, placing Mr. Tate in criminal history category V. PSR ¶ 47. This corresponded with an advisory guideline range of 100 to 125 months of incarceration. PSR ¶ 121. However, as the statutory maximum was 10 years, the PSR revised the guideline range to 100 to 120 months. PSR ¶ 121. The PSR recommended a sentence of 120 months. PSR p. 31.

> that presents a serious potential risk of physical injury to another.

U.S.S.G. § 4B1.2(a)(2).

D. Sentencing Proceedings

The parties filed sentencing memoranda. Therein and at the sentencing hearing, defense counsel maintained objections to the four-level enhancement for possessing a firearm in connection with another felony under U.S.S.G. § 2K2.1(b)(6)(B) and the two-level enhancement for obstructing justice under U.S.S.G. § 3C1.1. *See* PSR ¶¶ 28, 31; ER 53, 252-56. Defense counsel also asked the district court to depart or vary downward to a sentence of 37 months, emphasizing Mr. Tate's tragic life, including his being immersed into a notorious gang at age seven, his multiple suicide attempts, and his substance abuse issues. ER 257-59, 261-62.

The government argued for the statutory maximum of 120 months. ER 198. In support, the government submitted an audio file of the 911 calls made by McCollum, as well as three very selectively chosen jail calls which the government claimed supported a conclusion that Mr. Tate attempted to dissuade McCollum from testifying against him. ER 221, 229.

At sentencing, the government called Las Vegas Metropolitan Police Department Officer Boyd Brown, Detectives Daniel Tomaino and Jon Carpenter, Crime Scene Analyst William Speas, and Alcohol, Tobacco, Firearms, and Explosives (ATF) Special Agent Lavon Cuyler. The defense called investigator Al Tobin. The following summarizes the sentencing hearing testimony.

Boyd Brown

Brown testified that, on October 30, 2014, dispatch sent him to a home in Las Vegas, Nevada, around 11:30 p.m. ER 57. McCollum had called 911 four times that evening. ER 77. During the second call and all subsequent calls, McCollum was outside the home. ER 77.

On one of the 911 calls, McCollum claimed she was being hit. ER 91. A number of thuds could be heard on the call, which Brown testified sounded like someone being hit, or banging a hand on the wall, or banging a hand on another phone. ER 91.

Brown testified that, when he arrived, McCollum claimed she and her ex-boyfriend Mr. Tate had been arguing upstairs in the home. ER 67. McCollum alleged Mr. Tate "got a handgun" and struck her on the head with it while she walked down the stairs holding her child. ER 61. Brown also said McCollum claim that, while "descending the stairs," and allegedly being "being pistol-whipped" while "holding a baby, and shielding the baby," she simultaneously called 911. ER 73.

Brown stated he touched the "outside of [McCollum's] hair" and felt three or four bumps on the back part of her head. ER 68-69. Brown believed the bumps were consistent with McCollum's statement she had been struck in the head with a firearm. ER 62. Brown also stated it looked like McCollum had defensive wounds on her fingers where she was struck by the firearm, though Brown later changed his

testimony, admitting what he initially thought might be an abrasion was actually a tattoo. ER 62, 65, 90.

Brown also testified he spoke with Juelle Knighton, a witness inside the home during the argument. ER 83. Knighton told Brown she did not see or hear anything. ER 83-84.

Daniel Tomaino

Tomaino responded to the call around 3:22 a.m. ER 94, 101. According to Tomaino, McCollum claimed she and Mr. Tate had been involved in a "little altercation" and that Mr. Tate struck her head with his fists. ER 98, 100. When Tomaino asked McCollum whether Mr. Tate had hit her with something else, McCollum stated she thought Mr. Tate had a gun in his hand. ER 104. McCollum thought the object was silver and brown, but she did not "quite know if it was a gun." ER 108. Notably, no firearm matching McCollum's description was recovered that night. ER 109.

Tomaino felt bumps on McCollum's head, though he did not remember whether it was the front or the back of her head. ER 95, 99. Tomaino also did not know whether McCollum had hair extensions and, if so, whether they would feel like bumps. ER 99.

Tomaino admitted he had experienced situations where purported victims of domestic violence calls used the call to get even with the accused in some way. ER 122.

Jon Carpenter

Carpenter testified he executed a search warrant to locate the firearm allegedly used to hit McCollum. ER 124. He stated there were two bedrooms in the home. ER 129. He found a silver and black .22 in a bedroom, along with a female's ID and baby items. ER 129. A brown and black revolver was found in the second bedroom inside of a pillowcase on the floor. ER 125, 130. Carpenter testified no DNA was taken from McCollum to corroborate her story about being hit with a gun. ER 132.

William Speas

Speas testified he took photographs at the scene. ER 135. He photographed the back of McCollum's head, because he was told she had injuries there, but the photographs depicted no injuries—just hair. ER 137. He did not recall whether he made any efforts to find injuries. ER 140.

Lavon Cuyler

Cuyler testified that, while transporting Mr. Tate from county jail to federal court, he informed Mr. Tate there was a strong possibility his fingerprints would be found on the gun used in the alleged battery. ER 147-48. Cuyler claimed Mr. Tate responded by asking, "The silver one?" ER 148.

Al Tobin

Tobin testified he questioned Knighton, who was in the room next to Mr. Tate's bedroom with the door open on the night McCollum called 911. ER 162, 163, 171. Knighton said she heard McCollum yelling at Mr. Tate. ER 163. Knighton did not hear any hitting. ER 163. Knighton also said McCollum was not a truthful person, explaining McCollum was a liar and could not be trusted. ER 163.

Tobin stated he attempted to interview McCollum, but McCollum refused to answer his questions. ER 164-65. Instead, McCollum told Tobin she wanted Mr. Tate's DNA for paternity reasons because Mr. Tate might be the father of her baby. ER 166.

Findings of Evidentiary Hearing

The district court adopted the PSR's recommendation that the base offense level was 20 under U.S.S.G. § 2K2.1(a)(4)(A). ER 52; PSR ¶¶ 20, 40 (suggesting Mr. Tate's prior California second degree robbery conviction constituted a crime of violence). The district court stated the preponderance of the evidence standard applied to the challenged enhancements, not the clear and convincing standard. ER 19. The district court found both the four-level enhancement for possessing a firearm in connection with domestic battery and the two-level enhancement for obstructing justice sufficiently proven by the evidence, even under a clear and convincing standard. ER 22, 24.

The district court then heard arguments from counsel. Government counsel stated, "I've been in front of this Court several times and the Court has always remarked that there are people who are born into difficult circumstances but nevertheless they don't end up in federal court in situations like people like Mr. Tate." ER 26. The government asked the court to impose a sentence of 120 months—the statutory maximum. ER 26.

Defense counsel recounted the "exceptional circumstances" surrounding Mr. Tate's personal history, specifically that "he was basically beaten up, by an adult, in order to be admitted into a gang" and "this [was] highly unusual and tragic that his moral compass would be set by a street gang, since the age of seven." ER 27-28. The defense asked for a downward departure or variance to 37 months. ER 29, 261-263.

The district court declined to vary or depart downward and sentenced Mr. Tate to 120 months. ER 39. The district court stated Congress imposed stiff penalties for felons who possess weapons because it is a "dangerous situation." ER 35. The court vaguely acknowledged the "horrific circumstances in terms of the environment [Mr. Tate was] brought up in," but declared "[o]n balance against that though, you've had many, many chances to wake up and change your conduct, change your ways." ER 35. The court noted two previous possession charges and warrants for failing to

appear, concluding "a significant amount of prison time is justified . . . as a deterrent to future crimes by" Mr. Tate and "to protect the public." ER 36.

The district court discounted the letters of support that described Mr. Tate as a good father who wanted to be there for his kids, stating, "if that were the case, you wouldn't keep breaking the law and going back to prison." ER 36. The court also considered separate sentencing and warrants Mr. Tate faced in California. ER 37. Mr. Tate informed the court he had left California because he been shot in the head and that his mother and ex-wife were shot at seventeen times while driving his car. ER 37-38. The court responded impassively, stating, "I've got to stop you from possessing weapons, violating the law, and being a danger to the public because that's what you represent at this stage." ER 39.

The district court adopted the PSR's sentencing recommendations and sentenced Mr. Tate to 120 months in custody. ER 39. Mr. Tate filed a timely appeal. ER 46-47.

SUMMARY OF ARGUMENT

Appellant Gerald Tate began life in exceptionally tragic circumstances. He was jumped into a notorious street gang at the age of seven. His childhood, adolescence, and adult life have been marked by violent acts committed against him. He has exhibited a pattern of self-destructive behavior and suffers from untreated mental and emotional issues. However, those closest to him all adamantly agree he

is a caring father to his children and a good human being. He now faces a 10-year sentence for unlawful firearm possession. The district court erred in imposing this lengthy sentence for several reasons.

First, the Supreme Court's decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015), renders Mr. Tate's sentence unconstitutional, requiring remand for resentencing. *Johnson* dictates that Mr. Tate's California second degree robbery conviction is not a crime of violence under U.S.S.G. § 4B1.2. *Johnson* rendered the residual clause of the Armed Career Criminal Act void for vagueness. Without the residual clause, Mr. Tate's robbery offense cannot be classified as a crime of violence under § 4B1.2. While the district court did not have the benefit of *Johnson* at the time of Mr. Tate's sentencing, *Johnson* nevertheless requires Mr. Tate's sentence be vacated and remanded with instructions that he not be assessed the crime of violence enhancement under U.S.S.G. § 4B1.2. Without the enhancement, Mr. Tate's base offense level is decreased from 20 to 14, under U.S.S.G. § 2K2.1. This lowers his guideline range from 100 to 120 months of incarceration to 57 to 71 months.

Second, the district court erred by applying two enhancements not sufficiently supported by the evidence, committing reversible procedural error. The district court erroneously held the government to a preponderance standard of proof after incorrectly determining the sentencing enhancements did not disproportionately

affect Mr. Tate's sentence. The court also incorrectly concluded the unsubstantiated and inconsistent words of one woman to police supported a four-level enhancement for possessing a firearm in connection with domestic battery. Additionally, the court incorrectly concluded Mr. Tate's uncharged conduct relating to a separate state case supported a two-level enhancement for obstructing justice. Mr. Tate requests the Court vacate his sentence and remand with instructions that the district court resentence him without either enhancement.

Third, the district court erred by imposing a substantively unreasonable sentence. Defense counsel urged the district court to take into account Mr. Tate's tragic upbringing and allow him to remain in his children's lives, while continuing to heal from his past. The district court dismissed Mr. Tate's harrowing life history and gave undue weight to his past offenses and pending charges. Mr. Tate requests the Court vacate his sentence and remand for resentencing with instructions that the district court sentence Mr. Tate in accord with the individualized sentencing mandated by *United States v. Booker*, 543 U.S. 220 (2005), and its progeny.

ARGUMENT

I. Remand for resentencing is required under *Johnson v. United States*, 135 S. Ct. 2551 (2015), because Mr. Tate's California second degree robbery conviction is not a crime of violence under U.S.S.G. § 4B1.2.

A. Standard of Review

Whether the district court imposed an illegal sentence "is a question of law" this Court reviews de novo. *United States v. Fowler*, 794 F.2d 1446, 1449 (9th Cir.

1986). This Court also reviews de novo the district court's interpretation of the Sentencing Guidelines. *United States v. Hernandez*, 795 F.3d 1159, 958 (9th Cir. 2015) (citation omitted). Plain error review typically applies where an issue on appeal was not raised below. *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) (citing Fed. R. Crim. P. 52(b)). This Court, however, is not limited to plain error review when the issue raised "is purely one of law and where the opposing party will suffer no prejudice as a result of the failure to raise the issue in the trial court." *United States v. Evans-Martinez*, 611 F.3d 635, 642 (9th Cir. 2010) (quoting *United States v. Saavedra-Velazquez*, 578 F.3d 1103, 1106 (9th Cir. 2009) (internal quotations and citation omitted)). This Court has previously concluded "the government is not prejudiced by [its] requirement that the district court correctly calculate the Guidelines range before it imposes a sentence." *Evans-Martinez*, 611 F.3d at 642.

Mr. Tate challenges the finding that his prior robbery conviction constituted a crime of violence under U.S.S.G. § 4B1.2, in light of *Johnson*, 135 S. Ct. 2551. This issue is purely a question of law. Accordingly, this Court should review this issue de novo.

B. Introduction

At the time of Mr. Tate's sentencing, there were three ways an offense could be classified as a crime of violence under § 4B1.2. The offense could:

(1) satisfy the elements clause or "physical force clause" of § 4B1.2(a)(1), because it statutorily required as an element the use, attempted use, or threatened physical force against the person of another;

(2) be a generic burglary of a dwelling, arson, extortion, or involve the use of explosives under § 4B1.2(a)(2); or

(3) fall within the "residual clause" because it otherwise involved conduct that presented "a serious potential risk of physical injury to another," under U.S.S.G. § 4B1.2(a)(2).

The second degree robbery offense at issue here arose in 2001 under California Penal Code § 211, which provides:

> Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

Cal. Penal Code § 211. Fear in this context is defined as either fear of an: (1) "unlawful injury to the person *or property* of the person robbed, or of any relative of his or member of his family; or" (2) "immediate and unlawful injury to the person *or property* of anyone in the company of the person robbed at the time of the robbery." Cal. Penal Code § 212 (emphasis added).

It is unclear from the record which § 4B1.2 clause the district court applied to classify Mr. Tate's second degree robbery offense a crime of violence under §

4B1.2.[5] However, the Supreme Court's decision in *Johnson* dictates the robbery offense cannot be classified as a crime of violence under any clause.

C. Analysis

1. The residual clause of § 4B1.2 is void for vagueness under *Johnson*.

On June 26, 2015, the Supreme Court declared the residual clause in the Armed Career Criminal Act (ACCA) to be void for vagueness. *Johnson*, 135 S. Ct. at 2564. Under the ACCA's residual clause, a prior conviction may be a violent felony if, *inter alia*, that conviction "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). In *Johnson*, the district court employed the ACCA's residual clause to find the defendant qualified for the ACCA sentencing enhancement. *Johnson*, 135 S. Ct. at 2556.

Addressing the residual clause's deficiencies, the Supreme Court recognized the question of whether a crime fell within the clause required "court[s] to picture the kind of conduct that the crime involves in 'the ordinary case,' and to judge whether that abstraction presents a serious potential risk of physical injury." *Johnson*, 135 S. Ct. at 2557. The Court concluded the indeterminacy of this wide-

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[5] The PSR only suggests the robbery is a crime of violence under § 4B1.2 without identifying which clause rendered it so. PSR ¶ 40. The district court made no mention of the clause it applied.

ranging inquiry denied "fair notice to defendants and invite[d] arbitrary enforcement by judges." *Id*. The Court held "[i]ncreasing a defendant's sentence under the [residual] clause denies due process of the law." *Id*. The Court vacated and remanded Johnson's sentence, and remanded nine other lower court decisions that had sentenced defendants under the identical residual clause[6] contained in § 4B1.2.[7]

The government concedes the Supreme Court's vagueness finding in *Johnson* applies equally to the identically worded residual clause in U.S.S.G. § 4B1.2, [8] which

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[6] When the Sentencing Commission adopted the current definition of "crime of violence" in U.S.S.G. § 4B1.2, it stated "[t]he definition of crime of violence used in this amendment is derived from 18 U.S.C. § 924(e)." U.S.S.G. App. C, Amend. 268 (1989). The Commission amended § 4B1.2 in response to Congress's enactment of the ACCA, amending the definition of a crime of violence based on the definition of violent felony in the ACCA. U.S. Sent'g Comm'n, *Report on the Continuing Impact of United States v. Booker on Federal Sentencing*, Pt. C (Career Offenders), at 4 (2012).

[7] These included seven § 4B1.2 cases, *Vinales v. United States*, 135 S. Ct. 2928 (2015) (from 11th Circuit); *Denson v. United States*, 135 S. Ct. 2931 (2015) (from 11th Circuit); *Beckles v. United States*, 135 S. Ct. 2928 (2015) (from 11th Circuit); *Maldonado v. United States*, 135 S. Ct. 2929 (2015) (from 2d Circuit); *Smith v. United States*, 135 S. Ct. 2930 (2015) (from 6th Circuit); *Wynn v. United States*, 135 S. Ct. 2945 (2015) (from 6th Circuit); *Jones v. United States*, 135 S. Ct. 2944 (2015) (from 3d Circuit), a § 2K2.1 case, *Talmore v. United States*, 135 S. Ct. 2937 (2015) (from 9th Circuit), and a § 7B1.1 case, *Cooper v. United States*, 135 S. Ct. 2938 (2015) (from 11th Circuit)).

[8] *See* Supp. Br. for the United States, *United States v. Pagan-Soto*, No. 13-2243 (1st Cir. Aug. 11, 2015); Letter Br. of the United States, *United States v. Zhang*, No. 13-3410 (2d Cir. Aug. 13, 2015); Supp. Br. for the United States, *United States v. Talmore*, No. 13-10650 (9th Cir. Aug. 17, 2015); Br. of Appellee, *United States v. Gillespie*, No. 15-1686 (7th Cir. Sept. 14, 2015); Supp. Letter Br. for the United States, *United States v. Lee*, No. 13-10507 (9th Cir. Aug. 17, 2015); United

is also used by several other Guidelines.[9] Though the government's concession does not bind this Court, the concession accurately reflects this Court's prior decisions.[10]

The residual clause in § 4B1.2 is identical to the now-void ACCA residual clause that *Johnson* voided for vagueness, and this Court has always interpreted the two clauses interchangeably. *United States v. Crews*, 621 F.3d 849, 856 (9th Cir. 2010) ("[T]he terms 'violent felony' in the ACCA, 18 U.S.C. § 924(e)(2)(B)(ii), and 'crime of violence' in Guidelines section 4B1.2[] are interpreted according to the same precedent."); *see also United States v. Jennings*, 515 F.3d 980, 990 n.1 (9th Cir. 2008) (stating "we have made no distinction between the terms 'violent felony' and 'crime of violence' for purposes of interpreting the residual clause").

States Supp. Authority under Fed. R. App. P. 28(j), *United States v. Smith*, No. 14-2216 (10th Cir. Aug. 20, 2015); Supp. Br. of United States, *United States v. Goodwin*, No. 13-1466 (10th Cir. Aug. 21, 2015).

[9] *See* U.S.S.G. §§ 2K1.3 & cmt. n.2 (explosive materials); 2K2.1 & cmt. n.1 (firearms); 2S1.1 & cmt. n.1 (money laundering); 4A1.1(e), 4A1.2(p) (criminal history); 5K2.17 & cmt. n.1 (departure for semi-automatic firearms); and 7B1.1(a)(1) & cmt. n.2 (probation and supervised release).

[10] This Court recently accepted the government's concession in *United States v. Talmore*, No. 13-10650. The Supreme Court remanded *Talmore* to this Court after *Johnson*. *Talmore v. United States*, 135 S. Ct. 2937 (2015). On remand, the government conceded *Johnson* applies to the Sentencing Guidelines. *United States v. Talmore*, Case No. 13-10650 (order dated Aug. 24, 2015). This Court therefore vacated Talmore's sentence and remanded to the district court for resentencing. *Id.*

Further, this Court's prior decisions permit challenges to the Guidelines on vagueness grounds. *United States v. Rearden*, 349 F.3d 608, 614 (9th Cir. 2003). This Court adjudicates such challenges "in deference to the Supreme Court's declaration that 'vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute.'" *United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997) (quoting *United States v. Gallagher*, 99 F.3d 329, 334 (9th Cir. 1996)); *see also Peugh v. United States*, 133 S. Ct. 2072 (2013) (finding ex post facto challenge may be made to Guidelines even though Guidelines are advisory).

It is therefore appropriate for this Court to find § 4B1.2's residual clause is unconstitutional because, like its ACCA counterpart, it "denies fair notice to defendants and invites arbitrary enforcement by judges." *Johnson*, 135 S. Ct. at 2557. Post-*Johnson*, no offense may constitute a crime of violence under § 4B1.2 unless it meets the physical force clause or falls within one of the enumerated offenses set forth in the text of § 4B1.2. As demonstrated below, the robbery offense at issue here fails to meet either requirement.[11]

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[11] Notably, in *United States v. Prince*, the government conceded California Penal Code § 211 could only qualify as a crime of violence under the residual clause of the ACCA, and not under the ACCA's force clause or as enumerated offense. Appellant's Rep. Br., *United States v. Prince*, No. 13-30212 (9th Cir. Mar. 13, 2014); *see also United States v. Prince*, 772 F.3d 1173, 1175 (9th Cir. 2014).

a. The California robbery offense does not meet the physical force requirement of § 4B1.2(a)(1).

Second degree robbery under California Penal Code § 211 fails to meet the physical force clause of § 4B1.2(a)(1). This is because § 211 is indivisible under *Descamps v. United States*, 133 S. Ct. 2276 (2013), and describes a single crime that can be committed in a variety of ways, not all of which satisfy the physical force requirement of § 4B1.2(a)(1).

Descamps "substantially altered the framework for determining whether a prior state court conviction triggers certain consequences in subsequent federal proceedings." *Lopez-Valencia v. Lynch*, ___ F.3d ___, 2015 WL 4879874, at *1 (9th Cir. Aug. 17, 2015). Under *Descamps*, courts may look beyond the statutory definition by using the "modified categorical" approach to review certain judicially noticeable documents to narrow down a categorically overbroad statute, but only when that statute is a divisible statute. 133 S. Ct. at 2283-86. A statute is divisible if it contains "multiple, alternative elements, and so [the statute] effectively creates several different . . . crimes." *Id.* at 2285-86 (internal quotations and citation omitted). A statute is not divisible, or indivisible, if it "does not list alternative elements, but merely encompasses different means of committing an offense." *Lopez-Valencia*, 2015 WL 4879874 at *3.

This Court has explained "divisibility hinges on whether the jury must unanimously agree on the fact critical to the federal statute." *Lopez-Valencia*, 2015

WL 4879874 at *3 (quoting *Rendon v. Holder*, 764 F.3d 1077, 1085 (9th Cir. 2014)) ("[A] jury faced with a divisible statute must unanimously agree on the particular offense of which the petitioner has been convicted. . . ."). Indivisible statutes, however, are

> indivisible precisely because the jury need not agree on anything past the fact that the statute was violated. As long as the defendant's conduct violates the statute, the jury can disagree as to how, and a later sentencing court cannot conclude that the jury in fact agreed on the particular means of commission.

Rendon, 764 F.3d at 1085.

California Penal Code § 211 is indivisible. To convict a defendant of robbery under § 211, a jury need not unanimously agree on whether a defendant committed robbery by force or fear, nor unanimously agree on whether the force or fear of unlawful injury was directed against the person or property of another. *See* Judicial Council of California Criminal Jury Instructions, 1600 Robbery (Pen. Code § 211) (2015) (indicating the State must prove "[t]he defendant used force **or** fear to take the property or to prevent the person from resisting") (emphasis added). California Penal Code § 211 thus contains contain multiple, alternative means of committing the crime of robbery. *See* Cal. Penal Code § 211. The use, attempted use, or threatened physical force against the person is not a required element to sustain a conviction for robbery under § 211.

Even prior to *Descamps*, this Court acknowledged the breadth of § 211 and determined it criminalized conduct broader than generic robbery because "it

encompasses takings accomplished by a broader range of threats than would the generic offense" of robbery. *United States v. Becerril-Lopez*, 541 F.3d 881, 891 (9th Cir. 2008) (stating § "211 is broader [than generic robbery] because it encompasses mere threats to property, such as 'Give me $10 or I'll key your car' or 'Open the cash register or I'll tag your windows'").

California Penal Code § 211 thus does not require as an element the use, attempted use, or threatened use of physical force against the person of another. The California robbery statute therefore does not, and cannot, meet the physical force clause of § 4B1.2.

b. The California robbery offense is not an enumerated offense.

Second degree robbery is also not an enumerated offense in the text of § 4B1.2. *See* U.S.S.G. § 4B1.2(a)(2). The enumerated offenses are only burglary of a dwelling, arson, extortion, or use of explosives. U.S.S.G. § 4B1.2(a)(2). Moreover, Mr. Tate's robbery offense can also no longer be contorted into a generic extortion offense. *Descamps* prohibits such contortion.

Prior to *Descamps*, this Court examined California Penal Code § 211 in the context of U.S.S.G. § 2L1.2 in *United States v. Becerril-Lopez*, 541 F.3d 881 (9th Cir. 2008). The commentary to § 2L1.2, like the commentary to § 4B1.2, listed robbery as a crime of violence. *Becerril-Lopez*, 541 F.3d at 890 (quoting U.S.S.G. § 2L1.2 n.1(B)(iii)). Though § 2L1.2 does not contain guideline text setting forth

the parameters of a crime of violence, this Court has relied upon *Becerril-Lopez* to find robbery offenses may constitute the generic enumerated crime of extortion. *See United States v. Harris*, 572 F.3d 1065, 1066 (9th Cir. 2009) ("Like the California statute we analyzed in [*Becerril-Lopez*], any conduct under Nev. Rev. Stat. § 200.380 that did not satisfy the generic definition of robbery, such as threats to property, would satisfy the generic definition of extortion.").

The *Becerril-Lopez* Court was called upon to determine whether robbery under § 211 constituted a crime of violence under § 2L1.2. The Court readily acknowledged § 211 criminalized conduct broader than generic robbery. *Becerril-Lopez*, 541 F.3d at 891 (citing 3 W. LaFave, *Substantive Criminal Law* § 20.3(d)(2) & n.73 (2d ed. 2003) (noting most modern statutes limit robbery to force or threats against a person)).

The *Becerril-Lopez* Court believed the "categorical approach" allowed it to "look beyond generic robbery" and compare § "211 to generic extortion." *Becerril-Lopez*, 541 F.3d at 891-92 (stating "[t]akings through threats to property and other threats of unlawful injury fall within generic extortion, which is also" listed in the commentary to § 2L1.2 as a crime of violence) (citation omitted).

However, the categorical approach requires courts to "compare the elements of the statute forming the basis of the defendant's conviction with the elements of the 'generic' crime—*i.e.*, the offense as commonly understood." *Descamps*, 133 S.

Ct. at 2281. Under the categorical approach, a prior conviction qualifies as a predicate only when the "the statute's elements are the same as, or narrower than, those of the generic offense." *Id.*

The *Becerril-Lopez* Court manipulated the categorical approach by abandoning the generic offense of robbery and focusing instead on the enumerated offense of extortion to determine if robbery under § 211 was sufficiently similar to generic extortion to qualify as a crime of violence. *Becerril-Lopez*, 541 F.3d at 891-92. To define generic extortion, the Court applied the Supreme Court's definition—"'obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats.'" *Id.* at 891-92 (quoting *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003) (internal quotation marks omitted)). In adopting this definition, the Court acknowledged extortion is not a lesser-included offense of robbery because extortion requires the victim's consent to the taking. *Becerril-Lopez*, 541 F.3d at 892. At the time, however, the Court believed this to be a distinction without a difference. *Id.* at n.9 (citation omitted).

The *Becerril-Lopez* Court thus created a hybrid offense involving elements of both robbery and extortion to create a crime of violence under § 2L1.2. The Court concluded by stating, if a conviction under "§ 211 involved a threat not encompassed by generic robbery, it would necessarily constitute generic extortion and therefore

be a 'crime of violence' under U.S.S.G. § 2L1.2." *Becerril-Lopez*, 541 F.3d at 892 (citation omitted).

The Supreme Court's decision in *Descamps* precludes the mixing and matching of elements this Court undertook in *Becerril-Lopez* to create a hybrid generic offense.[12] *Descamps* holds that, "if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form." *Descamps*, 133 S. Ct. at 2283. *Descamps* also holds that, when "the statute of conviction is overbroad or missing elements of the generic crime," there is a "mismatch in elements, [and] "a person convicted under that statute is *never convicted of the generic crime*." *Id.* at 2286. Thus, when the elements of the statute of conviction do not precisely correspond to the elements of the generic offense, the court's inquiry is over and the conviction cannot serve as an ACCA predicate. *Id.*

The prior conviction at issue in *Descamps* was burglary under California Penal Code § 459. *Descamps*, 133 S. Ct. at 2282. Section § 459 provides "a 'person who enters' certain locations 'with intent to commit grand or petit larceny or any

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[12] Prior to *Descamps*, this Court created another hybrid offense by mixing and matching elements, though it appears to be the only federal circuit court of appeals to have done so. *See United States v. Velasquez-Bosque*, 601 F.3d 955, 958 (9th Cir. 2010) (citing *Becerril-Lopez* as authority to permit combining offenses of robbery and extortion to find California car-jacking offense constitutes a crime of violence under § 2L1.2).

felony is guilty of burglary.'" *Id.* The Court found § 459 did not, however, require "unlawful entry" into a location, rendering the statute broader than the generic definition of burglary. *Id.* The government tried to convince the Court that a modified categorical approach should apply where the mismatch of elements between the crime of conviction and the generic offense results, not from a missing element but from an element's overbreadth. *Id.* at 2292. The Supreme Court flatly rejected this argument. *Id.*

The Supreme Court found Descamps's burglary conviction did "not require the factfinder (whether jury or judge) to" find he had "broken and entered" unlawfully. *Descamps*, 133 S. Ct. at 2293. Because generic unlawful entry was not an element or alternative element of Descamps's burglary conviction, the Supreme Court held "a conviction under that statute is never for generic burglary." *Id.*

The Supreme Court's approach in *Descamps* applies with equal force here. Robbery under California Penal Code § 211 and generic extortion do not have identical elements. The enumerated generic extortion offense set forth in the guideline text is not a lesser-included offense of robbery. *Becerril-Lopez*, 541 F.3d at 892. Generic extortion requires the victim's consent to the taking. *Becerril-Lopez*, 541 F.3d at 891-92 (citing *Scheidler*, 537 U.S. at 409 (defining generic extortion as "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats")). Robbery does not have consent as

an element. This is no longer a distinction without a difference. *Descamps* renders this distinction material.

Post-*Descamps*, it is improper to mix and match elements of California Penal Code § 211 with elements of generic extortion in an attempt to categorize a robbery under § 211 as an enumerated crime of violence, *i.e.*, extortion. When the statute at issue is overbroad or missing an element of the generic offense, courts can no longer create a hybrid offense to contort the offense into a generic offense. Rather, courts must find the person convicted under the statute was "never convicted of a generic crime." *Descamps*, 133 S. Ct. at 2292.

The Supreme Court's recent opinion in *Johnson* is also germane to this inquiry. *Johnson* struck down the ACCA's residual clause as unconstitutionally vague because it failed to provide fair notice of the conduct it punishes and invited arbitrary enforcement. *Johnson*, 135 S. Ct. at 2557. The Supreme Court found increasing a defendant's sentence based upon such indeterminacy violated due process. *Id*. The same indeterminacy occurs if courts are permitted to mix and match elements of offenses to create a crime of violence. A defendant cannot be said to have fair notice an offense may be used to increase his sentence if that determination is predicated upon the ability of an individual judge to mix and match elements of one offense with another offense to create a crime of violence. Due process requires more predictability than this process allows.

Though the Court's decision in *Becerril-Lopez* was issued prior to the Supreme Court's decisions in *Descamps* and *Johnson*, the Supreme Court's rulings in these cases render erroneous *Becerril-Lopez*'s approach to classifying an offense as a crime of violence. A robbery offense under California Penal Code § 211 can no longer be classified as a generic extortion offense. Thus, a robbery conviction under § 211 is not an enumerated offense for purposes of classifying it as a crime of violence.

c. The commentary to § 4B1.2 does not interpret or explain the remaining guideline text and is, instead, inconsistent with the text.

The government may try to avoid the ramifications of *Johnson* and *Descamps* by claiming the offenses listed in the § 4B1.2 commentary may still qualify as crimes of violence, even if those offenses do not meet the physical force requirement and are not enumerated in the text of § 4B1.2. There is no merit to this claim. The government cannot manipulate guideline commentary to broaden the actual text of the guideline. The Separation of Powers doctrine prohibits such manipulation, as do Supreme Court and Circuit authority.

The United States Sentencing Commission promulgates the Sentencing Guidelines, pursuant to an express delegation of rulemaking authority by Congress. *Stinson v. United States*, 508 U.S. 36, 44 (1993). Therefore, the Guidelines are "the equivalent of legislative rules adopted by [other] federal agencies." *Id.* at 45.

The Sentencing Reform Act[13] (SRA) requires the Commission to provide Congress with any proposed guideline amendments at least six months before the effective date of those amendments and allows Congress to modify or disapprove of any such amendments before their effective date. 28 U.S.C. § 994(p). The Supreme Court determined this requirement makes the Commission "fully accountable to Congress." *Mistretta v. United States*, 488 U.S. 361, 393-94 (1989).

However, Congress does not review amendments to the commentary under 28 U.S.C. § 994(p) and does not expressly authorize the issuance of commentary at all. *See Stinson*, 508 U.S. at 40-41. Guideline commentary is therefore only valid if (1) it interprets or explains a guideline; and (2) it is not "inconsistent with, or a plainly erroneous reading of, that guideline." *Id*. at 38. Otherwise, the Commission could send guidelines to Congress for review, which is necessary to comport with the Separation of Powers and required by the SRA, *see* 28 U.S.C. § 994(p), but then issue binding rules in the form of commentary that Congress never approved, violating the Separation of Powers and the SRA. *See United States v. St. James*, 569 F. App'x 495, 497 (9th Cir. Apr. 14, 2014) (noting "delegation of authority to the Commission to promulgate policy statements and *interpretive* commentary is

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[13] Pub. L. No. 98–473, tit. II, ch. 2, § 218(a)(5), 98 Stat. 1037, 2027 (1984), as amended by 18 U.S.C. § 3551 *et seq.* (1988 ed. and Supp. III), 28 U.S.C. §§ 991–998 (1988 ed. and Supp. III).

consistent with separation-of-powers principles") (emphasis added) (citing *Mistretta*, 488 U.S. at 390; *United States v. Fox*, 631 F.3d 1128, 1133 (9th Cir. 2011)).

The Supreme Court also makes clear "[t]he functional purpose of commentary (of the kind at issue here [*i.e.*, interpreting the term 'crime of violence']) is to assist in the interpretation and application of" the actual guidelines. *Stinson*, 508 U.S. at 45. Every federal circuit acknowledges the commentary is inherently limited by the actual text of the guideline.

For example, the Fourth Circuit holds the guidelines' commentary "does not have freestanding definitional power," and only has force insofar as it interprets or explains a guideline's text. *United States v. Leshen*, 453 F. App'x 408, 413-15 (4th Cir. Nov. 10, 2011) (finding prior state sex offenses did not qualify as crimes of violence, despite government argument that offenses fell within the commentary); *accord United States v. Shell*, 789 F.3d 335, 340-41 (4th Cir. 2015) ("[T]he government skips past the text of § 4B1.2 to focus on its commentary," but "it is the text, of course, that takes precedence."). Following this principal, the Tenth Circuit rejected the government's suggestion that it need not qualify manslaughter as a crime of violence under the text of § 4B1.2, because manslaughter was listed in the commentary. *United States v. Armijo*, 651 F.3d 1226, 1236 (10th Cir. 2011). The

Tenth Circuit found that, if this were the case, the commentary would be "utterly inconsistent with the language of § 4B1.2(a)." *Id.* at 1236-37.[14]

Thus, guideline commentary has no freestanding definitional power. The only valid function of commentary is to interpret or explain the text of a guideline. Commentary that does not interpret or explain any existing text of a guideline is

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[14] *See also United States v. Chuong Van Duong*, 665 F.3d 364, 368 (1st Cir. 2012) (disregarding application note that conflicted with text of guideline); *United States v. Piper*, 35 F.3d 611, 617 (1st Cir. 1994) (conflicting commentary "carries no weight"); *United States v. Potes-Castillo*, 638 F.3d 106, 111 (2d Cir. 2011) (rejecting government reading of commentary that was inconsistent with text of guideline); *United States v. Cruz*, 106 F.3d 1134, 1139 (3d Cir. 1997) (disregarding commentary to the extent that it appeared to require greater scienter than text of guideline); *United States v. Dison*, 330 F. App'x 56, 61-62 (5th Cir. May 14, 2009) ("[I]n case of an inconsistency between an Application Note and Guideline language, we will apply the Guideline and ignore the Note."); *United States v. Webster*, ___F. App'x ___, 2015 WL 3916403, at *2 (6th Cir. June 25, 2015) ("As a general matter, the text of a guideline trumps commentary about it."); *United States v. Raupp*, 677 F.3d 756, 759 (7th Cir. 2012) (finding guideline commentary authoritative unless it conflicts with the text); *United States v. Stolba*, 357 F.3d 850, 852-53 (8th Cir. 2004) (rejecting enhancement arguably supported by commentary that conflicted with the guideline because "the proper application of the commentary depends upon the limits—or breadth—of authority found in the guideline"); *United States v. Landa*, 642 F.3d 833, 836 (9th Cir. 2011) (stating if there is a potential conflict between the text and the commentary, the text controls); *United States v. Armijo*, 651 F.3d 1226, 1236-37 (10th Cir. 2011) (rejecting government's claim that, because offense was listed in commentary, there was no need for it to qualify under *Begay*'s interpretation of the residual clause, as "[t]o read application note 1 as encompassing non-intentional crimes would render it utterly inconsistent with the language of § 4B1.2(a)"); *United States v. Wilks*, 464 F.3d 1240, 1245 (11th Cir. 2006) (commentary is not binding if it contradicts the "plain meaning of the text" of guidelines); *United States v. Fox*, 159 F.3d 637, 1998 WL 388801, at *2 (D.C. Cir. May 6, 1998) (rejecting commentary that purports to "substantially alter[]" the requirements of guideline's text because commentary has force "only to the extent that it is not inconsistent with the text").

invalid, and commentary that is inconsistent with or a plainly erroneous reading of the existing guideline's text must be disregarded in favor of the text.

The offenses listed in § 4B1.2's commentary that are not also listed in § 4B1.2(a)(2)'s enumerated offense clause are: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, extortionate extension of credit, unlawful possession of certain firearms, "(*e.g.*, a sawed-off shotgun or sawed off rifle, silencer, bomb, or machine gun)," and aiding and abetting, conspiring, or attempting to commit a crime of violence. U.S.S.G. § 4B1.2 cmt. n.1. Several of these offenses, as defined by applicable statutes, have been held or can be shown *not* to satisfy the force clause.[15]

When the offense at issue does not satisfy the force clause under the categorical approach (or the modified categorical approach if it applies), the commentary listing the offense must be disregarded because, after *Johnson*, the commentary does not interpret any existing text of the guideline and is also flatly inconsistent with the remaining guideline text. Moreover, even if the commentary could be argued to be valid in a particular case, the commentary offense must still

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[15] *See, e.g.*, *Becerril-Lopez*, 541 F.3d at 891 (finding robbery under California Penal Code § 211 does not meet force clause); *see also United States v. Woods*, 576 F.3d 400 (7th Cir. 2009) (stating no one contends involuntary manslaughter under Illinois Criminal Code § 720 5/4-6 meets the force clause).

satisfy the *generic* definition of that offense. *Taylor v. United States*, 495 U.S. 575, 600-02 (1990).

As set forth above, courts cannot mix and match elements of different offenses to create a generic crime. *See Descamps*, 133 S. Ct. at 2286. Robbery under § 211 does not satisfy a generic definition of any offense for purposes of classifying it as a crime of violence—not generic robbery and not the enumerated offense of generic extortion. *See* Sections I(C)(1)(a) and (b), *infra*.

Robbery under § 211 can therefore only qualify as a "crime of violence" if it interprets or explains § 4B1.2 *and* is not inconsistent with § 4B1.2. It fails on both fronts. First, a § 211 robbery cannot interpret or explain the residual clause, because *Johnson* rendered the residual clause void. Second, a § 211 robbery is also inconsistent with the remaining text of § 4B1.2, because a § 211 robbery extends beyond generic robbery, does not meet the physical force clause, and is not enumerated in the text of guideline. *See* Sections I(C)(1)(a) and (b), *infra*. Thus, because the commentary is inconsistent with the guideline "in that following [the commentary] will result in violating the dictates of [the guideline]," the Court must disregard the commentary and follow the text of § 4B1.2. *Stinson*, 508 U.S. at 43.

Finally, in light of *Johnson*, and because the residual clauses in the ACCA and § 4B1.2 are "identical," the Commission has now proposed to "delete the residual clause" of § 4B1.2 and to "move[] all enumerated [commentary] offenses

to the guideline." *See* U.S. Sent'g Comm'n, *Proposed Amendment to the Sentencing Guidelines* (Aug. 12, 2015). Specifically, it proposes moving murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offenses, and robbery from the commentary of § 4B1.2 to the text. *Id.* In addition, the Commission proposes to eliminate altogether the commentary regarding involuntary manslaughter, extortionate extension of credit, and unlawful possession of certain firearms. *Id*. The Commission is also seeking comment on whether to eliminate aiding and abetting, conspiracy, and attempt. *Id.* Notably, if robbery is moved to the text of § 4B1.2, a robbery under § 211 would not qualify as a generic robbery offense because it does not meet the generic definition of robbery.

The Commission's proposed amendments demonstrate its recognition that the only valid function of commentary is to interpret the guideline, and commentary is not authoritative if it is inconsistent with or a plainly erroneous reading of the guideline. *See* U.S.S.G. § 1B1.7 & cmt. (citing *Stinson*, 508 U.S. at 38). Thus, the Commission's proposal to move offenses from the commentary to the text indicates commentary offenses: (1) no longer interpret or explain any text in the guideline now that the residual clause is void; and (2) are inconsistent with the remaining text of the guideline.

For each of these reasons, Mr. Tate's robbery conviction under California Penal Code § 211 does not constitute a crime of violence under § 4B1.2.

2. **This Court may resolve this legal error.**

It is of no import that Mr. Tate did not raise this issue below. This question involves a pure question of law—whether *Johnson* rendered Mr. Tate's sentence unconstitutional. Assuming arguendo that de novo review is inapplicable, this Court may nevertheless remand to the district court pursuant to the plain error standard. *United States v. Ameline*, 409 F.3d 1073, 1078 (9th Cir. 2005). "Plain error is (1) error, (2) that is plain, and (3) that affects substantial rights." *Id.* (internal quotation and citation omitted). Once an appellant establishes plain error, there is a fourth prong, wherein this Court "may exercise its discretion to notice a forfeited error that . . . seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (internal quotation, citation, and footnote omitted).

Particularly applicable here, "[a]n error is plain if it is 'contrary to the law at the time of appeal . . . ." *Ameline*, 409 F.3d at 1078 (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)). No matter what clause the district court may have applied to find Mr. Tate's prior robbery conviction constituted a crime of violence under § 4B1.2, the district court committed plain error. This is because robbery:

- ♦ is not enumerated in the text of § 4B1.2;
- ♦ does not meet the physical force clause of § 4B1.2;
- ♦ cannot be molded into an extortion offense, pursuant to *Descamps*;

- cannot be deemed a crime of violence under the now void residual clause, pursuant to *Johnson*; and
- does not explain the text of § 4B1.2, and is actually inconsistent with the guideline's text.

The district court's application of § 4B1.2 impacted Mr. Tate's substantial rights. As shown above, application of § 4B1.2 increased his base offense level from 14 to 20. *Compare* §§ 2K2.1(a)(4) *with* (a)(5). This error affected Mr. Tate's substantial rights, since application of § 4B1.2 increased Mr. Tate's sentence. *See United States v. Anderson*, 201 F.3d 1145, 1152 (9th Cir. 2000) ("a longer sentence undoubtedly affects substantial rights"). Indeed, this Court holds *any* increase to a sentence affects substantial rights. *United States v. Joseph*, 716 F.3d 1273, 1280 (9th Cir. 2013) (finding one-month increase to sentence affected substantial rights under plain error review).

Prejudicial sentencing errors also undermine the "fairness, integrity, or public reputation of judicial proceedings." *Joseph*, 716 F.3d at 1281. This Court regularly deems the fourth prong of the plain error standard "satisfied where, as here, the sentencing court committed a legal error that may have increased a defendant's sentence." *Id.* (internal quotations and citation omitted). Here, application of the residual clause to increase Mr. Tate's sentence would constitute a legal error.

The district court set Mr. Tate's base offense level at 20, pursuant to U.S.S.G. § 2K2.1(a)(4)(A), believing he had a California second degree robbery offense that constituted a crime of violence under U.S.S.G. § 4B1.2. ER 52. Without the crime of violence enhancement, Mr. Tate's base offense level would have been 14. *Compare* U.S.S.G. §§ 2K2.1(a)(4) *with* 2K2.1(a)(5). Without the crime of violence enhancement, despite the other sentencing enhancements contested herein, Mr. Tate's sentencing range would decrease from a guideline range of 100 to 120 months of incarceration to 57 to 71 months of incarceration. PSR ¶ 121.

For all of these reasons, this Court should vacate Mr. Tate's sentence and remand with instructions that the district court resentence him without application of a crime of violence enhancement under § 4B1.2.

II. Mr. Tate's 120-month sentence is procedurally erroneous and substantively unreasonable.

A. Standard of Review

"Appellate review is to determine whether the sentence is reasonable." *United States v. Carty*, 520 F.3d 984, 993 (9th Cir. 2008) (en banc). Any sentence that is procedurally erroneous or substantively unreasonable will be set aside. *Id.* Accordingly, this Court employs a two-part review of sentences. *See United States v. Rising Sun*, 522 F.3d 989, 993 (9th Cir. 2008).

First, this Court must ensure the district court committed no "significant procedural error," such as incorrectly calculating the Guideline range, failing to consider 3553(a) factors, choosing a sentence based on clearly erroneous facts, or failing to adequately explain the sentence selected. *Carty*, 520 F.3d at 993. Then, the Court must "consider the substantive reasonableness of the sentence imposed." *Gall v. United States*, 552 U.S. 38, 51 (2007).

This Court reviews "the district court's application of the Sentencing Guidelines de novo, the district court's application of the Sentencing Guidelines to the facts of a case for abuse of discretion, and the district court's factual finding for clear error." *United States v. Grissom*, 525 F.3d 691, 696 (9th Cir. 2008) (quotation omitted).

The district court's application of a particular burden of proof at sentencing is reviewed for plain error if not objected to below. *United States v. Pineda-Doval*, 614 F.3d 1019, 1041 (9th Cir. 2010). This Court may order re-sentencing if there is (1) error, (2) that is plain, (3) that affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.* (citation omitted).

B. Analysis

1. The district court committed procedural error by using a preponderance of the evidence standard to apply two insufficiently proven sentencing enhancements.

a. The district court plainly erred in using a preponderance of the evidence standard, when the two enhancements it applied had an extremely disproportionate effect on Mr. Tate's sentence.

The district court erred in using the preponderance standard, rather than clear and convincing evidence, to determine whether Mr. Tate used the firearm in connection with another felony and whether he obstructed justice. ER 19. Although the court remarked the evidence also met the clear and convincing standard, ER 22, 24, the evidence met neither standard.

Due process requires the application of a clear and convincing evidence standard of proof when an enhancement based upon uncharged conduct has an extremely disproportionate effect on the length of a defendant's sentence. *United States v. Valensia*, 222 F.3d 1173, 1182 (9th Cir. 2000). This Court has identified six factors to determine disproportionate effect, though no single factor is controlling. *Id.* The factors are: (1) whether the enhanced sentence falls within the maximum sentence for the crime alleged in the indictment; (2) whether the enhanced sentence negates the presumption of innocence or the prosecution's burden of proof; (3) whether the facts offered in support create new offenses requiring separate punishment; (4) whether the increase is based on a conspiracy; (5) whether the increase in offense levels is less than

or equal to four; and (6) whether the length of the enhanced sentence more than doubles the length of the initial sentencing guideline range in a case where the defendant would otherwise have received a relatively short sentence. *Id.* (citations omitted).

Here, as the 6-level increase for uncharged conduct escalated Mr. Tate's guideline range from 57-71 months to 100-120 months, the district court should have used the clear and convincing standard. Three of the *Valensia* factors weigh in Mr. Tate's favor: the enhanced sentence exceeded the statutory maximum by five months (factor one); the alleged domestic battery and subsequent obstruction of justice were acts separate from the firearm possession (factor three); and the total increase in the number of offense levels was six (factor five). Particularly with regard to factor three, the uncharged domestic battery and obstruction of justice allegations were acts separate and apart from the firearm possession. The facts offered in support, if true, would create new offenses requiring separate punishment. Additionally, the length of the enhanced sentence was just shy of doubling the initial guideline range (factor six).

On balance, the enhanced sentence is extremely disproportionate, and the clear and convincing standard applies. The court plainly erred in finding otherwise. *See*

ER 18-19 (finding only factors one and five supported the higher standard of proof).[16]

b. The district court erroneously applied a four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B) because the government failed to prove Mr. Tate possessed the firearm in connection with Nevada Revised Statute § 200.481.2.

The district court erred in finding Mr. Tate possessed the firearms "in connection with another felony offense." ER 24. Two errors occurred here. First, the government did not sufficiently prove Mr. Tate committed domestic battery with a deadly weapon. Second, the district court engaged in improper burden-shifting by drawing adverse inferences from Mr. Tate's pre-trial silence.

To prove domestic battery with a deadly weapon, the government had to establish Mr. Tate committed: "willful and unlawful use of force or violence upon the person of another," using a "weapon, device, instrument, material or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing substantial bodily harm or death," against or upon a person with whom he had a domestic relationship, and "a union or joint operation of act or conduct and general criminal intent." Nev. Rev. Stat. §§

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[16] The district court remarked that it found both enhancements proved under the clear and convincing standard, ER 22, 24, but that claim is belied by the lack of evidence presented to support the enhancements, as described more fully herein.

200.481.2, 200.481.1(a), 33.018.1, 193.165(6)(b); Nevada Jury Instructions for Battery.[17]

There were three witnesses in this case. Two witnesses, Mr. Tate and Juelle Knighton, averred Mr. Tate never hit McCollum. ER 30, 83, 253, 295. In his allocution, Mr. Tate told the district court, "I never once put my hand on her." ER 30. Knighton, who was in the room next to Mr. Tate's bedroom with the door open, stated McCollum was upset and screaming at Mr. Tate. ER 295. Additionally, Knighton told police she did not see or hear any hitting. ER 163. Further, Knighton told Tobin that McCollum "lies" and "can't be trusted." ER 163.

The only evidence proffered in support of the felony battery enhancement was McCollum's statements to police officers, which were inconsistent, contradictory, and changed over the course of the evening. No physical or photographic evidence supported her claims, and no actual evidence indicated she received any injuries. ER 102, 233.

For instance, McCollum told the 911 operator that Mr. Tate was banging her head and her baby's head against a wall. ER 253. She told 911 that her "4 month old baby was also hit." ER 223. When police officers arrived and found no marks on the baby, McCollum admitted Mr. Tate did not hit the baby. ER 253.

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[17] Washoe County District Attorney's Office Jury Instructions, p. 17, available at http://nvpac.nv.gov/uploadedFiles/nvpacnvgov/Content/Attorneys/JuryInstructions.pdf.

Further, McCollum told the 911 operator, "He hit me with a gun," and claimed she was afraid Mr. Tate would shoot her if police did not arrive quickly. ER 206. However, McCollum later told police that Mr. Tate "just opened the door and [she] got out." ER 275. McCollum was standing outside the home during three out of the four 911 calls and when police arrived minutes later. ER 77. Though McCollum claimed she was in danger of being shot, she stood by the door instead of creating distance from the supposed threat.

When officers first arrived, McCollum stated Mr. Tate had hit her several times with a gun. ER 233. McCollum claimed the gun was a "handgun," that it was loaded, and Mr. Tate threatened to shoot her with it. ER 233. According to McCollum, Mr. Tate began "pistol whipping" her with the gun. ER 233. McCollum "couldn't say where she was struck," only that it was "about the head." ER 65. Later, McCollum changed her mind about being struck with a gun. McCollum told Tomaino that Mr. Tate hit her with his fists. ER 270. She said so twice. When the detective asked "what else" Mr. Tate hit her with, McCollum eventually stated, "I think he had a gun in his hand," ER 270, though she did not know what it looked like. ER 271.

McCollum denied seeing the object used to hit her because she was looking down the entire time. ER 271 (McCollum stated "the whole time . . . [she] wasn't looking up at him" and "was putting [her] head down"). Yet, she thought the object

was silver and brown. *Id.* McCollum admitted to police, "I don't quite know if it was a gun . . . ." ER 281. Notably, no gun matching any of the descriptions McCollum provided (loaded or silver and brown) was found.

McCollum further claimed she walked down the stairs, carrying her baby, shielding her baby, blocking her head with her hands, and simultaneously called 911. ER 73, 233. Somehow, the entire time, the baby stayed asleep. ER 278. McCollum also told police that despite the events, Knighton would have heard nothing from the other room. ER 276.

McCollum was also inconsistent in describing her relationship with Mr. Tate. She told police Mr. Tate was her ex-boyfriend with whom she separated six months prior. ER 268. However, Mr. Tate had recently driven McCollum and her four-month-old son from California to Las Vegas. ER 233. McCollum first told police Mr. Tate was not the father of her baby. ER 270. In a later interview with defense investigator Tobin, McCollum admitted Tate was one of two men who could be the father of her child. ER 166.

No physical evidence supported McCollum's claims. McCollum at first could not say where she was struck, just that it was "about the head." ER 65. Later, she claimed to have an injury to her pinky finger and "lumps" on her head. ER 273, 278. Police took photographs of McCollum's alleged injuries. ER 233. Those photographs simply show the outside of her hair and the top of her hand, which had

a tattoo and a scab. *See* ER 284, 289-90. No head injuries were photographed. ER 253. Two officers testified they felt bumps on McCollum's head. ER 67, 98-99. However, the officers did not agree about where the bumps were located, whether the bumps were old or new, or whether McCollum had hair extensions that might cause bumps in the hair. ER 62, 68, 95, 99. No attempts were made to link McCollum's DNA to the gun, which would have corroborated her story. ER 253.

Despite the dearth of evidence supporting McCollum's claims, the district court found the evidence sufficient to support the enhancement. ER 23. In particular, the court believed McCollum's statements to 911 that, "He hit me with a gun." ER 23. Despite the inconsistent testimony about the head bumps, the court found McCollum's statement corroborated by the officers who felt bumps on her head. ER 23.

Brown's testimony was also suspect. Brown wrote in his report and testified he saw defensive wounds on McCollum's fingers and felt bumps on the back of McCollum's head consistent with being struck by a firearm. ER 62, 68-69, 233. Brown later admitted what he thought were abrasions was actually a tattoo. ER 90. Brown's testimony about McCollum's alleged injury undercut his reliability and credibility. ER 90. Yet, the district court considered Brown's testimony reliable where it supported McCollum's story and simply disregarded evidence that undermined Brown's credibility. ER 22-23 (district court indicated it was not moved

by "whatever" Brown believed was on McCollum's finger, but believing Brown corroborated McCollum's claim that she was hit with a gun).

Additionally, the district court gave weight to Mr. Tate's failure to deny the allegations on the phone with McCollum and during his ride with Cuyler. ER 24. The district court stated that, during a call from jail, Mr. Tate "never denie[d] what he did, he never denie[d] he used a gun to beat her, he rather apologize[d] to her repeatedly for what he did to her . . . I note that he also didn't deny it to Special Agent Cuyler . . . [which] seemed to indicate some acknowledgment that he hit her with a gun." ER 24. This was improper burden-shifting.

The Supreme Court has held "a sentencing court may not draw an adverse inference from a defendant's silence in determining facts relating to circumstances and details of the crime." *Mitchell v. United States*, 526 U.S. 314, 315 (1999). "The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege." *Id.* at 330.

In *Mezas de Jesus*, this Court reversed and remanded where a district court "effectively shifted the burden of proof at sentencing to the defendant" by weighing the defendant's silence at sentencing against the government's "untested" evidence supporting an enhancement. *United States v. Mezas de Jesus*, 217 F.3d 638, 645 (9th Cir. 2000). The district court had erroneously drawn an adverse inference from

the defendant's silence; that error was a factor in the district court's misapplication of the preponderance standard. *Id.* The same principle applies here: the district court gave improper weight to Mr. Tate's failure to provide exculpatory statements over the phone to McCollum and during the car ride with Cuyler.

Given McCollum's contradictory statements and that no DNA and no photographic or physical evidence supported her story of being "pistol-whipped," the district court erred in concluding clear and convincing evidence supported the four-level enhancement. Nor did the evidence meet the preponderance standard. McCollum denied seeing a gun, and no other witness supported her claims. Despite the government's offer of photographs displaying her "injuries," no photographs showed any injuries. The government failed to demonstrate that a weapon readily capable of causing substantial bodily harm or death was willfully and unlawfully used against a domestic relation under Nevada Revised Statute § 200.481.2. Additionally, instead of examining whether the government's evidence was clear and convincing, the district court improperly shifted the burden onto Mr. Tate by weighing his pre-trial silence against him. Remand for resentencing is necessary, with instructions that the district court not apply the four-level enhancement under U.S.S.G. § 2K2.1(b)(6)(B).

c. The district erred in applying a two-level obstruction of justice enhancement under U.S.S.G § 3C1.1 when the government failed to prove Mr. Tate obstructed justice in the instant offense.

The district court found sufficient evidence for obstructing justice based on recorded jail calls and a reported act of arson in Los Angeles while Mr. Tate was in custody in Nevada. ER 21-22. The alleged conduct at issue, however, concerned Mr. Tate's state domestic battery case, not the "instant offense of conviction" for unlawful firearm possession under 18 U.S.C. § 922(g), as required under U.S.S.G. § 3C1.1. Moreover, because the conduct was not likely to thwart the investigation or prosecution for felon in possession, the district court erred in applying the enhancement.

The guideline language limits the enhancement to the defendant's conduct "with respect to the investigation, prosecution, or sentencing of the defendant's *instant offense of conviction*." U.S.S.G. § 3C1.1, cmt. n.1. "Obstructive conduct that occurred prior to the start of the investigation of the instant offense of conviction *may* be covered by this guideline *if* the conduct was purposefully calculated, *and likely, to thwart the investigation or prosecution of the offense of conviction*." U.S.S.G. § 3C1.1, cmt. n.1 (emphasis added). All of the alleged obstructive conduct occurred while Mr. Tate was in custody for domestic battery, before Mr. Tate was "re-booked" in state court for felony firearm possession charges. ER 236.

At the time Mr. Tate spoke to McCollum from jail on October 31, 2014, Mr. Tate had been arrested for and faced a state charge for felony domestic battery with a deadly weapon. ER 231. In a phone call at 10:53 a.m., Mr. Tate suggested McCollum not testify against him in the state domestic battery case. ER 255. The district court did not interpret the phone call in context. As the defense maintained at sentencing, that particular phone call was a continuation of a prior phone call between Mr. Tate and McCollum 48 minutes earlier. ER 255. In a call at 10:05 a.m., Mr. Tate made no mention of McCollum's testimony. *Id.* Rather, McCollum herself raised the subject by saying "I shouldn't have gone to court" or "I shouldn't go to court." *Id.* She repeated the statement three times. Shortly after the third repetition, Mr. Tate told McCollum he would call her back and urged her to "answer [her] phone please." *Id.* Then, during the second call, Mr. Tate picked up the conversation where McCollum had left off, agreeing that perhaps "it would be better if [she] didn't go to court." ER 174, 225.

The government argued Mr. Tate's statements concerned a future federal prosecution for unlawful firearm possession because he referenced "ten years" and "going to the pen[itentiary]." ER 210. However, Mr. Tate faced a term of ten years in state prison for the domestic battery charge. Nev. Rev. Stat. § 200.481.2(e). Thus, a possible future federal firearm conviction was not the only charge that carried the

ten-year penalty. Additionally, if the case were adopted by the federal government for interstate domestic violence, he could indeed face ten years in the federal "pen." *See* 18 U.S.C. § 2261(b)(3).

During another jail call on November 1, 2014, Mr. Tate told a friend to "call all the homies . . . and let them know [to] get on that bitch for real." ER 210. Immediately after that, Mr. Tate named his state charges and the corresponding bail amounts. ER 256. The federal district of Nevada typically does not impose appearance bonds, and did not for Mr. Tate. *Id.* The statement was clearly about Mr. Tate's domestic battery case.

On November 15, 2014, three days before McCollum was scheduled to testify in the domestic battery case against Mr. Tate, McCollum's mother reported an act of arson in front of her residence in Los Angeles. ER 240. The arson report noted the most likely motive was witness intimidation in a "domestic violence case that occurred in Nevada." ER 239. Apparently, the Nevada district attorney on the case told McCollum that Mr. Tate made threats against her. ER 242. Significantly, the arson took place three days before McCollum was scheduled to testify in the state domestic battery case. PSR ¶ 18. No state or federal firearm possession charges had been filed at that point. In fact, Mr. Tate was not "re-booked" on state firearm charges until November 17, 2014, weeks after the phone calls and days after the arson. ER 236. Even if the arson could somehow be linked to Mr. Tate, who was

in custody hundreds of miles away, it would have concerned the domestic battery case.

Significantly, the obstructive conduct was not "purposefully calculated, and likely, to thwart the investigation or prosecution of the offense of conviction." U.S.S.G. § 3C1.1, cmt. n.1. The firearms were found in Mr. Tate's residence pursuant to a search warrant. ER 256. Mr. Tate eventually admitted to officers that he possessed a firearm. *Id.* McCollum's domestic battery testimony was not necessary to prove the elements of federal firearm possession charges under 18 U.S.C. § 922(g). As discussed, McCollum's testimony did not reliably place a gun in Mr. Tate's hand during the domestic battery incident. Clearly, neither the investigation nor the prosecution into the instant case were thwarted.

Thus, the district court committed procedural error in applying U.S.S.G. § 3C1.1 where the evidence did not support the enhancement for obstructing justice in the underlying federal case. Because the jail calls clearly referenced the state domestic battery case and the arson was (if linked to Mr. Tate) related to the state's preliminary hearing for domestic battery, the evidence did not even meet the preponderance standard of proof for obstruction in this case. Remand for resentencing without the obstruction enhancement is therefore appropriate.

2. Mr. Tate's 120-month sentence is substantively unreasonable because the district court failed to attribute proper weight to Mr. Tate's induction into a gang at age seven and gave improper weight to his pending state sentence and criminal history.

This Court may not presume a sentence is reasonable simply because it falls within the suggested guideline range. *Carty*, 520 F.3d at 993. "[I]t is possible for a sentence to pass procedural muster and yet be substantively unreasonable." *United States v. Autery*, 555 F.3d 864, 870 (9th Cir. 2009). Appellate review for substantive reasonableness is thus not a "rubber stamp." *United States v. Ressam*, 679 F.3d 1069, 1087 (9th Cir. 2012) (citation omitted). Rather, appellate review of substantive reasonableness turns upon the particulars presented in a given case and, thus, requires individualized consideration. *Id.* This Court has said its review of the substantive unreasonableness of a sentence is deferential and will provide relief only in "rare" cases. *Id.* This is a rare case.

In considering whether a sentence is substantively unreasonable, this Court must determine whether the ultimate sentence is greater than necessary to achieve the overarching statutory charge in 18 U.S.C. § 3553(a), *i.e.* whether the district court "impose[d] a sentence sufficient, but not greater than necessary' to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to afford adequate deterrence; to protect the public; and to provide the defendant with needed educational or vocational training, medical care, or other correctional

treatment." *Carty*, 520 F.3d at 991. The Guidelines are not to be given "more or less weight than any other" 18 U.S.C. § 3553(a) factor. *Id.*

At sentencing, defense counsel asked the district court to take into account Mr. Tate's tragic and traumatic upbringing. ER 27-28, 257-59, 261-62. Despite uncontested evidence of horrific and violent circumstances manifesting in mental and emotional conditions and substance abuse throughout Mr. Tate's life, the district court declined to depart or vary downward and imposed the statutory maximum as Mr. Tate's punishment.

Mr. Tate was "beaten up, by an adult, in order to be admitted into a gang" when he was seven years old. ER 28. Seven. Child development experts indicate age seven is a key year in a young child's growth. At seven, children frequently ask adults and peers questions to satisfy their need to know; recognize more words by sight and can apply reading comprehension; do simple addition and subtraction; and effectively combine motor skills like running to kick a ball. PBS Parents, Child Development Tracker, http://www.pbs.org/parents/childdevelopmenttracker/seven/. PBS Parents suggests "Berenstain Bears" and "Sid the Science Kid" as appropriate television shows for a seven-year-old. *Id.* But that was not young Gerald Tate's destiny or story.

No adults in Mr. Tate's life interceded in his brutal induction into the gang at age seven. Defense counsel pointed out the "highly unusual and tragic" repercussions of this, namely that Mr. Tate's "moral compass would be set by a street gang, since the age of seven." ER 29. Mr. Tate stopped attending school at age twelve because he "wanted to be grown," and no adults intervened. PSR ¶ 106. This set a terrible trajectory. He used marijuana for the first time at age ten, developing substance abuse issues at a young age. PSR ¶ 97. At ages thirteen and fifteen, Mr. Tate was shot in the leg and back. PSR ¶¶ 88, 89. At ages fourteen and sixteen, he tried to commit suicide. PSR ¶ 91. He did not receive mental health counseling after those attempts. PSR ¶ 91.

As a young adult in 2004, the traumas of childhood continued to impact Mr. Tate; he attempted suicide again. PSR ¶ 92. That same year, he was diagnosed with schizophrenia and placed on medications while he was incarcerated. PSR ¶ 92. Mr. Tate has heard voices and continues to "see things" such as a ghost pushing on his head. PSR ¶ 93.

At the age of 32, about a year before the instant case, Mr. Tate was shot in the head. PSR ¶ 90. He somehow survived, though his ear had to be glued back onto his head. PSR ¶ 90. Also around that time, Mr. Tate's mother and his friend were shot at seventeen times while they were in his car. ER 38. His mother ducked under

the windshield and his friend threw the car in reverse and drove backwards for five blocks to escape the murder attempt. ER 38. Mr. Tate's home was shot at with an AK 47. ER 38.

When Mr. Tate attempted to explain the circumstances of the horrific shooting that nearly took his life and caused him to flee California, the district court simply replied, "I remember reading that. I understand. I can't relate because I can't put myself in your shoes, you're right, but I got to look at the facts . . . and it doesn't add up." ER 38.

This Court has reversed where a district court clearly erred in failing to find the psychological effects of the defendant's childhood abuse warranted departure. *United States v. Walter*, 256 F.3d 891, 894 (9th Cir. 2001). Here, the government did not deny the traumatic circumstances that engulfed Mr. Tate's childhood and impacted his adult life. Instead, the prosecutor characterized those circumstances as "excuses" and "explanations." ER 25-26. Despite the uncontested evidence of major childhood trauma in light of early induction into a gang, multiple reports of attempted suicides and substance abuse issues, the district court found no reason to depart or vary downward. This was substantively unreasonable.

The district court also ignored another argument for mitigation—Mr. Tate's ongoing rehabilitation while in custody. ER 258-59. Defense counsel submitted

certificates for parenting and anger management classes Mr. Tate received while detained. ER 309-10. When not in custody, Mr. Tate had been gainfully employed as a construction worker, a stocker at Walmart, helped his mother's business, and operated his own store. ER 259. Mr. Tate explained his sincere remorse, his desire to change his life and hope for a future for himself and his children. ER 307. The court did not address these positive changes in sentencing. Instead, the court focused on Mr. Tate's past and the fact he "ha[dn't] learned from" prior convictions. ER 36.

The district court gave undue weight to the fact the instant case occurred after Mr. Tate failed to appear for sentencing in an unrelated case, for possessing a firearm in California in 2014. ER 36-39 (referring to conduct four times); PSR ¶ 43. The court noted, "You ran away from sentencing after pleading guilty in June in the California case." ER 36. While rejecting Mr. Tate's letters of support, the court stated, "You weren't thinking of your kids when you were committing these crimes in California. Even if this case hadn't happened, you'd be facing a lengthy prison sentence already for the California case, the one that you left before you got sentenced in." ER 37. Later, the court repeated, "you are still facing and you still face problems in California so even if this case never happened, you'd still be facing time in California." ER 38. The court improperly gave undue weight to the prior, unrelated state case.

The PSR had already assigned two points to Mr. Tate's criminal history for committing the offense while under a criminal justice sentence under U.S.S.G. § 4A1.1(d). PSR ¶ 46. The two points bumped Mr. Tate from a category IV to category V, increasing his sentencing exposure under the Guidelines. It was substantively unreasonable for the court to impose the statutory maximum where that aspect of his conduct had been accounted for in his criminal history category.

Mr. Tate's sentence does not conform with the statutory purposes of 18 U.S.C. § 3553(a). This is a case where the defendant's life history and personal characteristics warranted a downward departure or variance. The district court imposed a substantively unreasonable sentence of 120 months on a man whose life trajectory was set when he was only seven years old. Accordingly, this Court should vacate Mr. Tate's sentence and remand for resentencing.

CONCLUSION

Appellant Gerald Tate's sentence is unconstitutional under *Johnson*, procedurally erroneous, and substantively unreasonable. Each error requires the Court to vacate Mr. Tate's sentence and remand this case for resentencing.

DETENTION STATUS

Appellant Gerald Tate has remained in custody since arraignment. Mr. Tate is presently in the Bureau of Prisons' custody and detained at the United States Penitentiary in Victorville, California. His projected release date is July 17, 2023.

STATEMENT OF RELATED CASES

Counsel is aware of three cases on direct appeal before this Court that involve the interplay between § 4B1.2's residual clause and *Johnson*: *United States v. Steppes*, Ninth Circuit Case No. 15-10243; *United States v. Torres*, Ninth Circuit Case No. 14-10210; and *United States v. Lee*, Ninth Circuit Case No. 13-10517.

Dated this 28th day of September, 2015.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,993 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word and Times New Roman 14-point font.

Dated this 28th day of September, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that, on September 28, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing documents by First-Class Mail, postage pre-paid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days, to the following non-CM/ECF participants: Defendant-Appellant, Gerald Leslie Tate.

/s/ Cecilia Valencia

CECILIA VALENCIA
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