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NC's Assault Inflicting Serious Bodily Injury Is a Crime of Violence under the Sentencing Guidelines

[*U.S. v. Thompson*](#), ___ F.3d ___, 2017 WL 4818870 (4th Cir. Oct. 26, 2017). The defendant pleaded guilty to possession of a firearm and a drug offense in the eastern district of North Carolina. The district court enhanced his sentence based on a prior conviction of a crime of violence under Section 4B1.2 of the Sentencing Guidelines. The defendant had a previous conviction for Assault Inflicting Serious Bodily Injury ("AISBI") in North Carolina. On appeal, the defendant argued that the district court erred in finding AISBI qualified as a crime of violence. The term "crime of violence" is defined in Section 4B1.2 as any state or federal crime punishable by more than a year of imprisonment and that is either one of the enumerated offenses or "*otherwise involves conduct that presents a serious potential risk of physical injury to another*" under what is commonly known as the residual clause. A nearly identical residual clause in the Armed Career Criminal Act ("ACCA") was struck down as void for vagueness in *U.S. v. Johnson*, 135 S. Ct. 2551 (2015). In *Beckles v. United States*, 137 S. Ct. 886 (2017), however, the U.S. Supreme Court rejected a similar challenge to the residual clause of Section 4B1.2 because the Sentencing Guidelines under which this clause applies are discretionary. The court in *Thompson* therefore assessed whether the residual clause applied to the defendant's prior AISBI conviction.

Looking by analogy to previous Supreme Court decisions interpreting the residual clause under the ACCA, the court found that those cases required a showing that the crime of violence must carry the same "degree-of-risk" as the enumerated felonies in Section 4B1.2 and must also be "similar-in-kind" to those felonies. (The enumerated offenses include burglary of a dwelling, arson, extortion, or use of explosives.) Courts should look to the "ordinary case" involving the offense in making both determinations. Slip Op. at 4-5. The defendant argued that, due to NC's broad definition of assault, AISBI may be committed by mere "culpable negligence". According to the defendant, the offense was therefore sufficiently dissimilar to the enumerated offenses, as commission of the offense in the ordinary case did not necessarily involve the kind of "purposeful, violent, and aggressive" conduct found in the enumerated offenses.

The court rejected this argument and held that NC's crime of AISBI is a crime of violence for purposes of the residual clause of Section 4B1.2. The degree of risk was similar—the statute itself and the case law interpreting it shows that the crime applies to "especially violent" assaults that cause "extremely serious injuries." Slip Op. at 9. The offense is also similar-in-kind to the enumerated offenses—of all 141 NC decisions mentioning the crime, none demonstrate "that AISBI can be committed with anything less than actual intent." *Id.* The court concluded that AISBI ordinarily involves the type of "purposeful, violent, and aggressive" conduct targeted by Section 4B1.2, and therefore is properly deemed a crime of violence under that section of the Sentencing Guidelines.