HILARY POTASHNER (Bar No. 167060)
Federal Public Defender
MARISOL ORIHUELA (Bar No. 261375)
Deputy Federal Public Defender
(E-mail: Marisol_Orihuela@fd.org)
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-2644
Facsimile: (213) 894-0081

Attorneys for Defendant
TONY BIDDLES

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. TONY BIDDLES, Defendant.	NO. CR 10-397-DMG **DEFENDANT TONY BIDDLES'S SUPPLEMENTAL BRIEF RE: SENTENCING** **Sentencing Date:** October 28, 2015 **Sentencing Time:** 11:00 a.m.

Defendant Tony Biddles, by and through his counsel of record Deputy Federal Public Defender Marisol Orihuela, hereby files his position paper re: sentencing.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: October 22, 2015

By */s/ Marisol Orihuela*
MARISOL ORIHUELA
Deputy Federal Public Defender

I. INTRODUCTION

Mr. Biddles will appear on October 28, 2015 to be sentenced for violating the conditions of his supervised release. On October 7, the defense filed a brief regarding the applicable Guideline range in this case. On October 14, the government filed a response to the defense's arguments. Mr. Biddles hereby files this supplemental brief to respond to the government's arguments.

II.ARGUMENT

This Court should conclude that the advisory guideline range in this matter is 4-10 months because Mr. Biddles's violations do not constitute as "crimes of violence" under U.S.S.G. § 4B1.2. The government concedes that Mr. Biddles's violation for sustaining a conviction for kidnapping under California Penal Code § 207 is not a "crime of violence," but it maintains that a conviction under California Penal Code § 211 is a "crime of violence" under § 4B1.2.

In order to rule for the government, the Court would have to make both of the following two legal conclusions: First, the Court would have to determine that the commentary to § 4B1.2 interprets the text of the Guideline that remains after *Johnson v. United States*, 135 S. Ct. 2251 (2015), a Guideline which lists out specific enumerated offenses and fails to include robbery in that list; Second, the Court would also have to conclude that it does not need to employ the categorical approach, as enunciated in *Descamps v. United States*, 133 S. Ct. 2276 (2013), in its determination of whether a state conviction matches an enumerated offense. Mr. Biddles respectfully argues that the Court must apply the categorical approach due to binding precedent, and that under the categorical approach his conviction Cal. Penal Code § 211 is not a "crime of violence" under § 4B1.2. Mr. Biddles argues that, in the alternative, the Court should disagree that the Guideline range called for by a Grade A violation is appropriate in this matter.

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A. Robbery is Not Included in the Definition of "Crime of Violence" Under U.S.S.G. § 4B1.2

First, the Court should rule that the language of § 4B1.2 and the language of its commentary, as they relate to enumerated offenses, are inconsistent, and apply the text of the Guideline itself. The parties agree that *Stinton v. United States*, 508 U.S. 36 (1993), sets forth the principles of construction that govern the relationship of the text of a Guideline and its commentary. In that case, the Supreme Court delineated when commentary to a Guideline is authoritative and when it is not, holding that when it is inconsistent with or a plain erroneous reading of the Guideline a commentary lacks authority on the reviewing court. *Stinton*, 508 U.S. at 43. In order for a commentary to be authoritative, it must "interpret" or "explain" the Guideline to which it refers. *Id.*, 508 U.S. at 38. Thus, the issue here is whether the commentary to 4B1.2 interprets or explains the Guideline, or whether it is inconsistent or plainly erroneous. Contrary to the government's argument in its brief, *Stinton* does not hold that the "starting point" is the commentary, or simply that commentary is "controlling." *See* Gov's Response at 4: 21-24 (Dkt. 25.)

Turning to the Guideline itself, § 4B1.2 sets forth limited ways to qualify as a "crime of violence:" the force clause, a few enumerated offenses, and the residual clause. Robbery is not included in the enumerated offenses in the text of the Guidelines, and *none* of the enumerated offenses in the text of the Guidelines apply to include the conduct prohibited by Cal. Penal Code 211.

The parties agree that a conviction under 211 does not qualify under the force clause and that the residual clause is vague and therefore should not be applied. The government is left with the following phrase as what could potentially render 211 a crime of violence under this Guideline: "burglary, arson, extortion, or involves the use of explosives." The government does not explain how the commentary it wants to apply "interprets" or "explains" these phrases,

likely because it cannot. Its argument is actually that commentary can "expand" upon the Guidelines, but *Stinton* does not stand for that proposition.

The same inconsistency that this case presents was addressed by the Fourth Circuit in *United States v. Schell*, 789 F.3d 335 (4th Cir. 2015). In that case, the court applied *Stinton* to the commentary of 4B1.2 and concluded that a conviction for rape was not a crime of violence because it did not qualify under the force clause and was not an enumerated offense in the text of the Guidelines. It rejected the government's argument that the conviction qualified as a crime of violence under the commentary, which listed "forcible sex offenses" as an additional enumerated offense. *Schell*, 789 F.3d at 343-44. The government argues that *Schell* does not control, but it offers no argument as to why its reasoning is not persuasive and the appropriate application of *Stinton* to § 4B1.2 and its commentary.

Schell's reasoning is applicable here. Cal. Penal Code § 211 does not qualify under the force clause, is not one of the enumerated offenses in the text of the Guideline, and the residual clause is inoperable. The commentary does not interpret or explain the enumerated offenses of the text of the Guideline, and therefore the commentary of § 4B1.2 is not authoritative. And further, as the Fourth Circuit discussed in *Schell*, "Section 4B1.2's career-offender guideline, at issue here, and § 2L1.2's immigration guideline . . . are different provisions with significantly different texts and structures," and therefore the construction of the term in one context does not automatically apply to the other. For these reasons, the Court should conclude that 211 does not qualify under any permitted prong of the definition of "crime of violence" of § 4B1.2.

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B. Even if Robbery is Considered Part of the "Crime of Violence" Definition of U.S.S.G. § 4B1.2, a Conviction for Penal Code 211 is Not a Categorical Match to Any Enumerated Offense

Even if the Court concludes that the commentary to § 4B1.2 interprets a phrase in the text of the Guideline and includes robbery, it must thereafter determine whether Cal. Penal Code § 211 matches the definition of robbery under the Guideline. The defense adamantly asserts that this Court must follow the Supreme Court's "rule for determining when a defendant's [] conviction counts as [an] enumerated predicate offense[.]" *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). The Ninth Circuit this year squarely held that the categorical approach applies to determinations of whether a supervised release violation constituted a Grade A, B, or C violation. *United States v. Willis*, 795 F.3d 986, 993 (9th Cir. 2015).

Applying the categorical approach, Cal. Penal Code § 211 fails to qualify as a crime of violence because it is not a categorical match of any enumerated offense. The government argues that *Descamps* did not overrule the approach employed by the Ninth Circuit in *United States v. Becerril-Lopez*, 541 F.3d 881 (9th Cir. 2008), *see* Gov't Response at 5:25-28 (Dkt. 25), but it offers no explanation for its argument and cites no authority for its proposition that the Court need not employ the categorical approach. To the extent that the government meant to argue that *Becerril* did apply the categorical approach, a review of that case clearly reveals that it did not.

The categorical approach is clear. The reviewing court must determine whether *all* of the criminal conduct covered by the statute of the prior conviction matches or is narrower than the enumerated offense. There is no dispute that 211 is broader than the enumerated offense of robbery. There is also no dispute that 211 is broader than the enumerated offense of extortion. It is not a categorical

match to either one. Under *Descamps*, therefore, even if this Court applies the commentary as included enumerated offenses of § 4B1.2, Mr. Biddles's prior conviction for Cal. Penal Code § 211 *cannot* be a categorical match to any enumerated offense.

The approach employed by the Ninth Circuit in *Becerril* is not the categorical approach. The court in *Becerril* recognized that §211 is overbroad, but it divided up the conduct prohibited by that statute into different categories of generic enumerated offenses in U.S.S.G. § 2L1.2 -- an approach no longer permissible after *Descamps*. Nor is the approach employed by *Becerril* the modified categorical approach, because robbery is not a divisible offense and the Ninth Circuit did not rule that it was.[1] Thus, in order to follow *Becerril*, this Court must conclude that it is permitted to apply an approach other than the categorical approach. The government has not offered any authority for that proposition, and binding precedent, *see Willis*, 795 F.3d at 993, mandates that this Court conclude that the categorical approach must be applied.

For the reasons stated above, Mr. Biddles's violations are Grade B violations, and the resulting advisory guideline range under Chapter 7 is 4-10 months.[2]

C. Alternatively, the Court Should Disregard the Policy Statements of Chapter 7

Even if the Court were to disagree on the construction of "crime of violence" under § 4B1.2, the Court should disregard the advisory range called for by a Grade

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[1] California robbery is not a divisible offense because force or fear under 211 are not two separate elements of the crime. *See Hays*, 147 Cal. App. 3d at 543.

[2]

A violation. Supervised release violations that constitute felonies, but that are not "crimes of violence" or "controlled substance offenses" are only Grade B violations. The range set forth in Chapter 7 was first incorporated into the Sentencing Guidelines in 1990. *See* U.S.S.G. (1990 edition). There does not appear to be empirical data justifying lengthier terms of imprisonment for defendants who violate the conditions of supervised release through a crime of violence or through committing a controlled substance offense. Nor could one be justified solely on the basis of the purported seriousness of the offense, since sentencing courts in supervised released proceedings are not permitted to afford punishment upon the defendants they sentence. *See United States v. Miqbel*, 444 F.3d 1173, 1182 (9th Cir. 2006) ("at a revocation sentencing, a court may appropriately sanction a violator for his "breach of trust," but may not punish him for the criminal conduct underlying the revocation").[3] For these reasons, a policy disagreement with the Grade A sentencing range is appropriate.

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[3] Indeed, the difference in range, as being categorized on these two types of convictions, is remarkably similar to the felon-in-possession Guideline, U.S.S.G. 2K1.2, which was amended in 1991 to increase its base offense level based on the nature of prior convictions even though neither one correlated with higher-end sentences at the time. See U.S. SENTENCING COMMISSION FIREARMS AND EXPLOSIVE MATERIALS WORKING GROUP REPORT (Dec. 11, 1990), available at: https://www.ncjrs.gov/pdffiles1/Digitization/145575NCJRS.pdf. It is conceivable that the decision to impose a higher range for violations consisting of controlled substance offenses or crimes of violence was part of a pattern at the Commission during this time, despite its lack of relation to an appropriate sentencing purpose.

III.CONCLUSION

For the reasons discussed above, Mr. Biddles respectfully argues that his violations constitute Grade B violations, and that the correct guideline range is 4-10 months imprisonment. Alternatively, Mr. Biddles argues that the Court should disagree with the sentencing range called for by Grade A violations.

Respectfully submitted,

HILARY POTASHNER
Federal Public Defender

DATED: October 23, 2015

By */s/ Marisol Orihuela*
MARISOL ORIHUELA
Deputy Federal Public Defender