

DETERMINING “CRIMES OF VIOLENCE” AND “VIOLENT FELONIES”

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COURSE INTRODUCTION:

No single sentencing calculation inflicts more harm than a determination that a client's previous conviction qualifies as a "crime of violence" or "violent felony." Such a finding exposes the client to huge guideline offense-level enhancements and/or increased statutory mandatory minimum sentences. However, recent Supreme Court jurisprudence has significantly empowered defense counsel to combat these designations. This session will teach you how to determine whether a previous conviction actually qualifies as a crime of violence or violent felony and how to defend against any such erroneous characterization.

- I. When Do You Need to Worry About These Designations?
 - A. At Detention Hearings.
 - B. When your client is charged with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1).
 - C. When your client is potentially facing a sentence as a career offender.
 - D. When your client is charged with aggravated illegal re-entry in violation of 8 U.S.C. § 1326.

Although there might be more situations in which the "crime of violence" or "violent felony" designations may be important, we encounter the above situations more frequently.

These situations all involve somewhat different definitions of "crime of violence" or "violent felony," and it is important that we keep these differences in mind.

II. Detention Hearings:

Although the issues of pre-trial release or detention is not as ultimately important as being sentenced as an armed career criminal, career offender, or to an enhanced guideline range in an aggravated re-entry case, they are important and relevant to this topic. It is helpful to familiarize yourself with the applicable definition of “crime of violence” in this setting.

18 U.S.C. § 3142(f)(1) provides that a detention hearing shall be held on the government’s motion in a case involving (1) a **crime of violence**. There are other factors that come into play pursuant to this section, but crime of violence is most relevant for this discussion.

18 U.S.C. § 3156(a)(4) defines “crime of violence” as

- (A) an offense that has as an element of the offense the use, attempted use, or threatened use of physical force against the person or property of another; or
- (B) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

This language is identical to the general federal definition of “crime of violence” contained in 18 U.S.C. § 16(b).

18 U.S.C. § 3142(e)(2) generally means that for a case described in (f)(1), (including when a crime of violence is charged) a rebuttable presumption of detention arises if the judicial officer finds that

- (A) the person has been convicted of a Federal offense described in

- (f)(1) or of a state or local offense that would have been an (f)(1) offense had Federal jurisdiction existed;
- (B) the above described offense was committed while the person was on release pending trial for a Federal, State, or local offense; and
- (C) a period of not more than 5 years has elapsed since the later of the date of conviction, or release from imprisonment for the above described offense.

Using the information that follows, you may be able to convince the judicial officer that your client is either not charged with a crime of violence or that certain prior convictions do not qualify as crimes of violence or violent felonies. This may improve your client's chances of getting a bond.

III. The Armed Career Criminal Act:

A. The Armed Career Criminal Act or (ACCA) generally:

As we all know, a violation of 18 U.S.C. § 922(g)(1) carries a 10 year maximum penalty, but for someone with three prior convictions of either a “serious drug offense” or “**violent felony**” or both, the statutory penalty increases to 15 years up to life in prison. This enhancement provision is contained in 18 U.S.C. § 924(e), and is more popularly known as “the Armed Career Criminal Act” or the ACCA. A defendant subject to this provision is generally referred to as an armed career criminal.

The term “violent felony” is defined at § 924(e)(2)(B) as:

Any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that

- (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .

B. Determining ACCA Violent Felonies:

The Origin Of The “Categorical Approach”:

In 1990, the United States Supreme Court had to decide what the word “burglary” meant for purposes of the ACCA. Burglary is one of the offenses specifically set forth in the ACCA. It is one of the named offenses or “example crimes.”

In Taylor v. United States, 495 U.S. 575, (1990), the Court ultimately decided, based on the legislative history of the ACCA, that “burglary” means “generic burglary.” Generic burglary is (1) an unlawful or unprivileged entry into, or remaining in, (2) a building or other structure, (3) with the intent to commit a crime. As a result, any time you are dealing with what could be an “example crime,” identify the elements of the generic form of the offense.

The Court then set out to determine how burglary convictions would qualify as predicates for the ACCA enhancement. The Court decided that courts should look only to the fact of conviction and the statutory definition of the prior offense. This is the “categorical approach and it applies to the entire enhancement provision.

The Information You Need:

Any time you are presented with a prior conviction that might qualify as a violent felony, you need to begin by gathering copies of the court documents regarding the conviction, the statute in effect at the time of the prior conviction, any statutory definitions relevant to the statute of conviction and any court cases which interpret or further define terms in the statute of conviction.

What To Look For:

1. A divisible statute:
A statute that, although not divided into sub-parts, sets forth two different offenses.
2. A broadly worded statute:
3. A statute that may provide for strict liability:
4. A statute which may be violated by negligent or reckless conduct:
5. A statute which may be violated by conduct that is not purposeful, violent and aggressive.

The ACCA specifically:

1. **Does the offense have as an element the use, attempted use, or threatened use of physical force against the person of another?**

If you are dealing with an element that involves some type of force, the type or degree of force is important.

U.S. v. Johnson, 130 S.Ct. 1265 (2010).

Here, the Supreme Court held that “physical force” means “violent force” for purposes of this clause of the ACCA. The Court explained that “violent force” is force capable of causing physical pain or injury to another person.

After Johnson, a prior offense must have an element of force which is capable of causing physical pain or injury to another person.

2. **Is the prior offense burglary, arson, extortion, or does it involve the use of explosives?**

If the prior offense is or could be one of the named offenses, you are directly in Taylor land. For example, North Carolina has “breaking and entering,” not “burglary.”

Here, you need to compare the generic form of the offense to the statutory definition of the prior.

If the statute for the prior is more broad than the generic offense, courts are permitted to look at the charging paper

and jury instructions to determine if the jury was actually required to find all of the elements of the generic offense in order to convict the defendant.

This exception has become known as the “modified categorical approach.”

The classic example of this exception applying is when a state burglary statute also criminalizes entry of an automobile as well as a building.

Because Taylor involved a defendant who was convicted after a trial, the Supreme Court did not address how the exception would apply if the defendant had entered a guilty plea.

In Shepard v. United States, 544 U.S. 14 (2005), the Supreme Court set forth the sources of information a sentencing court could consider in applying the modified categorical approach in a bench trial or guilty plea situation. If a defendant had a bench trial, the court can consider the trial judge’s formal rulings of law and findings of fact. In a pleaded case, the court can consider the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.

Practice Notes:

Do not let the government admit documents that are not authorized under the modified categorical approach.

Object to any presentence report narrative that comes from

a police report.

3. **Does the prior otherwise involve conduct that presents a serious potential risk of physical injury to another?**

The above provision is known as the “otherwise clause” or the “residual clause.” The Supreme Court has handed down three recent cases involving the application of this clause. James v. United States, 550 U.S. 192 (2007), Begay v. United States, 553 U.S. 137 (2008), and Chambers v. United States, 129 S.Ct. 687 (2009).

In James, the Supreme Court analyzed a Florida attempted burglary statute under the residual clause. Although the statute itself required the defendant “take any act toward commission” of the offense, the state courts required the defendant to make “an overt act toward entering or remaining in the structure or conveyance.” The Court held that this prior offense presented a risk “that is comparable to the risk posed by the completed offense.” James was decided before Begay, and Begay changed the analysis of prior offenses under the residual clause.

In Begay, the Court decided that a prior offense must be “similar in kind as well as in degree of risk posed” to the listed offenses of burglary, arson, extortion, and offenses involving the use of explosives.

To be similar in kind as well as in degree of risk posed, the prior offense must involve “purposeful, violent and aggressive conduct.”

In making this determination the Court recognized that a prior offense must be purposeful, violent and aggressive, because these factors “show an increased likelihood that the offender is the kind of person who might deliberately point a gun and pull the trigger.”

In Chambers, the Supreme Court examined an Illinois escape statute which was divided into several component parts. Because the statute separately criminalized conduct ranging from escaping from custody to failing to report for the service of a sentence, the Court applied the “modified categorical approach” and permitted the examination of Shepard approved documents to determine which crime the defendant committed.

The defendant pleaded guilty to “knowingly failing to report.” The Court’s Begay analysis of “knowingly failing to report” resulted in the conclusion that the offense is not similar in kind or in the degree of risk posed by the enumerated offenses. The Court said that “failing to report” is a crime of inaction and not purposeful, violent or aggressive. The Court also relied on data from the Sentencing Commission which revealed that none of the 160 failure to report cases over a two year period involved violence.

It is important to understand all of the above, because the same methodology generally applies to the definitions of “crime of violence” which apply to the firearm guideline, 2K2.1, the career offender guideline, 4B1.1, and the aggravated re-entry guideline, 2L1.2.

IV. THE CAREER OFFENDER GUIDELINE

Career Offender USSG 4B1.1

A defendant is a career offender if he is at least eighteen years old when he commits the instant offense, the instant offense is a felony and is either a crime of violence or a serious drug offense, and he has at least two prior convictions for crimes of violence or serious drug offenses. USSG § 4B1.1(a).

A crime of violence is defined in § 4B1.2(a) as any federal or state offense that is punishable by a term of imprisonment exceeding one year, and that

- A. has as an element the use, attempted use, or threatened use of physical force against the person of another, or
- B. is burglary of a dwelling, arson or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Application Note 1

“Crime of Violence” includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.”

“Crime of Violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extensions of credit, and burglary of a dwelling. Other offenses are included as “crimes of violence” if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e. expressly charged) in the count of which the defendant was convicted involved the use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk

of physical injury to another.

“Crime of Violence” does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a). Where the instant offense of conviction is the unlawful possession of a firearm by a felon, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition) provides an increase in offense level if the defendant had one or more prior felony convictions for a crime of violence or controlled substance offense; and, if the defendant is sentenced under the provisions of 18 U.S.C. § 924(e), § 4B1.4 (Armed Career Criminal) will apply.

The two prior felony convictions must carry sentences that are counted separately in the defendant’s criminal history under USSG § 4A1.1 *See* USSG § 4B1.2[c]. Sentences for related cases are treated as one sentence. *See* USSG § 4B1.2(a)(2). Cases are considered related if there was no intervening arrest and (1) the offenses occurred on the same occasion, (2) were part of a single common scheme or plan, or (3) were consolidated for trial or sentencing. *See* USSG § 4A1.2, comment. (n.3).

- A. Determining Crimes of Violence for Career Offender Purposes:
Although the legal analysis for determining crimes of violence for the career offender guideline is the same as for the ACCA generally, there are a few important differences between the ACCA and the career offender guideline which are set forth below.

- B. Important differences between the career offender guideline and the ACCA

1. The career offender guideline specifies that burglary of a dwelling is a crime of violence. All burglaries count as ACCA predicates.
2. In career offender situations, the prior offense must be counted in the defendant's criminal history to count as a potential predicate. Therefore, the criminal history time limits apply to predicates. If your client would be a career offender except for the time limits, be ready for an upward departure or upward variance.

There is no time limit for ACCA predicates.

3. Of course, it only takes two prior qualifying convictions to trigger the career offender guideline. It takes three predicates to trigger the ACCA.
4. The defendant must be at least 18 at the time of commission of the instant offense to trigger the career offender guideline. The ACCA counts acts of juvenile delinquency which involve the use of a knife or gun.
5. The career offender application notes contain an expanded list of offenses which qualify as "crimes of violence." The expanded list of example crimes causes some offenses to be crimes of violence for career offender purposes that would not be ACCA predicates.
6. Priors that are "related cases" do not count separately for purposes of the career offender guideline. The key is whether or not the offenses are separated by an intervening arrest.

ACCA priors count as long as they were committed on

“different occasions.” Unfortunately, courts have held that priors must essentially occur simultaneously for them to be considered as occurring on the same occasion. You need to consult the law in your circuit regarding this issue.

V. THE AGGRAVATED RE-ENTRY GUIDELINE 2L1.2

USSG § 2L1.2(b)(1) provides for a 16 level increase if the defendant was deported or unlawfully remained in the United States, after . . .

(A) a conviction for a felony that is . . .(ii) **a crime of violence**

Application Note(1)(B)(iii) defines crime of violence as follows:

“Crime of Violence” means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

When analyzing a prior offense for purposes of this guideline, you must identify the “generic form” of the offense, and then identify the statutory definition of the prior offense. The categorical approach generally applies. Therefore, you must be able to apply Taylor and Shepard to all priors which might qualify as a crime of violence.

Be aware that some circuits allow for a common sense determination that the prior offense qualifies as a crime of violence.

There is no residual clause twin in this guideline, so the Begay analysis does not apply as in the Armed Career Criminal Act or Career Offender guideline.

Since this guideline does contain the “physical force” language, the “violent force” definition argument from Johnson applies.

The aggravated re-entry guideline will only apply to a prior committed when the defendant was younger than 18 if the prior was treated as an adult conviction in that jurisdiction.

There are excellent materials at www.fd.org regarding which offenses have been held to constitute crimes of violence, and I recommend that you review those materials any time you are faced with an aggravated re-entry case.

VI OTHER WAYS TO ATTACK POTENTIAL PREDICATE OFFENSES

A. Is the prior offense a Felony?

A felony is generally defined as a crime punishable by more than one year in prison.

18 U.S.C § 921(20) provides:

The term "crime punishable by imprisonment for a term exceeding one year" does not include--

(A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or

(B) any State offense classified by the laws of the State as a

misdemeanor and punishable by a term of imprisonment of two years or less.

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

This definition applies to firearm offenses.

1. Check to see if the penalty for the offense carries less than 1 year in prison or if the offense is a state court misdemeanor that carries 2 years or less.
 - a. Check to see what the penalty was when your client was convicted. Sometimes an older version of the offense carried a lesser penalty.
2. Check to see if the client disposed of his case in a city or county court that cannot impose a sentence of more than one year.
3. Check to see if the prior was from a special court martial. Pursuant to 10 U.S.C § 819, a conviction resulting from a special court martial cannot be for more than 1 year imprisonment.
4. There is an argument that certain North Carolina convictions are not punishable by more than 1 year in

prison based on their sentencing guideline system. All misdemeanor convictions in North Carolina occurring during the current sentencing system carry less than 1 year in prison.

5. Check to see if your client's civil rights are restored.
6. U.S. v. Ruvalcaba, U.S. App. LEXIS 26008 (6th Cir. 2010). This case recognized that the Ohio Supreme Court declared all sentences void for offenders who did not receive proper post-release control notice. State v. Singleton, 920 N.E.2d 958 (Ohio 2009). However, this is a challenge that must be made in state court.

B. Was the conviction obtained in violation of your client's 6th Amendment right to counsel?

In Custis v. United States, 511 U.S. 485, 128 L. Ed. 2d 517, 114 S. Ct. 1732 (1994), the Supreme Court addressed whether a defendant sentenced under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924(e), could collaterally attack the validity of previous state convictions used to enhance his federal sentence, and held that, with the sole exception of convictions obtained in violation of the right to counsel, a defendant has no right to bring such a challenge in his federal sentencing proceeding. 511 U.S. 485, 487.

1. If your client did not have a lawyer and did not waive his right to counsel, the prior offense cannot count as a predicate.
2. If this is an issue, you may need to obtain a copy of the court transcript or other court records to see if your client waived his right to counsel.

3. Oftentimes the U.S. Probation Office will cite a rule of state court which presumes that all proceedings were conducted properly. In South Carolina, the U.S. Probation Office will point to the “advice to indigents” form which defendants receive when they are arraigned by the city or county judge. Arguably, such a form might not constitute a Shepard approved document in South Carolina, because it is a document used by a lower court and not part of the judicial record of the prior offense.
4. If possible, try to keep your client from discussing this issue with the U.S. Probation Officer writing the presentence report. This may be difficult or impossible in your district.

VII SUMMARY

1. **Does the prior have as an element the use, attempted use, or threatened use of physical force against the person of another?**
 - A. Determine exactly how the state defines the prior offense.
 - B. After Johnson, an offense in this category must involve “violent force” which is force capable of causing physical pain or injury to another person.
2. **Is the prior one of the “named” offenses?**
 - A. Look to the Model Penal Code, other sources of information referenced in Taylor and Begay, and many of the immigration cases to determine the elements of the “generic” form of the prior offense.

- B. Determine if the statute defining the prior criminalizes conduct which is more broad than the generic definition.
 - C. If so, the Taylor and/or Shepard materials may limit the admissibility of information the court can consider about the prior.
 - 1. Be prepared to argue that it is a 6th Amendment violation if the court considers and finds facts about a prior offense which the defendant did not admit. This applies in ACCA cases where the client's statutory maximum increases based on such improper judicial fact finding.
3. **Does the prior “otherwise involve conduct that presents a serious potential risk of physical injury to another?”**
- A. For it to count, the prior must be purposeful, aggressive and violent. These are the triggers which courts use to determine if the prior is sufficiently like the enumerated offenses in kind as well as in the degree of risk imposed.
 - B. You can argue that the prior should not count if the “violence” component of the offense is not the type of violence that is capable of causing physical pain or injury to another person. See Johnson.
 - C. As to the degree of risk imposed, you can argue that the prior's degree of risk is not sufficiently like the named offenses. See James.
 - D. Chambers allows you to argue that the prior is not sufficiently purposeful, violent or aggressive to qualify.

- E. If the government fails to present any statistics about the degree of risk or violence, argue that the prior should not count. See Chambers.

VIII FAVORABLE DECISIONS AFTER BEGAY

FIRST CIRCUIT COURT OF APPEALS

1. U. S. v. Giggey, 551 F.3d 27 (1st Cir. 2008).

Result: Burglary of a building is not a crime of violence for career offender purposes.

The defendant pled guilty to a Class C burglary. This was a burglary of a non-residence or building in the absence of aggravating circumstance such as use of firearms or other dangerous weapons or entry into a dwelling or the infliction or attempt to inflict bodily injury. In this case, the government argued that the court should delay its opinion and ask the U.S. Sentencing Commission to clarify its position on whether or not a non-dwelling burglary is a “crime of violence” for career offender purposes. However, the court refused to do so and noted that the commission has been aware of this issue for some time and has failed to make a definitive statement as to whether non-residential burglaries should be enumerated as crimes as violence. Therefore the First Circuit held this offense to be non-violent and dismissed the appeal.

2. U. S. v. Herrick, 545 F.3d 53 (1st Cir. 2008).

Result: Wisconsin conviction for motor vehicle homicide is not a crime of violence.

The court decided that Wisconsin’s vehicular homicide felony is not a crime of violence pursuant to Section 4B1.2(a) of the guideline. Based on the statutory definition of criminal negligence in Wisconsin, vehicular homicide meets if not exceeds the necessary degree of risk to be a crime of violence. The offense poses “a serious potential risk of physical injury to another.” It is not, however, similar in kind to the enumerated offenses. Although it is no doubt violent, as a typical vehicular homicide involves the death of a victim resulting from a forceful collision, it is not necessarily aggressive, a term that dovetails with purposefulness, because it involves a degree of intent. Intent, however, is not an element of Wisconsin’s vehicular homicide provision. Although vehicular homicide’s mens rea of criminal negligence under this statute surpasses that of the DUI at issue in Begay, which the Supreme Court described as a strict liability crime, it is below that of the other crimes that the Begay majority listed as crimes that do not fall under the residual clause.

SECOND CIRCUIT COURT OF APPEALS

1. U. S. v Gray, 534 F.3d 128 (2nd Cir. 2008).

Result: New York offense of reckless endangerment is not a violent felony.

Reckless endangerment on its face does not criminalize purposeful or deliberate conduct. Despite coming close to crossing the threshold into purposeful conduct, the criminal acts defined by the reckless endangerment statute are not intentional, a distinction stressed by the Supreme Court in Begay. As such this offense is categorically not a crime of violence.

THIRD CIRCUIT COURT OF APPEALS

1. U. S. v. Lewis, 330 Fed. Appx. 353 (3rd Cir. 2009).

Result: Ohio burglary statute, as defined below, is not categorically violent.

Here the Third Circuit found that Ohio's burglary statute which criminalizes trespass by force, stealth or deception in an "occupied closed structure" with an intent to commit a felony, is broader than generic burglary and is not categorically violent under the "otherwise" clause. The rationale for this decision is that Ohio case law revealed the overwhelming majority of cases involved intrusions into habitations when there is no likelihood of a person being present. Because the offense is narrowly defined to exclude situations with a greater potential for confrontation, Ohio burglary involving no likelihood of presence poses less risk of physical injury than typical burglary.

2. U. S. v. Hopkins, 577 F.3d 507 (3rd Cir. 2009).

Result: Escaping arrest is not a crime of violence.

This is a career offender case in which the Third Circuit held that the crime of unlawfully removing oneself from arrest on a misdemeanor charge without employing force, threat, deadly weapon, or other dangerous instrumentality does not qualify as a career offender predicate under Begay. The court believed that the officer would not be willing or be required to employ the same amount of force as in the enumerated offenses thereby lessening the potential for physical injury to the officer. The court also believed that the conduct involved in this case was materially less violent and aggressive than the enumerated offenses, because it is statutorily defined as unaccompanied by force, threat of a deadly weapon, or other dangerous instrumentality.

3. U. S v. Polk, 577 F.3d. 515 (3rd Cir. 2009).

Result: Possession of a weapon in prison is not a crime of violence.

This is a career offender case in which the Third Circuit held that possession of a prohibited object designed to be used as a weapon while in federal prison in violation 18 U.S.C. § 179 (a)(2) does not constitute a crime of violence, because it is not similar in kind to the “overt active conduct” required by the enumerated offenses. The court basically decided that this is a mere possession offense which cannot be transformed into an offense that is similar to the crimes listed simply by asserting the inherent danger of possession of such a weapon in prison. The distinction between active and passive crimes is vital when evaluating offenses under the career offender guideline to determine if they entail purposeful, violent and aggressive conduct. A possession offense cannot properly be categorized as conduct that is itself aggressive or violent as only the potential exists for aggressive or violent conduct.

4. U. S. v Johnson, 587 F.3d 203 (3rd Cir. 2009).

Result: Pennsylvania offense of knowing and simple assault may not qualify as a crime of violence if the defendant did not admit committing the offense intentionally.

This case involved a conviction for the Pennsylvania offense of knowing and intentional simple assault. The court conducted a Begay analysis and determined that this offense meets all the requirements of a crime of violence under the guidelines. However, from the available information the court could not determine if the defendant admitted to committing the offense intentionally. The Third Circuit remanded the case to the District Court to make this determination based on consideration of Shepard approved documents.

5. U.S. v. Lee, 612 F.3d 170 (3rd Cir. 2010).

Result: Reckless endangerment not a crime of violence.

FOURTH CIRCUIT COURT OF APPEALS

U. S. v. Haste, 292 Fed. Appx. 249 (4th Cir. 2008).

Result: Possession of a sawed-off shotgun is not a violent felony.

The court held that possession of a sawed off shotgun is not a violent felony.

U. S. v. Thornton, 554 F.3d 443 (4th Cir. 2009).

Result: Statutory rape is not a violent felony.

The Virginia statute of carnal knowledge of a minor is not a violent felony because it is not similar in kind to the enumerated predicates. Although the nonforcible adult-minor sexual activity can present grave physical risk to minors, and all those states are entitled to criminalize nonforcible adult-minor sexual activity to protect minor victims from this risk, such risks are not sufficiently “similar in kind as well as in degree of risk posed to the examples” of burglary, arson, extortion and crimes involving explosives. The risk associated with statutory rape such as sexually transmitted diseases and the risks that go along with pregnancy are not immediate or violent in nature and do not inherently support an inference that the offender will later commit a violent crime.

U. S. v. Rivers, 595 F.3d 558 (4th Cir. 2010).

Result: South Carolina failure to stop for a blue light is categorically not violent.

A different panel of the Fourth Circuit reversed U. S. v. Roseboro,

based on their analysis of the Chambers case. The methodology of Chambers clarifies when a court may vary from the categorical approach and apply the analysis supplied by Taylor and Shepherd. The modified categorical approach was intended only for a narrow range of cases. Only when a statute prohibits different types of behavior such that it can be construed to enumerate separate crimes can a court modify the categorical approach to determine armed career criminal eligibility. The court finally decided that S. C. Code Ann. § 56-5-750 (A) is not divisible, because it only contains one category of crime. The court decided that the South Carolina failure to stop for a blue light statute does not contain the requisite intent to bring it within the scope of crimes that fall under the Armed Career Criminal Act. In fact, it explicitly criminalizes a broad swath of unintentional conduct. Because it is a strict liability crime it differs from a prior record of violent and aggressive crimes committed intentionally such as arson, burglary, extortion, or crimes involving the use of explosives. The court held that this offense is categorically outside the scope of a “violent felony” as defined in the Armed Career Criminal Act’s residual clause.

U. S. v. Bethea, 603 F.3d 254 (4TH Cir. 2010).

Result: South Carolina offense of Escape not necessarily a violent felony.

In this case the Fourth Circuit analyzed the South Carolina offense of “escape” as defined in the S.C. Code Ann. § 24-13-410(A). This offense is defined broadly and includes both unlawfully leaving and failing to report to custody. The Fourth Circuit considered first, whether a conviction under this statute necessarily constitutes a violent felony under the Armed Career Criminal Act, and second, if it does not, whether this defendant’s conviction necessarily involved the type of violent conduct contemplated by the Armed Career Criminal Act. Based on Chambers, the Fourth Circuit decided that the South Carolina escape statute does not inherently constitute a violent felony. The court did decide that it would be appropriate to apply the modified categorical approach to convictions of this offense. However, the

Fourth Circuit could not determine whether this defendant's conduct necessarily "violated the statute in a way that would bring him under the Armed Career Criminal Act's application." This is an interesting holding, because the defendant's indictment stated that he escaped from the Marlboro County Detention Center while waiting to appear for General Sessions Court.

However, Fourth Circuit said that this did not necessarily mean the defendant had escaped from secured custody. Although this might have likely been what happened, the Fourth Circuit recognized the possibility that the defendant could have failed to report to the detention center before his hearing and might not have unlawfully left physical custody. There was no transcript of Mr. Bethea's disposition hearing in State court, and the only Shepard approved documents in existence did not necessarily show that Mr. Bethea engaged in the type of generally violent conduct contemplated by the Armed Career Criminal Act.

3. U. S.v. Clay, 2010 U.S. App. LEXIS 25000 (4th Cir. 2010).

Result: Georgia felony escape conviction not a crime of violence for 2K2.1 purposes.

This was a walkaway escape from an unsecured facility and did not qualify as a crime of violence pursuant to 4B1.2(a)'s otherwise clause. Currently, the 11th, 7th, 6th, 10th, and 3rd Circuits agreed that walkaways from unsecured settings are not crimes of violence.

FIFTH CIRCUIT COURT OF APPEALS

1. U. S. v Armendariz-Moreno, 571 F.3d 490 (5th Cir. 2009).

Result: Unauthorized use of a motor vehicle is not a crime of violence.

This case held that in a illegal re-entry case the Texas crime of unauthorized use of motor vehicle does not satisfy Begay, because the risk

of physical force may exist when the offender commits the offense, but the crime itself has no essential element of violent and aggressive conduct.

2. U. S. v Johnson, 286 Fed. Appx. 155 (5th Cir. 2008).

Result: Threatening to cause death is not a violent felony.

This is an unpublished case in which the Fifth Circuit held that the statute against threatening to cause the death of another person with the purpose of terrorizing that person does not constitute an Armed Career Criminal Act predicate after Begay. The court decided that this offense did not satisfy clause (I) of the Armed Career Criminal Act's definition of a violent felony based on Fifth Circuit precedent holding that a person can threaten to cause bodily injury without threatening the use of force such as to poison or to guide someone into oncoming traffic. The court decided that this offense also failed to satisfy clause (ii), because it is a crime against a person and not a property crime. The Supreme Court noted in Begay that congress sought to expand the definition of a violent felony to include crimes against a person from clause (I) and certain physically risky crimes against property in clause (ii). The Supreme Court cited the legislative history of the Armed Career Criminal Act regarding this issue. This may be the only court of appeals to make this distinction. The Third Circuit Court of Appeals has specifically rejected this interpretation of Begay.

SIXTH CIRCUIT COURT OF APPEALS

1. U. S. v Ford, 560 F.3d 420 (6th Cir. 2009).

Result: Walk-away escape is not a crime of violence.

This is a career offender case in which the Sixth Circuit held that a

walk-away escape from custody is not a crime of violence. It is important to note that the government conceded that walk-away escape is not a crime of violence within the meaning of the career offender guideline following the Chambers decision. Here, the court decided that there are four categories of the crime of escape. The categories in this statute are leaving custody with the use or threat of force, leaving custody in a secured setting, leaving in a non-secured setting by walking away, and failure to report. The court said that walk-away escape does not present the same degree of risk of physical injury of the enumerated offenses. The court also compared the lack of empirical data showing that such offenses do present a risk of physical injury on the one hand to the intuitive belief and empirical data showing that they do not on the other. The court held that walk-away escape is categorically not a crime of violence.

2. U. S. v. Baker, 559 F.3d 443 (6th Cir. 2009).

Result: Reckless endangerment is not a crime of violence.

This is a career offender case in which the Sixth Circuit held that a Tennessee conviction for reckless endangerment did not qualify as crime as a crime of violence even though it required the use of a dangerous weapon, because the offense does not clearly involve the type of purposeful violent and aggressive conduct as burglary, arson, extortion, or use of explosives. On its face the statute criminalizes only reckless conduct.

3. U. S. v Mosley, 575 F.3d 603 (6th Cir. 2009).

Result: Resisting an officer not categorically a crime of violence.

This is an career offender case in which the Sixth Circuit held that resisting and obstructing a police officer did not categorically constitute a crime of violence. This case involved a Michigan statute which contained two categories of offenses. One category simply described failing to comply

with a lawful command. The court reasoned that failing to comply is no more aggressive and violent than walking away from custody, drunk driving, or a failure to report to prison. Based on the condition of the record, the court could not identify where the defendant's failure to follow an officer's command carried the same risk as the enumerated offenses pose.

4. U. S. v. Wynn, 579 F.3d 567 (6th Cir. 2009).

Result: Ohio sexual battery statute not categorical crime of violence.

The Sixth Circuit held Ohio's sexual battery statute is not categorically a crime of violence under the career offender guideline, because some subsections of the statute do not involve aggressive and violent behavior. The First Circuit has also discussed, without deciding, whether or not an offense involving consensual sexual conduct with a minor presents a serious risk of injury only when it involves an aggravated factor such as the minor being less than 13 or 14 years of age or being related to the defendant by blood or affinity.

5. U. S. v. Anglin, 601 F.3d 523 (6th Cir. 2010).

Result: Federal escape statute not categorically crime of violence.

Here the Sixth Circuit held that the federal escape statute is not categorically a crime of violence and they remanded the case to allow the government to present Shepard information.

6. U. S. v. McFalls, 592 F.3d 707 (6th Cir. 2010).

This is a career offender case in which the Sixth Circuit decided that the South Carolina offenses of burglary 2nd and assault and battery of a high and aggravated nature (ABHAN) are not categorically crimes of violence.

The court decided that the South Carolina statute's broad definition of dwelling encompassed more conduct than the generic definition of burglary of a dwelling and thus did not qualify categorically as burglary of a dwelling for sentencing enhancement purposes. The court indicated that burglary of a dwelling would require habitation and if the indictment had said "residence" instead of simply "dwelling" the decision probably would have been different. They remanded the case for consultation of Shepard approved documents. As to the ABHAN conviction, the court noted that the South Carolina Supreme Court has not identified any particular mental state that the State must prove in order for a defendant to be found guilty of the offense. Consistent with the lack of a mental state requirement South Carolina courts have upheld ABHAN convictions in cases involving injuries resulting from a defendant's reckless driving. After Begay, only purposeful crimes, not crimes with a mens rea of negligence or recklessness, qualify as predicates. The Sixth Circuit remanded the case to the district court for further review of any sources permitted under Shepard.

SEVENTH CIRCUIT COURT OF APPEALS

1. U. S. v. Smith, 544 F.3d 781 (7th Cir. 2009).

Result: Criminal recklessness in Indiana is not a crime of violence.

The Seventh Circuit decided that the Indiana crime of criminal recklessness was not a crime of violence, because Begay requires that only "purposeful crimes" and not crimes with the mental state of recklessness qualify as crimes of violence.

2. U. S. v. High, 576 F.3d 429 (7th Cir. 2009).

Result: This is another case where the Seventh Circuit held that an "endangerment" crime is not a crime of violence based on U. S. v Woods 576 F.3d 400 (7th Cir. 2009).

3. U. S. v Goodpasture, 595 F.3d 670 (7th Cir. 2010).

Result: The California offense of lewd and lascivious conduct is not a crime of violence.

4. U. S. v. Hampton, 585 F.3d 1033 (7th Cir. 2009).

Result: Criminal recklessness not a violent felony.

5. U. S. v. Booker, 579 F.3d 835 (7th Cir. 2009).

Result: Involuntary manslaughter is not a crime of violence or violent felony.

6. U. S. v. McDonald, 592 F.3d 808 (7th Cir. 2010).

Result: Statutory rape is not a crime of violence.

7. U. S. v Hart, 578 F.3d 674 (7th Cir. 2009).

Result: The federal escape statute is not categorically violent under the guidelines.

8. U. S. v. Gear, 577 F.3d 810 (7th Cir. 2009).

Result: Reckless discharge of a firearm is not a crime of violence.

9. U. S. v. Evans, 576 F.3d 766 (7th Cir. 2009).

Result: Aggravated battery is not a crime of violence.

This is another case controlled by Woods. This particular statute is not divisible. This case is consistent with Johnson in which the Supreme Court decided that “violent force” is necessary to meet the “physical force”

requirement of clause (I) of the ACCA even though this is a residual clause case.

10. Jimenez-Gonzalez v. Mukasey, 548 F.3d 1115 (7th Cir. 2008).

Result: This is a removal case in which the crime of recklessness is not a crime of violence under 18 U.S.C. § 16(b).

11. U. S. v. Templeton, 543 F.3d 378 (7th Cir. 2008).

Result: Walk-away escape is not a crime of violence.

12. U. S. v. Ellis, 622 F.3d 784 (7th Cir. 2010).

Result: Indiana felony intimidation statute is not a violent felony.

The court decided the offense does not have as an element, the use, attempted use, or threatened use of physical force against the person of another. The government did not argue that the offense should be considered a violent felony under the residual clause. The court deemed that argument waived.

13. U.S. v. Sonnenberg, 2010 U.S. App. LEXIS 25028, (7th Cir. 2010).

Result: Minnesota conviction for “intra-familial sexual abuse” is not a crime of violence.

EIGHTH CIRCUIT COURT OF APPEALS

1. U. S. v. Webster, 524 F.3d 890 (8th Cir. 2008).

Result: Driving under the influence does not satisfy the Begay standard.

2. U. S. v. Williams, 537 F.3d 969 (8th Cir. 2008).

Result: Auto theft and auto tampering do not satisfy the Begay standard with the only exception being auto theft by coercion.

3. U. S. v. Gordon, 557 F.3d 623 (8th Cir. 2009).

Result: Child endangerment does not meet the Begay standard.

4. U. S. v. Tyler, 580 F.3d 722 (8th Cir. 2009).

Result: Minnesota's fleeing and eluding statute is not a crime of violence.

This is career offender case in which the Eighth Circuit found that Minnesota's crime of fleeing a police officer in a motor vehicle did not count as a career offender predicate after Begay. The court first found that the crime did not present a serious potential risk of physical injury to another, in part, because the statute did not require either high speed or reckless driving, and because a separate part of the statute provided enhanced penalties when death or bodily injury resulted. Even assuming the conduct did create a serious potential risk, the court still found it was not similar in kind, because although purposeful, it did not require violence or aggression.

5. U. S. v. Steward, 598 F.3d 960 (8th Cir. 2010).

Result: Operation of a vehicle without owner's consent is not violent.

The court held that operation of a vehicle without owner's consent is not violent. The Eighth Circuit previously held in U. S. v. Murueta-Espinosa 35 Fed. App. 468, that the Iowa offense of operating a vehicle without owner's consent is no longer a crime of violence for purposes of USSG §

2L1.2. This offense under Iowa law is no longer a crime of violence according to the guidelines, because it does not meet the Begay standard.

6. U. S. v. Johnson, 601 F.3d 869 (8th Cir. 2010).

Result: Minnesota fleeing and eluding statute is not a violent felony.

The Eighth Circuit held that for purposes of the Armed Career Criminal Act the defendant's Minnesota conviction for fleeing a police officer in a motor vehicle does not count as a predicate offense. The statute in question said "whoever by means of a motor vehicle flees or attempts to flee a peace officer who is acting in the lawful discharge of an official duty, and the perpetrator knows and should reasonably know the same to be a peace officer, is guilty of a felony and may be sentenced to not more than 3 years and 1 day imprisonment or to pay a fine of not more than \$5000.00 or both." The same statute says "flee" means "to increase speed, extinguish motor head lights or taillights, refuse to stop the vehicle, or use other means with intent to attempt to elude a police officer following a signal given by any peace officer to the driver of a motor vehicle." This defendant was convicted under the same statute that the Eighth Circuit found was not a crime of violence for career offender purposes in U. S. v. Tyler. Accordingly this offense is not a violent felony under the Armed Career Criminal Act.

NINTH CIRCUIT COURT OF APPEALS

1. U. S. v. Christenson, 559 F.3d 1092 (9th Cir. 2009).

Result: Statutory rape is not categorically a violent felony.

The Ninth Circuit held that statutory rape is not categorically violent under the Armed Career Criminal Act's residual clause. They reached this

decision because statutory rape may involve consensual sexual intercourse and does not necessarily involve either “violent or aggressive conduct”. The court did remand the case to permit the District Court to consult Shepard approved documents under the modified categorical approach.

2. U. S. v. Coronado, 603 F.3d 706 (9th Cir. 2010).

Result: Intentional discharge of a firearm is not a crime of violence.

The Ninth Circuit held that intentional discharge of a firearm in a grossly negligent manner is not a crime of violence. In its analysis the Ninth Circuit said that while it is true that the discharge of a firearm in a grossly negligent manner, especially in a populated area, may very well create a high likelihood of substantial harm to others, the statute does not require the act to be done with intent to harm or that an act be directed toward any other person. The act therefore need not be “purposeful, violent and aggressive” as required by Begay.

TENTH CIRCUIT COURT OF APPEALS

1. U. S. v. Dennis, 551 F.3d 986 (10th Cir. 2008).

Result: Indecent liberties with a minor is not categorically a crime of violence.

Here the Tenth Circuit held that the Wyoming statute prohibiting knowingly taking immodest, immoral or indecent liberties with a minor child did not categorically constitute a crime of violence under the career offender guideline. The court noted that this is not a sexual assault statute but rather a statute that criminalizes activities that are otherwise permissible between consenting adults when one of the parties is under the age of 18 years, “and thus does not necessarily involve conduct that presents a serious potential risk of physical injury to another”.

2. U. S. v Martinez, 602 F.3d 1166 (10th Cir. 2010).

Result: Attempted burglary is not a violent felony under the ACCA but is a violent crime under the guidelines.

Attempted burglary is not a violent felony for the purposes of Armed Career Criminal Act, but is a crime of violence pursuant to the guidelines. The Tenth Circuit said that this attempted burglary is not a violent felony, because the state court offense requires any step to constitute the attempt rather than a substantial step toward entering a building as described in U. S. v. James which required overt acts directed toward entry. Here the court essentially decided that more attenuated conduct presents less of a potential of serious injury under the Armed Career Criminal Act. Unfortunately, the career offender guideline specifies that attempts are treated as crimes of violence.

ELEVENTH CIRCUIT COURT OF APPEALS

1. U. S. v. Lee, 586 F.3d 859 (11th Cir. 2009).

Result: Walk-away escape is not a violent felony.

In this case the government conceded that walk-away escape is not a violent felony or a crime of violence. The Eleventh Circuit analyzed the issue and agreed that a non violent walk-away escape from unsecured custody is not sufficiently similar in kind or in degree of risk posed to the Armed Career Criminal Act's enumerated crimes to bring it within the residual clause. Because the defendant's third degree walk-away escape did not involve the use of threat of physical force the court found it unlikely to lead to an escalated confrontation with law enforcement or otherwise create a serious potential risk of physical injury to others.

2. U. S. v. Harrison, 558 F.3d 1280 (11th Cir. 2009).

Result: Wilfully fleeing an officer is not a violent felony.

The Eleventh Circuit held that the crime of willfully fleeing a police officer in a marked vehicle with lights and sirens activated did not constitute a violent felony under the Armed Career Criminal Act for two reasons. First, they found the degree of risk posed by willfully fleeing did not rise to the same level as that posed by the enumerated offenses. The behavior underlying this statute in the ordinary case involves only a driver who willfully refuses to stop and continues driving on but without high speed or recklessness. The court found that this made it unlikely that the confrontation would escalate into a high speed chase that threatens pedestrians, other drivers, or the officers. Second, the Eleventh Circuit decided that, although purposeful, without high speed or reckless conduct, this offense is not sufficiently aggressive and violent and enough like the enumerated crimes. The court also cited the government's failure to carry its burden by producing empirical support for the argument that a person who flees is likely to be violent.

3. U. S. v Archer, 531 F.3d 1347 (11th Circuit 2008).

Result: Carrying a concealed weapon is not a predicate offense.

The Eleventh Circuit reversed itself and held that carrying a concealed weapon does not involve the aggressive, violent conduct that the Supreme Court noted is inherent in the enumerated offenses. Carrying a concealed weapon is a passive crime centering around possession rather than around any overt action. The Eleventh Circuit also recognized that this offense does not require the specific intent to conceal, nor is it universally considered violent.

4. U. S. v. Harkness, 307 Fed. Appx. 578 (11th Cir. 2008).

Result: Leaving the scene of an accident is not a violent felony.

This is an armed career criminal case from Florida which the government conceded that a conviction for leaving the scene of an accident does not satisfy the Begay standard, because although purposeful, the offense involves neither violent nor aggressive conduct.

5. U. S. v. Whitson, 597 F.3d 1218 (11th Cir. 2010).

Result: South Carolina non-overt act conspiracy is not a crime of violence.

The Eleventh Circuit held that the South Carolina non-overt act of conspiracy offense is not a crime of violence. This crime is complete once an agreement is reached, and no violence or aggression is associated with forming the agreement. Without more, the agreement lacks the requisite violence and aggression to be roughly similar in kind to burglary, arson and the other enumerated crimes. Keep in mind that in U. S. v. White, 571 F.3d 365 (4th Cir. 2009), the Fourth Circuit held that conspiracy to commit robbery with a dangerous weapon is a violent crime under the Armed Career Criminal Act.

6. U. S. v. Harris, 608 F.3d 1222 (11th Cir. 2010).

Result: Florida statute for sexual battery with a child is not a violent felony.

Here the statute was too broad for the offense to be considered violent.

7. U. S. v. McGill, 618 F.3d 1273 (11th Cir. 2010).

Result: Florida possession of a short-barreled shotgun not considered predicate offense.

The court analyzed this offense differently in deciding that it was not similar in kind to “the use of explosives.” The court noted that the National

Firearms Act, (NFA), defines and regulates the possession of sawed-off shotguns and explosives. Since Congress included only the “use” of explosives as an example crime in the ACCA, the Eleventh Circuit decided that possession of a sawed-off shotgun was not similar in kind to the “use” of explosives and not a violent felony.

Deconstructing the Career Offender Guideline

Winning Strategies
San Antonio
February 12, 2011

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1

What is Deconstruction?

- Compare client's guideline range today to pre-guidelines sentence
- Track increases over time
- Examine reasons -- or lack thereof -- for increases:
 - USSC official "Reason for Amendment"
 - USSC reports (if any)
- Is any congressional directive involved?
 - Did USSC follow it, or go further?
- Evidence that guideline recommends punishment greater than necessary to satisfy sentencing purposes
 - USSC's own research
 - Criminological research
 - Law reviews
 - Court opinions
 - Data

2

What's the Legal Basis?

- Cunningham
- Rita
- Kimbrough
- Spears
- "Judges are free to disagree with any guideline, not just crack, including guidelines that are the product of congressional directives to the Commission"
 - www.fd.org, Sentencing Resource Page

3

- *Cunningham v. California*, 549 U.S. 270, 279-81 (2007)
 - authority to sentence outside the guideline range based solely on general policy objectives, without any factfinding anchor, is necessary to avoid a Sixth Amendment violation
- *Rita v. United States*, 551 U.S. 338, 351, 357 (2007)
 - because the guidelines may not be presumed reasonable at sentencing, judges are permitted to find that the "Guidelines sentence itself fails properly to reflect 3553(a) considerations," or "reflects an unsound judgment"

4

- *Kimbrough v. United States*, 552 U.S. 85, 101 (2007)
 - "courts may vary [from Guideline ranges] based solely on policy considerations, including disagreements with the Guidelines." (citing Rita)
- *Spears*, 129 S. Ct. 840, 842 (2009)
 - "only fact necessary to justify such a variance is the sentencing court's disagreement with the guidelines-its policy view that the 100-to-1 ratio creates an unwarranted disparity."

5

Spears (summary reversal)

- District Court can:
 - "categorically" apply a crack-to-powder ratio which, in its judgment, corrects the disparity
 - vary from the guideline range solely because of disagreement with the guideline
- Disagreeing with a guideline that does "not exemplify the Commission's exercise of its characteristic institutional role" is entitled to as much "respect" on appeal as a guideline-sanctioned "departure."

6

Why Do It? How Does It help?

- Court must calculate and consider the guideline range. As part of consideration:
 - Court may disagree with and need not follow a guideline that is not based on empirical data and national experience.
 - Most guidelines are *not* based on empirical data and national experience.
 - Makes court less willing to follow the guideline
 - When plenty of mitigating factors
 - When no individualized mitigating factors

7

And . . .

- Judge must *consider* nonfrivolous arguments and explain rejection of them, subject to reversal for procedural unreasonableness. *Rita*, 551 U.S. at 357.
- No lengthy explanation required if sentencing decision rests on Commission's "own reasoning." *Id.*
- More explanation required when you "argue[] that the Guidelines reflect an unsound judgment, or . . . that they do not generally treat certain defendant characteristics in the proper way-or argue[] for departure." *Id.*

8

Career Offender Guideline

- Originated in 28 USC 994(h)
 - Congressional directive = Commission did not develop guideline based on empirical evidence.
 - Just as drug guidelines based on statutory minimums, career offender guideline based on statutory maximums. *Kimbrough*.
- Commission went further than Congress directed
 - Included state drug felonies
 - Broadened definition of "crime of violence"
 - Defined "felony" to include state misdemeanors punishable by more than one year

9

Comparisons get the judge's attention

- Drug Trafficking – 50 g. heroin
- Predicates: 2 prior state drug convictions
 - 1 prior - no jail
 - 1 prior - 30 days
- Bank Robbery - \$2000
- Predicates: resisting arrest, assault and battery
 - Both state misdemeanors punishable by > 1 year

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	<u>Drug Trafficking – 50 g. Heroin</u>	<u>Bank Robbery - \$2000</u>
<u>Pre-Guidelines</u>	30-37 months	33-41 months
<u>Guideline range with predicates defined as 994(h) requires</u>	37-46 months CHC II	46-57 months CHC II
<u>Career Offender Guideline Range</u>	210-262 months (700% of pre-GLs sentence, 560% of 994(h) sentence)	210-262 months (636% of pre-GLs sentence, 456% of 994(h) sentence)

Why Does Past Practice Sentence Matter?

- Congress directed USSC to develop guidelines to advance purposes set forth in 3553(a)(2). See 28 USC 991(b)(1)(A).
- Commissioners could not agree; used empirical evidence of past practice as proxy for purposes. See USSG, Ch. 1 Pt. A(3).

12

- Supreme Court emphasized Commission's "empirical approach" which began "with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past." *Rita*, 551 U.S. at 349.
- As one of two reasons it may be "fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve 3553(a)'s objectives." *Rita*, 551 U.S. at 350.

13

Re-emphasized

- *Gall*: Guidelines are "the product of careful study based on empirical evidence derived from the review of thousands of individual sentencing decisions." 552 U.S. at 46.
- *Kimbrough*: "In the main," Commission used "an empirical approach based on data about past sentencing practices, including 10,000 presentence investigation reports." 552 U.S. at 96.

14

BUT

- "Notably, not all of the Guidelines are tied to this empirical evidence." *Gall*, 552 U.S. at 46 n.2.
- "The Commission did not use this empirical approach in developing the Guidelines sentences for drug-trafficking offenses." *Kimbrough*, 552 U.S. at 96.

15

Where to Get Past Practice Sentence?

- USSC, Supplementary Report on the Initial Sentencing Guidelines and Policy Statements (1987), www.fd.org, Sentencing Resource page.
 - Took "average time served" in 10,000 1985 cases
 - Converted into
 - guideline offense levels
 - points for typical aggravating factors (ignored most mitigating factors)

16

How do I figure out this #@\$\$@%! Report?

- See Sentencing by the Statute at pp. 36-45, www.fd.org, Sentencing Resource page.

17

USSC deviated from past practice

- Drugs, career offender, white collar, and others
- Did not include probationary sentences in estimating average past sentence length, or in making probation available
 - 38% of all sentences in 1984 were probation; now 7.2%.
- Mitigating offender characteristics prohibited or deemed "not ordinarily relevant"
- Required increases for acquitted and uncharged crimes at same rate as if charged and convicted

18

Two Reasons a Guideline *Might* Reflect 3553(a) Objectives

- 1) Based on Past Practice Study
- 2) Subsequent “evolution” in response to judicial decisions, sentencing data, criminological research, input from all key participants

Rita, 551 U.S. at 349-50; 28 USC 994(o).

19

But, when a guideline

- is not the product of “empirical data and national experience,” it is not an abuse of discretion to conclude that it “yields a sentence ‘greater than necessary’ to achieve 3553(a)’s purposes, even in a mine-run case.”

Kimbrough, 552 U.S. at 109-10.

20

Ways to Show Unsound “Evolution”

1. Lack of reasons in guideline history, or reasons not empirically based, such as congressional directive
2. Guideline based on congressional directive exceeds even the congressional directive
3. Commission studies identifying problems never addressed
4. Other empirical or policy research, e.g., ineffectiveness of long sentences v. effectiveness of drug treatment, education, jobs
5. Statistics showing guideline is not being followed
6. Judicial decisions criticizing guideline

GUIDELINE FAR EXCEEDS
28 USC 994(h)

WITHOUT EXPLANATION

994(h) lists only certain federal drug offenses as predicates

Commission adds:

- aiding and abetting, attempt, conspiracy
- any state offense punishable by more than one year
- possessing listed chemical with intent to manufacture, 21 U.S.C. 841(c)(1)
- possessing prohibited flask or equipment with intent to manufacture, 21 U.S.C. 843(a)(6)
- maintaining place for purpose of facilitating controlled substance offense if offense facilitated was a “controlled substance offense,” 21 U.S.C. 856
- using communications facility in committing, causing or facilitating a drug offense if offense committed, caused or facilitated was a “controlled substance offense,” 21 U.S.C. 843(b)
- 924(c) or 929(a) if underlying offense was a “controlled substance offense”
- See Career Offender Paper at 12-17, 40-41, 49-51.

“Felony” means an “offense classified by applicable Federal or State law as a felony”
21 USC 802(13)

- Commission defines “felony” as
“prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, **regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed.**”
- See Career Offender Paper at 31-33, 42, 52-54.

24

Commission broadened "crime of violence" beyond 18 USC 16 or 18 USC 924(e)

- To include crimes that USSC admitted were not violent, but declined to fix
- Courts interpreted broad definition to include, e.g.,
 - tampering with a motor vehicle,
 - burglary of a non-dwelling,
 - fleeing and eluding,
 - operating a motor vehicle without owner's consent,
 - oral threatening, possession of short-barreled shotgun
 - failing to return to halfway house

25

Courts to the rescue after Leocal, Chambers, Begay, and Johnson and GVRs in career offender cases

Courts hold the following (and others) no longer count:

- auto theft and auto tampering
- non-residential burglary
- child endangerment
- walkaway escape
- fleeing and eluding police
- carrying a concealed weapon
- reckless discharge of a firearm
- possession of a weapon in prison
- resisting or obstructing a police officer
- battery on law enforcement officer
- statutory rape
- vehicular homicide
- offenses that require only recklessness
- See Career Offender Paper at 25-31, 51-52.

26

Fix Is Not Perfect

- Commission has failed to develop a definition of "crime of violence" under the residual clause as defined under *Begay*
 - "certain physically risky crimes against property"
 - must present a serious potential risk of physical injury to another and "involve purposeful, violent, and aggressive conduct"
- Some courts continue to find the commentary in 4B1.2 to be broader than the definition of "violent felony" under 924(e) as interpreted by the Supreme Court.
 - * possession of sawed-off shotgun
 - * false imprisonment (a crime against the person)
 - * attempt (possessing burglary tools)

27

- *Sykes v. United States*, 08-3624
- Whether "fleeing police in a vehicle" is "violent felony" under ACCA
- Argued January 2011

USSC's own research shows unsound

- USSC Fifteen Year Review at 133-34 (2004), http://www.ussc.gov/15_year/15year.htm
 - When priors are controlled substance offenses, the risk of recidivism is same as that of offenders in ordinary CHC
 - Does nothing to deter or prevent drug crime
 - Creates racial disparity
- And irrationally punishes repeat drug and violent offenders at stat max, unlike repeat fraudsters, environmental violators, etc.

28

Unwarranted Uniformity

1988 Commission study:

- "makes no distinction between defendants convicted of the same offenses, either as to the seriousness of their instant offense or their previous convictions . . . even if one defendant was a drug 'kingpin' with serious prior offenses, while the other defendant was a low-level street dealer [with] two prior convictions for distributing small amounts of drugs."
USSC, Career Offender Guidelines Working Group Memorandum at 13 (March 25, 1988), http://www.src-project.org/wp-content/uploads/2009/08/ussc_report_careeroffender_19880325.pdf.

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Example of How to Use Commission's Findings:

- Vasquez Petition at 9-11
http://www.fd.org/pdf_lib/Vazquez%20Petition%20for%20Rehg%20En%20Banc.pdf

31

Other Empirical Research

- Longer sentences do not deter crime, particularly drug and violent crime.
 - Studies collected in Career Offender Paper at 35-36.
- Substantial evidence that prison, by disrupting employment, reducing prospects of future employment, weakening family ties, and exposing less serious offenders to more serious offenders, leads to increased recidivism.
 - Lynne M. Vieraitis, Tomaslav V. Kovandzic, Thomas B. Marvel, *The Criminogenic Effects of Imprisonment: Evidence from State Panel Data 1974-2002*, 6 *Criminology & Public Policy* 589 (2007).
 - Sentencing Project, *Incarceration and Crime: A Complex Relationship* 7-8 (2005).

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Better Ways to Reduce Recidivism

- “If drug addiction creates a propensity to crime, drug rehabilitation goes a long way to preventing recidivism. In fact, statistics suggest that the rate of recidivism is less for drug offenders who receive treatment while in prison or jail, and still less for those treated outside of a prison setting.”

US v. Perella, 273 F. Supp. 2d 162, 164 (D. Mass. 2003) (Gertner, J.) (citing Lisa Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 *Hastings L.J.* 1217, 1220 (2002)).

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Data – Career Offender Guideline Not Followed

The *only* data USSC has reported was in March 2006:

- Below-guideline rate rose from 7.3% to 21.5% one year after Booker
- Below-guideline rate for drug trafficking career offenders was 32.3%

USSC, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 137-39 (March 2006), http://www.ussc.gov/booker_report/Booker_Report.pdf.

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Courts may disagree with the career offender guideline.

- *United States v. Corner*, 598 F.3d 411 (7th Cir. 2010)
- *United States v. Gray*, 577 F.3d 947 (8th Cir. 2009)
- *United States v. Michael*, 576 F.3d 323 (6th Cir. 2009)
- *United States v. McLean*, 331 Fed. App'x 151 (3d Cir. June 22, 2009)
- *United States v. Friedman*, 554 F.3d 1301 (10th Cir. 2009)
- *United States v. Boardman*, 528 F.3d 86 (1st Cir. 2008)
- *United States v. Martin*, 520 F.3d 87 (1st Cir. 2008)
- *United States v. Sanchez*, 517 F.3d 651 (2d Cir. 2008)
- *United States v. Vazquez*, 558 F.3d 1224 (11th Cir. 2009) (court may not disagree); GVR'd, *Vazquez v. United States*, 130 S. Ct. 1135 (U.S. Jan 19, 2010)

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DOJ agrees

- “as with other guidelines, district courts may vary from the range recommended by the career offender guideline based on policy disagreements with the guideline, so long as they adequately explain why ‘the Guidelines sentence itself fails properly to reflect 3553(a) considerations.’”
- Supplemental Brief for the United States at 13, *United States v. Funk*, 05-3708 (6th Cir.).

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Some District Court Cases

- *Whigham*, ___ F. Supp. 2d ___, 2010 WL 4959882 *8 (D. Mass. Dec. 03, 2010)
- *Moreland*, 568 F. Supp. 2d 674 (S.D. W. Va. 2008)
- *Malone*, slip op., 2008 WL 6155217 (E.D. Mich. 2008)
- *Fernandez*, 436 F. Supp. 2d 983 (E.D. Wis. 2006)
- *Serrano*, slip op., 2005 WL 1214314 (S.D.N.Y. May 19, 2005)
- *Colon*, slip op., 2007 WL 4246470 *6 (D. Vt. Nov. 29, 2007)
- *Naylor*, 359 F. Supp.2d 521 (W.D. Va. 2005)
- *Hodges*, slip op., 2009 WL 366231 (E.D.N.Y. Feb. 12, 2009).

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Example

- small-time heroin dealer picked up with 50 grams of heroin
- drug-addicted mother, on the streets at age 10
- addict by age 13
- living in his car at time of arrest
- two prior minor state drug convictions, 60 days time served for both

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Sentencing Purposes

- Retribution?
 - No violence, weapons, injury
 - Little profit
 - Instant and prior offenses result of disadvantaged upbringing and addiction
 - Has not made a “career” of crime
- General Deterrence?
 - “Incapacitating a low-level drug seller prevents little, if any, drug selling; the crime is simply committed by someone else.” USSC Fifteen Year Review at 134.

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- Protect Public from Further Crimes?
 - Risk of recidivism not close to those in CHC VI, closer to those in CHC in which would be absent career offender guideline. See USSC Fifteen Year Review at 134.
 - Drug treatment, education, vocational training would prevent further crime
- Rehabilitation?
 - Drug treatment, education, job training needed

Purpose-Driven Sentence?

- Probation is possible because stat max is less than 25 years. See 3559(a), 3561(a).
- Some (v. short) prison time may be warranted because of his record
- Primary goal should be rehabilitation, which would protect the public from further crimes

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Calculate GL Range

- 50 grams = level 20
- Regular range in CHC III = 41-51 months
- Career offender range = level 32, CHC VI = 210-262 months

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Deconstruct Career Offender Guideline

- Not Based on Past Practice
 - “much larger increases” than under pre-guidelines practice. USSC Supplementary Report at 44
- Like drug guidelines not based on past practice but keyed to statutory minimums, *Kimbrough* at 567; *Gall* at 594 n.2, career offender guideline not based on past practice but keyed to statutory maximums.

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- Commission’s Own Findings, Fifteen Year Review at 133-34
 - Recidivism risk = same as defendants in non-career offender criminal history category
 - Deterrence not served because retail dealers are easily replaced
 - Career offender guideline creates racial disparity because drug crimes are more easily detected on the streets in poor neighborhoods.
- Exceeded congressional directive -- priors are state drug offenses; guideline includes state drug offenses but 994(h) does not.
- Support with caselaw in similar cases. See Career Offender Paper at 39-44.

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Use Regular Guideline?

- Level 20
- - 2 because USSC set 2 levels higher than necessary to reach MM (See USSG, App. C, Amend. 706, Reason for Amendment (Nov. 1, 2007))
- = 18
- - 3 Acceptance
- = 15
- = 24-30 months in CHC III

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Deconstruct Regular Guideline?

- Heroin GL Not Based on Past Practice or Empirical Research Either
 - *Kimbrough* at 567; *Gall* at 594 n.2; *US v. Thomas*, 595 F. Supp. 2d 949 (E.D. Wis. 2009)
- Though not required by Congress to match drug guidelines to MMs, USSC did, did not explain why.

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Empirical research shows

- Quantity is a poor proxy for offense seriousness.
 - USSC Fifteen Year Review at 47-55
 - Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminol. 155, 171 (2009)
 - Stephen J. Schulhofer, *Assessing the Federal Sentencing Process: The Problem Is Uniformity, Not Disparity*, 29 Am. Crim. L. Rev. 833, 851-73 (1992)
 - *United States v. Cabrera*, 567 F.Supp.2d 271 (D. Mass. 2008).

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Objective Basis in Past Practice

- If first offender:
 - Level 20
 - 2 for role
 - 2 for being drug user
 - 7 for pleading guilty
 - = level 9 = 4-10 months.
 - See Supplementary Report at 32, 35, 36, 38.
- He’s in criminal history category III, so equivalent past practice sentence:
 - **8-14 months**

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