

Begay and Beyond:
Chipping Away at “Crimes of Violence”

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I. The Starting Point: Taylor and Shepard.

A. The United States Supreme Court’s decisions in Taylor v. United States, 495 U.S. 575 (1990), and Shepard v. United States, 544 U.S. 13 (2005), provide the starting point to analyzing most federal sentencing enhancements based on prior convictions. Those decisions, and their progeny, lay out two basic principles:

B. CATEGORICAL APPROACH:

1. Generally, when analyzing whether a prior conviction qualifies for enhancement, the court should *not* look at the underlying facts of the offense.
2. Rather, the court should generally look only to “*the fact of conviction* and *the statutory definition of the prior offense*.” Taylor, 495 U.S. at 602 (emphasis added; footnote omitted).
 - a. **IMPORTANT PRACTICE NOTE:** In conducting a Taylor analysis, it is critical to evaluate the statute of conviction *as it existed at the time of the defendant’s prior offense*. Do not simply look at the current version of the statute of conviction, as it may have been amended unfavorably since the time of the prior offense.
 - b. Both Westlaw and LEXIS have good coverage of prior versions of state code provisions. Go into the statutory database for whichever state you are looking for, and there should be a tab for historical versions by year.
3. There is one limited exception to this categorical rule: where a statute may be violated both in ways that qualify for enhancement and in ways that do not qualify for enhancement, a court may look at certain judicially noticeable, reliable documents to determine precisely what the basis for the defendant’s conviction was. (This is sometimes referred to in the case law as the “modified categorical approach.”)
 - a. In Taylor, where the prior convictions occurred after a jury trial, the Supreme Court held that, where a defendant is convicted under a “mixed” statute of this type, enhancement will be appropriate if “the charging paper and jury instructions actually required the jury [in the prior case] to find all the elements of [a qualifying offense] in order to convict the defendant.” Taylor, 495 U.S. at 602.
 - b. In Shepard v. United States, 544 U.S. 13 (2005), the Supreme Court considered how this feature of Taylor should be applied in cases where the prior conviction was obtained by guilty plea rather than by jury trial. The Court held that the inquiry

to determine whether a plea of guilty to [a “mixed” statute] necessarily admitted elements of [a qualifying offense] is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.

Shepard, 544 U.S. at 26. Put another way, the inquiry under Shepard “is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” Id. at 16.

c. Limitations on use of charging instrument:

i. If the defendant pleads guilty to (or is found guilty of a) lesser-included offense of the offense alleged in the charging document, and there is not a new charging document for the lesser-included offense, a district court may not rely on the original charging document for these purposes. See, e.g., United States v. Turner, 349 F.3d 833, 836 (5th Cir. 2003).

ii. Also, in many jurisdictions, where the indictment contains conjunctive allegations of different ways that a statute was violated, a jury’s verdict or a guilty plea may rest upon proof of facts that a defendant violated the statute in any *one* of the ways listed. Where this is the rule, a conviction on such an indictment does *not* necessarily establish that the defendant was “convicted” of any particular one of those ways. If one of the alleged ways would not qualify for enhancement, and the government comes forward with no further evidence to demonstrate the basis on which the conviction rested, enhancement is improper. See, e.g., United States v. Morales-Martinez, 496 F.3d 356, 357-61 (5th Cir. 2007) (Texas state guilty plea); United States v. Gonzales, 484 F.3d 712, 714-17 (5th Cir. 2007) (Texas state jury trial).

d. **“LEAST CULPABLE ACT” RULE:** “If an indictment is silent as to the offender’s actual conduct, [the court] must proceed under the assumption that his conduct constituted the least culpable act satisfying the count of conviction.” United States v. Houston, 364 F.3d 243, 246 (5th Cir. 2004) (citations omitted); see also id. at 246-48 (applying analysis to conclude that statutory rape under Texas law did not qualify as a crime of violence under USSG § 4B1.2(a)); accord United States v. Insaulgarat, 378 F.3d 456, 467-71

(5th Cir. 2004) (applying Houston's "least culpable act" rule to hold that aggravated stalking under Florida law was not a "crime of violence" under USSG §§ 4B1.1 and 4B1.2).

- e. What may *not* be used for the Taylor/Shepard narrowing function?
 - i. Facts set forth in PSR. See, e.g., United States v. Gonzalez-Chavez, 432 F.3d 334, 338 (5th Cir. 2005).
 - ii. Abstract of judgment (California). See, e.g., United States v. Gutierrez-Ramirez, 405 F.3d 352 (5th Cir. 2005).
 - iii. Court minutes. See, e.g., United States v. Lopez-Solis, 447 F.3d 1201, 1210 n.61 (9th Cir. 2006).
 - iv. Certificate of disposition (New York). See, e.g., United States v. Hernandez, 218 F.3d 272, 278-79 (3d Cir. 2000).
 - v. Docket sheet. See, e.g., United States v. Jimenez-Banegas, 209 Fed. Appx. 384, 389 n.3 (5th Cir. 2006) (unpublished).
 - vi. Police reports and complaint applications. See Shepard, 544 U.S. at 16; United States v. Vasquez-Garcia, 449 F.3d 870, 873 (8th Cir. 2006).
- 4. Because the government has the burden of proving the applicability of a sentencing enhancement, the government's failure to produce Taylor/Shepard-approved proof that a prior conviction qualifies for enhancement should mean that the enhancement will not be applied.

C. **GENERIC, CONTEMPORARY MEANING:**

- 1. The second important feature of the Taylor line of cases is the "generic, contemporary meaning" rule. Under this rule, when a statute (or a Guideline) does not specifically define an enumerated offense that qualifies for enhancement (e.g., "burglary"), the enumerated offense is given a uniform, generic definition that represents a consensus of how the enumerated offense at issue is "now [defined] in the criminal codes of most States," Taylor, 495 U.S. at 598 – i.e., the "generic, contemporary meaning" of the predicate enumerated offense at issue.
- 2. *A state's label is not dispositive*; that is, just because a state calls an offense "burglary" does not mean that the offense constitutes "burglary" under a federal statute that enhances a sentence based on a prior "burglary" conviction. See Taylor,

495 U.S. at 592 (enumerated offenses have a “uniform definition independent of the labels employed by the various States’ criminal codes.” Id. at 592.

D. With these rules in mind, let’s turn to some of the more common types of federal sentencing enhancements based on prior convictions.

II. “Crimes of Violence”/“Violent Felonies”/“Serious Violent Felonies”

A1. Offenses that “have as an element the use, attempted use, or threatened use of physical force against the person of another.”

A2. Offenses that “have as an element the use, attempted use, or threatened use of physical force against the person or property of another.”

1. Where are these enhancements found?
 - a. The enhancement in A1 (person only) is found in:
 - i. 18 U.S.C. § 3559(c)(2)(F)(ii) (“three strikes” statute).
 - ii. USSG § 2L1.2(b)(1)(A)(ii) & comment. (n.1(B)(iii) (illegal reentry Guideline).
 - iii. USSG § 4B1.2(a)(1) (career offender Guideline).
 - b. The enhancement in A2 (person *or* property) is found in:
 - i. 18 U.S.C. § 16(a).
 - ii. 18 U.S.C. § 924(c)(3)(A).
 - iii. 18 U.S.C. § 924(e)(2)(B)(i) (ACCA).
 - iv. 18 U.S.C. § 3156(a)(4)(A) (bail statute).
2. The only difference between these two types of provisions is the type of provision described in A2 includes offenses that have as an element the use of force against *property* as well as against *persons*.
3. How should this rubric be analyzed?
 - a. “USE”: Does the term “use” imply an *intentional* application of force?

- i. The Fifth Circuit, sitting en banc, has held that, in order for an offense to be said to “ha[ve] as an element the use, attempted use, or threatened use of force” under USSG § 2L1.2, “the predicate offense [must] require[] that a defendant intentionally avail himself of that force.” United States v. Vargas-Duran, 356 F.3d 598, 602 (5th Cir. 2004) (en banc). The Eighth Circuit, on the other hand, refused to “read into” § 2L1.2’s “crime of violence” definition a mens rea of intentionality. See United States v. Gonzalez-Lopez, 335 F.3d 793, 798 (8th Cir. 2003); cf. Omar v. INS, 298 F.3d 710, 718 (8th Cir. 2002) (stating, without any analysis of the meaning of the word “use,” that “[18 U.S.C.] § 16(b) does not contain language of intent” Id. at 718; but see id. at 720-22 (Heaney, J., dissenting)).
- ii. The Supreme Court has at least partially settled this question, and, in the process, has partially overruled the Eighth Circuit’s decision in Gonzalez-Lopez. In Leocal v. Ashcroft, 543 U.S. 1 (2004), the question presented was whether the petitioner’s conviction of driving under the influence and causing serious bodily injury, in violation of Fla. Stat. Ann. § 316.193(3)(c)(2), was a “crime of violence” under 18 U.S.C. § 16(a) that rendered the petitioner removable under the immigration laws as an aggravated felon. The Supreme Court held that, because the Florida statute did not have any particular mental state, and could be violated by merely negligent conduct, it did not have the “use” of force as an element. See id. at 9-10. The Court held that the phrase “use . . . of physical force” “most naturally suggest[ed] a higher degree of intent than negligent or merely accidental conduct.” Id. at 9 (citations omitted).
- iii. The Court in Leocal explicitly left open, however, the question whether the *reckless* application of force could constitute the “use” of force. See id. at 13.
- iv. The circuits were also divided on whether, for purposes of USSG § 2L1.2, an element of causing injury is the equivalent of an element of using force. The Eighth Circuit had said yes. See Gonzalez-Lopez, 335 F.3d at 799. This holding, too, appears to have been overruled by Leocal, which drew a firm distinction between the use of force and the *result* of injury. See Leocal, 543 U.S. at 10 n.7. The holding in Leocal was in line with the holding in numerous other cases that the causing of injury does *not* necessarily equate to the “use . . . of physical force.” See, e.g., Vargas-Duran, 356 F.3d at 605 n.10 & 606; Chrzanoski v. Ashcroft, 327 F.3d 188, 194 (2d Cir. 2003).

- b. **“PHYSICAL FORCE”**: What is the “physical force” referred to?
- i. “[W]e must treat the word ‘force’ as having a meaning in the legal community that differs from its meaning in the physics community. The way to do this is to insist that the force be violent in nature – the sort that is intended to cause bodily injury, or at a minimum likely to do so.” Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003); see also id. (holding that offensive touching battery under Indiana law did not involve the use of “force” under this definition). Accord United States v. Belless, 338 F.3d 1063, 1067 (9th Cir. 2003) (holding that state battery statute that punished “unlawfully touch[ing] another in a rude, insolent or angry manner” did not include an element of “use or attempted use of physical force” because 18 U.S.C. § 921(a)(33)(A)(ii) requires violent force against the body of another individual, not merely rude touching); United States v. Rodriguez-Guzman, 56 F.3d 18, 20 n.8 (5th Cir. 1995) (“‘force’ . . . is synonymous with destructive or violent force”).
 - ii. This means that the mere act of physical contact and mere touching do **not** constitute the use of “physical force against” the person of another. See, e.g., Flores, 350 F.3d at 672.
- c. **ELEMENTS**:
- i. “The elements of an offense of course come from the statute of conviction, not from the particular manner and means that attend a given violation of the statute.” United States v. Calderon-Peña, 383 F.3d 254, 257 (5th Cir. 2004) (en banc) (citation and footnote omitted).
 - ii. Note, however, that the Fifth Circuit has held that, where a statute contains disjunctive elements, it is permissible to use an indictment to “pare down” a statute to the particular provisions that the defendant was convicted under. See id.
- d. **RULE OF THUMB**: “If any set of facts would support a conviction without proof of [the use of force], then [the use of force] most decidedly is not an element – implicit or explicit of the crime.” Vargas-Duran, 356 F.3d at 605. In other words, if the offense (as pared down) can be committed without the use of force, then the use of force is obviously not an element of the offense.
- i. Look for scenarios in state case law where defendants have been successfully prosecuted for the offense in question without their

having used force.

ii. If the case law contains no such scenarios, can I point to hypothetical ways that the offense could be committed without the use of force?

(1) In determining whether a California offense was categorically the “aggravated felony” of a “theft offense,” the Supreme Court held that

[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic possibility, an offender . . . must at least point to his own case or other cases in which the state courts did apply the statute in the special (nongeneric) manner for which he argues.

Gonzales v. Duenas-Alvarez, 549 U.S. 183, ____, 127 S. Ct. 815, 822 (2007). In light of this language in Duenas-Alvarez, the government may argue that you must point to an actual case where a defendant was successfully prosecuted for nonqualifying conduct.

(2) The Ninth Circuit has, however, identified an important exception to Duenas-Alvarez: “Where . . . a state statute explicitly defines a crime more broadly than the generic definition, no ‘legal imagination’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute’s greater breadth is evident from the text.” United States v. Grisel, 488 F.3d 844, 850 (9th Cir. 2007) (en banc); see also, e.g., United States v. Vidal, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc) (following and applying Grisel).

e. Remember: an element of “causing injury” is not the same thing as an element of “using force.” The former describes a **result**; the latter describes a **means**. Injury may result even where no force has been used. See Leocal, 543 U.S. at 10 n.7. Leocal appears to have overruled in this respect contrary

decisions like the Eighth Circuit’s decision in Gonzalez-Lopez, 335 F.3d at 799.

- B1. Offenses that “by [their] nature, involve[] a substantial risk that physical force against the person of another may be used in the course of committing the offense.”**
- B2. Offenses that “by [their] nature, involve[] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”**

1. Where is this enhancement found?
 - a. The enhancement in B1 (person only) is found in:
 - i. 18 U.S.C. § 3559(c)(2)(F)(ii) (“three strikes” statute).
 - b. The enhancement in B2 (person *or* property) is found in:
 - i. 18 U.S.C. § 16(b).
 - ii. 18 U.S.C. § 924(c)(3)(B).
 - iii. 18 U.S.C. § 3156(a)(4)(B) (bail statute).
2. The only difference between these two types of provisions is the type of provision described in A2 includes offenses that have as an element the use of force against *property* as well as against *persons*.
3. How should this rubric be analyzed?
 - a. **USE**: See discussion above.
 - b. **PHYSICAL FORCE**: See discussion above.
 - c. **“BY ITS NATURE”**: The words “by its nature” signal that courts are to take a *categorical* approach.
 - i. “This means that the particular facts of the defendant’s prior conviction do not matter, e.g., whether the defendant actually did use force against the person or property of another to commit the offense.” United States v. Chapa-Garza, 243 F.3d 921, 924 (5th Cir. 2001).

- ii. “The proper inquiry is whether a particular defined offense, in the abstract, is a crime of violence” Id.
- d. **“SUBSTANTIAL RISK”:** What is a “substantial risk”?
- i. Answer: Whether a risk is “substantial” is largely in the eye of the judicial beholder.
 - ii. The Fifth Circuit has said that “[a] substantial risk that an event may occur does not mean that it must occur in every instance; rather, a substantial risk requires only a strong probability that the event, in this case the application of physical force during the commission of the crime, will occur.” United States v. Rodriguez-Guzman, 56 F.3d 18, 20 (5th Cir. 1995).
 - iii. If there are many different, non-forcible ways to commit the offense in question, argue that the risk of the use of force is not “substantial.”
 - iv. Remember, if an offense is always committed negligently or accidentally, then there is *no* risk that force will be “used” so as to trigger application of provisions like these. See, e.g., Leocal, 543 U.S. at 10-11.
 - v. **FOOD FOR THOUGHT:** Is the “substantial risk” referred to here quantitatively the same as the “serious potential risk” at issue in the Armed Career Criminal Act and other statutes? If so, will the Supreme Court’s forthcoming decision in Chambers v. United States, No. 06-11206, cert. granted, ____ U.S. ____, 2008 WL 1775023 (Apr. 21, 2008), provide a methodology for assessing when a risk is “serious” or “substantial”?
- e. **“IN THE COURSE OF COMMITTING THE OFFENSE”:**
- i. This phrase limits the qualifying use of force to “force necessary *to* effectuate the offense . . . *not* . . . force used *while* effectuating the offense.” United States v. Medina-Anicacio, 325 F.3d 638, 646 (5th Cir. 2003) (emphasis in original; citation omitted).
 - ii. As so construed, the phrase “in the course of committing the offense” provides an important limitation on this “crime of violence” definition. This is so because the force inquiry is limited to the strict parameters of the offense of conviction, and any force used coincidentally with (but not as part of) that offense does not count.

This limitation also rules out force used as part of the sequelae of the offense of conviction.

C. Offenses that “involve[] conduct that presents a serious potential risk of physical injury to another.”

1. Where is this enhancement found?
 - a. 18 U.S.C. § 924(e)(2)(B)(ii) (ACCA).
 - b. USSG § 4B1.2(a)(2) & comment. (n.1) (career offender Guideline).
2. How should this rubric be analyzed?
 - a. Do **NOT** look at the underlying facts of your client’s particular prior conviction! The relevant inquiry is a **CATEGORICAL** one, namely: whether a particular prior offense of conviction **BY ITS NATURE** presents a serious potential risk of physical injury. See, e.g., James v. United States, 127 S. Ct. 1586, 1597 (2007) (ACCA’s residual “violent felony” definition, 18 U.S.C. § 924(e)(2)(B)(ii), requires an offense “of a type that, *by its nature*, presents a serious potential risk of injury to another.”) (Emphasis added.) This approach does not “requir[e] that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury” Id. “Rather, the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.” Id.
 - b. Under the residual “crime of violence” definition in USSG § 4B1.2, an offense can be a “crime of violence” if the conduct described in the statute of conviction, or the conduct described in the relevant count of the charging instrument, *by its nature* presents a serious potential risk of physical injury to another. See USSG § 4B1.2(a)(2) & Application Note 1, ¶ 2.
3. James v. United States, 127 S. Ct. 1586 (2007):
 - a. In James, a very divided Supreme Court barely (5-4) upheld the characterization of the petitioner’s prior Florida attempted burglary conviction as a qualifying “violent” felony under the ACCA’s residual clause. In an opinion written by Justice Alito and joined by Chief Justice Roberts and Justices Souter, Kennedy, and Breyer, the Court began by examining the language of the Florida statute at issue, but then took account of how that on-its-face broad language had been narrowed by Florida case law, that required

an overt act directed toward entering or remaining in a structure or conveyance. See James, 127 S. Ct. at 1594. The Court then concluded that, as so narrowed, attempted burglary poses a risk of injury that “arises . . . from the possibility that an innocent person might appear while the crime is in progress.” Id. at 1594-95.

- b. What the Court did not do in James was provide the lower courts with a concrete legal analysis for determining when an offense’s categorical risk of physical injury should be considered a *serious* one – a failing on which Justice Scalia called the Court. See id. at 1601 (Scalia, J., dissenting) (“The problem with the Court’s approach to determining which crimes fit within the residual provision is that it is almost entirely ad hoc.”).
- c. In his dissenting opinion, Justice Scalia (joined by Justices Stevens and Ginsburg) proposed his own rule for applying the ACCA’s residual clause. He first concluded that “what the residual provision means by the general phrase ‘conduct that presents a serious potential risk of physical injury to another’ is conduct that resembles, insofar as the degree of such risk is concerned, the previously enumerated crimes.” Id. at 1603 (Scalia, J., dissenting). Put another way, “the requirement that the degree of risk be similar to that for the enumerated crimes means that it be no lesser than the risk posed by the least dangerous of those enumerated crimes.” Id. (Scalia, J., dissenting).
- d. Justice Scalia then determined that burglary was the least dangerous of the enumerated crimes. See id. at 1603-07 (Scalia, J., dissenting). He finally concluded that “[b]ecause attempted burglary categorically poses a less ‘serious potential risk of physical injury to another’ than burglary, the least risky of ACCA’s enumerated crimes, I would hold that it cannot be a predicate ‘violent felony’ for purposes of [the ACCA], regardless of how close a State’s attempt statute requires the perpetrator come to completing the underlying offense.” Id. (Scalia, J., dissenting) (footnote omitted).

4. Begay v. United States, 128 S. Ct. 1581 (2008):

- a. In Begay, the Court once again grappled with the ACCA’s residual clause. At issue in Begay was whether the defendant’s prior felony convictions for driving under the influence of alcohol (DUI) were violent felonies under the residual clause.
- b. Interestingly, the Court, in an opinion written by Justice Breyer, “*assume[d]* that the lower courts were right in concluding that DUI involves conduct that ‘presents a serious potential risk of physical injury to another.’” Begay, 128

S. Ct. at 1584 (quoting 18 U.S.C. § 924(e)(2)(B)(ii); emphasis added). This, however, did not dispose of the case for the Court:

In our view, the provision’s listed examples – burglary, arson, extortion, or crimes involving the use of explosives – illustrate the kinds of crimes that fall within the statute’s scope. Their presence indicates that the statute covers only *similar* crimes, rather than *every* crime that “presents a serious potential risk of physical injury to another.”

Id. at 1584-85 (quoting 18 U.S.C. § 924(e)(2)(B)(ii); emphasis in original). In other words, said, the Court, “to give effect . . . to every clause and word of this statute, we should read the examples as limiting the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.” Id. (internal quotation marks and citations omitted).

c. Applying this principle, the Court reasoned that

DUI differs from the example crimes – burglary, arson, extortion, and crimes involving the use of explosives – in at least one pertinent, and important, respect. The listed crimes all typically involve purposeful, “violent,” and “aggressive” conduct. That conduct is such that it makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim. Crimes committed in such a purposeful, violent, and aggressive manner are “potentially more dangerous when firearms are involved.” And such crimes are “characteristic of the armed career criminal, the eponym of the statute.”

By way of contrast, statutes that forbid driving under the influence, such as the statute before us, typically do not insist on purposeful, violent, and aggressive conduct; rather, they are, or are most nearly comparable to, crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have had any criminal intent at all.

Id. at 1586-87 (citations omitted). And,

a prior record of DUI, a strict liability crime, 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 latter are associated with a likelihood of future violent, aggressive, and purposeful “armed career criminal” behavior in a way that the former are not.

Id. at 1588. The Court thus held that “New Mexico’s crime of ‘driving under the influence’ falls outside the scope of the Armed Career Criminal Act’s clause (ii) ‘violent felony’ definition.” Id.

- d. Justice Scalia filed an opinion concurring in the judgment. “Contrary to the Court, [he] conclude[d] that the residual clause unambiguously encompasses *all* crimes that present a serious risk of injury to another. But because he c[ould] not say that drunk driving clearly poses such a risk (within the meaning of the statute), the rule of lenity br[ought] him to concur in the judgment of the Court.” Id. at 1588 (Scalia, J. concurring in the judgment). Justice Scalia, reprising the test he proposed in his dissent in James, would ask “one question: Does drunk driving pose at least as serious a risk of physical injury to another as burglary [the enumerated crime he deemed to present the least such risk]?” Id. at 1591 (Scalia, J., concurring in the judgment). Finding that he could not conclude so from the evidence presented by the government, he would hold that “the rule of lenity require[d] that [he] resolve th[e] case in favor of the defendant.” Id. (Scalia, J., concurring in the judgment); see also id. at 1591-92 (Scalia, J., concurring in the judgment).
- e. Justice Alito filed a dissenting opinion in which he was joined by Justices Souter and Thomas. See id. at 1592-97 (Alito, J., dissenting). Unlike the majority, he found no warrant for limiting the ACCA’s “violent felony” definition only to purposeful, violent, and aggressive crimes. See id. at 1594-96 (Alito, J., dissenting). He also disagreed with Justice Scalia’s proposed mechanism for measuring the degree of risk of proposed injury. See id. at 1596-97 (Alito, J., dissenting). He had no trouble concluding that felony drunk driving posed a serious potential risk of physical injury, see id. at 1593-94 (Alito, J., dissenting), and therefore he would have affirmed the decision below. See id. at 1597 (Alito, J., dissenting).

4. Beyond Begay

- a. Although Begay leaves many questions unanswered, Begay does seem to make clear a couple of useful points in defending against “serious potential risk of physical injury to another” enhancements under the ACCA:

- i. First, not every crime that presents a “serious potential risk of physical injury to another” will qualify for enhancement under the ACCA. In other words, that is a *necessary*, but not a *sufficient*, condition for enhancement under the ACCA’s residual clause. Rather, in addition to presenting such a risk, the prior offense at issue must constitute the sort of purposeful, violent, and aggressive offense, concern about which animated the passage of the ACCA.
- ii. The Court’s opinion thus suggests that strict liability offenses, as well as offenses with a *mens rea* of mere negligence, or possibly even recklessness, may not qualify for enhancement, *even if these offenses present a serious potential risk of physical injury*.
- iii. *Begay* represents a significant constriction of the number and types of crimes that will qualify for enhancement under the ACCA. An early hint of the shift that *Begay* is likely to work in the lower courts’ ACCA law is found in the ACCA cases in which the Court granted certiorari, vacated the judgment below, and remanded for further consideration in light of *Begay*. See, e.g., *United States v. Counts*, 498 F.3d 802, 805 (8th Cir. 2007) (Missouri conviction for first-degree tampering with a motor vehicle by operation of the motor vehicle without the owner’s consent was a “violent felony” under the ACCA’s residual clause), cert. granted and judgment vacated, ___ U.S. ___, 2008 WL 1775012 (Apr. 21, 2008); *United States v. Haste*, 234 Fed. Appx. 70, 71 (4th Cir. 2007) (unpublished) (North Carolina conviction for felonious possession of a weapon of mass destruction [a sawed-off shotgun] was a “violent felony” under the ACCA’s residual clause), cert. granted and judgment vacated, ___ U.S. ___, 2008 WL 1775009 (Apr. 21, 2008); *United States v. Walker*, 494 F.3d 688, 693 (8th Cir. 2007) (Minnesota convictions for auto theft and temporary auto theft were “violent felonies” under the ACCA’s residual clause), cert. granted and judgment vacated, ___ U.S. ___, 2008 WL 1775014 (Apr. 21, 2008).
- iv. Additionally, the Court has signaled that the holding of *Begay* should also apply to the essentially identical “serious potential risk of physical injury” language in USSG § 4B1.2(a)(2) (the career offender Guideline’s residual “crime of violence” definition). Particularly, the Court has granted certiorari, vacated the judgments below, and remanded for further consideration in light of *Begay*, in a number of cases that treated offenses as “crimes of violence” under this Guideline definition. See, e.g., *United States v. Archer*, 243 Fed. Appx. 564, 566 (11th Cir. 2007) (unpublished) (Florida conviction

for carrying a concealed weapon was “crime of violence” under USSG § 4B1.2), cert. granted and judgment vacated, ___ U.S. ___, 2008 WL 1775015 (Apr. 21, 2008); United States v. Tiger, 240 Fed. Appx. 283, 284 (10th Cir. 2007) (unpublished) (DUI conviction was “crime of violence” under USSG § 4B1.2), cert. granted and judgment vacated, ___ U.S. ___, 2008 WL 1775010 (Apr. 21, 2008); United States v. Thomas, 484 F.3d 542, 545 (8th Cir. 2007) (Missouri conviction for tampering with a motor vehicle in the first degree, consisting of unlawful operation of a motor vehicle without the owner’s consent, was “crime of violence” under USSG § 4B1.2), cert. granted and judgment vacated, ___ U.S. ___, 2008 WL 1775006 (Apr. 21, 2008).

- b. Despite the significant limitations on the residual clause imposed by Begay, the Court still has yet to articulate a single, overarching methodology for determining whether a particular offense presents “a serious potential risk of physical injury to another.” The Court may, however, provide more guidance in October Term 2008. The Court has granted certiorari to review a Seventh Circuit decision that an Illinois conviction for escape – which may include simply failing to report to a penal institution – is a “violent felony” under the ACCA’s residual clause. See United States v. Chambers, 473 F.3d 724 (7th Cir. 2007), cert. granted, ___ U.S. ___, 2008 WL 1775023 (Apr. 21, 2007) (No. 06-11206).

D. Enumerated offenses.

1. **DO NOT GO BY THE STATE’S LABEL FOR THE CRIME!**
2. **DO NOT GO BY THE UNDERLYING FACTS!**
3. Under Taylor, the inquiry is two-fold:
 - a. What is the “generic, contemporary meaning” of the particular enumerated offense (i.e., what are the elements of the generic enumerated offense)? and
 - b. Do the elements of the offense of which the defendant was convicted match up with the elements of the generic offense?
 - c. For a recent application of this rubric, see Gonzalez v. Duenas-Alvarez, 549 U.S. 183, ___, 127 S. Ct. 815, 818-22 (2007).
4. Good sources for determining the “generic, contemporary meaning” of enumerated

offenses are the Model Penal Code and W. LaFare & A. Scott, Jr., Substantive Criminal Law. See Taylor, 495 U.S. at 598 & n.8 (relying on both of these sources); United States v. Dominguez-Ochoa, 386 F.3d 639, 642-43 (5th Cir. 2004) (same).

III. Conclusion.

- A. Keep an open mind about whether prior offenses qualify for enhancement!
 - 1. **DO NOT** simply go by the label of the offense.
 - 2. **DO NOT** go by the underlying facts of the offense.
 - 3. **DO** look at the particular state (or federal) statute under which your client was previously convicted, as well as the case law interpreting and explaining that statute.
 - 4. **DO** read the particular enhancement definition at issue carefully (and narrowly) to see if your client's previous conviction fits the bill.
- B. This is one area of the law where a little legal legwork can result in a huge payoff in terms of reducing the client's sentence.

APPENDIX:

**Chart of
“Crimes of Violence”/“Violent Felonies”/“Serious Violent Felonies”**

STATUTE	TYPE OF ENHANCEMENT (See Key below)
18 U.S.C. § 16	A2, B2
18 U.S.C. § 924(c) [element of offense]	A2, B2
18 U.S.C. § 924(e) (ACCA)	A2, C, D
18 U.S.C. § 3156 (bail statute)	A2, B2, D
18 U.S.C. § 3559 (“three strikes” statute)	A1, B1, D
USSG § 2L1.2 (illegal reentry Guideline)	A1, D
USSG § 4B1.2 (career offender Guideline) (also incorporated by reference in USSG § 2K2.1, the firearms Guideline)	A1, C, D

Key

- A1. Offenses that “have as an element the use, attempted use, or threatened use of physical force against the person of another.”**
- A2. Offenses that “have as an element the use, attempted use, or threatened use of physical force against the person or property of another.”**
- B1. Offenses that “by [their] nature, involve[] a substantial risk that physical force against the person of another may be used in the course of committing the offense.”**
- B2. Offenses that “by [their] nature, involve[] a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.”**
- C. Offenses that “involve[] conduct that presents a serious potential risk of physical injury to another.”**
- D. Enumerated offenses.**