

**Potential Uses of *Begay & Chambers*:
Annotated Caselaw Outline**

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A. Holdings of *Begay* and *Chambers*

In *Begay v. United States*, 128 S.Ct. 1581 (2008), the Supreme Court held that the Armed Career Criminal Act’s definition of “violent felony” at 18 U.S.C. § 924(e)(2)(B)(ii) requires that the predicate offense be “similar in kind” to the listed offenses – meaning that it must involve “purposeful, violent, and aggressive conduct.” See *Begay*, 128 S.Ct. at 1586 (applying new test to find that driving under the influence does not qualify as an ACCA predicate). The Court has since applied *Begay* to find that an escape conviction based on a failure to report to custody also does not qualify as a violent felony under ACCA’s “otherwise” clause. See *Chambers v. United States*, 129 S.Ct. 687 (2009). See Part C(4)(a), *infra.*, for further discussion of *Chambers*.

Begay and *Chambers* reach far beyond their facts. They apply to career offender cases as well as ACCA cases, and can be used to knock out more predicates than just those involving drunk driving and failure to report. The following reflects some of the ways that *Begay* and *Chambers* can be used. Note, however, that this list is not intended to be a substitute for your own research because it is not comprehensive, meaning that there may be contrary case law in your circuit. We hope instead that it will provide you with a strong starting place from which you can frame your arguments.

B. Relief from Career Offender Using the *Begay* Analysis

Although *Begay* directly dealt with ACCA, no circuit or court has expressly limited its reasoning to ACCA cases. To the contrary, in the following cases, courts have applied *Begay*’s reasoning to the career offender guideline based on similarity of the two provisions. So be sure to raise *Begay* challenges to predicate offenses in both ACCA cases and career offender cases.

First Circuit: *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008) (“Precedent in this circuit, as well as in others, requires the application of case law interpreting ‘violent felony’ in ACCA to ‘crime of violence’ in U.S.S.G. § 4B1.2 because of the substantial similarity between the two sections.”) (represented by CJA attorney Susan E. Taylor of New Bedford, MA).

Second Circuit: *United States v. Gray*, 535 F.3d 128, 129 (2nd Cir. 2008) (“In analyzing the definition of ‘crime of violence,’ we have looked to cases examining the statutory definition of ‘violent felony,’ as found in the Armed Career Criminal Act (‘ACCA’) because the operative language of U.S.S.G. § 4B1.2(a)(2) and the statute is identical . . . Thus we are hard pressed to reject the views of the Supreme Court’s most recent decision explaining the scope of the definition of ‘violent felony’ in understanding the reach of the term ‘crime of violence.’ The Government and defendant share that view.”).

Third Circuit: *United States v. Stinson*, __ F.3d __, 2009 WL 2231644, *1 (3rd Cir. July 28, 2009) (“Although this case involves the [career offender] Guidelines, the definition of a violent felony under the ACCA is sufficiently similar to the definition of a crime of

violence under the Guidelines that authority interpreting one is generally applied to the other.”) (represented by CJA attorney Thomas F. Burke of Philadelphia, PA).

Fourth Circuit: *United States v. Seay*, 553 F.3d 732, 739(4th Cir. 2009) (concluding that “*Begay*’s analysis is applicable to U.S.S.G. § 4B1.2”) (represented by CJA attorney Russell Warren Mace, III, of Myrtle Beach, South Carolina).

Fifth Circuit: *United States v. Mohr*, 554 F.3d 604, 608-09 (5th Cir. 2009) (“The definition of ‘violent felony’ is identical to that of ‘crime of violence’ in the Guidelines context. Thus, the Supreme Court’s interpretation of § 924(e)(2)(B) [in *Begay*] guides us in applying the categorical approach to the residual clause of §4B1.2.”) (represented by AFPD George Lowrey Lucas of the Southern District of Mississippi Federal Public Defender (Samuel Dennis Joiner, Defender)).

Sixth Circuit: *United States v. Bartee*, 529 F.3d 357, 363 (6th Cir. 2008) (“Adhering to our view that the parallel provisions in the definitions of a ‘violent felony’ under the ACCA and a ‘crime of violence’ under USSG § 4B1.2(a)(2) should be interpreted in a consistent manner, we conclude that § 4B1.2(a)(2) also should be limited to crimes that are similar in both kind and in degree of risk to the enumerated examples – burglary of a dwelling, arson, extortion, or crimes involving the use of explosives.”) (represented by AFPD Richard D. Strouba of the Western District of Michigan Federal Public Defender (Ray Kent, Defender)).

Seventh Circuit: *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008) (“[T]he Court [in *Begay*] interpreted the words of § 924(e), which the Sentencing Commission repeated verbatim in § 4B1.2. It would be inappropriate to treat identical texts differently just because of a different caption.”) (represented by CJA attorney David R. Karpe of Madison, Wisconsin); *United States v. Adams*, Slip. Op., 2008 WL 3889935, *1 (7th Cir. Aug. 22, 2008) (relying on prior cases treating “violent felony” and “crime of violence” the same to conclude that *Begay* abrogated prior conclusion that drunk driving is a “crime of violence” under § 4B1.2) (represented by AFPD H. Jay Stevens of the Northern District of Indiana Community Defenders (Jerome T. Flynn, Director)).

Eighth Circuit: *United States v. Williams*, 537 F.3d 969, 971 (8th Cir. 2008) (“we are bound by cases interpreting whether an offense is a crime of violence under the Guidelines as well as cases interpreting whether an offense is a violent felony under the Armed Career Criminal Act”) (citing *United States v. Johnson*, 417 F.3d 990, 996 (8th Cir. 2005)) (represented by AFPD Diane Dragan of the Eastern District of Missouri Federal Public Defender (Lee Lawless, Defender)).

Tenth Circuit: *United States v. Tiger*, 538 F.3d 1297, 1298 (10th Cir. 2008) (applying *Begay* standard to career offender case because “the definition of ‘crime of violence’ contained in USSG § 4B1.2(a) is virtually identical to that contained in the ACCA”) (represented by CJA attorney Jimmy Lance Hopkins of Tahlequah, Oklahoma).

Eleventh Circuit: *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) (“This court has repeatedly read the definition of a ‘violent felony’ under § 924(e) of the Armed Career Criminal Act as ‘virtually identical’ to the definition of a ‘crime of violence’ under U.S.S.G. § 4B1.2.”) (represented by AFPD Maurice C. Grant II of the Middle District of Florida Federal Public Defender (Donna Elm, Defender)).

C. Post-*Begay* Non-Qualifying Offenses: Case Summaries

Obviously, drunk driving offenses do not satisfy the *Begay* standard. *See, e.g., United States v. Webster*, 524 F.3d 890, 891 (8th Cir. 2008) (ACCA case) (represented by CJA attorney John Keith Rigg of Des Moines, Iowa); *United States v. Morris*, 527 F.3d 1059 (10th Cir. 2008) (ACCA case) (represented by CJA attorney Jimmy Lance Hopkins of Tahlequah, Oklahoma). But *Begay*’s reasoning goes further than that. The following is a list of offenses that courts have found are not necessarily “violent felonies” under ACCA and/or “crimes of violence” under the career offender guideline since *Begay*. Although some are ACCA cases and some are career offender cases, they each use reasoning that should apply equally to both provisions, as discussed in Part A, *supra*. These cases should be used whenever your client has the same or analogous predicate offenses. Note, though, that this list is not exclusive and there may be contrary case law in your circuit, so be sure to shepardize any cases upon which you rely.

1. Auto Theft and Auto Tampering

United States v. Williams, 537 F.3d 969 (8th Cir. 2008), *rehearing en banc denied*, 546 F.3d 961 (8th Cir. 2008) (career offender guideline case) (represented by AFPD Diane Dragan of the Eastern District of Missouri Federal Public Defender (Lee Lawless, Defender)).

The Eighth Circuit has completely altered its approach to auto theft and auto tampering cases after *Begay*. In *Williams*, the court recognized that the line of cases treating those two offenses as crimes of violence or violent felonies focused solely on the risk of injury, and did not analyze whether the offenses were similar in kind to the enumerated offenses. *Id.* at 972. Analyzing Mo. Rev. Stat. § 570.030, the court determined that there were three ways to commit auto theft: theft without consent, theft by deceit, and theft by coercion. *Id.* at 973. The court had no trouble deciding that “auto theft by deception is not a qualifying predicate offense under *Begay*.” It also concluded that auto theft without consent, although similar in kind to burglary, did not carry the same degree of risk because the risk of violent confrontation is far less. *Id.* at 974. For support, the court noted that auto theft by force is prosecuted by Missouri as robbery, and auto theft by force or intimidation can be prosecuted federally as carjacking. *Id.* It also cited the Supreme Court’s language in *Taylor v. United States*, 495 U.S. 575, 588 (1990), that “Congress singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense, both in 1984 and in 1986, because of its inherent potential for harm to persons.” *Williams*, 537 F.3d at 974. “While auto theft without consent or by deceit is certainly purposeful, . . . it does

not involve the same level of violence and aggression as the example crimes.” *Id.* at 975. The court found that only auto theft by coercion satisfies the *Begay* standard. *Id.* at 973.

With respect to auto tampering, the court held that “it does not involve conduct that is similar in kind to the example crimes” because (1) “it includes a range of conduct that is neither violent nor aggressive,” such as receiving, possessing, selling, altering or defacing an automobile; (2) it does not require an intent to permanently deprive the owner of the vehicle; (3) it is a non-serious crime akin to joyriding; and (4) it is a lesser included offense of auto theft, and thus it would be odd to count auto tampering as a violent felony when auto theft without consent and auto theft by deception are not. *Id.* at 974-75 (“[O]ur holding that auto tampering and auto theft without consent or by deceit are not crimes of violence brings us in line with all the other circuits that have addressed these issues.”) (citations omitted); *see also United States v. Rush*, 551 F.3d 749 (8th Cir. 2008) (following *Williams* as to prior convictions under Wisconsin auto theft statute and remanding for additional consideration of prior Virginia convictions for grand larceny auto, where statute criminalized both larceny from the person, which the court hinted would qualify as a “violent felony,” and larceny of property worth over \$200, which would not); *United States v. Boaz*, 558 F.3d 800 (8th Cir. 2009) (same result under Arizona’s auto theft statute, which criminalizes taking another’s motor vehicle with intent to deprive) (represented by AFPDs David Randolph Mercer and Michelle Kay Nahon of the Western District of Missouri Federal Public Defender (Raymond C. Conrad, Jr., Defender)).¹

2. Burglary

a. Non-Residential Burglary

United States v. Giggey, 551 F.3d 27 (1st Cir. 2008) (career offender case) (represented by CJA Attorney James S. Hewes of Portland, Maine, with Judith Mizner, Chief of Appeals for the Massachusetts Office of the Federal Public Defender (Miriam Conrad, Defender), appearing for the FDO as *amicus*).

¹ Courts have also begun to hold post-*Begay* and *Chambers* that unauthorized use or theft of a motor vehicle is not a crime of violence under §2L1.2’s definition of “aggravated felony,” which tracks 18 U.S.C. § 16(b). *See United States v. Armendariz-Moreno*, ___ F.3d ___, 2009 WL 1653551, *1 (5th Cir. June 15, 2009) (holding in illegal reentry case that Texas crime of unauthorized use of motor vehicle does not satisfy *Begay* because “[t]he risk of physical force may exist where the defendant commits the offense of unauthorized use of a vehicle, but the crime itself has no essential element of violent and aggressive conduct”) (represented by AFPDs Timoteo E. Gomez & Laura Fletcher Leavitt of the Southern District of Texas Federal Public Defender (Marjorie A. Meyers, Defender)); *United States v. Castillo-Lucio*, 2009 WL 1904524 (5th Cir. July 2, 2009) (same) (represented by AFPDs Philip G. Gallagher & Laura Fletcher Leavitt of the Southern District of Texas Federal Public Defender (Marjorie A. Meyers, Defender)); *Van Don Nguyen v. Holder*, ___ F.3d ___, 2009 WL 1884362 (6th Cir. July 2, 2009); *United States v. Murueta-Espinosa*, 2009 WL 1035159 (8th Cir. April 20, 2009) (represented by Defender Nicholas Drees of the Southern District of Iowa Federal Public Defender).

In *Giggey*, the *en banc* First Circuit overruled itself to hold that burglary of a non-residence is not necessarily a “crime of violence” under the career offender guideline. The court rested its decision on the following: (1) the Sentencing Commission’s decision to list only “burglary of a dwelling” in § 4B1.2’s enumerated list, thereby suggesting all other burglaries are not necessarily crimes of violence; (2) § 4B1.2’s administrative history, including that the Commission considered but decided not to amend the guideline to include “all burglaries” in 1992; (3) the Commission’s decision to pattern the “crime of violence” definition after ACCA’s definition of “violent felony,” except for its use of the phrase “burglary of a dwelling,” which narrowed ACCA’s “burglary” language; and (4) the fact that Congress did not direct the Commission to include all burglaries in its definition of “crime of violence.” *Giggey*, 551 F.3d at 33-37. The court then acknowledged that whether or not the defendant’s non-residential burglary constituted a crime of violence should be decided pursuant to the categorical method, as elucidated by *Begay*, and remanded the case to the district court for further factfinding. *Id.* at 41.

b. Non-Generic Burglary

United States v. Lewis, 2009 WL 1396809 (3rd Cir. May 20, 2009) (ACCA case) (represented by AFPD Thomas W. Patton of the Western District of Pennsylvania Federal Public Defender (Lisa B. Freeland, Defender).

In *Lewis*, the Third Circuit found that Ohio’s burglary statute, which criminalizes trespass by force, stealth or deception in an “occupied” structure with intent to commit a felony, is broader than generic burglary and thus does not categorically satisfy ACCA’s otherwise clause. *Id.* at **3, 5. In determining that Ohio’s statute is broader than generic burglary, the court noted that the relevant portion of Ohio law defines an “occupied” structure as either a habitation when there is no likelihood of a person being present or a dwelling whether or not there is a likelihood of a person being present. *Id.* at *7. The court next reviewed Ohio case law and determined that the overwhelming majority of cases involved intrusions into habitations when there is no likelihood of a person being present. *Id.* at *8. It then determined that Ohio courts define such offenses as those committed “at a time when the occupants are normally absent for a reason like work or school, and no one else has any reason to be there.” *Id.* “Because the offense is narrowly defined to exclude situations with the greatest potential for confrontation, Ohio burglary involving no likelihood of presence poses less risk of physical injury than typical burglary.” *Id.*

3. Child Endangerment

United States v. Gordon, 557 F.3d 623 (8th Cir. 2009) (ACCA case) (represented by CJA attorney Susan M. Hunt of Kansas City, MO)

In *Gordon*, the Eighth Circuit held that a Missouri conviction for endangering a child in the first degree, which makes it unlawful to “knowingly act in a manner that creates a substantial risk to the life, body, or health of a child less than seventeen years old,” was not a crime of violence under ACCA. *Id.* at 623. The court assumed that the

crime involved conduct that presents a serious potential risk of physical injury to another, and that the risk was comparable to that presented by ACCA’s enumerated offenses. Nonetheless, it found that it was not similar in kind because “it does not typically involve the three types of conduct characteristic of those crimes. Rather, a person can create a substantial risk to a child’s life, body, or health through knowing actions that are neither violent nor aggressive.” *Id.* at 626. The court noted that the subsection was routinely applied to such passive behavior as leaving a child unsupervised near a pond or leaving a child with a known abuser, *id.*, and found that given this, it was “not the kind of prior offense ‘show[ing] an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.’” *Id.* at 626-27 (*citing Begay*, 128 S.Ct. at 1587).

The *Gordon* court rejected the government’s attempt to distinguish *Begay* on the ground that it involved a strict liability crime, whereas endangering a child requires knowledge. Specifically, the government argued that it was critical under *Begay* to focus on the “purposeful” aspect of the predicate offense because the enumerated offense of burglary was clearly still an ACCA predicate after *Begay* even though it need not be either violent or aggressive. The *Gordon* court responded that, while “it is possible to imagine scenarios – however atypical – in which several of the example crimes could be committed in a purposeful but not particularly violent or aggressive manner,” *Begay* had focused on the “typical” manner in which the crime was committed. *Id.* at 627. The *Gordon* court also noted *Begay*’s repeated use of the word “and” to connect the “purposeful,” “violent,” and “aggressive” elements, and pointed out that because DUI is so obviously neither violent nor aggressive, the Court did not need to discuss that aspect of its opinion much. *Gordon* found that burglary was a violent and aggressive crime because the intentional and unlawful entry into a building created a possibility of a violent confrontation with an occupant, and because the burglar’s own awareness of this possibility indicates s/he is prepared to commit that violence if necessary. In contrast, “nothing in the definition of [child endangerment] suggests it typically involves a similar potential for either violence or aggression.” *Id.* at 628; *see also United States v. Wilson*, 562 F.3d 965, 967-68 (8th Cir. 2009) (same result for §2K2.1 enhancement based on career offender guideline’s definition of “crime of violence”).

4. Escape

a. Failure to Report

Chambers v. United States, 129 S.Ct. 687 (2009) (ACCA case)

The Supreme Court recently held that an escape conviction based on a failure to report to custody does not qualify as a violent felony under ACCA’s “otherwise” clause. The Court began by reaffirming the categorical approach to determining whether a particular statute criminalizes “violent” conduct within ACCA’s meaning, but noted that some statutes criminalize more than one “category” of crime. *Id.* at 690-91. For example, the escape statute before the Court covered “several different kinds of behavior” – escape from a penal institution, escape from the custody of a penal institution

employee, failing to report to a penal institution, failing to report for intermittent confinement, failing to return from work or day release, and failing to abide by the terms of home confinement. *Id.* at 691.

The Court determined from the charging document that Mr. Chambers' escape conviction was based on a failure to report for intermittent confinement, and then reasoned that a "failure to report" constitutes a different crime – or, rather, a different category of crime – than "escape" because the nature of "[t]he behavior that likely underlies a failure to report would seem less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody." *Id.* Moreover, the Court noted, the statute lists escape and failure to report separately in the title and in the text, and places them in different felony classes with differing degrees of seriousness. *Id.*

Having thus "categorized" the relevant crime as a failure to report, the Court then held that it failed to satisfy ACCA's "otherwise" clause for two reasons. First, "the crime amounts to a form of inaction, a far cry from the 'purposeful, "violent," and "aggressive" conduct' potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion." *Id.* at 692.² And second, the government failed to raise statistical or other proof showing that those people who fail to return to custody are "significantly more likely than others to attack, or physically resist, an apprehender," as required under the "otherwise" clause. *Id.* at 692-93. With respect to this second finding, the Court looked to a Sentencing Commission report on the incidents of violence in escape cases in fiscal years 2007 and 2008, and found "conclusive" that no failure to report cases in those two years involved

² This does not mean that *Begay*'s "purposeful, violent and aggressive" requirement is satisfied if the offense requires something more than merely passive conduct or non-action. Recall that *Begay* itself involved active conduct – drinking to intoxication and driving a car – but the Supreme Court nonetheless held that the active conduct at issue failed to satisfy the "purposeful, violent and aggressive" requirement because it did not show "an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 128 S.Ct. at 1587. *Chambers* focused on the passivity involved in a failure to report, not because failure to act is necessary to find that an offense is not violent, but rather because the inaction inherent in a failure to report casts doubt on the government's "powder keg" theory – the notion that an escapee will be likely to resort to violence to avoid recapture. It was this theory upon which the government relied to argue that a failure to report "involves *conduct* that presents a serious potential risk of physical injury to another," see 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added), and it is this theory that *Chambers* rejected. Indeed, in the very next line, the Court makes its point clear: "While an offender who fails to report must of course be doing *something* at the relevant time, there is no reason to believe that the *something* poses a serious potential risk of physical injury. To the contrary, an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct." *Chambers*, 129 S.Ct. at 692. See Part C(1), *infra*. for further discussion of the Court's rejection of the "powder keg" theory.

any violence.³ *Id.* at 692. It was also unimpressed with the results of the government’s case law search, which reflected only three failures to report in the past 30 years that involved violence under both state and federal law. *Id.* at 692-93.

Two aspects of *Chambers* stand out: its rejection of the “powder keg” theory and its reliance on statistics. *See* Parts C(1) & C(2), *infra.* for further discussion of these aspects of the decision.

b. Walkaway Escape

United States v. Templeton, 543 F.3d 378 (7th Cir. 2008) (career offender guideline case) (represented by CJA attorney David R. Karpe of Madison, Wisconsin).

In *Templeton*, the Seventh Circuit declined to wait for the Supreme Court to decide *Chambers*, and instead squarely held that “[a] walkaway is not a crime of violence under *Begay*. Nor is a simple failure to report to custody . . .” *Templeton*, 543 F.3d at 383. Note that this case goes further than *Chambers*, which addressed only failures to report. *See also* Part C(2), *infra.*, discussing statistics on “walkaway” escapes. The court noted that Wisconsin’s escape statute, Wis. Stat. § 946.42, includes prisoners let out for a particular purpose who do not return as instructed or who leave unsupervised confinement, such as house arrest. *Id.* It does not require any violent or aggressive conduct, nor does it require intent to injure or threaten anyone. *Id.* “It is easy to violate Wis. Stat. § 946.42 without intending or accomplishing the destruction of property or acting in an aggressive, violence-provoking manner that could jeopardize guards or bystanders.” *Id.*

The court also rejected the government’s attempt to analogize escape to burglary:

Doubtless for both crimes there is a chance the criminal will confront another person with violent results: the building’s occupant for burglaries and the guards or police for escapes. But *Begay* requires the crime to be aggressive or violent. All the prosecutor identifies is a common result: in both cases injuries may follow confrontations. *Begay* requires similarities *other* than risk of injury.

Id.(emphasis in original). The court found no such similarity between burglary and escape. Burglary “involves intentionally encroaching on another’s property or person, or intentionally injuring another’s property or person,” whereas many escapes involve passive conduct. *Id.*; *see also United States v. Hurns*, Slip. Op., 2008 WL 4463763, *2 (7th Cir. Oct. 3, 2008) (following *Templeton* and remanding career offender case based on escape predicate for resentencing) (represented by Defender Richard Parsons and AFPDs Andrew J. McGowan and Kent V. Anderson of the Central District of Illinois Federal Public Defender); *United States v. Burks*, Slip. Op., 2008 WL 4275108, *2 (7th Cir. Sept. 18, 2008) (same) (represented by AFPD Erika L. Bierma of the Eastern and Western Districts of Wisconsin Community Defender (Dan Stiller, Defender)).

³ *See* U.S. Sentencing Commission, *Report on Federal Escape Offenses in Fiscal Years 2006 and 2007* (Nov. 2008), available at http://www.ussc.gov/general/escape_FY0607_final.pdf.

United States v. Ford, 560 F.3d 420 (6th Cir. 2009) (career offender guideline case) (represented by CJA attorney Andrew Martin Stephens of Lexington, KY)

In *Ford*, the Sixth Circuit found that *Chambers* required it to “modify” the court’s earlier approach of treating all escape cases the same under both ACCA and the career offender guideline, and that it “undermines the notion that a ‘walkaway’ conviction is a crime of violence.” *Id.* at 423. *Ford* listed five reasons that it was appropriate to divide the crime of escape into four categories of leaving custody with the use or threat of force, leaving custody in a secured setting, leaving custody in a non-secured setting by “walking away,” and failure to report, and that walkaway escape is not a crime of violence. *Id.* at 424-25.

First, *Ford* noted that courts must be careful to distinguish between categories of offenses rather than to generalize about them, particularly where, as in the walkaway escape category, over-generalizing would result in it qualifying as an ACCA predicate, whereas giving it its own category would not. *Id.* at 424. Second, it noted that “after *Chambers*, a ‘walkaway’ is a meaningfully distinct and meaningfully distinguishable category of escape as a matter of federal law,” regardless of whether the state lumps all escapes into one statute (as in *Ford*) or separates them out (as in *Chambers*). *Id.* Third, the court found that walkaway escape does not present the same degree of risk of physical injury as the enumerated offenses. Here, the court compared the lack of empirical data showing that they do present such a risk on the one hand, to the intuitive belief and empirical data showing that they do not on the other. *Id.* at 424-25 (*citing Chambers and Templeton*). Fourth, the court found that although walkaway escape may involve purposeful conduct, it does not necessarily involve purposeful violence or purposeful aggressiveness. *Id.* at 425. Finally, the court found that even if the foregoing analysis was not clear, the rule of lenity would nonetheless compel the holding that walkaway escape is categorically not a crime of violence. *Id.*

Importantly in *Ford*, the court noted that the government had conceded that walkaway escape is not a crime of violence within the meaning of the career offender guideline following *Chambers*. *See id.* at 426. Everyone should cite this concession if the government attempts to take a contrary opinion in future cases.

United States v. Nichols, 563 F.Supp.2d 631 (S.D. W.Va. 2008) (career offender guideline case) (represented by AFPD David R. Bungard of the Southern District of West Virginia Federal Public Defender (Mary Lou Newberger, Defender)).

In *Nichols*, the court first found that the risk caused by escape differs in kind from burglary, arson, extortion and crimes involving explosives because (1) escape does not inherently require a trespass against persons, property or both, but rather “is more akin to a public order crime;” (2) escapees do not have as their purpose the imposition of harm against other individuals; and (3) the statutory definition of escape does not require the use of force. *Id.* at 636-37. Second, the court reasoned that West Virginia’s escape statute cannot meet the *Begay* standard as a categorical matter because it (1) imposes

strict liability so that “[e]scapees who purposefully break free from custody are treated the same as those who negligently or by mistake fail to report or are tardy in returning to custody,” and (2) requires no violent or aggressive conduct. *Id.* at 637 (citing W. Va. Code § 61-5-12a). Finally, the court found that the risk caused by escape differs in degree from the enumerated offenses because (1) many escape cases are based on an offender’s omissions, rather than actions, meaning they involve no violence or aggression and thus carry a much reduced risk of physical injury; and (2) the degree of risk posed by escape is “significantly more attenuated than the risks inherent in burglary of a dwelling, arson, extortion and crimes involving the use of explosives” because the possibility of danger that might arise from interrupting or apprehending an escapee “differs substantially from that involved with the listed offenses, which all require acts of aggression at their inception.” *Id.* at 637-38; *see also United States v. Lowery*, 599 F. Supp. 2d 1299, 1306 (M.D. Ala. 2009) (conviction for third degree escape, defined as escape where the escapee did not use physical force, had not been convicted of a felony, and escaped from detention other than a penal facility, does not satisfy ACCA’s residual clause after *Begay* and *Chambers*) (represented by AFPD Michael Peterson of the Middle District of Alabama Community Defender (Christine Freeman, Executive Director)).

5. Failure to Stop for a Blue Light / Fleeing or Eluding a Police Officer

United States v. Roseboro, 551 F.3d 226 (4th Cir. 2009) (ACCA case) (represented by Executive Director Claire J. Rauscher and AFPDs Ross Hall Richardson and Kevin Andre Tate of the Federal Defenders for the Western District of North Carolina, Inc.).

In *Roseboro*, the Fourth Circuit held that *Begay* overruled a prior line of cases finding that failure to stop for a blue light categorically constitutes a “violent felony” under ACCA:

Under [pre-*Begay* Fourth Circuit precedent], an offense presented a serious potential risk of physical injury to another if the offense conduct had the potential for serious physical injury to another. The Supreme Court, however, explicitly rejected this inquiry as outcome determinative, observing that the proper inquiry involved far more than an analysis of the risk associated with the prior crime.

Roseboro, 551 F.3d at 233. Finding that it was bound to apply the *Begay* standard, the *Roseboro* court noted that the South Carolina statute criminalizing the failure to stop for a blue light punishes both intentional and unintentional conduct. *Id.* at 235. Although the court stated that “[t]he intentional act of disobeying a law enforcement officer by refusing to stop for his blue light signal, without justification, is inherently an aggressive and violent act,” *id.* at 240,⁴ it could not say the same for a negligent failure to stop. The court remanded the case to the district court for further factfinding.

⁴ *See also id.* at *242-43 (distinguishing *United States v. Spells*, 537 F.3d 743, 752 (7th Cir. 2008), which affirmed an ACCA conviction based on fleeing a police officer where the statute required “purposeful” conduct).

United States v. Harrison, 558 F.3d 1280 (11th Cir. Feb. 19, 2009) (ACCA case) (represented by AFPDs Gwendolyn L. Spivey and Thomas S. Keith of the Northern District of Florida Federal Public Defender (Randolph P. Murrell, Defender))

In *Harrison*, 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 crime of violence under ACCA for two reasons. *See id.* at, 1282, 1301.

First, it found the degree of risk posed by willfully fleeing did not rise to the same level as that posed by the enumerated offenses. “[T]he behavior underlying Florida’s willful-fleeing crime, in the ordinary case, involves only a driver who willfully refuses to stop and continues driving on – but without high speed or recklessness.” *Id.* at 1294 The court found this made it “unlikely that the confrontation will escalate into a high-speed chase that threatens pedestrians, other drivers, or the officer.” *Id.* *Harrison* rejected the argument that willful fleeing is a form of escape and thus that it carries the same level of risk, finding that even if it is, all escapes are not the same after *Chambers*. *Id.* Similarly, it refused to treat all forms of willful fleeing equally, especially because the state does not. *Id.* It also noted that although proving the offense fit ACCA’s residual clause was the government’s burden, the government had failed to present any empirical evidence on the amount of risk in this case. Although it claimed not to set a “hard and fast rule requiring the use of statistical evidence in residual-clause cases, this type of case would benefit from empirical evidence of the likelihood of physical injury in statutory willful fleeing crimes that do not have the elements of high speed or reckless disregard.” *Id.* at 1295.

Second, *Harrison* held that even if willful fleeing did pose the same degree of risk as ACCA’s enumerated offenses, it still would not qualify as an ACCA predicate because, although purposeful, “without high speed or reckless conduct, [it] is not sufficiently aggressive and violent enough to be like the enumerated ACCA crimes:”

A person who refuses to stop and drives on, without anything more, . . . is not, in our mind, cut from the same cloth as burglars, arsonists, extortionists, or those that criminally detonate explosives. The fleeing crime . . . seems more appropriately characterized as the crime of a fleeing coward – not an armed career criminal bent on inflicting physical injury.

Id. at 1295-96. The court again highlighted 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. *Id.* at 13. It also declined to follow the Seventh Circuit’s contrary decision in *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008) based on what it described as *Spells*’ flawed use of statistics – a useful critique for those practicing in the Seventh Circuit and those in circuits that have not yet reached the issue. *See Harrison*, 558 F.3d at 1299-1300.

United States v. Arrington, 2009 WL 2170990, *2 (D. Minn. July 17, 2009) (career offender guideline case) (represented by CJA attorney Robert M. Poule of Minneapolis, MN)

The court found that the Minnesota fleeing and eluding statute at issue “covers conduct ranging from stereotypical high-speed chases to instances where a driver merely extinguishes her headlights after negligently failing to determine that a tailing vehicle is a police car.” *Id.* at *2. Thus, the court held that it could not find that a conviction under it was categorically a career offender predicate: “In the Court’s view, it is plain beyond dispute that certain types of negligent, passive conduct prohibited by this statute are not on par with burglary of a dwelling, arson, extortion, or crimes involving the use of explosives, either in terms of the resulting risks of injury, or in terms of what these crimes tell the Court about whether the defendant is likely to deliberately point the gun and pull the trigger.” *Id.* (citations and internal punctuation omitted).

United States v. Urbano, Slip. Op., 2008 WL 1995074 (D. Kan. May 6, 2008) (career offender guideline case) (represented by AFD Timothy J. Henry of the District of Kansas Federal Public Defender (David J. Phillips, Defender)).

Urbano applied the *Begay* standard to hold that the crime of fleeing and eluding a police officer is not similar in kind to the listed crimes in USSG § 4B1.2(a)(2). “While the crime of fleeing and eluding clearly would be the result of purposeful conduct, the statutory definition of the crime does not point to actions that are violent. A person may be charged with fleeing and eluding for merely failing to stop after an officer signals for that individual to stop. To be charged with a felony, a person may fail to stop and then drive around a tire deflating device.” *Id.* at *2. The court found that these actions were not violent or aggressive, and thus could not satisfy *Begay*. *Id.*

6. Firearms Offenses

a. Carrying a Concealed Weapon

United States v. Archer, 531 F.3d 1347 (11th Cir. 2008) (career offender guideline case) (represented by AFD Maurice C. Grant II of the Middle District of Florida Federal Public Defender (James T. Skuthan, Acting Defender)).

The Eleventh Circuit reversed itself post-*Begay* to hold that carrying a concealed weapon “does not involve the aggressive, violent conduct that the Supreme Court noted is inherent in the enumerated crimes:”

Burglary of a dwelling, arson, extortion, and the use of explosives are all aggressive, violent acts aimed at other persons or property where persons might be located and thereby injured. Carrying a concealed weapon, however, is a passive crime centering around possession, rather than around any overt action.

Archer, 531 F.3d at 1351. The court further distinguished carrying a concealed weapon from the enumerated crimes because it does not require specific intent to conceal, nor is it universally considered violent. *Id.* In fact, the court pointed out that only thirteen states have a statutory maximum of more than one year for the offense (thereby rendering it even potentially a career offender predicate in only those thirteen states), and that in Florida, carrying a concealed weapon is legal with a license. *Id.*; accord *United States v. Townsley*, 2009 WL 929986, *3 (11th Cir. April 8, 2009).

b. Possession of a Sawed-Off Shotgun

United States v. Haste, Slip. Op., 2008 WL 4218771 (4th Cir. Sept. 9, 2008) (“*Haste II*”) (ACCA case) (represented by Defender Louis Carr Allen III and AFPD Eric David Placke of the Middle District of North Carolina Federal Public Defender).

Haste II is a two-paragraph opinion that relies on *Begay* to find that felonious possession of a weapon of mass destruction (a sawed-off shotgun) is not a violent felony under ACCA. In doing so, the court implicitly overruled prior Fourth Circuit precedent, *United States v. Johnson*, 246 F.3d 330 (4th Cir. 2001), which held that possession of a sawed-off shotgun is a crime of violence under the career offender guideline. See *United States v. Haste*, 234 Fed. Appx. 70, 71 (4th Cir. 2007) (“*Haste I*”) (holding *Johnson* governs ACCA cases as well as career offender cases), *vacated and remanded by Haste v. United States*, 128 S.Ct. 2048 (2008). Here is the entirety of the court’s reasoning: “Having carefully reviewed the Supreme Court’s opinion, we conclude that a violation of N.C. Gen. Stat. § 14-288.8 is not a ‘violent felony’ under the ACCA.” See *Haste II* at *1.⁵

7. Leaving the Scene of an Accident

United States v. Harkness, Slip. Op. 2008 WL 5411455 (11th Cir. Dec. 30, 2008) (ACCA case) (represented by CJA attorney Ryan Thomas Truskoski of Orlando, Florida)

In *Harkness*, the government conceded that a conviction for leaving the scene of an accident does not satisfy the *Begay* standard for an ACCA predicate because, although purposeful, it involves neither violent nor aggressive conduct; the Eleventh Circuit agreed. See *Harkness*, 2008 WL 5411455 at *6.

8. Reckless Offenses

Always closely examine the *mens rea* required for the predicate offense. If it is a strict liability crime, or can be committed through negligence or recklessness, argue that

⁵ Courts have also held post-*Begay*, *Chambers*, and *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that possession of an unregistered firearm is not a crime of violence under 18 U.S.C. § 924(c), which tracks 18 U.S.C. § 16. See *United States v. Serafin*, 562 F.3d 1105, 1108-09, 1115-16 (10th Cir. 2009) (represented by CJA attorney Ronald G. Pretty of Cheyenne, WY).

it is not similar in kind to the enumerated offenses because it is not “*purposeful*, violent and aggressive” conduct.⁶

Three circuits have already ruled favorably on this issue, and a fourth has hinted that it agrees. In *United States v. Gray*, 535 F.3d 128 (2nd Cir. 2008), a case analyzing the definition of “crime of violence” under the career offender guideline, the Second Circuit held that:

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*. Thus, pursuant to *Begay*, we conclude that the district court procedurally erred in calculating the appropriate Guidelines range because reckless endangerment is not a “crime of violence.”

Id. at 129 (analyzing N.Y. Penal Law § 120.25) (citation omitted).

The Seventh Circuit followed *Gray* in *United States v. Smith*, 544 F.3d 781 (7th Cir. 2008) (represented by CJA attorney Jack F. Crawford of Indianapolis, Indiana), an ACCA case. The court analyzed key parts of *Begay* (including the Court’s use of reckless tampering with consumer products as an example of an offense that does not meet the *Begay* standard, its description of drunk driving as a “crime of negligence or recklessness,” and its statement that drunk driving “differs from a prior record of violent and aggressive crimes committed *intentionally*”) to conclude that:

After *Begay*, the residual clause of the ACCA should be interpreted to encompass only “‘purposeful’” crimes. Therefore, those crimes with a *mens rea* of negligence or recklessness do not trigger the enhanced penalties mandated by the ACCA. Accordingly, we agree with the Second Circuit that crimes requiring only a *mens rea* of recklessness cannot be considered violent felonies under the residual clause of the ACCA.

Id. at 786 (citing *Begay* at 1587-88).

Recently, the Sixth Circuit has also followed suit. See *United States v. Baker*, 559 F.3d 443 (6th Cir. 2009) (career offender guideline) (represented by CJA attorney Charles Patrick Dupree of Chattanooga, TN). In *Baker*, the Sixth Circuit held that a Tennessee felony conviction for reckless endangerment did not qualify as a crime of violence under the career offender guideline even though it required 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 the use of explosives. Rather, on its face, the

⁶ Of course, even “purposeful” predicates are still subject to challenge on the ground that they are non-violent or non-aggressive. See, e.g., Tr., *Chambers v. United States* (06-11206) (Kennedy, J.) (reminding the government that “*Begay* talked about purposeful *violent* conduct, not just purposeful conduct”) (emphasis added).

statute criminalizes only reckless conduct.” *Id.* at 453 (citing *Begay*, 128 S.Ct. at 1586); *see also United States v. Roseboro*, 551 F.3d 226 (4th Cir. 2009) (holding that unintentional failure to stop for a blue light is not a “violent felony” under ACCA because it does not involve “purposeful” conduct).

9. Resisting and Obstructing a Police Officer

United States v. Mosley, ___ F.3d ___, 2009 WL 2176634 (6th Cir. July 23, 2009) (career offender guideline) (represented by AFPD Richard Stroba of the Western District of Michigan Federal Public Defender (Ray Kent, Defender)).

The Sixth Circuit held that a prior conviction for resisting and obstructing a police officer did not categorically constitute a crime of violence. The court noted that the Michigan statute at issue contains two categories of offenses – one that defines “obstruction” as an assault, battery or wounding of an officer, and another that defines it as failing to comply with a lawful command. *Id.* at *3. The court held that “[a] knowing failure to comply with a lawful command – say, by refusing to produce information, by ignoring an officer’s command not to cross the street or by failing to stay put at an accident scene – is no more aggressive and violent than walking away from custody, drunk driving, or a failure to report to prison.” *Id.* (citations omitted). As for the degree of risk, the court held that while “there may be settings where an individual’s failure to follow an officer’s lawful command poses such risks [as the enumerated offenses pose,] . . . we have no basis in this record – empirical or otherwise – for concluding that the typical violation would create such a danger.” *Id.* at *4.

10. Statutory Rape

United States v. Thornton, 554 F.3d 443 (4th Cir. 2009) (ACCA case) (represented by Defender Larry W. Shelton and AFPD Fay Francis Spence of the Western District of Virginia).

In *Thornton*, the Fourth Circuit held that a prior Virginia conviction for “carnal knowledge of a minor” did not qualify as an ACCA predicate because it is not “similar in kind” to the enumerated ACCA predicates. *Thornton*, 554 F.3d at 449. “Although nonforcible adult-minor sexual activity can present grave physical risks to minors, and although states are entitled to criminalize nonforcible adult-minor sexual activity to protect minor victims from these risks, 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.” *Id.* While “[t]he enumerated crimes create immediate, serious and foreseeable physical risks that arise concurrently with the commission of the crimes themselves,” the risks associated with statutory rape – “primarily STDs and the risks attendant to pregnancy – are not immediate or violent in nature and do not inherently support an inference that an offender will later commit a violent crime.” *Id.*

As part of its reasoning, *Thornton* rejected the government’s attempt to equate a minor’s inability to legally consent to sexual intercourse – that is, the “constructive force”

inherent in statutory rape cases – with actual force, noting that Virginia law distinguishes between forcible and carnal knowledge offenses. *Id.* at 448. It also acknowledged that the conduct criminalized by the carnal knowledge statute involved deliberate, purposeful acts, but noted that “[t]he deliberation necessary to engage in adult-minor sexual activity . . . is not sufficient to bring the carnal knowledge offense within the definition of a violent felony. A qualifying offense must also be ‘violent’ and ‘aggressive,’ like the enumerated crimes.” *Id.* The government failed to cite any cases holding that the inability to give legal consent causes carnal knowledge offenses to be categorized as violent or aggressive, the statute itself did not categorically involve the use of force, and the court refused to infer violence and aggression in all instances of statutory rape. *Id.* at 448-49.

United States v. Dennis, 551 F.3d 986 (10th Cir. 2008) (career offender case) (represented by CJA attorney Thomas B. Jubin of Cheyenne, Wyoming)

In *Dennis*, the Tenth Circuit held that a prior Wyoming conviction for knowingly taking immodest, immoral or indecent liberties with a minor did not categorically constitute a crime of violence under the career offender guideline. *Dennis* noted that the statute is not a sexual assault statute but rather “criminalizes activities that are otherwise permissible between consenting adults when one of the parties is under the age of eighteen years,” and thus does not “necessarily involve[] conduct that presents a serious potential risk of physical injury to another.” *Id.* at 990. The statute itself had been challenged numerous times for its breadth, had been applied in numerous situations not involving a serious potential risk of physical injury to another (e.g., providing and promoting pornographic magazines to a minor, and engaging in consensual sex with a 16 year old), and did not require an age differential between the minor and the defendant. *Id.* at 990-91.

United States v. Christenson, 559 F.3d 1092 (9th Cir. 2009) (ACCA case) (represented by AFPD Christina L. Hunt of the Eastern District of Washington Community Defender (Roger Peven (Executive Director))

The Ninth Circuit is the latest circuit to hold that a statutory rape conviction is not categorically a crime of violence under ACCA’s residual clause. The court found that “because statutory rape may involve consensual sexual intercourse, it does not necessarily involve either ‘violent’ or ‘aggressive’ conduct.” *Id.* at 1095. The court remanded the case to the district court to permit it to analyze the offense under the modified categorical approach.

In addition to the Fourth Circuit’s decision in *Thornton*, the Tenth Circuit’s decision in *Dennis*, and the Ninth Circuit’s decision in *Christensen*, the Sixth Circuit has twice, in post-*Begay* cases, questioned the propriety of applying the career offender guideline when one of the predicates was based on conduct amounting to statutory rape that did not also involve an aggravating factor. First, in *Bartee*, the court discussed but avoided directly resolving the defendant’s argument that “a conviction involving consensual sexual contact with a minor presents the requisite ‘serious potential risk of injury’ only when it involves an aggravating factor, such as the minor is less than 13 or

14 years of age or is a minor related to the defendant by blood or affinity.” *Bartee*, 529 F.3d at 362. Then, in a later unpublished case, the court explicitly stated that “in order to determine whether the district court was correct to classify a sex offense with a minor as a ‘crime of violence,’ thus triggering the career offender enhancement, the age of the minor involved is critical.” *United States v. Niece*, 2008 WL 4602241, *6 (6th Cir. Oct. 16, 2008).

Before *Begay*, the First, Sixth and Seventh Circuits (at least) had already begun to struggle with whether it made sense to treat consensual statutory rape as a violent felony under ACCA or a crime of violence under the career offender guideline. *See, e.g., United States v. Meader*, 118 F.3d 876, 884 (1st Cir. 1998) (finding that statutory rape fits under § 4B1.2’s “otherwise” clause given that the charging documents listed the “crucial facts” of the age of the girl and the age gap between her and the defendant, while expressing concern that its holding “bypassed a number of troubling and complex issues” such as the standard age below which sexual intercourse typically may be considered to pose a substantial risk of physical injury and what “physical injury” means); *United States v. Thomas*, 159 F.3d 296 (7th Cir. 1998) (state statute criminalizing sex with a woman even one day under 17 and a man at least 22 does not by its nature present a serious potential risk of physical injury to another as a categorical matter under ACCA given that 16 is the age of consent in most states); *see also Valencia v. Gonzales*, 439 F.3d 1046, 1049 (9th Cir. 2006) (state statute does not satisfy 18 USC § 16(a)’s definition of “crime of violence” because it does not contain an element of physical force and does not satisfy 18 USC § 16(b) because it covers even consensual sex between 21 year old and a person one day under 18); *Xiong v. INS*, 173 F.3d 601, 606-07 (7th Cir. 1999) (consensual sex between a boyfriend and his fifteen-year-old girlfriend did not by its nature involve a substantial risk of physical force under 18 USC § 16(b)).⁷

Post-*Begay*, and particularly with the work of the Fourth, Ninth and Tenth Circuits, everyone should be renewing and preserving these arguments in all ACCA and career offender cases.

11. Threats

United States v. Johnson, Slip Op., 286 Fed. Appx. 155 (5th Cir. July 11, 2008) (unpub.) (ACCA case) (represented by AFPDs Amy R. Blalock and Robert Gerard Arrambide of the Eastern District of Texas Federal Public Defender (G. Patrick Black, Defender)).

In this unpublished decision, the Fifth Circuit held that a statute that makes it a crime to threaten to cause death to another person with the purpose of terrorizing that person does not constitute an ACCA predicate post-*Begay*. The statute at issue, Ark. Code § 5-13-301(a)(1)(A), did not satisfy clause (i) of ACCA’s definition of a violent

⁷ Remember, though, that 18 USC § 16’s standard differs from both ACCA’s and the career offender guideline’s because it looks for a risk that physical *force* will be used, not a risk that physical *injury* may result. *Compare* 18 U.S.C. § 16(b) *with* 18 U.S.C. § 924(e)(92)(B)(ii) *and* USSG § 4B1.2(a)(2).

felony based on Fifth Circuit precedent holding that a person can threaten to cause bodily injury without threatening the use of force (e.g., threats to poison or to guide someone into oncoming traffic). It also failed to satisfy clause (ii) because it is a crime against the person and not a property crime. The court based its conclusion that § 924(e)(2)(B)(ii) only reaches property crimes on the statement in *Begay* that “Congress sought to expand the definition of a violent felony to include both crimes against the person (clause (i)) and certain physically risky crimes against property (clause (ii)).” *Id.* (citing *Begay*, 128 S.Ct. at 1586) (additional internal punctuation omitted). The Supreme Court, in turn, cited the legislative history of the ACCA, which stated as follows:

The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of ‘violent’ felony. . . . This will add State and Federal crimes *against property* such as burglary, arson, extortion, use of explosives and *similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person.

H. R. Rep. No. 99-849, p. 3 (1986) (first emphasis in original, second and third emphases added).

12. Vehicular Homicide

United States v. Herrick, 545 F.3d 53, 58 (1st Cir. 2008) (career offender guideline case) (represented by CJA attorney Susan E. Taylor of New Bedford, Massachusetts).

In *Herrick*, the First Circuit held that “vehicular homicide involving criminal negligence does not involve the requisite purposeful, intentional or deliberate conduct” required by *Begay*. *Id.* at 60 (analyzing Wis. Stat. §§ 939.25 & 940.10). The court recognized that “the commentary to USSG § 4B1.2(a) includes manslaughter as a crime of violence without distinguishing between voluntary and involuntary manslaughter, arguably suggesting that the *mens rea* for the crime is not determinative. *Id.* at 60 n.8. Nonetheless, it concluded that, “just as the Supreme Court limited the broad language in the ACCA to crimes involving ‘purposeful, violent and aggressive conduct,’ so too is it logical to construe the reference to manslaughter as extending only to those crimes involving the requisite *mens rea*.” *Id.*

D. Potential applications of *Begay/Chambers*

1. “Powder keg” cases (e.g., escape)

As we all know, courts have generally counted escape as a “violent felony” under ACCA or a “crime of violence” under the career offender guideline because of the “powder keg” theory – that is, courts have assumed a sufficient risk exists that the escapee, or his pursuers, will resort to physical violence. *See, e.g., United States v. Winn*, 364 F.3d 7, 12 (1st Cir. 2004) (following “powder keg” rationale to find that escape from custody is categorically a crime of violence under § 4B1.2(a)); *United States v. Jackson*,

301 F.3d 59, 63 (2nd Cir. 2002) (escape qualifies as an ACCA predicate because it “invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public”); *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) (escape presents a serious potential risk of physical injury to another under the “powder keg” theory).

Perhaps the most notable part of the Supreme Court’s *Chambers* opinion – other than the holding – is the Court’s rejection of the “powder keg” theory as its own justification for satisfying ACCA’s “otherwise” clause. During oral argument in *Chambers*, Justices Ginsberg, Souter, Kennedy, and Scalia all expressed concerns with the theory,⁸ and the opinion reflects the Court’s skepticism. First, the Court suggested that ACCA requires a temporal link between the potential risk of violence and commission of the relevant crime. In noting that a failure to return involves inaction, the Court pointed out that someone who failed to return to custody would be unlikely “to call attention to his actions by *simultaneously* engaging in additional violent and unlawful conduct.” *Chambers*, 129 S.Ct. at 692 (emphasis added). The Court went on to assess the merits of the theory only because it “assume[d] for argument’s sake the relevance of violence that may occur long after an offender fails to report” *Id.* Setting aside the issue of a temporal link, the Court then required statistical proof that “such an *offender* is *significantly* more likely than others to attack, or physically to resist, an apprehender” before the offense can satisfy ACCA’s “otherwise” clause. *Id.* (emphasis added). The statistical proof in *Chambers* – consisting of one Sentencing Commission report and three reported cases – showed “only a small risk of physical violence (less than one in several thousand)” and was thus insufficient to satisfy ACCA’s standard. *Id.* at 693.

Similarly, in *United States v. Nichols*, 563 F.Supp.2d 631 (S.D. W.Va. 2008) (discussed in Part B(3), *supra.*), the district court found that *Begay* undermined the Fourth Circuit’s previous holding in *United States v. Mathias*, 482 F.3d 743, 744 (4th Cir. 2007), that all escapes involve an inherent danger of physical injury to others and that they therefore all fit ACCA’s definition of “violent felonies.” As the court noted:

⁸ Justice Ginsburg stated that “an arrest for any crime has a certain risk that the arrestee is going to resist” and questioned what about a failure to report was different. *See* Tr. of Oral Argument, *Chambers v. United States* (06-11206) at 20 (Nov. 10, 2008), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-11206.pdf. Justice Souter focused on the passive nature of a failure to report and noted that “I don’t see that the close logical connections [between failing to report and wanting to continue to avoid custody] convert the passive crime into a higher degree of resisting arrest from any other.” *Id.* at 22. Justice Kennedy noted that, although failing to report is a deliberate criminal act, “[y]ou can say the same thing about failure to respond to a traffic ticket.” *Id.* And Justice Scalia looked to the defendant’s initial sentence and stated, “But it’s not common sense that the person who has been convicted of a crime so gentlemanly that they only made him report to prison on the weekends would confront the policeman with violence when he comes. This is not normally what you would think of as a violent type” *Id.* at 24.

The holding in *Mathias* was based solely on the Circuit Court’s finding that the conduct prohibited by the Virginia escape statute “presents a serious potential risk of physical injury,” a finding that *Begay* held as alone insufficient to classify a crime as violent. Since the *Mathias* court did not make an additional finding required by *Begay*, namely that escape is “roughly similar” to the listed offenses, the analysis conducted in *Mathias* is now incomplete.

Id. at 635. The court went on to find that escape does not qualify as a crime of violence under *Begay*. See Part B(3), *supra*.

You can use the reasoning of *Chambers* and *Nichols* in any case in which the government attempts to expand the “powder keg” theory to offenses other than escape. In *United States v. Henry*, 556 F.Supp.2d 133 (D. Conn. 2008) (represented by CJA attorneys Francis L. O’Reilly of Southport, Connecticut, David J. Wenc of Windsor Locks, Connecticut, and Richard S. Cramer of Hartford, Connecticut), for example, the court rejected the government’s argument that violating a protective order requires law enforcement to effectuate an arrest, thereby presenting the same risk of physical injury that exists in escape cases:

The court finds this argument unpersuasive because the mere fact that an arrest must be effectuated is insufficient to qualify an offense as one which presents a serious potential risk of physical injury to another. Otherwise, virtually all criminal offenses could qualify as “crimes of violence.”

Id. at 140-41. These cases should be cited and their rationale explained in any case in which the government argues, without statistical proof, that the requisite “risk of physical injury” arises solely out of the fact that the defendant may seek to avoid being arrested at some later date.

Chambers can also be used in cases involving a nonconsensual touching, like battery, where the government argues that the conduct poses a risk of physical injury simply because the victim may respond by escalating the encounter. **Be aware** that the Supreme Court has granted cert to decide whether a conviction for battery satisfies ACCA even when the state has held that the offense did not have as element the use or threatened use of physical force, and whether the physical force required under ACCA is a *de minimis* touching or whether it must be violent in nature. See *Johnson v. United States*, 129 S.Ct. 1315 (2009). This issue should be raised and preserved in all ACCA and career offender cases pending the Supreme Court’s decision.

2. Crimes lacking statistical evidence of violence or injury

Another take-home lesson from *Chambers* is that statistics matter. The overall argument reflected a strong reliance on statistics, and provides a good roadmap for the ways in which we should be raising them in the lower courts, at least for those offenses that are not obviously or inherently violent. Many justices – including Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Souter, Breyer and Ginsburg –questioned

Assistant Solicitor General Matthew D. Roberts on the Sentencing Commission’s *Report on Federal Escape Offenses in Fiscal Years 2006 and 2007* (Nov. 2008) (“Escape Report”), available at http://www.ussc.gov/general/escape_FY0607_final.pdf.⁹ Justice Kennedy noted that “the potential risk [in ACCA cases] is based on an empirical assessment,” and asked “how can we make an empirical assessment without statistics?” *Id.* at 30. And Justice Souter followed up with the assertion that “we’ve got to have something more than an instinctive belief that something bad might happen.” *Id.* at 31. These statements and others from the *Chambers* transcript can be used to encourage your sentencing court to require more than just appeals to common sense, instinctive belief, or pure “imagination” from the government before finding that a crime is “violent” under ACCA or the career offender guideline. *See also id.* at 31 (Kennedy, J.) (“If statistics can inform that [inquiry], why ignore the statistics?”).

The opinion, too, is helpful. It labels the Sentencing Commission’s Escape Report “conclusive” for purposes of determining whether violence is in fact a serious potential risk in failure to report cases. *See Chambers*, 129 S.Ct. at 692. That report sets forth statistics on whether force, a dangerous weapon, or injury was present in each of five types of escape cases – leaving secure custody, leaving law enforcement custody, leaving nonsecure custody (*i.e.*, walkaway escapes), failing to report, and failing to return – during 2006 and 2007, and reflects the following data:

	Leaving Secure Custody	Leaving Law Enforcement Custody	Leaving Nonsecure Custody (“walkaway” escapes)	Failing to Report	Failing to Return
Number of Cases	64 (100%)	13 (100%)	177 (100%)	42 (100%)	118 (100%)
Force	10 (15.6%)	1 (7.7%)	3 (1.7%)	0 (0.0%)	0 (0.0%)
Dangerous Weapon	20 (31.3%)	1 (7.7%)	4 (2.3%)	3 (7.1%)	2 (1.7%)
Injury	7 (10.9%)	2 (15.4%)	3 (1.7%)	0 (0.0%)	0 (0.0%)

See Escape Report at 4-5, Figure 1. This type of data – and similar statistics from the Commission, the FBI, state sentencing commissions, and other state authorities – can be

⁹ *See* Tr. of Oral Argument, *Chambers v. United States* (06-11206) at 29-34 (Nov. 10, 2008), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-11206.pdf. According to Justice Breyer, those statistics showed that out of 160 failure to report or return cases, “the number of those cases, whether you looked at the time he had left or whether you looked at the time he was apprehended, in which force was involved is zero. The number of cases in which injury was involved is zero.” *Id.* at 32. While Justice Breyer also noted that the offender possessed a dangerous weapon in five of the cases, Justice Scalia pointed out to the government that none of the cases involved use of a weapon: “The problem is you say ‘if’ he had used a gun. And he didn’t use a gun. I mean, to come up with your statistics on the basis of something that didn’t happen is not using statistics; it’s using imagination.” *Id.* at 35.

used to demonstrate the lack of any empirical basis for finding a particular crime potentially injurious. For example, combining the categories of “leaving secure custody” and “leaving law enforcement custody” into one “escape” category (as the Supreme Court did in *Chambers*) reflects that 11.7% of those cases involved force and/or injury, and 27.2% had a dangerous weapon present. Compare those statistics to walkaway escapes, which involved force and/or injury in only 1.7% of cases, and had a dangerous weapon present in only 2.3%. Then compare both offense categories to national statistics for burglary, which reflect that 60.9 % of burglaries in 2004 involved a forcible entry, as did 60.8% in 2005.¹⁰ The fact that burglaries involve force in over 60% of cases, whereas force is used in less than 2% in walkaway escape cases and less than 12% in all other escape cases, is clearly relevant to whether escape cases present a risk of injury of the same kind and to the same degree as burglary. Agency statistics like those cited above, and statistics on the percentage of reported cases describing injury or violence in the course of committing the type of offense at issue, can thus provide evidentiary fodder for arguments that the offense is not sufficiently risky to fit within ACCA’s “otherwise” clause.

Remember, however, that because a “serious potential risk” is an element of the offense, the burden of proof should always lie with the government. *Accord Chambers*, 129 S.Ct. at 693 (describing the Commission’s statistics and relevant case law, and finding for the defense, in part, because “the *Government* provides no other empirical information”) (emphasis added); *United States v. Arrington*, 2009 WL 2170990, *3 (D. Minn. July 17, 2009) (“The burden of demonstrating that the career offender provision applies – and, in turn, the burden of demonstrating that [defendant’s] underlying convictions were the type of fleeing convictions that satisfy the career offender provision – rests on the prosecution.”). The Eleventh Circuit has already picked up on the fact that it is the government’s burden to present statistical evidence in support any claim that an offense fits within ACCA’s residual clause:

[S]tatistics about the potential risk of physical injury have taken on a heightened role in recent years. Whatever we may think about injecting statistics into statutory construction, we cannot ignore that the Supreme Court has relied on statistical evidence each time it has revisited the scope of the residual clause in the last three years. Although *Begay* and *Chambers* imposed no rule requiring the government to present statistical evidence on the question of whether a particular crime poses a serious potential risk of physical injury, . . . the Supreme Court has now thrice thrown [such evidence] in the analytical mix.

Harrison, 558 F.3d at 1299; *see also id.* at 1296 (noting government’s failure to present statistical evidence that crime of willfully fleeing poses a risk of the same kind and degree as ACCA’s enumerated offenses); *Lowery*, 599 F.Supp.2d at 1304 (“*Harrison* makes clear that the government bears the burden to show that the state-law offense poses a serious potential risk of physical injury to another, and that empirical data should be used to the extent possible in helping the court make this conceptually difficult risk

¹⁰ See F.B.I., Crime in the United States 2005, Table 15 (September 2006) available at http://www.fbi.gov/ucr/05cius/data/table_15.html.

assessment.”) (citations and internal punctuation omitted); *United States v. Mosley*, ___ F.3d ___, 2009 WL 2176634, *4 (6th Cir. July 23, 2009) (noting that while “there may be settings where an individual’s failure to follow an officer’s lawful command poses such risks [as the enumerated offenses pose,] . . . we have no basis in this record – empirical or otherwise – for concluding that the typical violation would create such a danger”).

3. Crimes against the person

In *United States v. Johnson*, Slip Op., 286 Fed. Appx. 155 (5th Cir. July 11, 2008) (unpub.), the Fifth Circuit relied on *Begay*, which relied on the legislative history, to find “that § 924(e)(2)(B)(ii) was created to expand the definition of a violent felony to include physically risky crimes against *property*” (emphasis in original). In other words, a crime against the person can be an ACCA predicate *only* if it has as an element the use, attempted use, or threatened use of physical force against the person of another. *See id.*; *see also* 18 USC § 924(e)(2)(B)(i). Subclause (ii) is reserved exclusively for *property* crimes involving a risk similar in kind as well as degree to the enumerated offenses. *See also United States v. Mathis*, 963 F.2d 399, 405 (D.C. Cir. 1992) (“It is evident from this definition that Congress created two subcategories of prior criminal conduct: First, there are felonies against the person that have as an element the use or threat of physical force; and, second, there are felonies against property (such as burglary, arson, extortion, etc.) that present a serious potential risk of physical injury.”).

Be sure to raise this argument whenever the government asks the court to treat a crime against the person as an ACCA predicate under the statute’s otherwise clause (§ 924(e)(2)(B)(ii)).

4. § 2255 motions

The government has conceded that *Begay* and *Chambers* each announced a new substantive rule for purposes of habeas relief, and courts have permitted defendants to file § 2255 habeas petitions based on *Begay* and *Chambers*. *See United States v. Leonard*, Slip. Op, 2009 WL 499357, *4 (N.D. Okla. Feb. 27, 2009) (agreeing with government that “*Begay* announced a new substantive rule, rather than a procedural rule, because *Begay* limits the authority of a court to increase a defendant’s punishment for certain types of conduct”); *United States v. Glover*, Slip Op. 2008 WL 2951085, *4 (N.D. Okla. July 28, 2008) (same); *George v. United States*, 2009 WL 1370858, *3 (M.D. Fla. May 14, 2009) (determining that *Chambers* “created a new substantive right in that escape is no longer a ‘violent felony’ for purposes of §924(e)(2)(B)(i) or (ii), and that such a new right should be applied retroactively”);¹¹ *see also Anderson v. Bodison*, Slip. Op. 2008

¹¹ Habeas petitions have been granted in a number of unpublished decisions as well. *See, e.g., Walden v. United States*, 2009 WL 2163182, *4 (S.D. Fla. July 17, 2009) (vacating sentence upon ground that sentence was imposed in violation of laws of United States under § 2255(a) & (b) because carrying a concealed weapon is no longer ACCA predicate post-*Begay*) (represented by CJA attorney Christian Scott Dunham of Miami, FL); *United States v. Barnette*, 2009 WL 1942192, *4 (D. S.C. July 1, 2009) (appointing counsel to determine whether defendant is now “actually innocent” of being career offender on basis of prior failure to stop for blue light

WL 5272572 (D. S.C. Dec. 18, 2008) (habeas petition brought under § 2241 based on *Begay* is more properly brought under § 2255); *Sperberg v. Marberry*, 2008 WL 5427727 (W.D. Wisc. Dec. 31, 2008) (permitting § 2241 petition based on *Begay* in light of Seventh Circuit precedent treating claim of fundamental illegality of sentence as claim of actual innocence, as well as fact that petitioner is procedurally barred from bringing § 2255 motion, and transferring case to S.D. of Ind. for venue purposes).¹²

At least one judge has held not only that *Begay* and *Chambers* announced a new substantive rule that should be given retroactive effect, but also that the “actual innocence” doctrine “applies within the context of challenging a predicate offense utilized to classify a defendant as a career offender,” thereby saving the defendant from what would otherwise have been procedural default. *See George*, 2009 WL 1370858 at *4. This argument should be raised in any case where the defendant would be procedurally precluded from habeas relief.

D. Additional Interesting Portions from *Chambers* Oral Argument

The following are some other interesting aspects of the oral argument in *Chambers v. United States* that did not make it into the opinion, but may nonetheless be helpful – or at least enjoyable to read:

- The sentence imposed for the ACCA predicate may be important. Several justices were interested to know that Mr. Chambers did not actually receive any additional jail time for failing to report, suggesting that the lack of a significant sentence may at least have some emotional pull if not doctrinal significance. *See* Tr. of Oral Argument, *Chambers v. United States* (06-11206) at 8, 24-25 (Nov. 10, 2008), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-11206.pdf.
- The government may want to rethink its policy of charging the maximum. In an interesting exchange about the propriety of prosecutorial decisions, Justice Kennedy asked: “What goes through the mind of – of a prosecutor? He says, because this fellow failed to report earlier for this offense, I’m going to give him 15 extra years in jail?” *Id.* at 27. Justice Kennedy also wondered if, in deciding

conviction post-*Begay*); *McCarty v. United States*, 2009 WL 1456386, *2 (M.D. Fla. May 22, 2009) (finding that “the new rule articulated in *Begay* and *Archer* is substantive in that it narrows the scope of § 924(e) by interpreting its terms” and granting § 2255 petition because mandatory minimum is now “a punishment that the law cannot impose”) (represented by AFPD Dionja L. Dyer of the Middle District of Florida Federal Public Defender (Donna Elm, Defender)); *United States v. McElroy*, 2009 WL 1372908, *3 (N.D. Okla. May 14, 2009) (vacating sentence where prior DUI was used as career offender predicate because DUI is no longer crime of violence post-*Begay*).

¹² Unfortunately, it was a pyrrhic victory for Mr. Glover, as the court refused to extend *Begay*’s holding to his larceny of a person offense. *Glover*, 2008 WL 295105 at *5.

whether to charge under ACCA, prosecutors “ever look at the attorney? This attorney has been giving us a hard time, and we ought to show him that we really mean business? Do they look at the nature of the – the identity of the counsel of the defendant? Do they ever look at that?”

- Failure to report to probation or parole is not as serious an offense as failure to report to jail or prison, according to the government. Assistant Solicitor General Matthew D. Roberts conceded that failure to report to probation or parole “doesn’t involve the same refusal to submit to custody that” failure to report cases do, suggesting that it thus involves inherently less culpable and/or dangerous behavior – a potentially useful point to make at revocation hearings. *Id.* at 24.