

GUNS AND VIOLENCE: FIGHTING THE CAREER OFFENDER GUIDELINE, ARMED CAREER CRIMINAL ACT AND GUN ENHANCEMENTS

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GUN CASES: PRACTICAL CONSIDERATIONS

Career offender (CO) or Armed Career Criminal Act (ACCA) enhancements often result from a defendant being charged with gun charges (18 U.S.C. § 924 (c) or 18 U.S.C. § 929 (a) for CO or 18 U.S.C. § 924 (e) for ACCA. But even where a defendant is charged with “garden variety” ex-felon in possession of a firearm charges, under 18 U.S.C. §922(g) the defendant’s sentence can be significantly increased by sentencing enhancements.

The defense attorney should take some simple steps at the beginning of any gun case which can assist in the defense of the alleged gun violations or at least prepare for possible sentencing issues:

(1) Go look at the gun or guns seized.

Take an expert with you. An “expert” can be someone from the local sporting goods store, the local rifle or trap shooting range or a retired police officer. Anyone who knows guns can qualify in court as an expert. If you can’t find an “expert”, at least take an investigator with you. Take someone who can photograph the gun(s) and document their condition. Particularly check to see whether you or your expert can read the serial numbers. A gun which is stolen or has an altered or obliterated serial number will **increase** a defendant’s sentencing level two points. United States Sentencing Guideline (U.S.S.G.) § 2K2.1 (b) (4). In many circuits the defendant does not even have to know that the gun was stolen. See e.g. *United States v. Singleton*, 946 F.2d 23 (5th Cir. 1991); *United States v. Goodell*, 990 F.2d 497 (9th Cir. 1993) (court held the strict liability language of the section did not violate the defendant’s due process rights); *United States v. Goff*, 314 F.3d 1248 (10th Cir. 2003).

(2) Determine where the guns were located.

If the gun was found inside a building, where? If it was found inside a vehicle, where?

Location of the weapon can dramatically affect the defendant’s sentencing guideline range even if he or she is not deemed a Career Offender or Armed Career Criminal. A defendant found with a gun under the seat of car, next to a stash of cocaine or methamphetamine, may be found guilty of 18 U.S.C. § 924 (c) or at the very least, suffer a sentencing enhancement for possession of a firearm in connection with

any felony under U.S.S.G. §2K2.1 (b) (5). See e.g. *United States v. Linson*, 276 F.3d 1017 (8th Cir. 2002). A sentence enhancement under U.S.S.G. §2K2.1 (b) (5) increases the offense level four levels or, if the total offense level is under 18, this enhancement increases the offense to 18.

U.S.S.G. §2K2.1 (b) (5) is not limited to possession of a firearm in connection with a drug felony but includes in connection with **any** felony. A “felony offense” under U.S.S.G. § 2K2.1(b) (5) is defined as “any offense (federal, state or local) punishable by imprisonment for a term exceeding one year, whether or not a criminal charge was brought, or conviction obtained.” U.S.S.G. § 2K2.1 comment n. 7.

The Ninth Circuit has established a two-prong approach for application of U.S.S.G. § 2K2.1(b) (5). First, the government must establish that the firearm was “used” in connection with another felony (see: *infra*) and second, the government must prove that the weapon was actually or constructively in the defendant’s possession and third, that the manner of its possession “permits an inference that it facilitated or potentially facilitated a defendant’s felonious conduct.” *United States v. Polanco*, 93 F.3d 555, 566-67 (9th Cir.) cert denied 519 U.S. 73 (1996). See also: *United States v. Routon*, 25 F.3d 815, 819 (9th Cir. 1994).

Possession of a firearm may be actual or constructive. Constructive possession requires **three** elements:

- (1) knowledge of the presence of the gun;
- (2) the power to exercise dominion and control over the gun; and
- (3) the intention to exercise dominion and control over the gun.

United States v. Terry, 911 F.2d 272, 278 (9th Cir. 1990).

Defense counsel should carefully note where guns were located when discovered, so an argument can be made at sentencing that a defendant had no knowledge of the gun, no power to control it or, at the very least, that the defendant had no intention to exercise dominion and control over the weapon in question.

An enhancement under U.S.S.G. §2K2.1 (b) (5) may also include possession of **ammunition** in connection with a felony (as well as possession of a gun). See e.g. *United States v. Ennenga*, 263 F.3d 499 (6th Cir. 2001). Determine early: was there any ammunition? Where was it in relation to the gun? Did the ammunition fit the firearm seized?

The term “in connection with” as used in U.S.S.G. §2K2.1 (b) (5) is equivalent to the phrase “in relation to” as used in 18 U.S.C. § 924 (c) and as construed by the Supreme Court in *Smith v. United States*, 508 U.S. 223, 113 S.Ct 2050, 124 L.Ed 2d 138 (1993). *U.S. v. Scolaro*, 299 F.3d 956 (8th Cir. 2002). See also: *U.S. v. Spurgeon*, 117 F.3d 641, 643-644 (2nd Cir. 1997); *U.S. v. Hardin*, 248 F.3d 489 (6th Cir. 2001); *U.S. v. Polanco*, 93 F.3d 555 (9th Cir.) cert denied 519 U.S. 73 (1996). The test, as noted, *supra*, requires that the gun at least facilitate or have the potential of facilitating another felony offense. In other words, the firearm must have been possessed in a manner that permits an inference that it had some “potentially emboldening role” in a defendant’s felonious conduct. *U.S. v. Ellis*, 241 F.3d 1096, 1099 (9th Cir. 2001) quoting *U.S. v. Routon*, 25 F.3d 815, 819 (9th Cir. 1994).

- 3) Persuade the government to stipulate factually concerning gun enhancement issues or ask for proof by clear and convincing evidence

If the prosecutor will not stipulate, or the defendant is facing multiple potential enhancements, argue the government has an increased burden to prove the disputed sentencing

enhancements under a “clear and convincing evidence” standard. *U.S. v. Jordan*, 256 F.3d 922 (9th Cir. 2001); See also: *U.S. v. Johansson*, 249 F.3d 848 (9th Cir. 2001); *U.S. v. Mezas de Jesus*, 217 F.3d 638, 642-644 (9th Cir. 2000); *U.S. v. Hopper*, 177 F.3d 824, 833 (9th Cir. 1999). The burden of proof is on the government. See e.g. *U.S. v. Leasure*, 319 F.3d 1092, 1096 (9th Cir. 2003).

For example, a defendant convicted of possession of marijuana with intent to distribute along with ex-felon in constructive possession of firearms may be an offense level 11 with a sentencing range of 18-24 months. If the Presentence Investigation Report (PSR) recommends multiple gun enhancements that same defendant could be facing a fivefold increase and a sentencing range of 82-101 months. The difference in potential prison time is dramatic and justifies placing a heavier burden of proof on the government.

But, where a defendant is charged with violating the felon in possession statute (18 U.S.C. § 922 (g)) and has three prior convictions for a violent felony, the government may not agree to forego a §924 (c) (1) enhanced sentence. Application of §924 (c) (1) is mandatory and does not require government agreement. *U.S. v. Moyer*, 282 F.3d 1311 (10th Cir. 2002).

CAREER OFFENDER AND ARMED CAREER CRIMINAL CASES

Career Offender

Armed Career Criminal

USSG enhancement

statutory

prior qualifying crimes depend on criminal history

qualifying priors last forever

2 prior felonies for drugs or violence

3 prior felonies for serious drugs or violence

present charge: drugs or violence

present charge: felon in possession (18 U.S.C. § 922 g)

areas of attack: qualifying felony
old prior

areas of attack: qualifying felony
priors “committed on occasions different from one another.”

An issue that differs markedly between the Career Offender Guideline provision and the ACCA involves criminal history calculations. As a statutory enhancement, vice a Guideline enhancement, the ACCA reaches back to use any qualifying prior convictions regardless of whether they are too old to count in a client’s Guideline criminal history. Thus, even though an offense may not count for purposes of an Armed Career client’s Guideline criminal history category, it may be used as a predicate offense to trigger an ACCA enhancement. For the Career Offender enhancement, any prior conviction that might be used to enhance must first be countable in the client’s criminal history – otherwise, it cannot serve as a Career Offender predicate.

There are a few areas of analysis that apply to both the Career Offender and ACCA enhancements:

1. The *Taylor* “categorical approach” for analyzing potential predicate offenses
2. The government’s burden of proof in showing the prior convictions

3. whether the prior conviction can be challenged for violating the right to counsel as articulated in *Gideon*.

Some questions presented by the *Taylor* analysis and associated case law, the burden of proof, as well as the question of a *Gideon* violation, are discussed further below, after the individual sections addressing particular issues in Career Offender and ACCA cases respectively.

I. DETERMINING IF CLIENT IS CAREER OFFENDER

A. BASIC REQUIREMENTS (Refer to U.S.S.G. §§ 4B1.1, and 4B1.2)

Two (2) prior felony convictions for either

1) crimes of violence

OR

2) controlled substance offenses

In addition, the instant offense charged must be a crime of violence or controlled substance offense. The Career Offender Guideline defines a “felony conviction” as an offense punishable by imprisonment for more than one year. U.S.S.G. § 4B1.2, comment (n.1).

B. REVIEWING CRIMINAL HISTORY: Each prior conviction must count in client’s criminal history in order to qualify as a predicate conviction for Career Offender purposes. Each prior also must count separately, and not be deemed related.

1. “RELATED CASES” U.S.S.G. § 4A1.2, comment (n.3)

If two prior convictions are considered “related cases,” they are not counted separately in criminal history. If they are not counted separately in criminal history, each case cannot serve as a predicate conviction for Career Offender purposes.

a. DEFINITION:

“Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest [. . .] Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing.” U.S.S.G. § 4A1.2, comment (n.3)

Whether prior convictions are related under § 4A1.2 is a mixed question of law and fact, subject to de novo review. *U.S. v. Chapnick*, 963 F.2d 224, 226 (9th Cir. 1992).

b. “INTERVENING ARREST”

U.S. v. Gallegos-Gonzalez, 3 F.3d 325, 327 (9th Cir. 1993)(“sentences for offenses separated by an intervening arrest are always unrelated under section 4A1.2 [. . .], regardless of whether the cases were consolidated for sentencing.”). *Accord*, *U.S. v. Hunter*, 323 F.3d 1314 (11th Cir. 2003); *U.S. v. Aguilera*, 48 F.3d 327, 330 (8th Cir. 1995); *U.S. v. Hallman*, 23 F.3d 821, 825 (3d Cir. 1994). But see: *United States v. Hayes*, 342 F.3d 385 (5th Cir. 2003) (separate docket numbers and no factual relationship for offenses: one cocaine distribution, one for armed robbery and one for purse snatching. Concurrent but different sentences from one judge: cases consolidated for sentencing only therefore court could not say that prior convictions ARE related if they were NOT separated by an intervening arrest.)

c. CONSOLIDATED FOR TRIAL OR SENTENCING

Generally, consolidated sentences are considered related, and thus do not count separately in criminal history calculations. *U.S. v. Woods*, 976 F.2d 1096 (7th Cir. 1992). A consolidated sentence does not necessarily mean, however, that there are not separate convictions, for Career Offender purposes. Most circuits seek some indication, beyond a mere joint sentencing, in order to find that cases are “related,” for purposes of calculating criminal history. Some courts require a formal consolidation order. *See U.S. v. Correa*, 114 F.3d 314 (1st Cir. 1997); *U.S. v. Gezler*, 50 F.3d 1133, 1143 (2d Cir. 1995); *U.S. v. Allen*, 50 F.3d 294, 297-98 (4th Cir. 1995); *U.S. v. Klein*, 13 F.3d 1182, 1185 (8th Cir. 1994). *But see*, *U.S. v. Huskey*, 137 F.3d 283, 287 (5th Cir. 1998); *U.S. v. Smith*, 991 F.2d 1468, 1473 (9th Cir. 1993); *U.S. v. Woods*, 1096, 1100 (7th Cir. 1991).

d. “OCCURRED ON SAME OCCASION”

U.S. v. Moreno-Arredondo, 255 F.3d 198, 207 (5th Cir. 2001)(“simultaneity is not an element of sameness”); *U.S. v. Chapnick*, 963 F.2d 224, 226-27 (9th Cir. 1992), superseded on other grounds as stated in *U.S. v. Gallegos-Gonzalez*, 3 F.3d 327 (9th Cir. 1993); *U.S. v. Connor*, 950 F.2d 1267, 1270 (7th Cir. 1991)(federal and state convictions for different offenses resulting out of same arrest are offenses that occurred on same occasion and cannot be counted separately); *U.S. v. Manuel*, 944 F.2d 414, 416 (8th Cir. 1991)(federal forgeries over fourteen-month period not related to state forgery five months later);

e. “SINGLE COMMON SCHEME OR PLAN”

U.S. v. Mullens, 65 F.3d 1560, 1565 (11th Cir. 1995)(“convictions are part of a common scheme if ‘substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purposes, or similar modus operandi.’ U.S.S.G. § 1B1.3, comment (n.9).” *See also*, *U.S. v. Breckenridge*, 93 F.3d 132, 138 (4th Cir. 1996)(significant to whether crimes “related” is whether they involved “similar substantive offenses”); *U.S. v.*

Chapnick, 963 F. 2d 224, 226 (9th Cir. 1992)(listing factors, proximity in time, identity of victims, arresting agency, when arrests occurred, number of investigations, that 9th Circuit considers).

The proximity in time of the prior offenses is a central factor in determining whether the cases are related. The circuits have been inconsistent with each other in determining how proximate the prior crimes need to be, to qualify as related cases. *See, U.S. v. Jones*, 899 F.2d 1097, 1101 (11th Cir. 1990)(concurrent sentences for bank robbery and attempted bank robbery committed ninety minutes apart not related: different banks, separate trials, different sentences), overruled on other grounds by *U.S. v. Morrill*, 984 F.2d 1136 (11th Cir. 1993), distinguished in *U.S. v. Moreno-Arredondo*, 255 F.3d 198, 206 (5th Cir. 2001)(offenses need not occur simultaneously in order to be considered the same offense); *see also, U.S. v. Houser*, 929 F.2d 1369, 1374 (9th Cir. 1990)(two prior drug offenses for drug sales to single agent, with arrest product of single investigation, were related cases where would have been tried together but for fact that sales took place in different counties), overruled on other grounds by *Buford v. U.S.*, 532 U.S. 59, 121 S.Ct. 1276, 1280 (2001); *U.S. v. Breckenridge*, 93 F.3d 132, 139 (4th Cir. 1996)(six prior B&E convictions occurring over four-week period found “related”); *U.S. v. Elwell*, 984 F.2d 1289, 1294-96 (1st Cir. 1993)(five separate bank robberies found “related” because deemed part of an overarching scheme to rob banks). *See generally, U.S. v. Carter*, 283 F.3d 755, 761 (6th Cir. 2002)(reviewing other circuits’ treatment of “common scheme or plan” question, and urging the Sentencing Commission to review the cases to resolve the inconsistencies). *U.S. v. Hernandez*, 330 F.3d 964 (7th Cir. 2003) (1993 drug conviction not related to 1996 drug distribution conviction where no conviction for “conspiracy” even though sale of drugs in the same geographic area, involving same gang and close in time. COA said U.S.S.G. § 1B1.3 n. 8 example of cases not related fits here.) *U.S. v. Herman Brothers*, 316 F.3d 120 (2nd Cir. 2003) (prior convictions not part of a “common scheme or plan” where robberies took place five weeks apart, different participants, different victims, separate judgments for each conviction and not consolidated for sentencing under U.S.S.G. §4A1.2 n. 3).

2. “PRIOR SENTENCE”

Only prior sentences for felony convictions are to be counted in criminal history. What constitutes a “prior sentence” is not always as evident as the term may seem. An offense committed after the instant offense, but for which the defendant is sentenced before, counts in criminal history, and thus is a qualifying predicate for Career Offender purposes. U.S.S.G. § 4A1.2(a)(1), comment (n.1); *see also, U.S. v. Lara*, 975 F.2d 1120, 1129 (5th Cir. 1992); *U.S. v. Hoy*, 932 F.2d 1343, 1345 (9th Cir. 1991). The fact that a prior case may be pending appeal when a defendant is being sentenced on the instant offense, does not preclude counting that prior case. *U.S. v. Beddow*, 957 F.2d 1330, 1337 (6th Cir. 1992); *U.S. v. Mackbee*, 894 F.2d 1057, 1058 (9th Cir. 1990).

3. APPLICABLE TIME PERIOD, U.S.S.G. § 4A1.2(e)

Under this Guideline section, certain prior sentences do not count after a certain period of time (e.g., a sentence of less than 60 days' imprisonment will towards defendant's criminal history only if it was imposed within 10 years of the defendant's commencement of the instant offense. U.S.S.G. § 4A1.2(e)(2)).

It is worth reviewing this section of the Guidelines in evaluating any potential Career Offender predicate offense. The timing of when the sentence was imposed, when the instant offense commenced, when the defendant was released from the prior sentence of imprisonment, are all factors that play into whether that prior offense actually counts. These concepts must be carefully reviewed anytime a client is a potential Career Offender.

4. JUVENILE OFFENSES, U.S.S.G. 4B1.2, comment (n.1)

The Career Offender provision applies where the defendant has "two prior felony convictions" for controlled substance offenses or crimes of violence. U.S.S.G. 4B1.1(a). In the 4B1.2 application notes, a "prior felony conviction" is defined as:

A prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed prior to age eighteen or older is an adult conviction. A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult.)

Accordingly, a juvenile adjudication (i.e., where the client was not proceeded against as an adult), does not count as a predicate for Career Offender purposes. *See U.S. v. Mason*, 284 F.3d 355 (4th Cir. 2002) (even though defendant was adult when sentenced for juvenile offense, was sentenced as juvenile, and therefore prior sentence could not count as predicate for Career Offender purposes); *U.S. v. Hazelett*, 32 F.3d 1313 (8th Cir. 1994). See also: *United States v. Mason*, 284 F.3d 555 (4th Cir. 2002). The key is whether the defendant was tried as an adult. Even if defendant served the sentence in a juvenile facility, if he was tried as an adult (and received a sentence greater than a year and a month), the prior will qualify as a predicate for Career Offender purposes. *U.S. v. Coleman*, 38 F.3d 856, 861 (7th Cir. 1994); *U.S. v. Carillo*, 991 F.2d 590 (9th Cir. 1993)(same).

5. EXPUNGED CONVICTIONS

Expunged convictions are NOT counted in criminal history. See U.S.S.G. 4A1.2(j)¹ Convictions referred to as “set aside” can be considered expunged; it will, however, depend on the particular statutory provision affording the set-aside. See *U.S. v. Hidalgo*, 932 F.2d 805, 807 (9th Cir. 1991) (set aside under California Welfare and Institutions Code not counted in criminal history; conviction considered expunged even if it was set aside for reasons unrelated to innocence or errors of law); *U.S. v. Kammerdiener*, 945 F.2d 300, 301 (9th Cir. 1991) (conviction set aside pursuant to the Federal Youth Corrections Act not counted); *contra U.S. v. Wacker*, 72 F.3d 1453, 1479-80 (10th Cir. 1995). See also, *U.S. v. Hayden* 255 F3d. 768, 773 (9th Cir. 2001) (California Penal Code section authorizing set-aside of a conviction, but providing that such conviction be considered in any subsequent criminal proceeding, did not constitute “expungement” for Sentencing Guideline purposes); *U.S. v. Griffin*, (150 F.3d 778, 787 (7th Cir 1998) (Texas conviction, “dismissed” after service of probation, not considered “expunged” for U.S.S.G. purposes). The 1st, 2nd, 5th, 10th and D.C. Circuits, look to whether the given expungement statement aims “to give defendant a fresh start,” and not “to correct errors of law or vindicate innocence.” Only the latter type of case is deemed “expunged,” and therefore does not count for Sentencing Guidelines purposes. See, *U.S. v. Dubovsky*, 279 F.3d 5 (1st Cir. 2002)(following 10th, 5th and DC Circuits); *U.S. v. Driskell*, 277 F.3d 150, 155 (2^d Cir. 2002). See also, *U.S. v. Greene*, 187 F.Supp. 595, 600 (E.D. Va. 2002). A “deferred adjudication” may count as a prior felony conviction. *U.S. v. Joshua*, 305 F.3d 352 (5th Cir. 2002) (*Nolo contendere* to robbery charge, plea successfully discharged by deferred adjudication , conviction still held to be a “prior felony conviction” for CO purposes.)

C. REVIEWING DEFINITIONS: IS PRIOR A “CRIME OF VIOLENCE” (COV) OR “CONTROLLED SUBSTANCE” (C/S) OFFENSE?

1. DEFINITION: “CRIME OF VIOLENCE”

U.S.S.G. § 4B1.2(a) defines a “crime of violence” as:

Any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that
(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or

¹ However, for general sentencing purposes, be aware that §1B1.3 (relevant conduct) still applies, such that an expunged conviction, although precluded from qualifying as a predicate, could be considered by the court in sentencing. A related concept is that a court may consider in sentencing conduct for which a defendant has been acquitted, so long as the conduct is proven by a preponderance of the evidence. *U.S. v. Watts*, 519 U.S. 148, 155, 117 S.Ct. 633 (1997).

otherwise involves conduct that presents a serious potential risk of physical injury to another.

An important fact to remember (and a difference with the ACCA, as seen below) is that state law characterizations of a prior conviction are not controlling here. An offense may be a COV even though the state labels it a misdemeanor.

Whether the prior conviction constitutes a qualifying predicate “crime of violence” can only be answered by looking at the language of the underlying statute, and the elements required to sustain a conviction under that statute. If the circuit in which you practice has not ruled on whether the particular statute qualifies as a “crime of violence,” then the question is probably not settled.

a. “CONDUCT THAT PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO ANOTHER” U.S.S.G § 4B1.2

The legal terrain is particularly murky if the government seeks to have a prior conviction qualify as a crime of violence, when that conviction is not for one of the enumerated crimes (burglary of a dwelling, arson, extortion). The government may seek to qualify a predicate under § 4B1.2(a)(2), by arguing the prior is an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.”

b) EXAMPLES:

- i. ESCAPE FROM JAIL/CUSTODY: This offense, whether analyzed as a COV or a “violent felony” under the ACCA’s section 924(e), has been determined to be “conduct that presents a serious potential risk of physical injury to another.” *U.S. v. Nation*, 243 F.3d 467, 472 (8th Cir. 2001)(“every escape, even a so-called “walkaway” escape, involves a potential risk of injury to others”); *U.S. v. Harris*, 165 F.3d 1062 (6th Cir. 1999)(escape under Tennessee statute is COV); *U.S. v. Dickerson*, 77 F.3d 774 (4th Cir. 1996)(attempted escape is COV); *U.S. v. Gosling*, 39 F.3d 1140 (10th Cir. 1994)(escaping from county jail). But cf: government failed to prove that prior “attempted escape” was a felony. *United States v. Sun Bear*, 307 F.3d 747 (8th Cir. 2002).
- ii. DRUNK-DRIVING: *U.S. v. Trinidad-Aquino*, 259 F.3d 1140, 1146-47 (9th Cir. 2001) (because California drunk-driving statute permitted conviction under negligence standard, conviction under that statute cannot qualify as COV; the term “use” of force implies some threshold intent); *but see, U.S. v. Farnsworth*, 92 F.3d 1001 (10th Cir. 1996)(vehicular manslaughter - California conviction - committed while under the influence and “with gross negligence” is COV); *U.S. v. Fry*, 51 F.3d 543 (5th Cir. 1995)(causing the death of another while driving under the influence is “conduct that presents

a serious potential risk of physical injury to another”); *U.S. v. Rutherford*, 54 F.3d 370 (7th Cir. 1995)(vehicular assault by a drunk driver is COV); *United States v. Rubio*, 317 F.3d 1240 (11th Cir. 2003) (driving under the influence causing serious bodily injury is a crime of violence)

iii. SEXUAL CONDUCT INVOLVING MINORS: Such offenses have ordinarily been found to be COVs, falling under the “residual clause” as offenses which present “a serious potential risk of physical injury to another.” *U.S. v. Coronado-Cervantes*, 154 F.3d 1242 (10th Cir. 1998)(sexual contact with minor); *U.S. v. Hawkins*, 69 F.3d 11, 13 (5th Cir. 1995); *U.S. v. Bauer*, 990 F.2d 373 (8th Cir. 1993)(statutory rape involving female under age sixteen, regardless of consent); *U.S. v. Pierce*, 278 F.3d 282 (4th Cir. 2002) (taking indecent liberties with a child).

iv. POSSESSION OF A FIREARM BY A FELON: U.S.S.G. § 4B1.2, comment (n.2) states that unlawful possession of a firearm by a felon is not a crime of violence for Career Offender purposes. This amendment is retroactive. *See* U.S.S.G. § 1B1.10(c).

This application note has been used to find that a conviction under a Missouri statute for possessing a concealed weapon was not a COV, in the context of determining whether the enhancement under § 2K2.1(a)(4)(A) (establishing a higher base offense level where a felon in possession has a previous conviction for a COV or C/S offense, as these terms are defined in 4B1.2). *See U.S. v. Crawley*, 213 F.Supp2d 1250, 1258 (D.Kansas 2002)(applying the categorical approach, and finding the Mo. statute involved no element that presented “a serious potential risk of physical injury to another”).

There are notable loopholes, however, in the Sentencing Guideline application note precluding prior felon in possession conviction from counting as a predicate COV.

One involves a relatively new amendment to the Sentencing Guidelines. If the instant offense charges a firearm violation under 18 U.S.C. § 924(c) or § 929(a), then the Career Offender provision of U.S.S.G. § 4B1.1 & 4B1.2 can be triggered, if the defendant has the two required Career Offender predicates. *See* U.S.S.G. § 4B1.1(c) (added Nov. 2002).

In addition, possession of a sawed-off shotgun by a felon, has been found to be a crime of violence. *U.S. v. Brazeau*, 237 F.3d 842 (7th Cir. 2001); *U.S. v. Johnson*, 246 F.3d 330 (4th Cir. 2001); *U.S. v. Jennings*, 195 F.3d 795 (5th Cir. 1999); *U.S. v. Drapeau*, 188 F.3d 987 (8th Cir. 1999); *U.S. v. Fortes*, 141 F.3d 1 (1st Cir. 1998); *U.S. v. Huffhines*, 967 F.2d 314 (9th Cir. 1992); *U.S. v. Serna*, 309 F.3d 859 (5th Cir. 2002).

A twist on this issue is when there is a prior conviction for possessing a weapon while in prison. Cases consistently hold that such a prior conviction constitutes “conduct that otherwise presents a serious potential risk of physical injury to another,” and is therefore a COV. *See U.S. v. Kenney*, 310 F.3d 135, 137 (3rd Cir. 2002)(possession of a razor blade by

an inmate is a COV, regardless of inmate's intentions); *U.S. v. Vahovick*, 160 F.3d 295, 296-98 (7th Cir. 1998)(inmate's possession of pencils bound together to serve as weapon is COV); *U.S. v. Young*, 990 F.2d 469 (9th Cir. 1993)(California conviction for possession of deadly weapon in prison is a COV regardless of fact that the statute did not specify a requisite intent).

v. OTHER OFFENSES

First degree theft is a crime of violence in Iowa where defendant knocked victim from his bike, kicked him in the ribs and face and punched him before stealing personal property. *U.S. v. Johnson*, 318 F.3d 821 (8th Cir. 2003)

c) **THE BURGLARY QUANDARY**

All the case law addressing burglary offenses as predicates cannot be discussed here. What is important to remember is that, even what seems obviously answered in the Career Offender provisions of the Guidelines, is not: although § 4B1.2(a) refers to "burglary of a dwelling" as a crime of violence, courts differ on whether burglary of a commercial or other building qualifies as a crime of violence. See *U.S. v. Houltz*, 240 F.3d 647 (7th Cir. 2001) (remanding for sentencing court to determine that prior burglary conviction under Illinois statute required finding that dwelling was involved, otherwise Career Offender provision should not have applied); *U.S. v. Bennett*, 108 F.3d 1315 (10th Cir. 1997)(same, Oklahoma statute); *U.S. v. Harrison*, 58 F.3d 115, 119 (4th Cir. 1995) *U.S. v. Spell*, 44 F.3d 936 (11th Cir. 1995); but see, *U.S. v. Chhien*, 266 F.3d 1 (1st Cir. 2001)(burglary of a commercial building constitutes crime of violence); *U.S. v. Williams*, 47 F.3d 993 (9th Cir. 1995)(although California first-degree burglary statute broader because includes burglaries of buildings other than dwellings, prior conviction under that statute here involved violence, as shown by indictment that alleged defendant "willfully and unlawfully" entered); *U.S. v. Sawyer*, 144 F.3d 191, 196 (1st Cir. 1998)(even though not an enumerated offense along with "burglary of a dwelling, breaking and entering of a building fits into clause for offenses that "otherwise involve conduct that presents a serious risk of physical injury to another," and thus qualifies as COV). *United States v. Wright*, 340 F.3d 724 (8th Cir. 2003) (burglary of dwelling even without victim present is COV)

2. **"CONTROLLED SUBSTANCE OFFENSE"**

Definition found in U.S.S.G. § 4B1.2(b).

The term involves an offense (punishable by imprisonment exceeding one year) under federal or state law:

that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a

controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute or dispense.

Think “trafficking” in drugs. Simple possession or use is not enough. Generally, prior drug convictions provide much less room for argument as to whether a given prior conviction qualifies as a predicate for Career Offender purposes. There are a few areas, however, where doors can be opened.

a) SIMPLE POSSESSION NOT A QUALIFYING PREDICATE

See U.S. v. Neal, 27 F.3d 90, 92 (4th Cir. 1994); *U.S. v. Vea-Gonzales*, 999 F.2d 1326, 1329, n.1 (9th Cir. 1993); *U.S. v. Gaitan*, 954 F.2d 1005, 1011 (5th Cir. 1992); *U.S. v. Galloway*, 937 F.2d 542, 549 (10th Cir. 1991); *U.S. v. Tremble*, 933 F.2d 925, 929 (11th Cir. 1991). Because simple possession is not a predicate, if the particular statute of prior conviction includes simple possession among the actions criminalized, the sentencing court will have to look beyond the statute to determine what action defendant was actually convicted of.

b) VARIATIONS OF C/S OFFENSES: AIDING & ABETTING, CONSPIRACY, SOLICITATION, FACILITATION . . .

Conviction for conspiring to commit a drug offense qualifies as a C/S offense. U.S.S.G. § 4B1.2, comment (n.1); *see also, U.S. v. Lightbourn*, 115 F.3d 291, 293 (5th Cir. 1997); *U.S. v. Seals*, 130 F.3d 451, 463 (D.C. Cir. 1997). Application note 1 also specifies that aiding and abetting, and attempt offenses involving C/S offenses are Career Offender predicates.

Other offenses, however, that may seem analogous to conspiracy or aiding and abetting, do not necessarily qualify as predicates. *See, e.g., U.S. v. Dolt*, 27 F.3d 235, 238 (6th Cir. 1994) (prior Fla. conviction for solicitation to traffic in cocaine not a C/S offense where the Fla. solicitation statute was general, not applying to drugs specifically, and did not require intent to commit the underlying offense; also, Sentencing Guidelines did not specify that solicitation offenses should be included.); *U.S. v. Liranzo*, 944 F.2d 73, 79 (2d Cir. 1991) (prior NY state conviction for criminal facilitation did not have as an element the intent to commit the underlying offense, which here involved drugs, and therefore could not qualify as C/S offense); *U.S. v. Wagner*, 994 F.2d 1467, 1474 (10th Cir. 1993) (possession of a listed chemical with intent to manufacture a controlled substance is not a C/S offense where the chemical was not itself a controlled substance). In accord: *United States v. Waltermann*, 343 F.3d 938 (8th Cir. 2003) (lithium is not a listed chemical).

c. MAINTAINING A PLACE TO FACILITATE A C/S OFFENSE

An example in Application Note 1 to § 4B1.2 further suggests the importance of looking at the statute of conviction, and the underlying facts. This note addresses 21 U.S.C. 856, maintaining a place for purpose of facilitating drug offense. In what seems to be circular reasoning, the note states that 21 U.S.C. § 856 is a C/S offense

if the drug offense facilitated is itself a C/S offense. Essentially, where the client has a prior conviction under this (or a similar) statute, it would be necessary to determine what client actually pled to using the place for: the conviction may not be a C/S offense if the place was maintained to facilitate drug use. See *U.S. v. Baker*, 16 F.3d 854, 857 (8th Cir. 1994) (remanding, because jury conviction, for prior violation of 21 U.S.C. § 856, was vague, and sentencing court needed to determine whether conviction was for managing residence for drug distribution - a c/s offense, or for drug use - not a c/s offense).

D. DOWNWARD DEPARTURES AND ROLE ADJUSTMENTS

No minor role reduction if sentence would result in an offense level below career-offender minimum. *United States v. Perez*, 328 F.3d 96 (2nd Cir. 2003); *United States v. Jeter*, 329 F.3d 1229 (11th Cir. 2003) (no minor role adjustment; rule of lenity does not apply)

Downward departure argument: career offender status overstated seriousness of defendant's criminal history rejected. *United States v. Hutman*, 339 F.3d 773 (8th Cir. 2003); *United States v. Diaz*, 296 F.3d 680 (8th Cir. 2002) (en banc).

Downward departures for over representation criminal history specifically provided for in U.S.S.G. § 4A1.3 but district court cannot make a comparison between defendant and "ordinary" or usual Category VI defendant who has 12 criminal history points under U.S.S.G. § 5K2.0; court must look at whether defendant falls outside "heartland" of most career offenders. *United States v. Adams*, 329 F.3d 1196 (11th Cir. 2003). Defendant denied downward departure. He did not challenge CO status but argued criminal history over representative because defendant young at time of conviction, conviction only for marijuana, least serious class of convictions and suspended sentence. COA said denial not reviewable. *United States v. Ridge*, 329 F.3d 535 (6th Cir. 2003).

E. PROOF AT SENTENCING

Under categorical approach outlined in *Taylor v. U.S.*, 495 U.S. 575 (1990) (infra), trial court to look only to the fact of conviction and statutory definition of the prior offense. Where statutory definition may include both violent and non-violent offenses, court may look to charging document and jury instructions. Here court looked to police report. Police report permitted to confirm conviction where defendant did not object and failed to challenge accuracy of copy of police report attached to PSR. *U.S. v. Delgado*, 288 F.3d 49 (1st Cir. 2002).

II. DETERMINING IF CLIENT IS AN ARMED CAREER CRIMINAL U.S.S.G. § 4B1.4 & 18 U.S.C. 924(e)

A. REQUIREMENTS:

Client presently charged with 18 U.S.C. 922(g) (felon in possession)
Client has THREE (3) prior convictions for either:

1) a "serious drug offense." - (18 U.S.C. § 924(e)(2)(A)),

OR

2) a “violent felony” - (18 U.S.C. § 924(e)(2)(B))

The three prior convictions must have been committed “on occasions different from one another.” 18 U.S.C. 924(e)(1). The prior felonies must have been punishable by 10 years or more. 18 U.S.C. § 924

B. REVIEWING DEFINITIONS: IS THE PRIOR A “SERIOUS DRUG OFFENSE” OR A “VIOLENT FELONY?”

1. “VIOLENT FELONY”

Under 18 U.S.C. § 924(e)(2)(B), “violent felony” means: *any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –*

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another

Despite different definitions, the determination of what predicate convictions qualify as “violent felonies” or “serious drug offenses” under the ACCA is very similar to those that qualify as COVs or C/S offenses under the Guidelines’ Career Offender provision. *See, e.g., U.S. v. Delgado*, 288 F.3d 49, 53 (1st Cir. 2002)(“Although the definition of “violent felony” is not identical to the definition of “crime of violence,” we look generally to cases pertaining to either provision to ‘elucidate the nature of the categorical inquiry.’”), *citing U.S. v. Shepard*, 231 F.3d 56, 63, n.7 (1st Cir. 2000). One difference in interpretation, involving whether to include aiding and abetting, conspiracy, and attempt to commit a violent felony, is discussed below.

Once again, as with the Career Offender definition of “crime of violence,” the ACCA definition of “violent felony” includes the nebulous language “otherwise involves conduct that presents a serious potential risk of physical injury to another.” Some examples of how the “violent felony” provision has been interpreted are provided below.

a. EXAMPLES

- i. ESCAPE FROM CUSTODY: A prior conviction for escape from a custodial facility has been held, in all circuits to address the question, to be a crime involving a serious potential risk of physical injury to another.” *U.S. v. Jackson*, 301 F.3d 59 (2d. Cir. 2002) (Florida escape statute); *U.S. v. Hairston*, 71 F.3d 115 (4th Cir. 1995)(felony escape under N.C. statute);

U.S. v. Houston, 187 F.3d 593 (6th Cir. 1999) (1966 Tennessee escape statute); *U.S. v. Moudy* 132 F.3d 618 (10th Cir. 1998) (court does not reference statute of conviction, but makes general finding that escape is a “violent felony,” just as it is a COV under *Gosling* (above)); *U.S. v. Franklin*, 302 F.3d 722 (7th Cir. 2002); *U.S. v. Abernathy*, 277 F.3d 1048 (8th Cir. 2002) (doesn't matter that defendant “merely walked away”).

- ii) POSSESSION OF FIREARM BY FELON: Some courts have found that, because possession of a firearm by a felon is not a “crime of violence” for Career Offender purposes, it cannot be deemed a “violent felony,” since 924(e) uses the same language as the Career Offender provision to define “violent felony.” *See Royce v. Hahn*, 151 F.3d 116, 120 (3rd Cir. 1998); *U.S. v. Hill*, 131 F.3d 1056, 1062 (D.C. Cir. 1997); *U.S. v. Oliver*, 20 F.3d 415 (11th Cir. 1994); *U.S. v. Garcia-Cruz*, 978 F.2d 537 (9th Cir. 1992); *U.S. v. Doe*, 960 F.2d 221 (1st Cir. 1992). Following the Career Offender analysis that weapons in prison present a “serious potential risk of physical injury,” the Tenth Circuit has held that conveying a firearm in a federal prison is a “violent felony” under the ACCA. *U.S. v. Romero*, 122 F.3d 1334, 1340-41 (10th Cir. 1997).
- iii) AIDING & ABETTING, CONSPIRACY, ATTEMPT: Unlike the Sentencing Guidelines, which specify that aiding and abetting, conspiracy, and attempt crimes can qualify as predicates offenses for Career Offender purposes if the underlying offense is a COV or C/S offense, the ACCA does not specifically include these offenses where offenses involving a “serious potential risk of physical injury” are concerned. *See* U.S.S.G. § 4B1.2, comment (n.1); *see U.S. v. Martinez*, 954 F.2d 1050, 1054 (5th Cir. 1992)(noting that the ACCA does not include attempts, and holding that a conviction for attempted burglary under Texas law, because it does not require an entry into a building, does not involve conduct that “presents a serious potential risk of physical injury,” and therefore does not qualify as “violent felony.”); *U.S. v. Strahl*, 958 F.2d 980, 984 (10th Cir. 1992)(finding that although Utah burglary statute includes all the elements of common law burglary, conviction under Utah attempted burglary law does not require an entry, and therefore does not constitute a violent felony under ACCA); *U.S. v. Weekley*, 24 F.3d 1125 (9th Cir. 1994)(same, with respect to conviction for attempted burglary under law of Washington state); *U.S. v. Anderson*, 989 F.2d 310, 313 (9th Cir. 1993)(conviction for attempting to get money by threatening harm, being only an attempt, did not constitute “extortion” and thus was not a “violent felony” under ACCA); *see also, U.S. v. Jackson*, 113 F.3d 249, 253 (D.C. Cir. 1997)(recognizing that Md. attempted housebreaking conviction may not qualify as violent felony); *but see, U.S. v. Collins*, 150 F.3d 668, 671 (7th Cir. 1998)(conviction for attempted burglary under Wisc. statute could not be sustained without having created a serious potential risk of physical injury to another); *U.S. v. Bureau*, 52 F.3d 584, 593, (6th Cir. 1995); *U.S. v.*

Andrello, 9 F.3d 247, 250 (2nd Cir. 1993)(attempted 3rd degree burglary under NY law, which required more than “mere preparation” to commit a burglary, is a violent felony).

Despite the fact that the ACCA does not include a reference to these offenses, some have been found to be predicates nonetheless. *See, e.g., U.S. v. Hawkins*, 139 F.3d 29, 33 (1st Cir. 1998)(reasoning that interpretations of COV are persuasive in reading ACCA, and therefore finding that prior conviction for conspiracy to commit armed robbery was qualifying predicate to defendant's being sentenced under ACCA). The reasoning of such holdings, however, should be analyzed, because some cases leave open the possibility that a conviction for such an offense may not always qualify as a predicate, if the actual findings made in the previous conviction do not encompass the conduct sought to be reached in the ACCA. *See U.S. v. Davis*, 16 F.3d 212, 218 (7th Cir. 1994)(attempted burglary conviction under Ill. law qualified as predicate for ACCA absent proof, evidenced by charging paper or jury instructions, that predicate attempted burglary conviction was not based on type of conduct encompassed within generic burglary definition of unlawful entry into building).

- iv) BURGLARY: Unlike the Career Offender provision, the ACCA does not limit the scope of “violent felony,” to “burglary of a dwelling.” Here, therefore, the Career Offender “crimes of violence,” and the ACCA’s “violent felony,” differ distinctly. *See generally, Taylor v. U.S.*, 495 U.S. 575, 598-99 (1990); *see also, U.S. v. Wilson*, 168 F.3d 916, 926 (6th Cir. 1999). Because of the ACCA does not narrow the qualifying predicate of burglary to “dwellings,” burglaries of buildings more generally, can qualify as predicate convictions for ACCA purposes. *See U.S. v. Woods*, 233 F.3d 482 (7th Cir. 2000)(Illinois conviction for burglary of an unoccupied, closed commercial building is “violent felony” under ACCA).

The defense battle ground for challenging a prior state burglary conviction usually entails a state statute that includes in its definition of burglary not only buildings, but cars, boats, and other items beyond the traditional “building,” considered in common law burglary. In such instances, the sentencing court, per *Taylor*, 495 U.S. at 602, will have to examine underlying documents (indictment, judgment of conviction . . .), to determine, if possible, the precise conduct for which the defendant previously was convicted. *See, e.g., U.S. v. Cooper*, 302 F.3d 592, 596 (6th Cir. 2002)(although Ohio statute criminalized entering into structures other than buildings, where indictment specified a building only was involved, jury must have found defendant entered a building, and therefore defendant had been convicted of burglary within the meaning of ACCA); *U.S. v. Stephens*, 237 F.3d 1031 (9th Cir. 2001) (considering Alaska burglary statute, which criminalized breaking into “any propelled vehicle or structure adapted for overnight accommodation of persons or for carrying on business;” court looked to prior indictments, and found these referred to buildings in the traditional sense, and therefore convictions under those indictments qualified as ACCA predicates). *See also: U.S. v. Melton*, 334

F.3d 1021 (9th Cir 2003) (Virginia burglary offense is not COV because defined to include breaking and entering dwellings, ships, vessels, railroad cars and automobiles. But, armed robbery under Virginia common law does qualify as COV because definition of taking with the intent to steal the property of another against his will by violence or intimidation. Another area where prior “burglary” convictions might be challenged exists where the statute of conviction does not specify a requisite criminal intent. *See U.S. v. Peterson*, 233 F.3d 101, 109 (1st Cir. 2000)(finding Rhode Island breaking and entering statute could not qualify as “burglary” predicate for ACCA where that statute lacked a criminal intent and Congress defined burglary under ACCA as including a criminal intent requirement).

No “absolute bar” to use of police reports and complaint applications to establish burglary. *U.S. v. Shephard*, 348 F.3d 308 (1st Cir. 2003).

v. SEXUAL CONDUCT INVOLVING MINORS

Alaska statute qualifies as COV where defines sexual contact with a person 18 or younger because of serious potential risk of physical injury to another. *U.S. v. Melton*, 334 F.3d 1021 (9th Cir. 2003); *U.S. v. Moyer*, 282 F.3d 1311 (10th Cir. 2002) (sexual assaults on children under 12).

vi. OTHER OFFENSES

Flight to avoid arrest is a crime of violence. *U.S. v. Howze*, 343 F.3d 919 (7th Cir. 2003). Resisting arrest may be a COV. *U.S. v. Wardrick*, 350 F.3d 446 (4th Cir. 2003). Robbery where defendant steals a bicycle from its rider was held a crime of violence because of the risk of injury. *Id.* Most circuits hold that theft from a person is a crime of violence under ACCA. *U.S. Griffith*, 301 F.3d 880 (8th Cir. 2002); *U.S. v. Payne*, 163 F.3d 371 (6th Cir. 1998). Armed robbery is a COV under Virginia common law according to the Ninth Circuit. *U.S. v. Melton*, 334 F.3d 1021 (9th Cir. 2003). Armed robbery even where none of Indiana conviction elements showed use or attempted use of force and the crime was not a listed offense, crime still COV where qualified under “otherwise” prong of 18 U.S.C. § 924 (e) (2) (B), i.e. presented serious risk of physical injury to another. PSR said only conviction for “felony while armed”. *U.S. v. Hurlich*, 348 F.3d 1219 (10th Cir. 2003).

2. “SERIOUS DRUG OFFENSE”

A “serious drug offense” is defined in 18 U.S.C. § 924(e)(2)(A) as:

An offense under the Controlled Substances Act (21 U.S.C. § 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C.

951 et seq.), the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

An offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in Section 102 of the Controlled Substances Act, 21 U.S.C. 802), for which a maximum term of ten years or more is prescribed by law.

As noted earlier in this section, courts have relied upon Career Offender cases in determining whether a particular offense is a predicate under the ACCA, and vice versa. *See U.S. v. Brandon*, 247 F.3d 186, 192, n.3 (4th Cir. 2001); *U.S. v. Shepard*, 231 F.3d 56, 62, n.7 (1st Cir. 2000) (“despite the differences between 4B1.1 and 924(e)(2), the categorical approach applies to both provisions and we may look to the 4B1.1 cases to elucidate the nature of the categorical inquiry”). The section above, addressing “controlled substance offenses,” and the Taylor categorical approach, discussed below, should be referred to.

Aiding and abetting offenses, attempts and conspiracies are not specifically included in the ACCA definition of “serious drug offense.”

Despite the ACCA’s silence regarding these inchoate offenses, two cases worth noting have held that the ACCA definition of “serious drug offense” does include conspiracy. *U.S. v. King*, 325 F.3d 110, 113 (2nd Cir. 2003) (fact that under New York law, person could be convicted of attempt to commit an offense only if shown that he came “within dangerous proximity to the criminal end to be attained,” made conviction for attempted possession of cocaine a “serious drug offenses” within ACCA meaning); *U.S. v. Trope*, 31 F.Supp.2d 417, 421-22 (M.D. Pa. 1997)(conspiracy to deliver methamphetamine is “serious drug offense” under ACCA; the elements of the underlying offense are subsumed in Pa.’s conspiracy statute).

C. REVIEWING THE PRIORS

As noted earlier, prior convictions count forever, for purposes of the Armed Career Criminal Act. *See U.S. v. Wright*, 48 F.3d 254 (7th Cir. 1995). That is, although priors may be too old to count in criminal history under the Guidelines, they still can be predicates under the Armed Career Criminal Statute. *See U.S.S.G. § 4B1.4*, comment (n.1).

Moreover, the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony. 18 U.S.C. § 924(e)(2)(C).

Nonetheless, there is language (somewhat buried) in the ACCA that leaves some room for discussion as to whether certain priors actually qualify as predicates . . .

1. “COMMITTED ON OCCASIONS DIFFERENT FROM ONE ANOTHER”

The ACCA’s references to prior offenses having been “committed on occasions different from one another” does not have the same meaning as the Guideline’s relatedness concept of “committed on the same occasion.” See *U.S. v. Moreno-Arredondo*, 255 F.3d 198, 206-07 (5th Cir. 2001).

Unfortunately, the ACCA meaning of “committed on occasions different from one another” has been interpreted quite narrowly, such that the focus becomes whether the victims are different, or the time of commission of the crimes is not the same. *U.S. v. Hobbs*, 136 F.3d 384, 388, n.8 (4th Cir. 1998)(comparing ACCA analysis with Career Offender concept of “related cases,” and noting ACCA focuses on whether the convicted offenses were perpetrated on different victims at different times). See also: *U.S. v. Deroo*, 304 F.3d 824 (4th Cir. 2002) (three burglaries of three different cabins on three different lakes with three different owners, even where occurred within one hour of each other were separate crimes).

2. “CONVICTED IN ANY COURT OF A CRIME PUNISHABLE BY A TERM EXCEEDING ONE YEAR”

The ACCA states that its provisions are triggered by “three previous convictions by any court referred to in section 922(g)(1).” 18 U.S.C. § 924(e)(1). In turn, section 922(g)(1) refers to “any person who has been convicted in any court, of a crime punishable by imprisonment for a term exceeding one year.” One has to refer to the definitions section of the statute to find the meaning of the term “crime punishable by a term exceeding one year.” 18 U.S.C. § 921(a)(20). The term does *not* include:

- (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices,*
- or*
- (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.*

What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which rights restored shall not be considered a conviction for purposes of this chapter, unless such a

pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

18 U.S.C. § 921(a)(20)

Of note here is the language barring from consideration as a predicate a prior State misdemeanor (as so-labeled by the state where the conviction was sustained) that is *punishable by two years or less*.

3. “CONVICTED IN ANY COURT:” FOREIGN CONVICTIONS?

Circuits are split on whether, and when, foreign convictions can count as predicates under the ACCA. *See U.S. v. Concha*, 233 F.3d 1249, 1256 (10th Cir. 2000)(There are policy reasons to believe that Congress intended to include previous foreign convictions (foreign criminals are likely to be as dangerous as domestic criminals), but there are equally strong policy reasons to believe that Congress did not so intend (unfair foreign convictions can be challenged with difficulty, if at all). The legislative history does not illuminate the meaning of "convictions by any court." For these reasons, and contrary to the Fourth and Sixth Circuits, we believe that the statute is ambiguous. In such a situation, we are guided by the rule of lenity, that we "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended."). *But see, U.S. v. Atkins*, 872 F.2d 94 (4th Cir. 1989) (conviction in English Crown Court for unlawful possession of a firearm counts as predicate under ACCA); *U.S. v. Winson*, 793 F.2d 754 (6th Cir. 1986) (Swiss conviction can serve as predicate under ACCA); *U.S. v. Small*, 183 F.Supp 2d 755 (W.D. Pa. 2002) (Japanese conviction counts as predicate for ACCA).

4. JUVENILE DELINQUENCY

As noted in the definition of “violent felony,” a juvenile adjudication can count as a predicate if it involved “the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult.” 18 U.S.C. § 924(e)(2)(B). The 9th Circuit, however, has held that juvenile adjudications that did not afford the defendant the procedural necessities of a jury trial and proof beyond a reasonable doubt cannot be used to enhance a sentence under the ACCA. *U.S. v. Tighe*, 266 F.3d 1187, 1195 (9th Cir. 2001); *but see, U.S. v. Smalley*, 294 F.3d 1030, 1033 (8th Cir. 2002)(because juvenile defendants have the rights to notice, to counsel, to confront and cross-examine witnesses, and the privilege against self-incrimination, they can be characterized as “prior convictions” which can be used to enhance sentences). Where the government seeks to enhance a sentence based upon a prior juvenile adjudication, therefore, at least Tighe calls for an examination not only of the “violent felony” alleged in the prior adjudication, but also of the particular state juvenile procedure rules applied.

More generally, the categorical approach (discussed below) must be applied to determine whether the particular juvenile prior required a finding that the weapon

was used. If the prior did not entail such a finding (or an admission to that element), that prior likely will not qualify as a predicate under the ACCA. *See U.S. v. Richardson*, 313 F.3d 121, 125-27 (3rd Cir. 2002)(Defendant's prior state court juvenile adjudication for robbery, criminal conspiracy, theft by unlawful taking, receiving stolen property, simple assault, and possessing an instrument of crime could not be counted as predicate offense under ACCA where none of the criminal statutes underlying the juvenile adjudication required fact finder to find that defendant used a firearm, knife, or other destructive device, nor was it otherwise unequivocally established that defendant committed violent felony during commission of juvenile offenses).

III. U.S. v. TAYLOR: THE CATEGORICAL APPROACH

A. THE PRINCIPLE

Taylor v. U.S., 495 U.S. 575 , 602, 110 S.Ct. 2143 (1994), holds that a sentencing court must look only to the statutory definition of the prior offense, not the underlying facts, to determine whether a prior conviction is a violent felony. *Id.* at 600. Although *Taylor* involved an ACCA enhancement, its holding has been applied to the analysis of all sentencing enhancements, including the Career Offender Guideline enhancement.

At times, the defense may want the court to look at the underlying conduct, because it mitigates what the bare criminal record shows. *Taylor's* categorical approach usually precludes such an inquiry – unless the indictment or charging document is vague as to what the client actually was found guilty of. For example, in *U.S. v. Allen*, 282 F.3d 339 (5th Cir. 2002) the COA said the trial court could not reclassify the prior drug conviction based on the police report which showed the defendant delivered less than 1/4 gram of crack. The defendant pleaded guilty to a charge of delivering less than 28 grams of cocaine. Under current state law, the offense no longer qualified as a “serious drug offense.” The COA reversed holding the trial court could not look to the police report for quantity even though the indictment did not state an actual quantity of drugs. However, defense counsel should argue that a look at the underlying case’s PSR or plea colloquy is permissible under *Taylor*, and may also have the collateral beneficial effect of fleshing out some mitigating circumstances in the prior conviction.

B. THE “MODIFIED” CATEGORICAL APPROACH: GETTING BEYOND THE PRIOR STATUTE OF CONVICTION

Where the prior statute of conviction is ambiguous (for example, whether the prior conviction requires “physical force” as an element), the sentencing court, can look at the indictment, the judgment of conviction or other similar document, the transcript of guilty plea colloquy, to determine the actual elements found to convict the defendant of the prior. *See, e.g., U.S. v. Jackson*, 177 F.3d 628, 631 (7th Cir. 1999); *U.S. v. Hill*, 131 F.3d 1056 (D.C. Cir. 1997)(remanded to determine whether prior conviction for attempted robbery qualified as COV where statutory definition of attempted robbery here included non-violent conduct; sentencing court erred in relying only on indictment); ; *U.S. v. Bennett*, 108 F.3d 1315, 1317 (10th Cir. 1997); *U.S. v. Watkins*, 54 F.3d 163 (3^d Cir. 1995); *U.S. v. Spell*, 44 F.3d 936 (11th Cir. 1995); *U.S. v. Smith*, 10 F.3d. 724, 733 (10th Cir. 1993)(also

holding that ambiguities in statutory language should be resolved “in favor of narrowly interpreting the Career Offender provisions”). Although state law is not controlling, a federal court may look at a state’s interpretations of a statute, to determine if the particular offense is a COV or C/S offense. *U.S. v. Wood*, 52 F.3d 272 (9th Cir. 1995), n.4. At times, however, an inquiry into underlying conduct is not necessarily beneficial to a client. In some circumstances, advocating for a strict categorical approach that looks only to the charging document and count of conviction, can be the best position for the client. *See, e.g., U.S. v. Hicks*, 122 F.3d 12 (7th Cir. 1997) (where original charge indicated defendant charged with burglary of a dwelling – a COV – but defendant ultimately pled to burglary of a building, district court could not “peek behind the information” to find that the burglary was actually one of a dwelling); *U.S. v. Gaitan*, 954 F.2d 1005, 1008 (5th Cir. 1992)(error for district court to look at defendant’s underlying conduct, resulting in the prior conviction for possession being viewed as a possession with intent); *but cf. U.S. v. Delgado*, 288 F.3d 49, 56 (1st Cir. 2002)(district court could rely on police report to determine that prior burglary involved a dwelling, and therefore could serve as predicate for Career Offender sentencing enhancement).

Where the conduct that occurred in an underlying case is more prejudicial than the actual conviction on record, the government should be reminded that the conduct originally charged is not relevant - only those acts for which defendant was convicted are to be analyzed in determining whether a qualifying predicate offense is present. The Career Offender provision specifies this point in U.S.S.G. § 4B1.2, comment (n.2). *See also, U.S. v. Arnold*, 58 F.3d 1117 (6th Cir. 1995)(adopting a strict categorical approach, where “ ‘it is not only impermissible, but pointless for the court to look through to the defendant’s actual criminal conduct’ ”), quoting *U.S. v. John*, 936 F.3d 763, 767 (3d Cir. 1991); *U.S. v. Wagner*, 994 F.2d 1467, 1474 (10th Cir. 1993)(offense charged, rather than that offense and all relevant conduct, is controlling for purposes of determining whether a qualifying predicate for Career Offender purposes).

1. WHAT EVIDENCE MAY THE COURT CONSIDER?

Certificates of disposition from county clerk, stating that the "records on file indicate" that the defendant's prior convictions were for criminal possession of a controlled substance with intent to sell, did not conclusively indicate the statute of conviction, so as to establish predicate offenses for Career Offender sentencing enhancement, and thus defendant was entitled to rely on easily produced court documents, such as a plea colloquy, in order to establish that he was not convicted of a statute qualifying as a predicate offense, where it was not clear what records the clerk relied on or whether he read them correctly, and though the indictments charged defendant with possession with intent to sell, it was not clear that this was the statutory offense to which he pleaded guilty. *U.S. v. Hernandez*, 218 F.3d 272, 278-79 (3rd Cir. 2000); *see also, generally, U.S. v. Franklin*, 235 F.3d 1165, 1170 (9th Cir. 2000) (providing review of 9th Circuit cases indicating what documents can and cannot be considered to show predicates) *and U.S. v. Matthews*, 278 F.3d 880 (9th Cir. 2002) (en banc) (priors for burglary and attempted burglary: PSR gave description of crimes but did not include specific statutes of conviction or certified copies of judgments. COA said court may use PSR plus “a variety of sources

including the statutes of conviction themselves”, “copies of the judgments of conviction” or “other documentary evidence that ‘clearly establishes’ the statutes under which [the defendant] was convicted or the elements of those statutes.” Moreover, remand for re-sentencing was on an “open record”.

Where jury instructions are not available, charging papers alone are not sufficient to determine if a prior jury conviction was for a “violent felony” under section 924(e). *U.S. v. Parker*, 5 F.3d 1322, 1327 (9th Cir. 1993)(reasoning that the *Taylor* inquiry focuses on ensuring that the jury actually found all the requisite facts to render the offense a “violent felony”). Charging papers are also insufficient when accompanied with a PSR. *U.S. v. Franklin*, 235 F.3d 1165, 1172 (9th Cir. 2000).

A district court may not rely on arrest affidavits to prove whether the prior conviction is “controlled substance offense” for Career Offender purposes; the conduct for which defendant is convicted is all that counts. U.S.S.G. § 4B1.2, comment (n.3); *U.S. v. Hernandez*, 145 F.3d 1433 (11th Cir. 1998). In the 11th Circuit case of *Hernandez*, the defendant had a prior conviction under a Florida statute that made it unlawful “for any person to sell, purchase, manufacture, deliver, or possess with the intent to sell a controlled substance.” The judgment of conviction did not make clear which of those actions the defendant was actually convicted of; since purchasing drugs is not a C/S offense, district court looked at affidavits of arrest to clarify the nature of offense defendant was arrested for. On remand, the district court was instructed only to look at “easily produced and evaluated court documents, such as any helpful plea agreements or plea transcripts, any presentencing reports adopted by the sentencing judges, and any findings made by the sentencing judges” in the underlying case.

2. CAN UNDERLYING CONDUCT BE USED AS BASIS FOR DOWNWARD DEPARTURE?

A limited inquiry into defendant’s underlying conduct in prior case may be made to determine if a downward departure is warranted. *U.S. v. Harris*, 165 F.3d 1062, 1068 (6th Cir. 1999); *see also, U.S. v. Hill*, 131 F3d. 1056, 1064 (D.C. Cir. 1997); *U.S. v. Spell*, 44 F3d 936, 939 (11th Cir. 1995).

V. BURDEN OF PROOF TO SHOW PRIOR CONVICTIONS

A. PREPONDERANCE OF EVIDENCE

Initially, the burden is on the government to show the existence of the prior conviction. If the defendant challenges the validity of that prior, then the burden generally shifts to the defendant to show a procedural defect. As discussed further below, the only defect a defendant may raise against a prior conviction in a subsequent sentencing proceeding is a violation of the Sixth Amendment right to counsel.

The government must demonstrate the existence and nature of the prior by a preponderance of the evidence. Some courts, however, have found that the government

may be held to a higher standard, where the prior conviction enhances the sentence markedly. A summary of how most of the circuits have handled this notion is provided below.

B. CAN THE GOVERNMENT BE HELD TO A “CLEAR AND CONVINCING EVIDENCE” STANDARD OF PROOF TO SHOW THE PRIOR PREDICATES?

1. YES, AT TIMES:

Most circuits have recognized that where an enhancement has a disproportionate impact on a client’s sentence, a higher standard of proof than the customary “preponderance of evidence” standard applied at sentencing, may be required. Courts are fond of stating that the sentence enhancement must not become “the tail that wags the dog of the substantive offense.” *McMillan v. Pennsylvania*, 477 U.S. 79, 88, 106 S.Ct. 2411 (1986). Circuits differ widely, however, regarding when an enhancement’s impact is disproportionate enough to trigger a higher standard of proof. The following is a list of some cases in which a higher standard of proof was applied. *U.S. v. Jordan*, 256 F.3d 922 (9th Cir. 2001); *U.S. v. Mezas de Jesus*, 217 F.3d 638 (9th Cir. 2000); *U.S. v. Hopper*, 177 F.3d 824 (9th Cir. 1999); *U.S. v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990); *U.S. v. Julian*, 922 F.2d 563 (10th Cir. 1990).

2. YES, BUT WHO KNOWS WHEN:

The following cases acknowledged that a higher standard of proof should be applied to prove an enhancement in certain instances, without deciding when. *U.S. v. Geraldts*, 158 F.3d 977 (8th Cir. 1998); *U.S. v. Billingsley*, 978 F.2d 861 (5th Cir. 1992); *U.S. v. Concepcion*, 983 F.2d 369 (2d. Cir. 1993).

3. NOT LIKELY:

The Seventh and Fourth Circuits have consistently rejected the application of a higher standard of proof for any sentencing enhancements. *See U.S. v. Ewers*, 54 F.3d 419 (7th Cir. 1995); *U.S. v. Urrego-Linares*, 879 F.2d 1234 (4th Cir. 1989).

V. CHALLENGING THE PRIOR CONVICTION

Not infrequently, clients contend that a prior conviction or another is false, or was based on incorrect facts. As a result of the Supreme Court’s decision in *Custis*, there is nothing an attorney can do about such claims, once that prior conviction is final, and appeals are exhausted or waived. In *Custis v. U.S.*, 511 U.S. 485, 114 S.Ct. 1732 (1994), the Supreme Court held that, other than an attack on a violation of the right to counsel, a defendant being sentenced under the ACCA otherwise has no right to collaterally attack his prior state convictions at the time of the federal sentencing. *Id.*; *see also, U.S. v. Daniels*, 532 U.S. 374, 121 S.Ct. 1578 (2001) (extending *Custis* to 2255 proceedings, and finding that a defendant cannot challenge a federal sentence based on an allegedly invalid prior conviction

used to enhance that federal sentence.) This approach (questioning the prior conviction), therefore, is not likely to be the most fruitful.

A. RAISING A VIOLATION OF RIGHT TO COUNSEL

Custis still leaves the following questions regarding any prior conviction: Was the client represented by counsel? If not, did the client waive counsel? If there was a waiver of counsel, was it knowing and voluntary?

It is most likely that the defense will bear the burden of showing that the right to counsel was violated. In strategizing a means of raising a violation of the right to counsel, it is helpful to consult the line of cases arising out of *Alabama v. Shelton*, 535 U.S. 654, 122 S.Ct. 1764 (2002). Although this case does not relate to the Career Offender or ACCA provisions, it has and will continue to generate case law regarding the impact of prior offenses on sentencing, Sixth Amendment violations and how to establish such violations. In *Shelton*, the Supreme Court held that the Sixth Amendment does not permit activation of a suspended sentence upon an indigent defendant's violation of the terms of his probation, where the State did not provide him counsel during the prosecution of the offense for which he is imprisoned. In response to *Shelton*, some districts are raising the argument that a prior uncounseled misdemeanor cannot be counted in a defendant's criminal history. District courts are responding in several ways. While some districts are dismissing the argument outright, some districts are holding hearings to determine whether a particular defendant was represented in the previous case sought to be counted. In some areas, the government is given the burden to show the prior misdemeanor was not obtained without counsel; in at least one of these districts, the prosecutor on the former case may be called to attest that the individual had an attorney at the time of the misdemeanor. In other districts, a presumption of regularity is given to the prior conviction, and the defense is given the burden to show that the conviction was obtained in violation of the right to counsel (that is, there was none, and the waiver was not knowing and voluntary).

With sentencing enhancements under the Career Offender provision and the ACCA, the defense can follow similar procedures to raise the question of a Sixth Amendment violation – bearing in mind that this area is not the most fruitful for the defense . . .

B. WHAT IF PRIOR CONVICTION IS STILL BEING REVIEWED AT TIME OF FEDERAL SENTENCING?

A defendant can, however, reopen federal sentencing proceeding if defendant was successful in challenging a prior conviction that served as predicate for federal sentencing enhancement. Because of this right to reopen sentencing, a defendant who has not yet challenged the prior conviction, or who is in the midst of challenging it, may not be able to postpone the federal sentencing pending the results of the challenge to the prior – federal sentencing proceeding may proceed, and defendant is free to later challenge the enhancement. *U.S. v. Doe*, 239 F.3d 473, 475 (2d Cir. 2001); *U.S. v. Turner*, 183 F.3d 474, 477 (6th Cir. 1999)(defendant cannot challenge prior state conviction in federal sentencing; must proceed in state court first - or through 2254 petition - then reopen federal sentencing).