

Analyzing Presentence Reports and Common Sentencing Issues in Illegal Reentry Cases

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The purpose of this memo is to orient attorneys to some of the major issues involved in sentencing for illegal reentry cases. Among other things, it presents a method for determining what the appropriate enhancement level should be, explains some of the arguments that can be used in challenging enhancements and criminal history, and provides some common arguments for a below-guidelines sentence based both on the guidelines and 18 U.S.C. § 3553(a) factors.

The memo explains the issues in some detail and provides some case law in support of the arguments we advance. We have compiled the list of issues from cases that some of the attorneys from both Districts have had over the last several years. It is by no means comprehensive, and we hope to continue adding to it.

The memo covers four distinct areas, or types, of arguments. The first, which we call “external defects,” are arguments which apply regardless of the type of enhancement alleged. If the defense can prevail on any of these arguments, then the government has failed to prove the enhancement regardless of what kind of enhancement it is (i.e., aggravated felony, crime of violence, etc.). The second set of arguments can broadly be called “categorical approach” arguments; they concern whether the Pre-Sentence Report (hereinafter “PSRs”) has correctly categorized the conviction used for enhancement as a drug trafficking offense, crime of violence, firearms offense, or one of the other listed enhancement categories. These arguments typically involve comparing the elements of the statute of conviction with the elements as defined in the Guideline definition of the particular enhancement involved. The third set of arguments has to do with computing the criminal history score. Finally, once it is determined that the guidelines are properly calculated, the memo discusses some arguments for a sentence below the advisory guidelines range based on guideline departure and § 3553(a) factors. Judges are now invited to consider arguments that the within-guideline sentence fail properly to reflect § 3553(a) considerations, reflect an unsound judgment, do not treat defendant characteristics in the proper way, or that a different sentence is appropriate regardless. *Rita v. United States*, 127 S. Ct. 2456, 2465, 2468 (2007). Judges therefore do not abuse their discretion in deciding that even a within-guideline sentence is “greater than necessary” to achieve § 3553(a)’s purposes, even in a mine-run case, based on a disagreement with the Sentencing Commission’s policy choices as reflected in the Guidelines. *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007).

I. “EXTERNAL DEFECTS” IN THE ENHANCEMENT CONVICTION

A. Sufficiency of the Evidence to Support the Enhancement

The general rule continues to be that, to determine the *existence* of a prior conviction for purposes of criminal history calculation, the district court may rely on “any information ... so long as it has sufficient indicia of reliability to support its probable accuracy.” *See United States v.*

Marin-Cuevas, 147 F.3d 889, 894-95 (9th Cir.1998) (internal alterations omitted). Nonetheless, in order to meet its burden of proof for an *enhancement*, we believe the government has to have a judgment of conviction (or the indictment and jury instructions or plea agreement).

Shepard v. United States, 544 U.S. 13 (2005), is the Supreme Court's most recent explanation of its decision in *Taylor v. United States*, 495 U.S. 575 (1990), held that when a court determines whether a crime constitutes a violent felony under the ACCA, the Sixth Amendment requires it to take "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Id.* at 600. Unlike the prior convictions in *Taylor*, which followed jury trials, the prior convictions at issue in *Shepard* were the result of guilty pleas. The Court found "*Taylor's* reasoning controls the identification of ... convictions following pleas, as well as convictions on verdicts." *Shepard*, 125 S.Ct. at 1259. As a consequence, when determining whether a prior conviction resulting from a guilty plea is a violent felony for purposes of the ACCA, a court is limited to an examination of the language of the statute of conviction, "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant..., or to some comparable judicial record of this information." *Id.* at 1262. *See also Taylor v. United States*, 495 U.S. 575, 600 (1990) (rejecting the view that the sentencing court may consider extrinsic evidence when determining whether enhancement applies, and instead requiring judgment or combination of indictment and jury instructions); *United States v. Barney*, 955 F.2d 635, 639 (10th Cir. 1992) (holding that extrinsic evidence i.e., relying solely on convictions mentioned in presentence report cannot support enhancement); *United States v. Martinez-Villalva*, 232 F.3d 1329 (10th Cir. 2000) (holding that state court journal entry by itself insufficient to support enhancement).

At sentencing, the district court may rely on facts in the presentence report unless the defendant objected to them. *See United States v. Shinault*, 147 F.3d 1266, 1277 (10th Cir.1998). However, upon a proper objection by the defendant, the government must prove the disputed fact by a preponderance of the evidence, *see id.* at 1278, and the presentence report itself is insufficient to prove facts contained therein, *see United States v. Farnsworth*, 92 F.3d 1001, 1011 (10th Cir.1996). The mere fact that the government presents an official report does not mean that all the government's contentions relating to that report are true. *See United States v. Cataldo*, 171 F.3d 1316, 1321 (11th Cir. 1999) (holding that a computer printout indicating that the defendant had been arraigned and convicted was insufficient evidence that the defendant had also been arrested on that charge, as the inference, while reasonable, required too much speculation). Thus, computer printouts, abstracts of judgments, evidence from other PSRs, and other "extrinsic" evidence is not sufficient to prove the enhancement. *See United States v. Gutierrez-Ramirez*, 405 F.3d 352 (5th Cir. 2005) (California abstract of judgment could not be used to determine that defendant's prior California drug conviction was a "drug trafficking offense" that could be used to enhance his federal sentence); *United States v. Medina-Covos*, Slip Copy, 2006 WL 2689913 (5th Cir. 2006) (Minute entry stating that defendant pleaded guilty to "violations of section [s] § 11352.A Health and Safety Code in count II" of indictment did not establish prior conviction was for drug trafficking offense, as required to support sentence enhancement for illegal reentry following deportation, where only first paragraph of count II charged violation, which paragraph tracked language of statute, and which language contained acts not encompassed by sentencing guidelines enhancements); *United States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir. 2004) (California abstract of judgment insufficient to prove that prior conviction was for a drug trafficking offense where statute covered non-trafficking conduct); *but see United States v. Zuniga-Chavez*, 464 F.3d 1199 (10th Cir. 2006) (prior convictions

adequately proven by certified docket sheet for one conviction and certified abstract of judgment for another).

While the government or the probation office may try to rely on case law stating that any “reliable evidence” can be used at sentencing, the case law cited above is controlling because it is specific to enhancements, which typically involve a more precise inquiry than other kinds of determinations made at sentencing, in part because the consequences are often very severe. *See United States v. Martinez-Hernandez*, 422 F.3d 1084 (10th Cir. 2005) (applying categorical approach in determining that prior California conviction for weapons possession under Calif. PC § 12020(a)(1) was not a firearms offense for purposes of U.S.S.G. § 2L1.2 enhancement, and rejecting argument that description of prior conduct included in PSR and based on arrest reports could be considered).

B. Uncounseled Convictions

Uncounseled convictions are not scorable, because a violation of the right to counsel is tantamount to a jurisdictional defect, rendering the conviction null and void for all purposes. *See Custis v. United States*, 511 U.S. 485 (1994) (uncounseled convictions cannot serve as basis for statutory enhancement); *United States v. Bacon*, 94 F.3d 158, 163 (4th Cir. 1996) (applying *Custis* to Guidelines, and noting that other circuits have overwhelmingly adopted this approach). Therefore, the government must either prove that the client was represented in the proceedings which led to the conviction used for enhancement, or prove that the right was voluntarily waived. *See United States v. Cruz-Alcala*, 338 F.3d 1194 (10th Cir. 2003) (holding that defendant failed to prove that he unknowingly waived his right to counsel and concluding that prior uncounseled misdemeanor convictions were properly used to calculated criminal history). Once the Government proves a valid conviction the burden is on the defendant to show, by a preponderance of the evidence, that the conviction is constitutionally invalid. *United States v. Osborne*, 68 F.3d 94, 100 (5th Cir. 1995); *United States v. Windle*, 74 F.3d 997, 1001 (10th Cir. 1996). The defendant must make an affirmative showing that the prior conviction is constitutionally invalid. *United States v. Krejcarek*, 453 F.3d 1290, 1298 (10th Cir. 2006). Self-serving statements by a defendant that his conviction was constitutionally infirm are insufficient to overcome the presumption of regularity accorded prior convictions. *Id.*

In general, most of the core documents in the case -- the judgment, the plea agreement, and other similar documents – should have counsel’s signature or name. In other cases, there will be a waiver of the right to counsel which the client has signed or initialed. If no such proof exists, the enhancement should be rejected. One should not assume that the client was represented merely because the right to counsel is generally guaranteed whenever a defendant receives any time in prison or jail; in practice many people are sentenced to jail time without receiving counsel, despite the constitutional rule.

C. Juvenile Prosecuted in Adult Court

Like a violation of the right to counsel, a violation involving a defendant’s age usually creates a defect in the convicting court’s jurisdiction, although this may vary depending on the state law governing juveniles. If the convicting court lacked jurisdiction, the conviction is null and void for all purposes. *See, e.g., Bannister v. State*, 552 S.W.2d 124 (Tex.Crim.App. 1977) (conviction void for lack of jurisdiction where Defendant was tried in adult court because she gave false birth date); *Custis v. United States*, 511 U.S. 485, 496 (1994) (authorizing collateral attack on sentence

imposed in violation of right to counsel because *Gideon* violation “rises to the level of a jurisdictional defect”); *Johnson v. Zerbst*, 304 U.S. 458, 468 n.23 (1938) (holding that jurisdictional defect renders conviction void, and that violation of right to counsel is jurisdictional defect); *In re Nielsen*, 131 U.S. 176, 182 (1889) (“[i]t is firmly established that if the court which renders a judgment has not jurisdiction to render it, either because the proceedings, or the law under which they are taken, are unconstitutional, *or for any other reason*, the judgment is void and may be questioned collaterally.”)(emphasis added). However, the Tenth Circuit has held that a defendant could not collaterally attack his prior conviction on the basis that he was incorrectly sentenced in state court as an adult when he was actually a juvenile at the time. *United States v. Millan-Torres*, 139 Fed.Appx. 105 (10th Cir. 2005).

This issue often arises because clients have lied about their age in order to get processed through adult rather than juvenile court in the state system. To spot this issue, check the date of the prior conviction against the client’s date of birth to determine his age at the time of conviction. If the client was a minor, but the conviction was obtained in adult court, then check the applicable state law to determine what procedures were required for the adult court to obtain jurisdiction. In many states the adult court cannot obtain jurisdiction without first going through a transfer proceeding. It is important to note that the court may require, we believe wrongly, that defendant would be required to seek post-conviction relief for uncertified adult convictions before finding the prior conviction null and void.

D. Non-final Convictions.

Non-final convictions can be used to enhance criminal history, but it can be argued that they cannot be used to increase the defendant’s offense level under U.S.S.G. § 2L1.2. This situation can arise when the defendant’s conviction is on appeal or when the defendant was removed from the United States before sentencing on the prior conviction. It can be argued that, although the term “felony” is defined for purposes of applying U.S.S.G. § 2L1.2(b)(1)(D), see Application Note 1(B)(2), the term “conviction” is not similarly defined. However, the application notes do define the term “aggravated felony,” stating that “‘aggravated felony’ has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43))....” Application Note 1(B)(3)(A). For purposes of the INA, a conviction must include a sentence in the form of punishment or some form of restraint and be final. See 8 U.S.C. § 1101(a)(48)(A)(ii). See also *Pino v. Landon*, 349 U.S. 901 (1955); *Morales-Alvarado v. INS*, 655 F.2d 172, 174-75 (9th Cir. 1981). The definition of “conviction” in 8 U.S.C. § 1101(a)(48) also applies to the term “felony” as used in 8 U.S.C. § 1326(b)(1). Accordingly, for purposes of 8 U.S.C. § 1326, he was not removed “subsequent to a conviction ... for a felony”. Logic and consistency require that a “felony”, like an “aggravated felony,” be final and have a sentence imposed before an offense-level increase under U.S.S.G. § 2L1.2 can be assessed.

II. CHALLENGES UNDER THE CATEGORICAL APPROACH

If there are no “external” problems with the government’s evidence establishing a past conviction, the next step involves doing a categorical analysis of that conviction to determine which enhancement, if any, applies. Put simply, categorical analysis involves comparing the elements of the crime that the client was convicted of with the elements of the crime to which the enhancement applies. *The facts underlying the conviction are irrelevant*; what matters is what the government

had to prove to get the conviction in question. For the government to prove its enhancement, it must show that the statute of conviction contains every element required for the enhancement to apply.

To determine whether or not an enhancement applies under the categorical approach, it is important to locate the exact statute of conviction under which the client was convicted. In addition, if the statute is divided into subsections, it is also important to obtain the charging documents used in your client's particular case. This is important because some subsections of the statute may qualify for enhancement while others do not. Once these have been found, determine what elements the state has to prove in order to obtain a conviction under the statute of conviction. If the charging document contains a subsection, determine the elements which must be proven under that subsection. Then, examine the enhancement which the government or PSR is applying, and determine what elements must be proven for a crime to qualify under the enhancement definition. If the crime contains every element that the enhancement definition contains, then the enhancement applies.

This general method applies to all of the enhancements under Section 1326. Below we discuss its application to the most common enhancements that arise in our cases.¹

A. Enhancement for Felony Drug Trafficking Crime

Under § 2L1.2, the defendant receives a substantial enhancement if convicted of a felony “drug trafficking crime.” If the defendant has such a conviction and received a sentence of greater than 13 months actual imprisonment for it, he or she receives a 16-level enhancement, while a sentence of 13 months or less for a drug trafficking crime triggers a 12-level increase. For an offense to be a drug trafficking crime under the Guidelines, the statute of conviction under federal or state law must contain as an element the “manufacturing, importing, exporting, distributing, or dispensing” of a controlled substance. *See* Application Note (1)(B)(iv); *United States v. Herrera-Roldan*, 414 F.3d 1238 (10th Cir. 2005) (Texas conviction for mere possession of, and not possession with intent to manufacture, import, export, distribute or dispense, a controlled substance, was not “drug trafficking offense,” that would support 12-level increase in defendant’s offense level, regardless of whether amount possessed, i.e., more than 50 pounds of marijuana, was indicative of intent to distribute; but conviction was an aggravated felony). This requirement – that the statute contain one of these as an element – is the key to defenses under the categorical approach for this enhancement. The other issue to look for is whether the state felony drug conviction could be prosecuted as a federal felony drug offense. The Supreme Court in *Lopez v. Gonzales*, 127 S.Ct. 625 (2006), held that, although South Dakota treated alien’s conviction for aiding and abetting another person’s possession of cocaine as equivalent of possessing the drug, and thus a felony under that state’s law, the offense was misdemeanor under Controlled Substances Act, and thus not an “aggravated felony”. Thus, generally, simple possession offenses will not qualify as aggravated felonies or drug trafficking crimes. However, the Court noted that some possession crimes will qualify, stating: “Those state possession crimes that correspond to felony violations of one of the

¹The categorical method was first set forth by the Supreme Court in *Taylor v. United States*, 495 U.S. 575 (1990), although several lower courts had adopted the method pre-*Taylor*. For a good discussion of how the method works in illegal reentry cases, *see United States v. Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003), *see also United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc) (DeMoss, J., concurring).

three statutes enumerated in § 924(c)(2), such as possession of cocaine base and recidivist possession, see 21 U.S.C. § 844(a), clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2)[.]” 127 S.Ct. at 630 n.6. *See case list United States v. Cepeda-Rios in citing pre-Lopez case United States v. Sanchez-Villalobos applying federal recidivist statute.*

Hypothetical #2 – California Felony Transport of Marijuana

Your client has a prior conviction for Felony Transport of Marijuana in California. See Cal. Health & Safety Code § 11360. According to arrest reports, he was arrested driving on a freeway. After he consented to a search of his trunk, police found 60 kilograms of marijuana in two boxes hidden under a blanket there. Assume he pled guilty, and was sentenced to 14 months imprisonment. The PSR asserts that the 16-level enhancement applies because this is a drug trafficking offense.

Under the categorical approach, the PSR is incorrect, as this also is probably not a drug trafficking offense. Although your client was obviously engaged in drug trafficking, the statute of conviction does not require that the state prove as an element that he was engaged in “manufacturing, importing, exporting, distributing, or dispensing a controlled substance.” Put another way, the state of California could secure a conviction under this statute even if the Defendant were transporting a mere user quantity. Thus, the enhancement does not apply.

B. Enhancement for Felony Crime of Violence

The Guidelines and federal criminal code contain many different definitions of “crime of violence.” Under Section 2L1.2, a “crime of violence” is *either* one of a set of listed crimes which are not themselves defined (murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling) or any crime which has as an element the use, attempted use, or threatened use of physical force against the person of another. *See* Application Note (1)(B)(iii).

To determine whether any given prior conviction qualifies as a “crime of violence,” consider first if the crime has, as an element, the attempted, threatened, or actual use of force. Examine the elements of the statute of conviction. To qualify as a crime of violence under this part of the definition, the crime must be defined such that the state could not obtain a conviction without proving that the defendant used, threatened, or attempted to use force against a person.

If the crime does not have as an element the attempted, threatened, or actual use of force, it may still qualify as a crime of violence if it qualifies as one of the listed crimes. To see if the crime qualifies under this part of the definition, first compare the prior conviction to the listed offenses, and determine if the offense appears to be one of them (i.e., murder, manslaughter, etc.). If it appears to be listed, then it may qualify for enhancement, but only if it contains all of the elements of the listed offense.

To determine if the statute of conviction contains the elements of the generic definition, first determine its elements. Then examine the “generic” definition of the listed offense. In general, the “generic” definition mirrors the common law definition; but determining the generic definition may be difficult, as there is often no federal case law or other source definitively establishing it. Apart from the common law, helpful sources include the Model Penal Code, dictionary definitions, and the general practice of different states.

After determining what elements must be present under the generic definition, compare the elements of the statute of conviction to the elements of the generic definition. If the statute of conviction contains all elements contained in the generic definition, the conviction qualifies as a crime of violence.

Here, it is worth noting that there is still some confusion in the case law concerning how to apply the categorical approach to the differing definitions of “crime of violence.” It is important not to be deterred simply because the Probation Office cites a case that appears to be on point. If the categorical approach method suggests the enhancement may not apply, you generally should object.

Hypothetical #3 – Texas Theft of Person

Your client has a prior conviction for a third degree felony Theft of Person in Texas. Tex. P.C. 31.03 (1992). According to arrest reports, he smacked a woman in the head and then grabbed her purse, from which he stole \$200 worth of jewelry and ran away. Assume he pled guilty and received four years imprisonment suspended to four years probation. The PSR asserts that the 16-level enhancement applies because this is a felony crime of violence. In support, the PSR cites *United States v. Hawkins*, 69 F.3d 11 (5th Cir. 1995), which holds that Texas Theft of Person is a crime of violence.

Under the categorical approach, the PSR is incorrect, as this is not a crime of violence. First, examine the elements of the statute of conviction. Under Texas’s Theft of Person statute, the state need not prove that the defendant attempted, threatened, or actually used force to obtain a conviction. The state can prevail under the statute even if someone steals by picking a victim’s pocket. Thus, the conviction does not qualify under the first part of the definition. Next, examine the list of generic offenses which qualify as crimes of violence. While robbery and burglary are present, theft is not. Therefore, the crime does not qualify. Finally, examine the case relied on by the Probation Office. *United States v. Hawkins*, 69 F.3d 11 (5th Cir. 1995). Note that the case holds that Texas Theft of Person is a crime of violence under a different Guideline section – Section 4B1.2, which contains a different, broader, definition. Section 4B1.2 classifies as a crime of violence not only offenses which involve use of force as an element, but also any offense that “involves conduct that presents a serious potential risk of physical injury to another.” *Id.* at 12-13. In *Hawkins*, the Fifth Circuit relied on this second, broader portion of the definition to find that Theft of Person constituted a crime of violence under Section 4B1.2. *Id.* at 13. Therefore, because the definition of crime of violence in Section 2L1.2 does not contain the “substantial risk” definition, the case is inapposite.

Hypothetical #4 – Wisconsin Arson

Your client has a prior conviction for Arson in Wisconsin, a Class C felony. According to arrest reports, she lit fire to her neighbor's house with a blowtorch while the neighbor was asleep. Assume that the indictment also charged attempted murder, but that she pled guilty to arson and received ten years imprisonment. The PSR asserts that the 16-level enhancement applies because this is a felony crime of violence. In support, the PSR cites the list of offenses in Application Note (1)(B)(iii), which includes arson, and the judgment of conviction, which lists a conviction under Wis. Stat. § 943.02(1), the section which criminalizes arson. (The indictment lists no subsection). That section defines arson as either the intentional burning of a dwelling or the intentional destruction of any property by the use of explosives.

Under the categorical approach, the PSR is incorrect. First examine the statute of conviction to determine if it requires proof of attempted, threatened, or actual use of force against the person of another. It clearly does not. The state can obtain a conviction by showing damage to property by fire or explosives, and need not show the intentional use of force.

Second, examine the list of offenses defined as crimes of violence in Application Note (1)(B)(iii). Although arson is included, this does not complete the analysis. For the enhancement to apply, it must be true that the statute of conviction contains all the elements of "generic" arson. Generic arson, as defined by common law, is the malicious burning of the house of another. *See* Black's Law Dictionary (4th ed. 1951). In contrast, the Wisconsin statute does not require proof that the defendant burned a house; the state can obtain an arson conviction by showing the intentional damage of any property by the use of explosives. *See* Wis. Stat. 943.02(1)(c). As long as the jury could have convicted the defendant without finding that she had burned a house, she was not convicted of generic arson. The 16-level enhancement does not apply, even though she did in fact burn a house. *It is critical to remember that the facts alleged are irrelevant for purposes of categorical analysis.* In addition, note that if the indictment or the plea colloquy had specified that your client was convicted under the subsection of the statute that applies to the burning of houses, then the enhancement would apply. However, absent documentary proof, the facts alone may not be used to show what subsection your client was convicted under.

C. Enhancement for Firearms Offense

The categorical approach method applies to firearms offenses in the same way that we have described above. We will not review it in detail here. However, one issue merits special mention. If the PSR alleges that this enhancement applies based on a state conviction, look to determine that the state conviction requires, as an element, proof that the firearm traveled in interstate commerce. If that element is not present, the enhancement should not apply. This argument was rejected by the Ninth Circuit in *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001), held that state felon in possession offense was not required to include interstate or foreign commerce nexus as one of its elements in order to qualify as aggravated felony for purposes of sentence enhancement for removal subsequent to conviction for aggravated felony.

D. Enhancement for Prior Aggravated Felony Conviction

Any conviction which qualifies as an “aggravated felony” under the long list of enumerated offenses in 8 U.S.C. 1101(a)(43) triggers an eight-level enhancement. Although we will not list or comment upon each of the many classes of offenses described in that section, in general the same mode of analysis used above should be employed. Find the statute under which your client was convicted, including any subsection listed in the charging instrument. Using the categorical approach, determine whether the statute of conviction contains all elements contained in the definition listed in Section 1101(a)(43). Where the definition simply lists an offense (e.g., “theft offense” in § 1101(a)(43)(G)), find the “generic” offense’s definition and use that as the basis for comparison.

Some cautionary points should be noted here. First, note that the definition of “crime of violence” in this section is broader than the definition in U.S.S.G. § 2L1.2, because it includes any crime which “by its nature,” involves a “substantial risk” that physical force will be used, and also includes crimes which harm the “property of another” not just those which harm “the person of another.” See § 1101(a)(43)(F) (incorporating definition from 18 U.S.C. § 16). A mens rea of recklessness is insufficient to support a finding that particular crime is a crime of violence. See e.g., *United States v. Perez-Vargas*,

Second, note that the definition of “drug trafficking” is also broader than the one in U.S.S.G. § 2L1.2, and that it includes any drug crime which is a felony under either federal or state law. Formerly, courts had held that drug possession offenses were aggravated felonies. However, the Supreme Court has held that simple possession offenses are not aggravated felonies because they are punishable as misdemeanors under the Controlled Substances Act. *Lopez v. Gonzales*, 127 S.Ct. 625 (U.S. 2006). Thus, even if the client received a felony state conviction for the possession, it should only receive a 4-point enhancement.

Third, make sure to check the sentence your client received against the sentence required under the definition in § 1101(a)(43), including whether your client received “straight” probation (as opposed to a term of imprisonment suspended to a term of probation). If your client received “straight” probation, then the sentence did not include a term of imprisonment and for that reason may not be an aggravated felony. See, e.g., § 1101(a)(43)(R) (defining as aggravated felony an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in VIN numbers if the term of imprisonment is at least one year); *United States v. Martinez-Villalva*, 232 F.3d 1329 (10th Cir. 2000) (noting parties’ agreement that legal effect of state court’s probation sentence was not an aggravated felony under federal law); *United States v. Arguijo-Lucio*, 2003 WL 21417496 (5th Cir. June 04, 2003) (unpublished disposition) (a sentence of deferred or straight probation with no subsequent revocation is not an aggravated felony, but still could be a crime of violence under the Guidelines). However, just because a prior conviction does not qualify as an aggravated felony, it may still qualify for the 16-level 2L1.2 enhancement. See *United States v. Gonzalez-Coronado*, 419 F.3d 1090 (10th Cir. 2005) (defendant properly given 16-level crime-of-violence enhancement for prior Kansas conviction for attempted aggravated assault even though he received probation; court observed that “unlike 8 U.S.C. § 1326(b)(2)’s requirement that an aggravated felony must result in a sentence of at least one year, U.S.S.G. § 2L1.2(b)(1)(A)(ii) does not require that, to be a ‘crime of violence,’ a prior conviction result in a sentence of any particular length.”).

Fourth, check to see if the state offense was enhanced pursuant to a recidivist statute. In *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002), the Ninth Circuit held that a

conviction for petty theft under California law, which has a maximum penalty of six months but for which the defendant received a two-year sentence under Cal. Penal Code § 666, was not an aggravated felony because the categorical approach required the court to consider only the sentence available for the crime itself, without considering separate recidivist sentencing enhancements. *See also United States v. Rodriguez*, 464 F.3d 1072 (9th Cir. 2006) (applying *Corona-Sanchez* analysis to Washington state drug trafficking statutes and concluding that prior convictions, considered without recidivist enhancements, did not qualify as predicate offenses for ACCA purposes); *United States v. Ballesteros-Ruiz*, 319 F.3d 1101 (9th Cir. 2003) (applying *Corona-Sanchez* to Arizona conviction for possession of marijuana in reentry case); *United States v. Sanchez-Sanchez*, 333 F.3d 1065 (9th Cir. 2003) (remanding for reconsideration and noting that Arizona shoplifting conviction might have been a recidivism-type charge under *Corona-Sanchez*); *but see United States v. Sanchez-Villalobos*, 412 F.3d 572, 577 n.3 (5th Cir. 2005); *Mutuscu v. Gonzales*, 444 F.3d 710, 712 (5th Cir. 2006).

Fifth, in case of California convictions, see if the statute was a “wobbler.” These California offenses are misdemeanors or felonies based on the sentence imposed by the judge. Whether a “wobbler” is a felony or a misdemeanor is controlled by Cal. Penal Code § 17(b), which states the range of judgments by which an offense is categorized “for all purposes” following judgment. *Garcia-Lopez v. Ashcroft*, 334 F.3d 840, 844 (9th Cir. 2003). If punished by time in the state prison, the crime is a felony. However, “[a] wobbler offense is treated as a misdemeanor ‘[a]fter a judgment [imposes] a punishment other than imprisonment in the state prison.’” *Garcia-Lopez*, 334 F.3d at 844 (quoting Cal. Penal Code § 17(b)(1)). Furthermore, “[i]mposition of a sentence other than imprisonment in a state prison automatically converts a felony to a misdemeanor.” *Id.* (citing *People v. Glee*, 82 Cal.App.4th 99, 102 (2000)). However, if the state court has not properly converted the offense to a misdemeanor, it may be deemed to still be a felony. *See United States v. Hernandez-Castillo*, 449 F.3d 1127 (10th Cir. 2006) (Defendant’s prior California conviction for wobbler offense of having unlawful sexual intercourse with a minor was not converted to a misdemeanor, even though he received probation and suspended sentence of 157 days in county jail amounting to time served, for purposes of Sentencing Guideline applicable to sentencing for illegal reentry; neither probation nor suspended sentence was deemed to be a judgment under California law and thus did not convert conviction to misdemeanor, and state court did not declare offense to be misdemeanor). The *Hernandez-Castillo* court strongly observed that such a situation was suitable for a sentencing variance.

Hypothetical # 5 - Unlawful Deprivation of Property

Your client has a prior Kansas conviction for unlawful deprivation of property. According to arrest reports your client used a neighbor's bike without consent and was intending to return the bike. Unfortunately he was arrested before returning the bike. He pled guilty and was sentenced to 365 days jail time suspended to two years probation. The United States Probation Officer recommends a 16-level enhancement because the prior conviction is a theft offense and an aggravated felony under 8 U.S.C. § 1101(43)(G) and the 2000 U.S.S.G. § 2L1.2.

Under the categorical approach, the Probation Officer is incorrect, as this is not an aggravated felony. Although theft offenses may be considered aggravated felonies under §1101(a)(43)(G), the elements of the Kansas statute do not establish generic theft, but rather a conversion of property. Black's Law Dictionary defines theft as "the felonious taking and removing of another's personal property with the intent of depriving the true owner of it." See Black's Law Dictionary (7th ed. 1999). In contrast, Kansas Statute § 21-3705(a) defines criminal deprivation of property as "obtaining or exerting unauthorized control over the property with the intent to deprive the owner of the temporary use thereof, without the owner's consent but not with the intent of depriving the owner permanently of the possession, use or benefit of such owner's property." Thus, the prior conviction does not qualify as an aggravated felony because under the statute of conviction there is no intent to permanently deprive the owner of the property as required under the generic definition of theft.

Hypothetical #6 - Texas Robbery

Your client has a prior Texas robbery conviction which is a felony. He was placed on deferred adjudication supervision for a term of 6 years. The PSR asserts that a 16-level applies because the prior conviction is an aggravated felony and a crime of violence.

The PSR is wrong that it is an aggravated felony, but probably correct that the 16-level enhancement applies. The prior conviction is not an aggravated felony because there is no term of imprisonment imposed as required under §1101(a)(48)(B). Therefore, it clearly does not qualify as an aggravated felony.

However, on these particular facts, the Court ruled that even though the conviction was not for an aggravated felony, the statute of conviction requires proof of the use of force against the person of another as an element. Therefore, the 16-level enhancement probably applies under § 2L1.2.

III. CHALLENGES TO CRIMINAL HISTORY

The following suggestions may aid in reducing your client's criminal history score.

A. Sufficiency

While *Taylor* and its progeny make clear that the government must provide a judgment in order to prove an enhancement, no such case law requiring a judgment applies for assessing criminal history. Nonetheless, information supplied at sentencing must be "reliable," and we have had occasional success arguing that the reports or other documents on which the PSR is based are

insufficient to meet the test. Collecting examples of when computer printouts or other such records were incorrect may assist in arguing that the particular documents in your case are unreliable.

B. Uncounseled Convictions

The same arguments described above apply here. Check to determine that your client was counseled, or if not that he or she properly waived that right. We have generally succeeded with this argument. *See United States v. Cruz-Alcala*, 338 F.3d 1194 (10th Cir. 2003) (finding that a defendant may collaterally attack prior conviction used to enhance sentence on ground of complete denial of counsel and holding that Defendant failed to prove that he unknowingly waived his right to counsel and hence prior uncounseled misdemeanor convictions were properly used to calculated criminal history).

C. Juvenile Prosecuted in Adult Court

The same arguments described above apply here.

D. Age of Conviction under § 4A1.2(e)

Unlike in the enhancement context, convictions may not count for criminal history purposes if they are too old. Note that for purposes of determining whether or not a one- or two-point conviction counts for criminal history, look at the original date of conviction, and not at the date of any subsequent revocation. *United States v. Arnold*, 213 F.3d 895 (5th Cir. 2000).

E. Trivial Convictions under § 4A1.2(c)

Some convictions are too trivial to be counted for criminal history purposes. Section 4A1.2(c) contains two lists of such offenses.² Importantly, the section also states that “offenses similar to” those listed also do not count. If a conviction appears trivial (e.g., criminal mischief, lying to a law enforcement officer), consult the list. For an example of how to determine whether an offense is “similar to” a listed one for Guideline purposes, *see United States v. Mendez-Lopez*, 338 F.3d 1153 (10th Cir. 2003) (holding that the offense of fleeing or eluding police is not similar to hindering or failing to obey a police officer and resisting arrest under § 4A1.2(c)(1) was not plain error).

F. “Permanent” Probation or Warrants under § 4A1.1(d) and 4A1.2(m).

Some states have adopted the practice of placing a “permanent warrant” out for undocumented people convicted of crimes, which in some cases effectively places them on permanent probation. The theory is that after their deportation, they should never be found in the United States, so if they are found they should immediately be arrested. We have argued that these permanent warrants should not count for purposes of determining whether the client was on probation at the time of the offense under § 4A1.1(d), or whether there was an outstanding warrant for his arrest under § 4A1.2(m). Because these probation terms are set indefinitely for the convenience of the sentencing jurisdiction, rather than for a fixed term with the intention of engaging in any actual supervision, they do not count for purposes of the Guidelines. Similarly,

²Convictions in the first list may or may not count depending upon the sentence, whereas those in the second list never count.

because the permanent warrant is not entered upon a showing of any criminal wrongdoing, it does not count for Guideline purposes.

IV. DEPARTURE AND VARIANCE ARGUMENTS

Following are some grounds for departure under the Guidelines and variances under 18 U.S.C. § 3553(a) that have been raised. The two areas intertwine. However, it is important to first analyze the client's case for possible departure grounds under the Guidelines and pre-Guideline case law. If possible, give the court a "comfort zone" in which to impose a sentence below the advisory guidelines. Then, consider whether arguments rejected before *Booker* might have new life in the context of §3553(a). The following is certainly not a complete list of potential bases.

A. Over-representation.

The argument that the defendant's criminal history is over-representative of the seriousness of the current offense is often applicable. Many clients have extensive criminal histories of primarily petty offenses, such as drunk and disorderly, failure to pay fines, etc. Often, our clients may have received jail sentences because they were unable to pay bonds and thus were in jail until a court date, at which time they received time-served sentences. These circumstances can be pointed out when making over-representation arguments. Cases include: *United States v. Ellis*, 376 F.Supp.2d 1177 (D.N.M. 2004) (reducing criminal history category from IV to III for defendant whose priors included imprisonment for failure to pay traffic fines and one drug distribution conviction); *United States v. Hammond*, 240 F.Supp.2d 872, 880-81 (E.D. Wisc. 2003) (reducing criminal history category of III to II where one charge was drunk driving; priors for criminal damage to property and reckless use of a weapon were more serious but no one was injured and defendant apparently did not intend to harm anyone; prior burglary conviction involved attempt to steal cigarettes; and prior convictions occurred when defendant was a young man and intoxicated); *United States v. Baker*, 804 F. Supp. 19, 22 (N.D. Cal. 1992) (reducing criminal history category from III to I for defendant with prior convictions for giving false information and grand theft auto, and two additional points for committing offense of conviction while on probation); *United States v. Anderson*, 955 F. Supp. 935, 937 (N.D. Ill. 1997) (finding criminal history category III significantly over-represented defendant's prior convictions, for drunk driving and domestic battery, such that downward departure to criminal history category II was warranted; defendant was in category III because current offenses were committed while defendant was on conditional discharge).

B. Double-counting.

In situations in which one of the prior convictions is both included in the criminal history score and is the basis for an offense-level increase under U.S.S.G. § 2L1.2, it can be argued that the criminal history category should be adjusted because the conviction is double-counted in setting the defendant's advisory guideline range. *United States v. Galvez-Barrrios*, 355 F.Supp.2d 958, 960-61 (E.D. Wisc. 2005). *See also United States v. Santos*, 406 F.Supp.2d 320, 328 (S.D.N.Y. 2005) (three-level offense-level reduction granted to offset fact that reentry defendant's criminal history was used to both enhance criminal history category and offense level); *United States v. Austin*, 2006 WL 305461 (S.D.N.Y. 2006) (same).

C. Over-breadth.

The categories contained in U.S.S.G. § 2L1.2 are very broad, and even though the prior conviction might actually fit within the technical scope of the category, the actual conduct involved in the prior conviction might not merit an 8-, 12-, or 16-level enhancement. *United States v. Perez-Nunez*, 368 F.Supp.2d 1265 (D.N.M. 2005), recognized that the definition of “crime of violence” contained in U.S.S.G. § 2L1.2 is too broad and does not promote uniformity in sentencing, which is one of the goals of the sentencing guidelines. *Id.* at 1267-68. The court in *United States v. Galvez-Barríos*, 355 F. Supp. 2d 958 (E.D. Wisc. 2005), also determined that the 16-level increase mandated by § 2L1.2 of the Sentencing Guidelines is excessively harsh in effect, because it gives such heavy weight to a defendant’s *prior* felony conviction to establish his current offense level for a crime of illegal reentry. There, the Court held that a downward adjustment was justified where the defendant did not reenter the country for another criminal purpose, and the 16-level increase was based on a prior conviction that over-exaggerated the seriousness of the current conviction.

D. Older Convictions.

Older convictions that were not aggravated felonies at the time of conviction but now are can be the basis for an argument that they should not receive the offense level enhancement: *Pradith v Ashcroft*, CV 03-1304-BR (D.C. Ore. 2003) (unpublished) (where the noncitizen pled guilty to felony simple possession before May 13, 2002, based on correct advice that the offense was not then an aggravated felony under immigration law, the conviction was held not to be an aggravated felony for purposes of serving as a bar to cancellation of removal); *see I.N.S. v. St. Cyr*, 533 U.S. 289, 321 (2001); *see also Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9th Cir. 2004) (stating in dicta that "a rule that classifies state drug offenses punished as felonies under state but not federal law as aggravated felonies for immigration purposes is inequitable to aliens who committed minor drug offenses prior to 2002").

E. Additional Sample Cases Affirming or Granting A Sentence Below the Advisory Guidelines.

United States v. Krutsinger, 449 F.3d 827 (8th Cir.2006) (affirming co-defendants' sentences of 21 and 24 months that were below the 100 to 125 and 70 to 87 advisory guideline ranges respectively).

United States v. Gray, 453 F.3d 1323 (11th Cir. 2006) (affirming 72-month sentence that was below the advisory range of 151 to 188 months).

United States v. Halsema, 2006 WL 1229005 (11th Cir. May 9, 2006) (unpublished) (affirming 24-month sentence that was below the advisory range of 57 to 71 months as reasonable).

United States v. Baker, 445 F.3d 987 (7th Cir. 2006) (affirming 87-month sentence that was below the advisory range of 108 to 135 months as reasonable).

United States v. Montgomery, 165 Fed.Appx. 840 (11th Cir. Feb.7, 2006) (unpublished) (affirming 8-month sentence that was below the advisory range as reasonable).

United States v. Williams, 435 F.3d 1350 (11th Cir. 2006) (in crack cocaine case, affirming a 90-month sentence that was below the advisory range of 188 to 235 months as reasonable).

United States v. Chavez-Diaz, 444 F.3d 1223 (10th Cir. 2006) (Defendant’s 30-month sentence for illegal reentry after deportation was reasonable; sentence was below advisory sentencing guidelines range of 41-51 months, district court carefully considered statutory sentencing factors and imposed sentence below guidelines range to make defendant's sentence

consistent with that of another defendant sentenced that day, and court's decision not to impose even lower sentence because of defendant's alleged inadequate medical care during pre-sentence incarceration did not render sentence unreasonable).

United States v. Urena, 2006 WL 755962 (2d Cir. 2006) (72-month sentence for reentry defendant was reasonable, where defendant had lengthy criminal history following other prior illegal entries and sentence imposed was five months below recommended guidelines range).

United States v. Thomas, 2006 WL 584281 (3d Cir. 2006) (reentry defendant's 75-month sentence was reasonable; district court considered sentencing guidelines range of 77 to 96 months, its discretion to depart from that range, role of statutory sentencing factors in directing its exercise of that discretion, and goals to be served by choice of sentence, and court found that defendant's extensive history of theft convictions required lengthy prison term for protection of society and as appropriate punishment).

United States v. Martinez-De Loza, 192 Fed.Appx. 666 (9th Cir. 2006) (for reentry defendant, affirming sentence of 40 months, 17 months less than minimum advisory guideline range, as reasonable)..

United States v. Constantine, 417 F.Supp.2d 337 (S.D.N.Y.,2006) (27 month sentence was appropriate for illegal reentry defendant who did not return to United States for purpose of engaging in criminal conduct, was arrested 12 years after he reentered, and, subsequent to reentry, maintained steady employment, paid taxes, and contributed to support of his family. Advisory range was 30-37 months.).

United States v. Santos, 406 F.Supp.2d 320 (S.D.N.Y.,2005) (non-Guidelines sentence was warranted, upon conviction of defendant of illegal reentry after deportation subsequent to aggravated felony conviction, based on several considerations, including geographical sentencing disparities created by fast-track, early disposition programs in illegal reentry cases in some jurisdictions, inappropriate double-counting of criminal history points, and undue delay in transferring defendant from state to federal custody; after adjustments, defendant's offense level of 14, with further consideration of the transfer delay, warranted sentence of twenty-four months incarceration and three years supervised release), *but see United States v. Galicia-Cardenas*, 2006 WL 751349 (7th Cir. 2006) (27-month prison sentence for reentry defendant, which reflected equivalent of four level downward departure because district did not have fast-track program for immigration offenses, was not reasonable.