How a Person Who Was Sentenced under the ACCA, 18 U.S.C. § 924(e), Would Likely Receive a Lower Sentence Today

The Armed Career Criminal Act (ACCA) at 18 U.S.C. § 924(e) is not the same as 21 U.S.C. § 851 or the career offender guideline at USSG § 4B1.1. Inmates, lawyers, judges, courts of appeals, and news reporters sometimes misuse the word "career offender," which is a guideline classification, to refer to a person who received a statutory enhancement under the ACCA or 21 U.S.C. § 851. Most important, many do not know the substantive difference between the three.

This memo explains how the ACCA works and how to show that a client would no longer be subject to it or would otherwise receive a lower sentence today. Separate memos explain how § 851 works and how the career offender guideline works, and how a client would no longer be subject to those provisions or would otherwise receive a lower sentence today.

If you need help:

- If you are a pro bono lawyer, refer to the reference material on the subject posted at https://clemencyproject2014.org/reference, and if your question is not answered in the reference material, please contact appropriate resource counsel through the applicant tracking system.

- If you are a Federal Defender, contact abaronevans@gmail.com.

I. How the ACCA Works

When a prohibited person, *e.g.*, a person previously convicted in any court of a crime punishable by more than one year, possesses a firearm or ammunition, the statutory punishment range is 0-10 years. *See* 18 U.S.C. § 922(g), § 924(a)(2). But under the Armed Career Criminal Act, a 15-year mandatory minimum is required if the person has three prior convictions for a "violent felony" or a "serious drug offense." *See* 18 U.S.C. § 924(e).

A prior "violent felony" is defined broadly to encompass conduct that does not involve actual violence. As defined at 18 U.S.C. § 924(e)(2)(B), a "violent felony" is "any crime 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, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

As explained in Parts III.A and III.B of this memo, a prior offense may by its label *sound* violent but is not a "violent felony" under current Supreme Court law, or even if it is, did not involve actual violence. Offenses that count as "violent felonies" can be quite minor.[1]

[1] They include pickpocketing, *United States v. Jarmon*, 598 F.3d 228 (4th Cir. 2010), entering a telephone booth to steal change from a coin box, *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009)

The term "crime punishable by imprisonment for a term exceeding one year" includes state offenses classified by the laws of the state as a misdemeanor and punishable by a term of imprisonment of more than two years, which includes misdemeanors in states such as Maryland, Massachusetts, and South Carolina. *See* 18 U.S.C. § 921(a)(20).

A prior "serious drug offense" is defined at § 924(e)(2)(A) as

> (1) 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.), or chapter 705 of title 46, for which a maximum term of ten years or more is prescribed by law; or
> (2) 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 Substance Act (21 USC 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.

The prior offense's "maximum term of imprisonment" is determined by reference to the law at the time the defendant was convicted of the prior offense, even if the maximum term was later lowered to less than ten years.[2]

The term "conviction" "includes a finding that a person has committed an act of juvenile delinquency involving a violent felony." *See* 18 U.S.C. § 924(e)(2)(C). To qualify, however, the act of juvenile delinquency must "involv[e] 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," in addition to satisfying the ordinary definition of "violent felony." *See id.* § 924(e)(2)(B).

Whether a defendant has a previous "conviction" is

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

(Kozinski, C.J., dissenting), inciting or participating in a prison hunger strike, *Johnson v. United States*, 616 F.3d 85, 90 (2d Cir. 2010), failing to pull over for a police officer, *Sykes v. United States*, 131 S. Ct. 2267 (2011), and attempted burglary of a dwelling, *James v. United States*, 550 U.S. 192 (2007). *See generally Derby et al. v. United States*, 131 S. Ct. 2858, 2859 (2011) (Scalia, J., dissenting).

[2] *McNeill v. United States*, 131 S. Ct. 2218 (2011).

18 U.S.C. § 921(a)(20).

The ACCA enhancement applies no matter how old the prior convictions.[3] "[T]he [ACCA]'s mandatory minimum penalty can apply to offenders who served no or minimal terms of imprisonment for their predicate offenses, further increasing the potential for inconsistent application insofar as the penalty may be viewed as excessively severe in those cases."[4] It has a disproportionate impact on African-American offenders.[5] There is no safety valve relief.

The ACCA has been applied to defendants who are not "armed career criminals" by any common-sense view, including the view of the sentencing judge. For example, the ACCA required a 15-year mandatory sentence for a 51-year old defendant who sat in a turkey blind on his family's property in a remote rural area at 5:00 a.m. with a 60-year-old hunting rifle owned by his uncle. The ACCA enhancement was based on minor prior convictions that were 30 years old (complicity to commit third-degree burglary, which involved no actual violence) and 10 and 13 years old (two hand-to-hand drug sales). In sentencing the defendant to the 15-year mandatory minimum for "armed career criminals," the judge noted that the defendant "was not involved in a violent crime" and "no one was threatened by the possession of the weapon."

II. How a Client Previously Subject to the ACCA Would Likely Receive a Lower Sentence Today

For clients sentenced to the 15-year mandatory minimum under the ACCA, the sentence may be lower today when one or more of the prior convictions necessary to the ACCA enhancement would no longer qualify under current law:

- A prior conviction necessary to the ACCA enhancement would no longer qualify as a "violent felony" under the Supreme Court's decisions in *Leocal*, *Begay*, *Chambers*, and *Johnson*. *See* Part III.A.

- A prior conviction necessary to the ACCA enhancement would no longer qualify as a "violent felony" or "serious drug offense" under the categorical or modified categorical approach, as clarified by *Descamps*. *See* Part III.B.

[3] *See, e.g., United States v. Turner*, No. 09CR156 (E.D. Va.) (ACCA applied to 50-year-old drug-free man based on pickpocketing, burglary and robbery committed when a heroin addict in early 20s).

[4] U.S. Sent'g Comm'n, *Mandatory Minimum Penalties in the Federal Criminal Justice System* 362-63 (2011).

[5] *Id*. at 283, tbl. 9-4.

- A prior conviction necessary to the ACCA enhancement would no longer qualify as a "violent felony" or a "serious drug offense" under the Supreme Court's decision in *Carachuri-Rosendo*. *See* Part III.C.

When a prior conviction necessary to the ACCA enhancement would no longer qualify as a predicate, and the client has no other prior convictions that could qualify, the client would not be subject to the ACCA today. Absent the ACCA enhancement, the statutory range would be zero to 10 years, and the client would be sentenced under advisory guideline § 2K2.1. The guideline range could be no greater than 120 months, USSG § 5G1.1(c), and in most cases it is less than 120 months. Judges today sentence below the range recommended by § 2K2.1 in 31.4% of all cases sentenced in which the government did not ask for a substantial assistance or fast-track departure.[6] In most cases, the ten years already served is longer than necessary to serve sentencing purposes. *See* How a Person Who Was Convicted of a Firearms Offense, or Was Convicted of a Drug Offense and Received a Guideline Increase Because a Firearm "Was Possessed," May Qualify for Commutation.

III. Research Guide with Examples

Determining whether a client's prior offense would no longer qualify as an ACCA predicate may not be obvious or clear, and the law in this area is evolving. In some cases, circuit precedent squarely holding that a particular prior offense qualifies as a predicate may no longer be good law after a more recent Supreme Court decision—but the circuit has not yet reversed its prior precedent. The following is a research guide only. It is not a substitute for your own research relating to a client's particular prior conviction(s) and relevant Supreme Court and circuit law.

> **RULE OF THUMB:** When the Supreme Court or at least one court of appeals has held that a prior offense necessary to the client's ACCA status, or one materially identical to it, does not qualify as a predicate in any case, then the client would not be subject to the ACCA and her sentence would likely be lower today.
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> If the court of appeals in the circuit in which the client was sentenced has held that the prior offense always qualifies or sometimes qualifies as a predicate, the client may still not be subject to the ACCA, depending on the timing of that holding and later clarifying Supreme Court law.

IF YOU NEED HELP DETERMINING WHETHER A PRIOR CONVICTION WOULD STILL QUALIFY UNDER CURRENT LAW, SEEK ASSISTANCE AS NOTED ABOVE.

[6] U.S. Sent'g Comm'n, *Sourcebook of Federal Sentencing Statistics* tbl. 28 (2013) (2,698 out of 7,019 cases).

For illustration purposes, consider the following example:

CLIENT A

In 2005, Client A pled guilty to being a felon in possession of ammunition under 18 U.S.C. § 922(g)(1). He had a prior state conviction for burglary (of a storage unit, committed at age 19) for which he was sentenced to 15 months, a prior state conviction for statutory rape (also when he was 19), and a state conviction for fleeing and eluding, committed at age 33, for which he received a sentence of 60 days, suspended. None of the offenses involved a gun or actual violence.

Eventually, he turned his life around and settled down. He married, worked six days a week, and helped to raise his wife's three children. As he neared age 40, back problems and rheumatoid arthritis left him disabled, so he became a stay-at-home dad. A few years later, he agreed to help a recently widowed neighbor sell her husband's belongings, and took several boxes from her attic to his house to sort through. When sorting through the boxes, he found five shotgun shells. He put them aside to give them back to the neighbor (and to keep them safe from children), and then forgot about them until they were discovered by police in a search of his home while investigating recent break-ins (for which he was not prosecuted). Client A did not then possess, and had never possessed, a gun.

At the time of sentencing for the § 922(g)(1) conviction, he was 43 years old. Because his prior state sentences for the burglary and statutory rape convictions were completed more than 15 years earlier, his only criminal history points were for the fleeing and eluding conviction. Under USSG § 2K2.1, his base offense level was 20, based on the judge's finding that the prior fleeing and eluding offense was a "crime of violence" as defined under USSG § 4B1.2(a). With three levels off for acceptance of responsibility, USSG § 3E1.1, and in Criminal History Category II, his guideline range under the Sentencing Table in Chapter 5 of the *Manual* was 27-33 months. The sentencing judge found, however, that all three convictions qualified as "violent felonies" under the ACCA, requiring him to impose the 15-year mandatory minimum. The sentencing judge acknowledged the disproportionate severity of the sentence, in light of the offense conduct and his remote and relatively minor prior offenses, but said he had no leeway under the law. Client A was sentenced to the mandatory minimum of 15 years.

A. Would a prior conviction no longer qualify as a "violent felony" under the Supreme Court's narrowing interpretation?

The three prongs of the definition of "violent felony" under the ACCA are commonly referred to as follows:

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

18 U.S.C. § 924(e)(2)(B). This definition is similar, but not identical, to the definition of "crime of violence" under 18 U.S.C. § 16[7] and the definition of "crime of violence" under the career offender guideline at USSG § 4B1.2.[8]

In a series of decisions beginning in 2004, the Supreme Court narrowly interpreted the statutory definitions of "crime of violence" under 18 U.S.C. § 16 and "violent felony" under the ACCA

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[7] "Crime of violence" under §16 is defined as

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

18 U.S.C. § 16.

[8] "Crime of violence" under the career offender guideline is defined as

> [A]ny offense under federal or state law, punishable by a term of imprisonment for a term exceeding one year, that—
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> (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 otherwise involves conduct that presents a serious potential risk of physical injury to another.

It is very important to be aware of the differences between the definitions when researching and analyzing a prior conviction used an ACCA predicate. While most appellate decisions interpreting a prior conviction for purposes of § 16 and the career offender guideline will apply in the ACCA context, some may not. If you have any questions, seek assistance as noted above.

and signaled (by granting, vacating and remanding in career offender cases) that courts should narrow the meaning of "crime of violence" under the career offender guideline in the same way.

- In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court interpreted the "force clause" and "residual clause" at § 16 to apply only to a category of "violent, active crimes" requiring at least reckless disregard of a substantial risk that physical force may be used, which "cannot be said naturally to include DUI offenses."

- In *Begay v. United States*, 553 U.S. 137 (2008), the Court held that "violent felony" under ACCA's residual clause, 18 U.S.C. § 924(e)(2)(B)(ii), requires that the offense be "roughly similar, in kind as well as in degree of risk posed" to the enumerated offenses against property ("burglary, arson, or extortion, involves use of explosives"), each of which involves "purposeful, violent, and aggressive conduct," and that DUI, which required only recklessness, is thus not a "violent felony" under the ACCA.

- In *Chambers v. United States*, 555 U.S. 122 (2009), the Court applied *Begay* to hold that an escape conviction based on a failure to report to custody does not qualify as a "violent felony" under ACCA's residual clause at § 924(e)(2)(B)(ii) because it does not present "a serious potential risk of physical injury to another." In the process, the Court considered statistics released by the Sentencing Commission showing that the risk of injury from offenses involving failure to report was low.

- In *Johnson v. United States*, 559 U.S. 133, 140 (2010), the Court held that the ACCA's "force clause" at § 924(e)(2)(B)(i)—defining an offense as a "violent felony" if it "has as an element the use, attempted use, or threatened use of physical force against the person of another"—applies only to offenses that involve "violent force—that is, force capable of causing physical pain or injury to another person," and that simple battery, defined as "actually and intentionally touching," is not a "violent felony."

Every court of appeals has held that the interpretation of "violent felony" under the ACCA applies equally to "crime of violence" under the career offender guideline. Thus, these decisions address whether, in either context, an offense has "as an element" the requisite "physical force," i.e., "violent force" under the force clause (*Leocal*, *Johnson*) or carries the requisite *mens rea* and/or degree of risk of physical injury under the residual clause (*Begay*, *Chambers*).

Applying these decisions, courts have held that numerous offenses are no longer "violent felonies" under the ACCA or "crimes of violence" under the career offender guideline, including arson in the third degree,[9] auto theft and auto tampering,[10] child endangerment,[11] involuntary

[9] *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013).

[10] *United States v. Williams*, 537 F.3d 969 (8th Cir. 2009).

manslaughter,[12] walkaway escape,[13] carrying a concealed weapon,[14] conspiracy that requires no overt act toward commission of the underlying offense,[15] reckless discharge of a firearm,[16] possession of a weapon in prison,[17] resisting or obstructing a police officer,[18] statutory rape,[19]

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[11] *United States v. Wilson*, 562 F.3d 965 (8th Cir. 2009) (career offender); *United States v. Gordon*, 557 F.3d 623 (8th Cir. 2009) (ACCA).

[12] *United States v. Woods*, 576 F.3d 400 (7th Cir. 2009).

[13] *United States v. Hopkins*, 577 F.3d 507 (3d Cir. 2009); *United States v. Anglin*, 601 F.3d 523 (6th Cir. 2010); *United States v. Ford*, 560 F.3d 420 (6th Cir. 2009); *United States v. Harp*, 578 F.3d 674 (7th Cir. 2009); *United States v. Templeton*, 543 F.3d 378 (7th Cir. 2008); *United States v. Lee*, 586 F.3d 859 (11th Cir. 2009); *United States v. Nichols*, 563 F. Supp. 2d 631 (S.D. W. Va. 2008).

[14] *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

[15] *United States v. Whitson*, 597 F.3d 1218 (11th Cir. 2010) (holding that although conspiring to commit a violent crime increases the risk of harm to another and is purposeful, the conspiracy itself is not violent or aggressive because the statute does not require an overt act). *But see United States v. Chandler*, 743 F.3d 648 (9th Cir. 2014) (holding that conspiracy to commit robbery is a violent felony under the residual clause; noting circuit split regarding whether conspiracy to commit a violent felony is itself a violent felony).

[16] *United States v. Gear*, 577 F.3d 810 (7th Cir. 2009).

[17] *United States v. Polk*, 577 F.3d 515 (3d Cir. 2009).

[18] *United States v. Mosley*, 575 F.3d 602 (6th Cir. 2009). The Fourth Circuit has held that, under the Supreme Court' s decision in *Johnson*, a Maryland conviction for resisting arrest is not a "crime of violence" for purposes of the "force clause" in the illegal reentry guideline, *United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. 2014), which is the same as the "force clause" in the ACCA. *Compare* USSG § 2L1.2 cmt. n.1(B)(iii) ("any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another"), *with* 18 U.S.C. § 924(e)(2)(B)(i) (offense "has as an element the use, attempted use, or threatened use of physical force against the person of another"); *see also United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013) (same for Arizona conviction for resisting arrest).

[19] *United States v. Dennis*, 551 F.3d 986 (10th Cir. 2009); *United States v. Wynn*, 579 F.3d 567 (6th Cir. 2009) (holding prior conviction under Ohio's sexual battery statute not categorically a career offender predicate because some statutory subsections do not necessarily involve aggressive and violent conduct); *see also United States v. Thornton*, 554 F.3d 443 (4th Cir. 2009) (prior conviction under Virginia's statutory rape statute is "not sufficiently similar to the enumerated crimes in kind or in degree of risk to constitute a violent felony" under the residual clause of the ACCA). The Eleventh Circuit held that, under *Johnson*, an Alabama conviction for second degree rape is not a "violent felony" under the "force" clause of the ACCA, nor, under *Begay*, a "violent felony" under the residual clause of the ACCA, effectively overruling precedent holding that it is a "crime of violence" for purposes of the career offender guideline. *United States v. Owens*, 672 F.3d 966 (11th Cir. 2012).

sexual misconduct with a minor,[20] vehicular homicide,[21] assault and battery on a policy officer,[22] battery,[23] and numerous offenses that require only recklessness.[24]

Two additional Supreme Court cases inform the inquiry under the ACCA's residual clause.

- In *James v. United States*, 550 U.S. 192 (2007), the Court explained that a crime involves the requisite risk under the ACCA's residual clause when "the risk posed by [the crime in question] is comparable to that posed by its closest analog among the enumerated offenses." *Id.* at 203. The Court compared the risks posed by attempted burglary to its closest analog among the enumerated offenses, burglary, and held that attempted burglary is a "violent felony."[25]

- In *Sykes v. United States*, 131 S. Ct. 2267 (2011), the Court addressed whether an Indiana conviction for knowingly and intentionally fleeing a police officer by use of a vehicle is a "violent felony" under the ACCA's residual clause. It held that the offense of vehicular fleeing from a police officer inherently carries risk of violence, and thus a risk of physical injury. Statistics, which the Court said in *Chambers* can help provide an answer to the question of risk, also showed a risk of injury greater than burglary and arson, two enumerated offenses. The Court held that the Indiana offense presents a serious potential risk of physical injury to another, comparable to that posed by the enumerated offense of burglary. *Id.* at 2274-75.

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[20] *United States v. Goodpasture*, 595 F.3d 670 (7th Cir. 2010).

[21] *United States v. Herrick*, 545 F.3d 53 (1st Cir. 2008).

[22] *United States v. Carthorne*, 726 F.3d 503 (4th Cir. 2013).

[23] *United States v. Evans*, 576 F.3d 766 (7th Cir. 2009) (spitting on a pregnant woman not comparably violent to the enumerated offenses in the career offender guideline, and does not present a "*serious* risk of physical injury" for purposes of the residual clause).

[24] *United States v. McFalls*, 592 F.3d 707 (6th Cir. 2010) (assault and battery of a high and aggravated nature); *United States v. Johnson*, 587 F.3d 203 (3d Cir. 2009) (reckless assault); *United States v. Hampton*, 585 F.3d 1033 (7th Cir. 2009) (criminal recklessness); *United States v. High*, 576 F.3d 429, 430-31 (7th Cir. 2009) (recklessly endangering safety); *United States v. Gear*, 577 F.3d 810 (7th Cir. 2009) (reckless discharge of a firearm); *United States v. Baker*, 559 F.3d 443 (6th Cir. 2009) (reckless endangerment); *United States v. Gray*, 535 F.3d 128 (2d Cir. 2008) (reckless endangerment).

[25] In *United States v. Martinez*, 602 F.3d 1166 (8th Cir. 2010), the Eighth Circuit held that Arizona attempted second degree burglary is not a "violent felony" because it permits conviction if the person took "any step" toward committing the offense, which is too attenuated from the "substantial step" approved in *James*). At the same time, the court said that the offense qualifies as a "crime of violence" for purposes of the career offender guideline because that guideline expressly includes attempts.

> At the same time, the Court rejected Sykes' argument that because the Indiana offense is not "purposeful, violent, and aggressive" in the ways of the enumerated offenses, then it is not a "violent felony" under *Begay* regardless of the risks presented. The Court explained that *Begay* involved an offense (DUI) akin to a strict liability, negligence, or recklessness crime, which is why the risk inquiry was not dispositive in that case. *Id.* at 2275-76.

Courts of appeals have understood *Sykes* to mean that if the crime is intentional, then only the risk inquiry applies, while *Begay*'s requirement of "purposeful, violent, and aggressive" conduct still applies to strict liability, negligence, and recklessness crimes.[26] Thus, regardless of the risk presented, a crime with a *mens rea* less stringent than "purposeful and deliberate" is not similar "in kind" to the enumerated offenses and is thus not a "crime of violence" or "violent felony."[27]

Finally, on April 21, 2014, the Supreme Court granted *certiorari* to resolve a circuit split regarding whether possession of a sawed-off shotgun is a violent felony under the ACCA's residual clause. *Johnson v. United States*, No. 13-7120.

The question whether a prior conviction would no longer qualify as a "violent felony" under the Supreme Court's narrowing interpretations (and later applications of those decisions by lower courts) depends on both state and federal law. Each state defines its own crimes, with similar-sounding crimes having different elements from state to state. The state's label for the prior crime may sound like a "violent felony," but its elements do not actually describe a "violent felony" under Supreme Court law. The question whether a given offense is a "violent felony" thus depends on the state's definition of the offense, application of the Supreme Court's narrowing interpretations, and application of the categorical or modified categorical approach (discussed in the next section). While some state statutes have already been construed (or

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[26] *See, e.g., Brown v. Caraway*, 719 F.3d 583, 593 (7th Cir. 2013); *United States v. Chitwood*, 676 F.3d 971, 978-79 (collecting cases).

[27] *See, e.g., United States v. Martin*, __ F.3d __, 2014 WL 2525214 (4th Cir. June 5, 2014) (Maryland conviction for fourth-degree burglary is not a "crime of violence" under the residual clause of § 4B1.2(a)(2) because, although the statute proscribes conduct that presents a degree of risk of physical injury roughly similar to the risk of injury posed by generic burglary, the statute could also be violated by negligent conduct and therefore was not similar in kind to the offenses enumerated in § 4B1.2); *Brown v. Caraway*, 719 F.3d at 593 (confirming that after *Sykes* and under *Begay*, a conviction for third degree arson under Delaware statute is not a crime of violence under the career offender guideline's residual clause because it has the less stringent *mens rea* of recklessness); *United States v. Owens*, 672 F.3d 966, 972 (11th Cir. 2012) (because second degree rape and second degree sodomy under Alabama law are strict liability offenses, "we cannot hold that a violation of either of them involves 'purposeful, violent, and aggressive conduct'" under *Begay* for purposes of the ACCA's residual clause).

reconstrued) by federal district or appellate courts in light of the Supreme Court's narrowing interpretations, many have not. This will require research.

> **Example:** Client A's prior conviction for statutory rape was under Ala. Code § 13A-6-62, which makes it a crime for a person, "[b]eing 16 years old or older, [to] engage[] in sexual intercourse with a member of the opposite sex less than 16 and more than 12 years old," provided "the actor is at least two years older than the member of the opposite sex." The Eleventh Circuit held that, under *Johnson*, this conviction is not a "violent felony" under the "force" clause, and that, under *Begay*, it is not a "violent felony" under the residual clause. *United States v. Owens*, 672 F.3d 966 (11th Cir. 2012). Because the conviction was one of three necessary prior convictions, and there is no other conviction that would qualify, Client A is not subject to the ACCA under current law.

B. Would a necessary prior conviction no longer qualify as a "serious drug offense" or a "violent felony" under the categorical approach or the modified categorical approach, as clarified by the Supreme Court in *Descamps*?

To determine whether a client was previously convicted of an offense with the requisite elements to qualify as a "serious drug offense" or "violent felony" under any clause of the ACCA, courts apply the "categorical approach." *See Descamps v. United States*, 133 S. Ct. 2276 (2013). Under this "elements-based" approach, the prior conviction must be for an offense having the same (or narrower) elements as the applicable definition of the qualifying offense, *id.* at 2285-86, as interpreted by the Supreme Court. If, by its elements, the offense of conviction applies more broadly than the qualifying offense (i.e., it applies to an offense that is not criminalized under the definition of the qualifying offense), the prior conviction cannot be a predicate. *See id.* at 2285-86, 2293.

The Supreme Court first adopted the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990). As it recently reiterated, it adopted this approach—rather than a factual approach that would authorize federal sentencing courts to try to discern from a previous trial or plea record facts superfluous to the prior conviction and to find that the defendant was in fact guilty of an offense of which he was not convicted—for three reasons: (1) the categorical approach comports with the ACCA's text and history; (2) a factual approach would present practical difficulties and unfairness; and (3) it would violate the Sixth Amendment for the federal court to make findings of fact that belong to a jury. *See Descamps*, 133 S. Ct. at 2287-89.

The categorical approach applies to each prong of the definition of "violent felony," as interpreted by the Supreme Court. For example, the ACCA lists burglary as one of the enumerated qualifying offenses. The Supreme Court instructs that "burglary" in this context is generic burglary, which is defined as "having the basic elements of [1] unlawful or unprivileged [2] entry into, or remaining in, [3] a building or structure, [4] with intent to commit a crime." *Taylor*, 495 U.S. at 599. A defendant was previously convicted under a California statute that provides that a "person who enters" certain locations "with intent to commit grand or petit

larceny or any felony is guilty of burglary." The statute is missing the element of "unlawful or unprivileged" entry. As a result, a shoplifter who enters a store during normal business hours may be convicted of burglary. *See, e.g.*, *People v. Barry*, 94 Cal. 481, 483-84 (1892). Because the statute applies more broadly than generic burglary, it is categorically not a "violent felony" for purposes of the ACCA. *Descamps*, 133 S. Ct. at 2286. In order to avoid a Sixth amendment violation, a judge applying the ACCA in a federal sentencing may not determine for herself whether the defendant, in committing the prior state offense, in fact unlawfully entered a building. *Id.* at 2286.

> **Example:** In Client A's case, one of the prior offenses necessary to the ACCA enhancement was for burglary. The state's burglary statute is materially identical to the California statute that the Supreme Court found to be categorically not a violent felony in *Descamps*, in that it is missing the element of unlawful or unprivileged entry. As in California, state caselaw indicates that a shoplifter who enters a store during normal business hours may be convicted of burglary. Although several circuits had, before *Descamps*, upheld similar ACCA predicates under this and other state statutes, and although no circuit has since weighed in on the issue, *Descamps* makes clear that the statute applies more broadly than generic burglary. The burglary conviction is not a "violent felony," and Client A is not subject to the ACCA under current law.

The categorical approach is not always easy to apply. State statutes vary considerably. The breadth of a statute may only be known by researching state cases interpreting the statute. In addition, many statutes set forth elements in the alternative, some of which describe qualifying offenses and some of which do not. In these circumstances, a court may use the "modified categorical approach" to determine whether a defendant was necessarily convicted of a qualifying offense.

For example, under the ACCA, "serious drug offense" is defined as "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 Substance Act (21 USC 802))" for which the maximum term of imprisonment is ten years or more. Offenses involving purchase, use, or simple possession, or that are punishable by less than ten years are not included in this definition, so do not qualify as ACCA predicates. A state statute, meanwhile, may set forth the alternative offenses of manufacture, distribution, purchase, use, or simple possession, and may include offenses punishable by less than ten years. A judgment of conviction under the state statute may simply cite the statute or list all of the alternative offenses, so that it is impossible to determine the actual offense of conviction.

The Supreme Court has held that under these circumstances, the court is permitted to look beyond the judgment to a limited set of case-specific documentation—*i.e.*, the charging document and jury instructions or bench trial findings of the court if the defendant was convicted at trial, *Taylor v. United States*, 495 U. S. 575, 602 (1990), and the plea agreement and plea colloquy transcript (or "some comparable judicial record of this information") if the defendant

pled guilty, *Shepard v. United States*, 544 U. S. 13, 25-26 (2005)—to determine the elements of the offense of which the defendant was convicted, *Descamps*, 133 S. Ct. at 2283-84. If the elements of the offense of conviction cannot be determined from these documents without regard to the underlying facts, it must be assumed that the conviction was for the least culpable crime, *i.e.*, the non-qualifying offense, *see Johnson v. United States*, 559 U.S. 133, 137 (2010), and thus the prior conviction under that statute cannot qualify as a predicate offense. This "modified categorical approach" is intended only as a "tool for implementing the categorical approach." *Descamps*, 133 S. Ct. at 2284.

Courts of appeals have not always been disciplined in using the modified categorical approach in that limited manner, however, expanding its use to apply to statutes that do not have alternative elements and permitting federal district courts to determine on an unreliable paper record that the defendant in fact committed a qualifying offense, as the Ninth Circuit did with the California burglary statute described above. In *Descamps*, decided in 2013, the Supreme Court clamped down on these loose practices. It clarified that courts may use the modified categorical approach only for "divisible" statutes, under which the "statute sets out one or more elements of the offense in the alternative," not all of which qualify as a predicate. *Id.* at 2281-82. It further clarified that the court may use this modified approach "*only* to determine which alternative element in a divisible statute formed the basis of the defendant's conviction." *Id.* at 2293 (emphasis added). "The modified approach does not authorize a sentencing court to substitute . . . a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction." *Id.* In other words, as with the categorical approach, the modified approach may be used only to identify the elements of the crime of which the defendant was *convicted*, not to identify and rely on facts superfluous to the conviction.

Reversing the Ninth Circuit, the Supreme Court held that the modified categorical approach had "no role to play" in determining whether Descamps' conviction under the California burglary statute was a violent felony because that statute was not divisible. *Id.* at 2285. Under the categorical approach, the California burglary conviction was not a "violent felony" because the statute of conviction did not require proof of unlawful entry, which is an element of the generic crime of burglary, and thus the district court erred in enhancing Descamps' sentence under the ACCA.

1. Violent felonies after Descamps

In light of *Descamps*, courts have reversed longstanding precedent to hold that the modified categorical approach has been wrongly applied to find ACCA "violent felony" predicates, such as a Maryland conviction for second degree assault, *see United States v. Royal*, 731 F.3d 333 (4th Cir. 2013), a South Carolina conviction for assault and battery of a high and aggravated nature, *see United States v. Hemingway*, 734 F.3d 323 (4th Cir. 2013), an Alabama conviction for third degree burglary, *see United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014), and a Nebraska conviction for escape from custody, *United States v. Tucker*, 740 F.3d 1177 (8th Cir. 2014). Under *Descamps*, prior offenses under these statutes do not qualify as a "violent felony" in any case.

In *United States v. Bankhead*, the Eighth Circuit considered whether an Illinois statute underlying an adjudication of juvenile delinquency for armed robbery qualified as an ACCA predicate. For ACCA purposes, a prior juvenile adjudication must "involv[e] the use or carrying of a firearm, knife, or destructive device" *in addition to* satisfying the ordinary definition of "violent felony." *See* 18 U.S.C. § 924(e)(2)(B). The Illinois statute, however, requires only that the robbery be committed with a "dangerous weapon." The Eighth Circuit held that the Illinois statute is indivisible with respect to the type of dangerous weapon used or carried and, covering such "instrumentalities" as a brick or baseball bat, sweeps more broadly than the ACCA. As a result, it cannot form the basis of "an act of juvenile delinquency involving a violent felony" for purposes of the ACCA. *United States v. Bankhead*, 746 F.3d 323 (8th Cir. 2014).

The law is still evolving. There are likely many defendants whose ACCA enhancement was based on the incorrect application of the modified categorical approach to an indivisible statute. Even relatively recent prior precedent may be fatally undermined by *Descamps*, but the court of appeals has not yet addressed the question.

There are also likely many defendants whose prior convictions were properly understood to be under an indivisible statute and counted as a "violent felony" under the categorical approach at sentencing, but a court of appeals *later* held that it is not a violent felony under the Supreme Court's narrowing interpretation but the defendant got no relief in the courts through habeas proceedings due to procedural bars, or because a habeas petition was not even filed on the defendant's behalf. When a court of appeals has held that a client's prior conviction, or one materially identical to it, no longer categorically qualifies as a "violent felony" or "crime of violence," the client would not be subject to the ACCA.

Finally, there are likely many defendants whose ACCA enhancement was based on an incorrect application of the modified categorical approach to a divisible statute, as clarified by *Descamps*.

A step-by-step guide to applying the categorical and modified categorical approaches to determine whether a prior offense is a "violent felony" after *Descamps*, with examples, is contained in Appendix 1.

2. "*Serious drug offenses*" and the modified categorical approach

State drug statutes generally have been treated as divisible, permitting use of the modified categorical approach when the statute criminalizes conduct that does not qualify as an ACCA predicate. So far, there have been no decisions after *Descamps* holding that a state drug statute has been wrongly treated as divisible.

However, some clients with prior drug convictions from California and Connecticut may have been sentenced in federal court before the federal courts recognized that the state statute of conviction applies to some offenses that qualify as a "serious drug offense" under the ACCA and some that do not, requiring them to use the modified categorical approach to determine whether

the client was *necessarily* convicted of a qualifying offense. *See United States v. Lopez*, 536 F. Supp. 2d 218, 221 (D. Conn. 2008) (because Conn. Gen. Stat. § 21a-277(a) criminalizes offenses involving substances that are not controlled by the federal Controlled Substances Act, court was required to apply the modified categorical approach to determine whether the defendant's prior offense qualified as an ACCA predicate); *United States v. Mattis*, 14 F. App'x 773, 775 (9th Cir. 2001) (recognizing that Cal. Health & Safety Code § 11351 criminalizes offenses involving substances that are not listed in the Controlled Substance Act, such as tilidine, so that the modified categorical approach must be applied to determine whether the defendant's prior offense involved a federally controlled substance); *United States v. Savage*, 542 F.3d 959, 966 (2d Cir. 2008) (recognizing that Conn. Gen. Stat. § 21a-277(b) criminalizes a mere offer to sell, which is not a "controlled substance offense" under the career offender guideline, requiring application of the modified categorical approach); *see Carter v. United States*, 731 F. Supp. 2d 262, 274 (D. Conn. 2010) (applying *Savage* to hold that a prior conviction was not a "serious drug offense" under the ACCA because it could not be shown that the defendant was necessarily convicted of a qualifying offense). Under the modified categorical approach as clarified by *Descamps*, a client's prior California or Connecticut drug conviction may not qualify as an ACCA predicate.

> **Example:** Assume that instead of the non-generic burglary conviction, Client A was charged by information with "possession of narcotics with intent to sell" under Conn. Gen. Stat. § 21a-277(a). Under the ACCA, a "serious drug offense" is "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 Substance Act (21 USC 802))," 18 U.S.C. § 924(e)(2)(A)(ii). Connecticut's scheduled list of controlled substances matches the federal schedules under the Controlled Substance Act, except that it includes two obscure substances, benzylfentanyl and thenylfentanyl, that are not listed in the federal Controlled Substance Act. As a result, Connecticut statutes criminalizing the sale of a controlled substance apply more broadly, both to offenses that qualify as an ACCA predicate and offenses that do not qualify. *See United States v. Lopez*, 536 F. Supp. 2d 218 (D. Conn. 2008). The information did not specify which narcotic was involved in the offense, and the transcript of the plea proceeding had been, by the time of the federal offense, destroyed according to the state court's policy. As a result, there was no way to determine, looking only to *Shepard*-approved documents, which narcotic was involved. The prior conviction cannot qualify as a "serious drug offense" under the ACCA.

In other cases, the sentencing judge may have recognized that the modified categorical approach applies, but incorrectly transformed what should have been an elements-based inquiry into a fact-based inquiry or otherwise incorrectly applied the elements-based inquiry. Determining whether this happened in a client's case will require research of the statute of conviction and guideline definition applicable at the time of sentencing (and its relevant history), research regarding what documents may be consulted *in that circuit* for purposes of the modified categorical approach

(and obtaining those documents),[28] and a concise, rigorous application of the categorical or modified categorical approach as clarified by *Descamps*.

> **Example:** Assume that instead of the non-generic burglary conviction, Client A was convicted under a Florida statute that makes it a felony to "knowingly sell[], purchase[], manufacture[], deliver[], or bring into this state 28 grams or more of cocaine." Under the ACCA, "serious drug offense" is defined in relevant part as "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 Substance Act (21 USC 802))." 18 U.S.C. § 924(e)(2)(A)(ii). This definition does not include offenses involving *purchase*. The Florida statute applies to the purchase of cocaine, which does not qualify as a "serious drug offense," and to the sale of cocaine, which does qualify. Thus, to determine whether Client A was necessarily convicted of a qualifying offense, the court may use the modified categorical approach. *See United States v. Shannon*, 631 F.3d 1187, 1190 (11th Cir. 2011).
>
> In 2005, the sentencing court looked to the underlying facts of Client A's offense alleged in the police report to find that Client A's offense involved selling 30 grams of cocaine. This was error, as clarified by later Supreme Court decisions, and most recently in *Descamps*. The indictment charged all four of the alternative methods of violating the Florida statute. At the plea colloquy, Client A pled guilty "as charged." Properly applying the modified categorical approach by looking only at *Shepard*-approved documents, a judge cannot determine to which of the four alternative offenses Client A pled guilty. As a result, it must be assumed that he pled guilty to the least culpable offense, i.e., purchasing, which does not qualify as a "serious drug offense." Client A is not subject to the ACCA.

> **Example:** Assume that instead of the non-generic burglary conviction, Client A was previously convicted under a Maryland statute under which some controlled substances, such as cocaine or heroin, trigger a maximum term of imprisonment of ten years or more and others, such as marijuana, do not. Under the ACCA, "serious drug offense" is defined in relevant part as "an offense under State law . . . for which a maximum term of imprisonment for ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii). To determine whether Client A was necessarily convicted of the offense carrying a maximum term of ten years or

[28] For example, the Ninth Circuit has held that a court may consult other "equally reliable" documents. *See, e.g., United States v. Snellenberger*, 548 F.3d 699, 701-02 (9th Cir. 2008) (en banc) (per curiam) (holding that a California state court clerk's minute order was "equally reliable" and could be used in applying the modified categorical approach); *United States v. Strickland*, 601 F.3d 963, 968 (9th Cir. 2010) (en banc) (concluding that an uncertified Maryland docket sheet was sufficiently "reliable"). Holdings expanding the list of *Shepard* documents that may be consulted do not control cases arising in other circuits.

more, the court may use the modified categorical approach. *See United States v. Washington*, 629 F.3d 403, 408 (4th Cir. 2011).

The *Shepard*-approved documents show that the Client pled guilty to an indictment that in Count I alleged that he possessed with intent to distribute a controlled substance, "to wit, cocaine." The docket entry notation indicates that the defendant pled guilty to Count I; the judgment states that the defendant pled guilty to Count I. The prior drug conviction is a qualifying offense.

C. Would a prior conviction no longer qualify as a "violent felony" or "serious drug offense" under the Supreme Court's decision in *Carachuri-Rosendo*?

Under 18 U.S.C. § 922(g), a defendant must have been previously convicted in any court of a crime punishable by more than one year. To qualify for the ACCA enhancement, a defendant must have three prior convictions for either a "violent felony," a crime punishable by more than one year, or a "serious drug offense," an offense for which the statutory maximum is ten years or more.

In some cases, one or more prior convictions necessary to the ACCA enhancement (and perhaps even the prior conviction necessary to the § 922(g) conviction itself) would (1) no longer be a "felony" today because the client could not have been sentenced at the time of the prior conviction to a term of imprisonment of "more than one year," or (2) no longer be a "serious drug offense" today because the client could not have been sentenced to a term of imprisonment of "ten years or more."

In *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), the Supreme Court addressed whether a prior conviction qualifies as an "aggravated felony" under the Immigration and Nationality Act. The question presented was whether Carachuri had been "convicted of" a drug trafficking crime for which the "maximum term of imprisonment authorized exceeds one year." In 2004, Carachuri was convicted under Texas law for possessing less than two ounces of marijuana (a misdemeanor) and then in 2005 for possessing a Xanax tablet without a prescription. *Id.* at 570-71. Under Texas law, Carachuri could have received an enhanced recidivist sentence of more than 12 months for the 2005 Xanax conviction, but only if the state proved the fact of the 2004 marijuana conviction. Because the record of the 2005 Xanax conviction contained no finding of fact concerning the 2004 marijuana conviction, Carachuri could not have received a sentence in excess of one year for the 2005 Xanax conviction, and was thus not previously convicted of an "aggravated felony." *Id.* at 581-82. The Court emphasized that the question was whether Carachuri was "actually convicted of a crime that is itself punishable as a felony," not whether a hypothetical person could have received a sentence exceeding one year had he been convicted of the recidivist enhancement. *Id.* at 576, 581.

In light of *Carachuri-Rosendo*, the Fourth Circuit changed course with respect to prior drug convictions under North Carolina law. Under that state's structured sentencing scheme, the maximum sentence that may be imposed is controlled by the defendant's particular "prior record

level." In *Simmons v. United States*, 649 F.3d 237 (4th Cir. 2011) (en banc), the Fourth Circuit held that a prior North Carolina conviction for possession with intent to sell no more than ten pounds of marijuana was not a "felony drug offense" for purposes of a § 851 enhancement because the defendant, with a "prior record level" of only 1 and where the prosecutor alleged no facts in aggravation sufficient to warrant an aggravated sentence, was subject to a statutory maximum sentence of eight months' community punishment (no imprisonment). *Id.* at 241. As a result, he was not convicted of an offense punishable by imprisonment for more than one year . Under *Simmons*, courts determining whether a prior offense is punishable by a term exceeding one year may no longer look at the maximum sentence that may be imposed on a hypothetical defendant with the hypothetically worst prior record level, but only at the maximum sentence that could have been imposed on the particular defendant with his actual prior record level under the law at the time of conviction.

In *United States v. Haltiwanger*, on remand from the Supreme Court for further consideration in light of *Carachuri-Rosendo*, the Eighth Circuit similarly changed course and held that a prior Kansas conviction for possession of a controlled substance without affixing a tax stamp did not qualify as a "felony drug offense" for purposes of § 851 because, as in North Carolina, the "Kansas sentencing structure ties a particular defendant's criminal history to the maximum term of imprisonment." *United States v. Haltiwanger*, 637 F.3d 881, 884 (8th Cir. 2011). "[W]here a maximum term of imprisonment . . . is directly tied to recidivism," the "actual recidivist finding. . . must be part of a particular defendant's record of conviction for the conviction to qualify as a felony." *Id*. at 884.

On June 2, 2014, in *United States v. Brooks*, 751 F.3d 1204 (10th Cir. 2014), the Tenth Circuit held that *Carachuri-Rosendo* invalidated its prior decision in *United States v. Hill*, 539 F.3d 1213 (10th Cir. 2008). In *Hill*, it held that the question whether a prior Kansas conviction qualifies as a "felony" for purposes of conviction as a felon in possession of a firearm under 18 U.S.C. § 922(g)(1) depends on the maximum statutory penalty for the aggravated offense, not the lower maximum penalty actually applicable to the individual defendant based on the unaggravated facts of conviction. In *Brooks*, the Tenth Circuit overruled *Hill* and held that a prior Kansas conviction for fleeing and eluding, for which the defendant could not have actually been sentenced to more than 7 months, does not qualify as a "felony" for purposes of the career offender guideline after *Carachuri-Rosendo*.

Under *Simmons*, *Haltiwanger*, and *Brooks*, many defendants with prior North Carolina or Kansas convictions may have been wrongly subject to the ACCA because they were not previously convicted of a necessary "felony" punishable by more than 12 months in prison or a necessary "serious drug offense" with a maximum punishment of ten years or more.[29] Some have gotten relief, including some in post-conviction proceedings. But many have not.

[29] In the rare case, all three prior offenses relied on for the ACCA designation will no longer qualify as predicates, and the client could not have been sentenced to more than ten years as a felon in possession under 18 U.S.C. § 922(g)(1). In such a case, it is also possible that the client may not be a "felon" in possession of a firearm because the necessary predicate offense for purposes of 18 U.S.C. § 922(g)(1)

If a client was classified as an Armed Career Criminal based on one or more prior convictions under North Carolina or Kansas law, you will need to determine whether, under the applicable state law at the time of conviction, a necessary prior conviction would still be a "felony" or "serious drug offense" today.

Be aware that the sentencing schemes of Kansas and North Carolina are complex and difficult to decipher for the inexperienced. Unless you already have experience determining actual penalties under Kansas and North Carolina law, seek assistance as noted above.

> **Example:** Client A's third predicate offenses was a 2002 Kansas conviction for fleeing and eluding, KSA 21-6804. Under the state's sentencing grid, now codified at KSA 21-6801 through KSA 21-6824, he could not have been sentenced to more than 7 months. Under *Haltiwanger* and *Brooks*, the conviction is not a "felony" for purposes of the ACCA because it is not "punishable by imprisonment for a term exceeding one year." Client A's Kansas conviction is not a "violent felony."

If the client was convicted of an offense in another state under a statutory scheme that appears to function like the statutes in *Carachuri-Rosendo*, *Simmons*, and *Brooks*, but there is no circuit law addressing the issue, seek assistance as noted above.

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itself was not punishable by more than 12 months in prison. *See, e.g.*, *United States v. Kerr*, 737 F.3d 33 (4th Cir. 2013) (considering whether, under *Simmons*, the defendant was even a "felon" for purposes of § 922(g) but finding the defendant's offense of conviction was subject to a maximum of 14 months).

Appendix 1

Steps for conducting post-*Descamps* categorical/modified categorical analysis

Step 1: Determine the applicable definition under the ACCA (a "violent felony" or "serious drug offense").

Step 2: Determine the elements of the prior offense of conviction by looking at the face of the statute of conviction, both state and federal case law interpreting the statute or common law offense, and standard jury instructions. At this point, you may find that a federal court has already determined whether a conviction categorically qualifies as an ACCA predicate in accordance with the relevant definition properly construed under Supreme Court law. If so, that is the end of the inquiry. If not, go to Step 3.

Example: A former Indiana statute made it a crime to "flee from a law enforcement officer after the officer, by visible or audible means, identified himself and ordered the person to stop . . . and the person uses a vehicle to commit the offense."

The Supreme Court held in *Sykes v. United States*, 131 S. Ct. 2267 (2011), that this Indiana offense is a "violent felony" under the residual clause of the ACCA. A prior conviction under that Indiana statute is therefore a "violent felony."

Be careful: There may be a federal case that analyzes the statute, but that case may have been decided before *Descamps* and may have erroneously used the modified categorical approach. *See, e.g.*, *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014) (holding that Alabama third degree felony of burglary is not a violent felony under the ACCA and that the court misapplied the modified categorical approach when it previously held to the contrary). <u>If you believe you have such a case, seek assistance as noted above.</u>

Step 3: Determine whether the elements of the prior offense **always** fit within the applicable definition of the federal predicate. The prior offense always qualifies as an ACCA predicate if the elements of the prior offense **match or are narrower** than the applicable definition. If this match occurs, that is the end of the inquiry, and the modified categorical approach does not apply. The prior offense is categorically an ACCA predicate. If not, go to Step 4.

Example: A state burglary statute requires proof of three elements: (1)

unlawful entry (2) into a building (3) with intent to commit a crime.

The ACCA lists "burglary" as a crime of violence. 18 U.S.C. § 924(e)(2)(B)(ii). "Generic" burglary requires proof of three elements: (1) unlawful entry (2) into a building (3) with intent to commit a crime.

A conviction under this state statute always qualifies as a "violent felony" under the ACCA because the elements of the state offense match the three elements of "generic" burglary. There is no need to determine whether it qualifies under the force clause or the residual clause.

Step 4: Even though the prior offense does not fit in the "always" category in Step 3, it may **sometimes** qualify as an ACCA predicate. The prior offense sometimes qualifies if it has **alternative elements** – some that match or are narrower than the applicable definition and some that do not match or are broader. If the statute is **divisible** in this way, the **modified categorical approach** applies. If so, go to Step 5. If not, skip to Step 6.

Example: Same as in Step 3, but the state burglary statute has two subsections with alternative elements:

Subsection (a) requires proof of (1) unlawful entry (2) into a building (3) with intent to commit a crime.

Subsection (b) requires proof of (1) entry (2) into a building (3) with intent to commit a crime.

Subsection (a) has all three "generic" elements of burglary, but subsection (b) is missing the *unlawful* entry element. Subsection (b) does not fit the generic definition of burglary, and so does not qualify as an enumerated offense under the ACCA. Therefore, the modified categorical approach applies to determine whether the offense of conviction was under subsection (a) or subsection (b). Go to Step 5.

Be careful: Merely because a statute contains different disjunctive phrases or terms does not mean it is divisible in a way that triggers the modified categorical approach.

a. Sometimes these phrases are just a non-exhaustive list of examples of different factual means through which an

element can be met. The jury does not ever have to find these factual means to convict the defendant. Factual means are not elements. In these circumstances, the modified categorical approach does not apply.

Example: A South Carolina conviction for assault and battery of a high and aggravated nature requires proof of two elements: (1) unlawful act of violent injury (which does not require "violent force," *see State v. Primus*, 564 S.E.2d 103, 106 n.4 (S.C. 2002),) and (2) circumstances of aggravation.

According to South Carolina case law, "circumstances of aggravation" include use of a deadly weapon, infliction of serious bodily injury, intent to commit a felony, disparity in age, physical condition or sex, indecent liberties, purposeful infliction of shame, resistance of lawful authority, and others.

The applicable ACCA definitions are as follows:

- Under the "force clause," "force" means "violent force," i.e., force capable of causing physical injury or pain. *Johnson v. United States*, 559 U.S. 133, 140 (2010).
- Under the residual clause, a "violent felony" is an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii); *Begay v. United States*, 553 U.S. 137 (2008); *Sykes v. United States*, 131 S. Ct. 2267 (2011).

In *United States v. Hemingway*, 734 F.3d 323 (4th Cir. 2013), the Fourth Circuit held that the list of various circumstances of aggravation in the South Carolina statute were not alternative elements, but rather a non-exhaustive list of factual means for satisfying the "circumstances of aggravation" element. Thus, the modified categorical approach did not apply.

The court held that, under *Johnson*, it does not satisfy the "force clause" because the first element—an act of "violent injury" —does not necessarily involve force capable of causing physical injury. *Id.* at 327. Under *Begay*, the

second element—"circumstances in aggravation"—"can be satisfied simply by showing, for example, a disparity in age," which does not present the same "'serious potential risk of physical injury as the ACCA's enumerated offenses-burglary, arson, or extortion, [or offenses that] involve[] use of explosives.'" *Id.* at 337 (quoting *Begay*, 553 U.S. at 144).

Thus, the South Carolina offense fails to qualify as a "violent felony" under the ACCA.

b. Sometimes the different phrases are an exhaustive list, but under the law of the relevant jurisdiction, they are still just factual means (for satisfying an element) that a jury never has to find. Thus, they are not elements and the modified categorical approach does not apply.

Example: A state assault statute prohibits use of "force" against another by "stabbing, shooting, or squirting water" on that person.

Although the statute limits the list of ways of satisfying the "force" element to "stabbing, shooting, or squirting water," state case law holds that "stabbing, shooting, and squirting water" are factual means for satisfying the "force" element, and the jury does not have to find these means to convict.

Under these circumstances, stabbing, shooting, and squirting are not alternative elements; thus the modified categorical approach cannot apply.

Under the "force clause" of the ACCA, a "violent felony" "has as an element the use, attempted use, or threatened use of physical force against the person of another." 18 U.S.C. § 924(e)(2)(B)(i).

The state "force" element is indivisible and broader than the "force clause" under the ACCA. Therefore, it cannot qualify under the "force clause." It also cannot qualify under the residual clause because the least culpable means of committing the offense, squirting water, does not present a serious potential risk of physical injury to a degree similar to an enumerated offense. Therefore, the state offense never qualifies as a crime of violence.

c. Sometimes, the jury never has to find one alternative phrase versus another because, under the law of the relevant jurisdiction, these phrases are submitted to the jury as one clump. Thus, it can never be determined whether the jury necessarily found one phrase versus another. Hence, the different phrases cannot be separated into alternative elements, and the modified categorical approach does not apply.

Example: Maryland second degree assault prohibits "offensive physical contact with" *or* "physical harm" to the victim.

Under Maryland law, the jury is not required to find one of these phrases to the exclusion of the other; rather, it is enough that the jurors agree only that one of the two occurred, without settling on which.

Thus, rather than alternative *elements*, "offensive physical contact" and "physical harm" are merely alternative *means* of satisfying a single element of the Maryland offense.

Thus, in *United States v. Royal*, 731 F.3d 333 (4th Cir. 2013), the Fourth Circuit held that Maryland second degree assault is indivisible and so the modified categorical approach does not apply. Applying the categorical approach, "Maryland's second-degree assault statute reaches any unlawful touching, whether violent or nonviolent and no matter how slight," thus a conviction under the statute cannot categorically be a violent felony because it does not always involve "violent force," as required by the Supreme Court's narrowing interpretation in *Johnson*. *Id.* at 342. Also, offensive touching does not qualify under the residual clause because it does not present a serious potential risk of physical injury to a degree similar to an enumerated offense.

Step 5: If the prior offense has alternative elements that fit in the sometimes category and the modified categorical approach applies, review the *Taylor/Shepard* documents (charging document, plea agreement, plea colloquy transcript, jury instructions, bench trial findings of court, and judgment) to determine which of the alternative *elements* the defendant was necessarily convicted of, not to determine *how* the defendant *factually* committed the offense.

If these documents establish that the defendant *necessarily* pled guilty to or *necessarily* was convicted by a jury (or by the judge if a bench trial) of the subset of elements of the statute satisfying the relevant ACCA definition, then the inquiry is over and the prior offense is an ACCA predicate.

If the documents fail to establish that the defendant *necessarily* pled guilty to or *necessarily* was convicted by a jury (or by the judge if a bench trial) of the subset of elements of the statute satisfying the relevant ACCA definition, then the inquiry is over and the prior offense cannot qualify as an ACCA predicate.

Be careful: a. If the charging document, jury instructions, or plea colloquy alleges both sets of elements—a set that matches the ACCA definition and a set that does not—then it must be assumed that the defendant was convicted of the set of elements that do not qualify as an ACCA predicate.

Example: A state assault statute with alternative elements, requiring either an intentional "offensive physical contact" or "the intentional infliction of serious physical injury."

The modified categorical approach applies. "Offensive physical contact" does not qualify as a "violent felony" under the ACCA because it does not satisfy the "violent force" requirement under the "force clause" or present a serious risk of physical injury under the residual clause. In contrast, "intentional infliction of serious physical injury" likely qualifies under the residual clause.

However, the charging document—the only existing *Shepard* document—charges both subsections: "offensive physical contact" and "intentional infliction of serious physical injury."

You must assume that defendant pled guilty to "offensive physical contact," which does not qualify as a "violent felony."

b. If the charging document and judgment simply note the statute or allege both sets of elements, and the plea colloquy does not explicitly note the subset of elements to which defendant pled guilty, but reflects that defendant admitted to facts that conform with both sets of elements—the ones that match the ACCA definition and the ones that

do not—then it must be assumed that the defendant pled guilty to the set of elements that do not qualify as an ACCA predicate.

Example: A state burglary statute has two subsections with alternative elements. Subsection (a) requires (1) unlawful entry (2) into a building (3) with intent to commit a crime. This satisfies the generic definition of burglary under the ACCA.

Subsection (b) requires (1) entry (2) into a building. It does not satisfy the generic burglary definition because it does not have the element of "unlawful" entry or the element of "with intent to commit a crime." Nor does it satisfy the force clause or the residual clause.

Thus, the modified categorical approach applies to determine whether a client was convicted of the qualifying offense under subsection (a).

The specific subsection of the statute to which the defendant pled guilty is not specified in the charging document. In the plea colloquy, the client admitted to breaking into someone's house with intent to steal a Rolex watch. These facts make out both subsections. Therefore, you must assume that the defendant pled guilty to subsection (b), which does not constitute a "violent felony."

c. Same state burglary statute as above. The charging document recites both subsections of the statute. The defendant entered an *Alford* plea, by which he did not admit any facts to support the plea.

You must assume that the defendant pled guilty to subsection (b), which does not constitute a "violent felony."

d. The judgment is a critical document because defendants often plead guilty to lesser included offenses that are not noted in the charging document. While the judgment usually sets forth the offense to which the client actually pled guilty, judgments are <u>not always accurate</u>. Be sure to ask the client what he was actually convicted of. If he says he was convicted of a lesser included offense, search further.

Example: A defendant was convicted under a Florida statute that provides:

Whoever, wantonly or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or other hard substance which would produce death or great bodily harm, at, within, or in any public or private building, occupied or unoccupied, or public or private bus or any train, locomotive, railway car, caboose, cable railway car, street railway car, monorail car, or vehicle of any kind which is being used or occupied by any person, or any boat, vessel, ship, or barge lying in or plying the waters of this state, or aircraft flying through the airspace of this state shall be guilty of a felony of the second degree. . . .

The PSR deemed the defendant to be subject to the ACCA based in part on his prior conviction for violating this statute. The government provided the information and judgment, both of which referred to the Florida offense. But a notation in the state attorney's file, which defense counsel obtained through a public records request, indicated the defendant actually pled to the lesser included offense of misdemeanor assault under a different statute. So counsel ordered a transcript of the plea colloquy, which ultimately revealed that the defendant had in fact pled guilty to the misdemeanor. He thus was not subject to the ACCA.

Step 6: If the prior offense does not fit in the always or sometimes categories in Steps 3, 4, and 5, that means the prior offense will **never** qualify as an ACCA predicate. Under the never category, the prior offense has no subset of elements that conforms with the ACCA definition of "serious drug offense" or "violent felony." Thus, the prior offense categorically fails to qualify as an ACCA predicate.

Example: A state burglary statute requires (1) entry (2) into building (3) with intent to commit a crime.

The statute is missing the *unlawful* entry element. State caselaw confirms that the jury is never required to find "unlawful" entry, so the offense does not qualify as generic burglary. Further, it has no element of force, and it does qualify under the residual clause because it does not present a serious potential risk of physical injury. Therefore, the offense never qualifies as a "violent felony"

under the ACCA.

See also "be careful" examples in Step 4.