

## CASE LIST

### Sentencing Issues in Reentry Cases

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#### Introduction

It is important to note two things when reviewing the decisions which follow. First, the Sentencing Commission has amended Section 2L1.2 several times, each time altering the enhancement levels triggered by various prior convictions. For example, under the 2000 version of Section 2L1.2, a misdemeanor assault under Texas state law for which a defendant received a one-year jail sentence qualified as an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(F) and a sixteen-level enhancement pursuant to § 2L1.2. However, under the 2003 version the guidelines, only an eight-level increase would apply, although the conviction would still be an aggravated felony under § 1101(a)(43). This list includes cases applying both the 16-level enhancement and the 8-level enhancement. The definition applicable to the 8-level enhancement for having a prior aggravated felony crime of violence is generally broader than that for imposing the 16-level increase, but it is often possible for a prior offense to qualify for the 16-level increase without being an aggravated felony.

Second, there has been some confusion, mainly in the past, in the cases concerning how to apply the categorical approach. However, following *Shepard v. United States*, 544 U.S. 13 (2005) and more recently in *Descamps v. United States*, 133 S.Ct. 2276 (2013), some of the confusion has been resolved in our favor. Do not hesitate to make categorical approach-based objections even in the face of contrary cases which appear to be on point. A proper analysis of the prior conviction under the categorical approach may require a different result, and your Circuit may end up deciding as much on appeal or the issue could be ripe for a petition for certiorari. Facially similar state statutes may include differ in crucial ways. Therefore, it is recommended that you use the decisions below only as a starting point in analyzing which enhancement applies.

Additionally, this list is not exhaustive and focuses on appellate decisions. Please check all citations to ensure accuracy. Some cases appear in multiple categories.

**Applying the Categorical and Modified Categorical Approach.**

*Descamps v. U.S.*, 133 S.Ct. 2276 (June 20, 2013), requires reconsideration of many prior decisions in which courts had applied the modified categorical approach overbroadly and as an excuse to consider the defendant's actual prior conduct. *Descamps* reiterated the categorical approach is concerned with the elements of the prior conviction, and not the defendant's actual conduct. "If the relevant statute has the same elements as the 'generic' ACCA crime, then the prior conviction can serve as an ACCA predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is 'necessarily ... guilty of all the [generic crime's] elements.'" 133 S.Ct. at 2283. But a conviction under a law that "sweeps more broadly than the generic crime" can never count, even if the defendant actually committed the generic offense. *Id.* The preferred approach forbids consideration of anything other than the judgment and statute of conviction. Only when the statute has elements that the prosecutor can charge alternatively, documents such as the plea colloquy, plea agreement, and jury instructions can be consulted if necessary to determine which set of elements constitute the prior conviction. 133 S.Ct. at 2283-84. Such statutes are called "divisible," and resorting to these approved record documents is called the "modified categorical approach." Be aware of courts treating as "divisible" statutes that merely embrace a broader range of conduct than the generic offense, and then – under the guise of the modified categorical approach – considering the facts of the prior conviction. This misapplies the modified categorical approach. It does not apply to statutes that "sweep more broadly" than the generic crime, but rather only to those that actually create multiple crimes. *Descamps* also suggests that the fact a statute sweeps more broadly than the generic enumerated offense is not a basis to resort to ACCA's residual clause. *See* 133 S.Ct. at 2286.

Additionally, be aware that the analysis should be different depending on whether the prior offense is an "enumerated offense" or is allegedly an offense under "element of use of force" prong. *See United States v. Herrera-Alvarez*, 753 F.3d 132, 137-38 (5<sup>th</sup> Cir. 2014): Post-*Descamps*. "Because § 2L1.2 defines "crime of violence" in two different ways—with reference to a list of enumerated offenses (the " 'enumerated offense' prong") and with reference to any other offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the " 'use of force' prong"), we of necessity use slightly different methodologies to determine whether a prior offense constitutes a crime of violence under each respective definition. Our two methodologies are both iterations of the elements-based categorical approach set forth in Taylor and its progeny, with each looking to different sources of guidance. Under the "enumerated offense" prong, we conduct a "common-sense" categorical approach, looking to various sources—such as "the Model Penal Code, the LaFare and Scott treatises, modern state codes, and dictionary definitions"—to define each crime by its "generic, contemporary meaning." Under the "use of force" prong, we analyze whether the offense has as an element the use, attempted use, or threatened use of physical force. The "force" necessary under this provision must rise to the level of "destructive or violent force"; mere "offensive touching" with a deadly weapon is insufficient. Under both approaches, we determine the elements to which a defendant pleaded guilty by analyzing the statutory definition of the offense, not the defendant's underlying conduct." (citations and footnote omitted).

*United States v. Aguilar-Ortiz*, 450 F.3d 1271, 1273 (11<sup>th</sup> Cir. 2006): A categorical approach "generally" applies to determining whether a prior conviction is a qualifying offense for enhancement purposes under U.S.S.G. § 2L1.2(b)(1)(A).

*United States v. Llanos-Agostadero*, 486 F.3d 1194, 1196-97 (11<sup>th</sup> Cir. 2007): Generally, in determining whether a prior conviction is a qualifying offense for enhancement purposes, "categorical" approach is used: "that is, we look no further than the fact of conviction and the statutory definition of the prior offense." However, modified categorical approach applies where the judgment of conviction and the statute are ambiguous and the district court cannot determine whether the prior conviction qualifies. Under the modified categorical analysis, the district court may look to the facts underlying the state conviction to determine whether it qualifies. In so doing, the district court is generally limited to "relying only on the charging document[s], written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."

*United States v. Marcia-Acosta*, 780 F.3d 1244 (9<sup>th</sup> Cir. 2015): Post-*Descamps*. District court misapplied categorical approach when it relied solely on factual-basis statement during plea colloquy to determine defendant had intentionally assaulted victim. The purpose of considering the plea colloquy is not to determine what defendant and state judge understood factual basis to be but to assess whether the plea had necessarily rested on the fact identifying the offense as generic; so restricting the examination of plea colloquies assures that a sentencing court not substitute a facts-based inquiry for an elements-based one.

*United States v. Santiesteban-Hernandez*, 469 F.3d 376, 378 (5<sup>th</sup> Cir. 2006): “Even if a prior offense is designated as ‘robbery’ in a state penal code, it may not qualify as a robbery under Section 2L1.2.”

*United States v. Reyes-Castro*, 13 F.3d 377 (10<sup>th</sup> Cir. 1993). Applying the categorical approach to the guidelines in interpreting whether a prior conviction is a crime of violence under Armed Career Criminal Act, as defined under § 4B1.2. Holding that the sentencing court must only look to statutory definition, not underlying facts, to make determination whether the prior conviction is a crime of violence.

*United States v. Vargas-Duran*, 356 F.3d 598 (5<sup>th</sup> Cir. 2004) (en banc). Texas crime of intoxication assault under Tex. Penal Code § 49.07 is not a “crime of violence” as defined under U.S.S.G. § 2L1.2(b)(1)(A)(ii) (Nov. 1, 2001). Looks to fact of conviction and statutory definition of offense to determine that statute does not require “use of force,” as the term “use” of force requires an intentional availment of force. Although Texas statute requires, as an element, that the defendant “cause serious bodily injury to another,” the Guideline’s requirement of an element of “use, attempted use, or threatened use of physical force against the person of another” is absent from the Texas statute.

*United States v. Reyes-Solano*, 543 F.3d 474 (8<sup>th</sup> Cir. 2008): Convictions under Mississippi law for misdemeanor assault did not qualify as crimes of violence justifying enhancement where the record failed to include the elements of the offenses.

*United States v. Martinez-Hernandez*, 422 F.3d 1084 (10<sup>th</sup> Cir. 2005). Court recognizing that the categorical approach used by the Supreme Court in *Shepard* would seem to apply to guideline enhancements as well as statutory enhancements. Court rejecting government’s request to expand the range of documents (i.e., police reports parroted in the presentence report that Defendant’s weapon of choice was a sawed-off shotgun) to consider under the categorical approach. Government failed to produce official judicial records to support enhancement.

*United States v. Pimental-Flores*, 339 F.3d 959 (9<sup>th</sup> Cir. 2003). District court’s reliance on factual description in PSR to conclude that defendant’s prior conviction for “assault in violation of a court order” was a COV was plain error.

*United States v. Velasquez-Bosque*, 601 F.3d 955, 957-58 (9<sup>th</sup> Cir. 2010): “To determine whether a state offense meets the Guidelines’ definition of a “crime of violence,” the court compares the state statute of conviction with the federal generic definition of the same crime. If the state statute criminalizes the same (or less) conduct as the generic crime, then the sentence enhancement applies to convictions for the state offense; if the state statute penalizes more conduct than the generic offense, however, the state offense is not categorically a crime of violence under § 2L1.2, and therefore the upward sentence enhancement for prior convictions of a crime of violence will not apply under the categorical approach.”

*United States v. Herrera-Alvarez*, 753 F.3d 132, 136 (5<sup>th</sup> Cir. 2014): Post-*Descamps* and recognizing that decisions made under the career offender guideline and ACCA are not necessarily controlling in determining whether a prior offense is a crime of violence for purposes of U.S.S.G. § 2L1.2.

*United States v. Duhaney*, 594 Fed.Appx. 573 (11<sup>th</sup> Cir. 2014): post-*Descamps*. Certified copy of state court minutes was a *Shepard* document.

### **Rule of Lenity.**

*United States v. Bustillos-Lopez*, 612 F.3d 863 (5<sup>th</sup> Cir. 2010): The Fifth Circuit held that part of U.S.S.G. § 2L1.2 is ambiguous and therefore the rule of lenity applied to support the reading more favorable to the defendant. Specifically, the Court concluded that where the defendant had received a probated sentence for a drug conviction, was removed, subsequently reentered, and (after receiving another, unrelated conviction) had his probation revoked and a sentence of more than 13 months imposed, the 16-level enhancement did not apply.

### **Firearms.**

*United State v. Duarte-Aldana*, 364 Fed.Appx. 360 (9<sup>th</sup> Cir. 2010) (unpublished): conviction under **Oregon** law for **felon-in-possession** qualified for 8-level aggravated felony enhancement under modified categorical approach.

*United States v. Martinez-Hernandez*, 422 F.3d 1084 (10<sup>th</sup> Cir. 2005): Defendant's **California** conviction for **possession** of a weapon was *not* a "firearms offense," within meaning of Sentencing Guidelines provision for 16-level sentence enhancement.

*United States v. Diaz-Diaz*, 327 F.3d 410 (10<sup>th</sup> Cir. 2003). Not plain error for district court to enhance reentry defendant's sentence based on **Texas** conviction for **possession of short-barrel firearm** (note that this case involved older versions of the guideline).

*United States v. Vasquez-Garcia*, 449 F.3d 870 (8<sup>th</sup> Cir. 2006). Where defendant had pled guilty in **California** state court to **possession of a short barrel rifle**, under Cal. Penal Code § 12020(a), based on state court information, enhancement under § 2L1.2 properly imposed even though defendant contended, based on police reports, that he actually possessed a pistol.

*United States v. Lopez-Garcia*, 565 F.3d 1306 (11<sup>th</sup> Cir. 2009): **Georgia firearms** conviction- Ga.Code Ann § 16-11-106(b)- constituted a violation of federal law 18 U.S.C. § 924C and meets the definition of "firearms offense" under U.S.S.G. § 2L1.2.

### **Drug Trafficking and Simple Possession.**

*Lopez v. Gonzales*, 549 U.S. 47 (2006), and *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010): The circuit split over whether the prior offense must have been punishable as a felony under the Controlled Substances Act (in which case simple possession offenses with no intent to distribute would not be included; *see* 21 U.S.C. §844) or whether the prior simply need have been a felony under either state or federal law and additionally punishable under the CSA as any level of offense was settled in *Lopez v. Gonzales*, 549 U.S. 47 (2006), in which the Supreme Court 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" under Immigration and Naturalization Act (INA), as would disqualify alien from discretionary cancellation of removal. Thus, generally, simple possession offenses will not qualify as aggravated felonies or drug trafficking crimes. However, the Court noted some possession crimes will qualify, stating: "Those state possession crimes that correspond to felony violations of one of the 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)[.]" 549 U.S. at 630 n.6.

Another issue to look for is whether the prior conviction statute has a "trafficking" element. In *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), the court held that the alien's Georgia conviction for possession of marijuana with intent to distribute was not an aggravated felony under the INA because it failed to establish that the offense involved either remuneration or more than a small amount of marijuana. The Court stated:

This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as “illicit trafficking in a controlled substance,” and thus an “aggravated felony.” Once again we hold that the Government’s approach defies “the ‘commonsense conception’ ” of these terms. *Carachuri–Rosendo*, 560 U.S., at —, 130 S.Ct., at 2584–2585 (quoting *Lopez*, 549 U.S., at 53, 127 S.Ct. 625). Sharing a small amount of marijuana for no remuneration, let alone possession with intent to do so, “does not fit easily into the ‘everyday understanding’ ” of “trafficking,” which “ ‘ordinarily ... means some sort of commercial dealing.’ ” *Carachuri–Rosendo*, 560 U.S., at —, 130 S.Ct., at 2584–2585 (quoting *Lopez*, 549 U.S., at 53–54, 127 S.Ct. 625). Nor is it sensible that a state statute that criminalizes conduct that the CSA treats as a misdemeanor should be designated an “aggravated felony.” We hold that it may not be.

*Id.* at 1693. So far, the weight of authority is to reject this argument, but we feel this is a viable argument, with the proviso that some offenses are arguably not “trafficking” offenses but are nonetheless aggravated felonies because they punish conduct punishable as a felony under the Controlled Substances Act.

*United States v. Martinez-Lugo*, 782 F.3d 198 (5<sup>th</sup> Cir. 2015): in a split decision, Fifth Circuit held that the same statute at issue in *Moncrieffe* nonetheless warranted a 16-level enhancement. The dissenting judge would have found it was not a drug trafficking offense.

*United States v. Teran-Salas*, 767 F.3d 453 (5<sup>th</sup> Cir. 2014): **Texas drug conviction** in violation of V.T.C.A., Health & Safety Code §§ 481.002(8, 14), 481.112(a), was a drug trafficking offense and an aggravated felony; however, court recognized that the statute was broader than the generic offense and applied the modified categorical approach.

*United States v. Selvan-Cupil*, 2015 WL 860779 (5<sup>th</sup> Cir. 2015): **Prior Georgia conviction for selling cocaine** supported 12-level enhancement.

*United States v. Reyes-Mendoza*, 665 F.3d 165 (5<sup>th</sup> Cir. 2011): Defendant’s prior **California** conviction of **manufacturing a controlled substance** in violation of **section 11379.6** is not categorically a “drug trafficking offense”.

*Rosendo v. Holder*, 130 S.Ct. 2577 (2010). The Supreme Court held that the defendant’s second **Texas** conviction for **simple drug possession** did not qualify as an aggravated felony where the defendant was not charged as a recidivist for the second conviction. Accordingly, the second conviction was not based on the fact of a prior conviction. The fact that the defendant *could have been* charged as a recidivist was not a basis for a later court to enhance the defendant’s record.

*United States v. Amaya-Portillo*, 423 F.3d 427 (4<sup>th</sup> Cir. 2005): Defendant’s **Maryland** conviction for **cocaine possession** did not constitute a felony conviction under the Controlled Substances Act, and thus, it was not an aggravated felony subjecting defendant to an eight-level increase; although offense carried a maximum sentence of four years’ imprisonment, offense was characterized as a misdemeanor under Maryland law.

*United States v. Phillips*, 413 F.3d 1288 (11<sup>th</sup> Cir. 2005): Defendant’s state conviction (specific state and statute not identified) for **attempted criminal sale of a controlled substance** was a “drug trafficking offense,” which could be used to enhance his sentence for illegal reentry after deportation.

*United States v. Aguilar-Ortiz*, 450 F.3d 1271 (11<sup>th</sup> Cir. 2006): Applying modified categorical approach, **Florida** conviction for **solicitation to deliver** cocaine, Fla. Stat. 777.04(2), was not a drug-trafficking offense warranting 12-level increase under U.S.S.G. § 2L1.2 where defendant solicited a personal-use amount of drugs.

*United States v. Madera-Madera*, 333 F.3d 1228 (11<sup>th</sup> Cir. 2003): **Georgia** conviction for **trafficking** under O.C.G.A. § 16-13-31 where the trafficking charge could be based on the possession of 28 or more grams of methamphetamine qualified as a “drug trafficking conviction” for purposes of § 2L1.2.

*United States v. Orihuela*, 320 F.3d 1302 (11<sup>th</sup> Cir. 2003): **Telephone facilitation** conviction in violation of 21 U.S.C.A. § 843(b) can constitute “drug trafficking offense” where underlying drug offense is a felony and the sentence imposed was more than 13 months.

*United States v. Nunez-Segura*, 566 Fed.Appx. 389 (5<sup>th</sup> Cir. 2014): post-*Descamps*. Defendant’s **California drug conviction** in violation of **West’s Ann.Cal.Health & Safety Code § 11379(a)** was not a drug trafficking offense even though defendant acknowledged as factual basis for his guilty plea that he possessed methamphetamine for transportation and with the specific intent to sell; defendant was thus convicted under transporting prong of statute which is not trafficking. Statute is divisible.

*Cheuk Fung S-Yong v. Holder*, 578 F.3d 1169 (9<sup>th</sup> Cir. 2009): **California sale or transportation of controlled substance** and **possession** of a controlled substance for sale are not categorically “drug trafficking offenses” in violation of the CSA and therefore not aggravated felonies. Government was unable to produce reliable evidence that the controlled substance involved in convictions is the same drug as regulated under the CSA. The court found that both California drug statutes regulate a broader amount of drugs than the federal statutes.

*United States v. Benitez-De Los Santos*, 650 F.3d 1157 (8<sup>th</sup> Cir. 2011): Defendant’s **California** conviction for unlawfully **possessing heroin for sale** was a drug trafficking offense under USSG § 2L1.2(b)(1)(B) even though statute includes some substances that or not “controlled substances” under CSA. Government’s evidence of a “Report-Indeterminate Sentence”, a clerical document, was sufficient to prove controlled substance was heroin. This case is probably an example of misapplying the modified categorical approach.

*United States v. Juarez-Corona*, 140 Fed. Appx. 228 (11<sup>th</sup> Cir. 2005): conviction for violating **California** Health and Safety Code **section 11351**, which criminalizes the “**possess[ion] for sale or purchase[ ] for purposes of sale**” of controlled substances was a drug-trafficking offense; district court properly considered indictment, plea agreement, plea hearing transcript, and judgment.

*United States v. Orozco-Vega*, 172 Fed. Appx. 776 (9<sup>th</sup> Cir. 2006): Defendant’s conviction for **possession of marijuana for sale**, pursuant to **California** Health & Safety Code § **11359**, qualifies categorically as a drug trafficking offense for purposes of USSG § 2L1.2(b)(1)(B).

*United States v. Navidad-Marcos*, 367 F.3d 903 (9<sup>th</sup> Cir. 2004): Under categorical approach, **California** conviction for **importing, selling, furnishing, administering, or giving away certain controlled substances**, or offering to do so, was not “drug trafficking offense” warranting 16-level enhancement under § 2L1.2, because it criminalized a variety of conduct, including more than “manufacture, import, export, distribution, or dispensing of a controlled substance,” or possession with intent to do same; under modified categorical approach, California abstract of judgment was insufficient to prove that defendant was convicted of sale and transportation of methamphetamine.

*United States v. Zubia-Torres*, 550 F.3d 1202 (10<sup>th</sup> Cir. 2008): not plain error to assess 16-level enhancement for **Nevada methamphetamine** conviction even though conviction could be for **simple possession**; in absence of objection by defendant, probation did not need to produce documents to prove the conviction was for drug trafficking.

*United States v. Figueroa-Ocampo*, 494 F.3d 1211 (9<sup>th</sup> Cir. 2007). **Felony simple drug possession** under **California** Health & Safety Code § **11350(a)** was not an aggravated felony.

*United States v. Santana-Illan*, 337 Fed.Appx. 992 (10<sup>th</sup> Cir. 2009): **California** conviction for **marijuana possession** and **Georgia** conviction for **cocaine possession** were not aggravated felonies; district court erred by concluding Georgia conviction could have been prosecuted as a felony under the federal Controlled Substances Act and therefore was an aggravated felony where Georgia conviction was not prosecuted as a recidivist crime. *See also* *Alsol v. Mikasey*, 548 F.3d 207, 219 (2d Cir.2008) (holding second simple possession conviction was not an aggravated felony because it was not prosecuted as recidivist possession); *United States v. Ayon-Robles*, 557 F.3d 110 (2d Cir. 2009); *Rashid v. Mukasey*, 531 F.3d 438, 442-48 (6<sup>th</sup> Cir. 2008) (same); *Berhe v.*

*Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006) (same). See *Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010)(holding that defendant’s second Texas offense of simple drug possession was not “aggravated felony” where second conviction was not based on fact of prior conviction).

*United States v. Cepeda-Rios*, 530 F.3d 333 (5<sup>th</sup> Cir. 2008). Defendant’s California felony conviction for **sale of tar heroin** is an aggravated felony. Even if the § 11352 conviction alone did not qualify as an aggravated felony, it could have been charged as a felony if it had been brought under federal recidivist provision because defendant had prior conviction for possession of a controlled substance. See 21 U.S.C. § 844(a). *But see reversed by Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010).

*United States v. Duhaney*, 594 Fed.Appx. 573 (11<sup>th</sup> Cir. 2014): post-*Descamps*. Defendant’s prior no contest plea to **California drug trafficking** in violation of West’s Ann.Cal.Health & Safety Code § 11352(a) was a drug trafficking offense warranting 12-level enhancement; “when Duhaney pled no contest, he admitted to, among other things, importing, selling, and offering to sell cocaine base, acts he does not dispute are drug trafficking offenses under § 2L1.2(b)(1).”

*United States v. Sanchez-Villalobos*, 412 F.3d 572 (5<sup>th</sup> Cir. 2005). Pre-*Carachuri-Rosendo* case holding that where defendant had **two state convictions for possession of controlled substance**, thus making defendant eligible for the federal recidivist enhancement because the second conviction could have been punished under § 844(a) as a felony under federal law.

*Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5<sup>th</sup> Cir.2009), *reversed by Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010). defendant’s second state misdemeanor **possession** drug offense- after the conviction for a prior misdemeanor possession offense is final- could have been punished as a felony under the CSA and therefore is a “drug trafficking crime,” an aggravated felony.

*United States v. Pacheco-Diaz*, 513 F.3d 776 (7<sup>th</sup> Cir. 2008). Where defendant had two state convictions for simple **possession** of marijuana, and a second marijuana possession conviction would be a federal felony under 21 U.S.C. § 844(a), he was a controlled-substance felon under 8 U.S.C. § 1101(a)(43) and was properly enhanced for the aggravated felony under § 2L1.2(b)(1)(C), *but see Carachuri-Rosendo v. Holder*, 130 S.Ct. 2577 (2010)

*United States v. Ayon-Robles*, 557 F.3d 110 (2<sup>nd</sup> Cir. 2009). Court rejected the application of the federal recidivist enhancement because defendant had two prior felonies for **simple possession of controlled substances** neither of which was prosecuted as under a state recidivist statute.

*United States v. Herrera-Roldan*, 414 F.3d 1238 (10<sup>th</sup> Cir. 2005). **Texas** felony conviction for **possession** of large amounts of **marijuana** is not a drug trafficking offense meriting a twelve-level offense under the guidelines but is an aggravated felony meriting an eight-level enhancement. Transportation for personal use is not “trafficking” under federal law.

*United States v. Castellanos-Barba*, 648 F.3d 1130 (10<sup>th</sup> Cir. 2011): **California** conviction for **sale or transportation marijuana** under **California** Health and Safety Code § **11360(a)** was not a drug trafficking offense but on plain error review district court’s conclusion that conviction for “sale or transport” of controlled substance “fits within the intent of § 2L1.2(b)(1)(A)(i) enhancement. Ouch.

*United States v. Castro-Rocha*, 323 F.3d 846 (10<sup>th</sup> Cir. 2003). A state felony conviction for **possession** of a controlled substance is an “aggravated felony” within the meaning of U.S.S.G. § 2L1.2(b)(1)(C) authorizing eight-level sentencing enhancement, *but see Lopez, supra and Martinez-Macias below*.

*Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013): a state drug conviction constitutes an “aggravated felony” under the categorical approach--and thus renders a noncitizen deportable without the possibility of discretionary relief from removal--where it involves conduct punishable as a felony under federal law. Petitioner Moncrieffe pleaded guilty under **Georgia** law to possession of marijuana with intent to distribute. Under 21 U.S.C. § 841(b)(4), marijuana distribution is a misdemeanor if it involves a small quantity for no remuneration. The Court holds that

an aggravated felony is not established where the applicable statute for the marijuana distribution offense does not necessarily require either remuneration or more than a small quantity of marijuana.

*United States v. Millan-Torres*, 139 Fed.Appx. 105 (10<sup>th</sup> Cir. 2005): Defendant's **California** conviction for **selling cocaine** was a "drug trafficking offense," for purposes of the 16-level enhancement for a prior felony drug-trafficking conviction.

*United States v. Martinez-Macias*, 472 F.3d 1216 (10<sup>th</sup> Cir. 2007): **Kansas** conviction for **possession** of cocaine not an aggravated felony, applying Supreme Court holding in *Lopez v. Gonzales*, 127 S.Ct. 625 (2006).

*United States v. Mendoza-Guardiola*, 184 Fed.Appx. 791 (10<sup>th</sup> Cir. 2006): Applying modified categorical approach to determine that defendant's **racketeering** conviction under 18 U.S.C. § 1852 was a drug trafficking offense and affirming 12-level increase.

*United States v. Torres-Romero*, 537 F.3d 1155 (10<sup>th</sup> Cir. 2008): Recognized that **Colorado** conviction under **C.R.S.A. § 18-18-105** reached a broad range of conduct including **trafficking and simple possession**, but applying modified categorical approach, defendant had admitted to elements of trafficking in plea colloquy.

*United States v. Zuniga-Guerrero*, 460 F.3d 733 (6<sup>th</sup> Cir. 2006): Defendant's conviction for **unlawful use of a communication facility to facilitate controlled substance offense** was a "drug trafficking offense" within the meaning of U.S.S.G. § 2L1.2.

*United States v. Henao-Melo*, 591 F.3d 798 (5<sup>th</sup> Cir. 2009): A conviction in violation of 21 U.S.C. § 843(b) for **use of a telephone to facilitate the commission of a narcotics offense** is a "drug trafficking offense," for purposes of USSG § 2L1.2., only if the underlying offense facilitated was a drug trafficking offense, limiting *United States v. Pillado-Chaparro*, 543 F.3d 202 (5<sup>th</sup> Cir. 2008).

*United States v. Arizaga-Acosta*, 436 F.3d 506 (5<sup>th</sup> Cir. 2006): Defendant's conviction for **possession of a listed chemical with intent to manufacture a controlled substance** not a "drug-trafficking offense."

*United States v. Martinez-Rodriguez*, 472 F.3d 1087 (9<sup>th</sup> Cir. 2007): Defendant's **California** convictions for **possession of marijuana for sale** were "drug trafficking offenses".

*United States v. Garcia-Arellano*, 522 F.3d 477 (5<sup>th</sup> Cir. 2008): applying modified categorical approach, **Texas** conviction for **delivery of a controlled substance** was a drug trafficking offense. See *U.S. v. Ibarra-Luna* below for different result.

*United States v. Medina-Campo*, 714 F.3d 232 (4<sup>th</sup> Cir. 2013): **Oregon** conviction for **felony of unlawful delivery of controlled substance**, Or.Rev.Stat. § 475.992(1)(a), categorically qualified as a drug trafficking offense.

*United States v. Ibarra-Luna*, 628 F.3d 712 (5<sup>th</sup> Cir. 2010): **Texas delivery of cocaine**, § 481.112(a)-(b), was not a drug trafficking crime and not an aggravated felony.

*United States v. Ramirez*, 2009 WL 4722237 (S.D.N.Y. 2009) (unpublished): Conviction for **criminal sale of a controlled substance** in the second degree in violation of **New York** Penal Law § 220.41 was a drug trafficking offense.

#### **Crime of Violence under Statute and Guidelines.**

*Johnson v. United States*, 130 S.Ct. 1265 (2010), and *Sykes v. United States*, 131 S.Ct. 2267 (2011): The Supreme Court clarified the meaning of "physical force" in *Johnson v. United States*, 130 S.Ct. 1265 (2010). In *Johnson*, the Court held that the term "physical force" in the definition of "violent felony" in the Armed Career Criminal Act, 18 U.S.C. § 924(e), meant "violent force," or force capable of causing physical pain or injury to

another person. Accordingly, a prior conviction for battery under Florida law, that could be committed by any physical contact, no matter how slight, was not a “violent felony.” This decision arguably settles a circuit split over whether assaults and batteries that can be proven by only nonconsensual or offensive touching are “crimes of violence.” See, e.g., *United States v. Nason*, 269 F.3d 10 (1st Cir. 2001) (Maine general purpose assault statute necessarily involves, as an element, use of force even though offensive touching was sufficient to violate statute) with *United States v. Sanchez-Torres*, 136 Fed.Appx. 644 (5<sup>th</sup> Cir. 2005): Washington convictions for assault in the fourth degree not crimes of violence because a “Washington state prosecutor may secure a conviction for fourth degree assault by proving that there was an intentional touching that [was] either ‘harmful’ or ‘offensive’.”). Thus, cases below in which circuits had held that convictions that could be based on *de minimus* contact are crimes of violence should be reconsidered.

The Supreme Court also rebroadened the scope of “violent felonies” in *Sykes v. United States*, 131 S.Ct. 2267 (2011), in which it held that the defendant’s prior conviction under Indiana law for knowing or intentional flight from a law enforcement officer in a vehicle was a violent felony under ACCA’s residual clause. The majority of the Court stated that *Begay*’s “purposeful, violent, and aggressive” phrase is an addition to the statutory text that has no precise link to the residual clause. *Sykes* seems to draw back from the focus on the nature of the defendant’s required conduct (“purposeful, violent and aggressive,” as in *Begay*) and reintroduce to the analysis whether a particular offense should be considered “violent” because of its potential for harm (emphasizing that “[s]erious and substantial risks are an inherent part of vehicle flight.”). However, the Supreme Court asked for supplemental briefing and additional argument on whether the residual clause is unconstitutionally vague in *Johnson v. United States*, Docket No. 13-7120

*United States v. Diaz*, 546 Fed.Appx. 281 (4<sup>th</sup> Cir. 2013): post-*Descamps*. Remanding based on holding in *United States v. Royal*, 731 F.3d 333 (4<sup>th</sup> Cir. 2013), an ACCA case that held **Maryland second-degree assault** was indivisible and not a crime of violence.

*United States v. Villegas-Hernandez*, 468 F.3d 874 (5<sup>th</sup> Cir. 2006): defendant’s **Texas assault conviction** under **Texas Penal Code § 22.01(a)**, which provides: “A person commits an offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person’s spouse”, was not a crime of violence; see also *United States v. Flores-Pizana*, 233 Fed.Appx. 358 (5<sup>th</sup> Cir. 2007).

*United States v. Coronado-Cura*, 713 F.3d 597 (11<sup>th</sup> Cir. 2013): **Florida conviction for simple vehicle flight**, Fla. Stat. § 316.1935(2), was a crime of violence under 18 U.S.C. § 16(b) thus, an aggravated felony warranting a 8-level enhancement under Sentencing Guidelines re-entry provision.

*United States v. Aparicio-Soria*, 740 F.3d 152 (4<sup>th</sup> Cir. 2014) (en banc): post-*Descamps*. On hearing en banc the 4<sup>th</sup> Circuit found defendant’s **Maryland conviction for resisting arrest, Md. Code, Crim. Law § 9-408(b)(1)** did not categorically qualify as a crime of violence under illegal reentry guidelines because no more than offensive touching was required. Note this decision overruled the earlier panel decision to the contrary.

*United States v. Flores-Cordero*, 723 F.3d 1085 (9<sup>th</sup> Cir. 2013): post-*Descamps*. Defendant’s prior **Arizona conviction for resisting arrest** in violation of A.R.S. § 13-2508(A)(1) is not categorically a crime of violence because the use of minimal force is sufficient; court refuses to remand for resentencing because § 13-2508(A)(1) is not divisible.

*United States v. Pascacio-Rodriguez*, 749 F.3d 353 (5<sup>th</sup> Cir. 2014): post-*Descamps*. **Nevada conspiracy to commit murder** conviction (NRSA 199.480, 199.490, 200.010, 200.030) was a crime of violence under U.S.S.G. § 2L1.2 even though overt act was not element of Nevada conspiracy offense. Includes exhaustive review of conspiracy statutes and determines that conspiracy to commit murder does not require an overt act as an element.

*United States v. Contreras-Hernandez*, 628 F.3d 1169 (9<sup>th</sup> Cir. 2011): **California solicitation of murder** was a crime of violence for purposes of 16-level sentence enhancement.

*United States v. Gamboa-Garcia*, 620 F.3d 546 (5<sup>th</sup> Cir. 2010): **Arizona** conviction for **accessory to first degree murder** qualifies as an aggravated felony.

*United States v. Treto-Banuelos*, 165 Fed. Appx. 668 (10<sup>th</sup> Cir. 2006): **Kansas** conviction for **felony criminal threat**, K.S.A. 21-3419(a)(1, 2) (1996), was a crime of violence supporting 16-level enhancement.

*United States v. Licon-Nunez*, 230 Fed.Appx. 448 (5<sup>th</sup> Cir. 2007): **New Mexico** conviction for **aggravated assault** by use of a deadly weapon was a crime of violence under 2L1.2.

*United States v. Barillas*, 549 Fed.Appx. 204 (4<sup>th</sup> Cir. 2014): post-*Descamps*. District court erred by holding that defendant's **Maryland second degree assault** conviction qualified as a crime of violence for purposes of applying the sixteen-level enhancement.

*United States v. Estrada-Eliverio*, 583 F.3d 669 (9<sup>th</sup> Cir. 2009): **California** conviction for **assault with a deadly weapon** (§ 245(a)(1)) was categorically a crime violence warranting a 16-level increase under the GL. See also *United States v. Grajeda*, 581 F.3d 1186 (9<sup>th</sup> Cir. 2009) decided on the same day with identical holding.

*United States v. Cordova*, 269 F.3d 895 (11<sup>th</sup> Cir. 2008): Reentry defendant's **Iowa** conviction for **assault on a peace officer** was a crime of violence.

*United States v. Zuniga-Soto*, 527 F.3d 1110 (10<sup>th</sup> Cir. 2008): **Texas** conviction for **assaulting a public servant** under V.T.C.A. Penal Code § 22.01(a)(1), (b)(1) was not a crime of violence because it could be based on reckless conduct and thus "use ... of physical force" was not an element .

*United States v. Esparza-Perez*, 681 F.3d 228 (5<sup>th</sup> Cir. 2012). **Arkansas** conviction for **aggravated assault**, Ark. Code § 5-13-204, was categorically not a crime of violence under § 2L1.2 either as an enumerated offense of "aggravated assault" nor under the residual clause . Arkansas offense does not require proof of an underlying assault and therefore does not comport with the generic, contemporary definition of "aggravated assault". The Arkansas statute does not require *any* contact or injury or attempt or threat of offensive contact or injury.

*Karimi v. Holder*, 715 F.3d 561 (4<sup>th</sup> Cir. 2013): **Maryland misdemeanor second-degree assault conviction**, Maryland Annotated Code, Criminal law section 3-203, did not categorically qualify as a "crime of violence" as defined by 18 U.S.C. § 16(b) sufficient to trigger removability.

*United States v. Sahagun-Gallegos*, 782 F.3d 1094 (9<sup>th</sup> Cir. 2015): post-*Descamps*. Defendant's **Arizona aggravated assault conviction** in violation of A.R.S. § 13-1203(A) is overbroad and the government's documents did not establish that Defendant pled to subsection (A)(2) (a crime of violence) rather than (A)(1) or (3) (not crimes of violence). District court misapplied modified categorical approach by relying on defense attorney's statement of factual basis for guilty plea. Bonus holding: government should not have withheld motion for third point for acceptance of responsibility based solely on defendant's refusal to waive his appeal rights.

*United States v. Cabrera-Perez*, 751 F.3d 1000 (9<sup>th</sup> Cir. 2014): pre-*Descamps* by a few weeks. Defendant's **Arizona attempted aggravated assault with a deadly weapon conviction** was a crime of violence warranting 16-level enhancement.

*United States v. Gomez-Hernandez*, 680 F.3d 1171 (9<sup>th</sup> Cir. 2012). **Arizona** conviction for **attempted aggravated assault**, A.R.S. § 13-1203, warranted a 16-level enhancement under § 2L1.2. Arizona attempt statute and generic definition of "attempt" were, in general coextensive, in that attempted aggravated assault under Arizona law required specific intent that took it outside the Arizona conviction of aggravated assault which is not categorically a COV. See *United States v. Esparza-Herrera*, 557 F.3d 1019 (9<sup>th</sup> Cir. 2009).

*United States v. Esparza-Herrera*, 557 F.3d 1019 (9<sup>th</sup> Cir. 2009): **Arizona** offense of **aggravated assault**, A.R.S. § 13-1204(A)(11), did not correspond to the generic definition of "aggravated assault" that is enumerated as a crime of violence in U.S.S.G. § 2L1.2 and therefore does not warrant a 16-level enhancement.

*United States v. Guillen-Alvarez*, 489 F.3d 197 (5<sup>th</sup> Cir. 2007): **Texas** conviction for **aggravated assault** was a crime of violence for sentencing purposes; see also *United States v. Delgado-Salazar*, 252 Fed.Appx. 596 (5<sup>th</sup> Cir. 2007).

*United States v. Sanchez-Sanchez*, 779 F.3d 300 (5<sup>th</sup> Cir. 2015): post-*Descamps*. **Texas** Penal Code § 22.02(a) (1988) is not categorically a crime of violence, but is divisible; section 22.02(a)(4) is generic **aggravated assault** and warrants 16-level enhancement.

*United States v. Cortez-Rocha*, 552 Fed.Appx. 322 (5<sup>th</sup> Cir. 2014): **Texas aggravated assault conviction** in violation of V.T.C.A., Penal Code § 22.02 was not a crime of violence.

*United States v. Ramirez*, 557 F.3d 200 (5<sup>th</sup> Cir. 2009): **New Jersey** conviction for **aggravated assault** was a crime of violence warranting a 16-level increase under guideline section 2L1.2.

*United States v. Mungia-Portillo*, 484 F.3d 813 (5<sup>th</sup> Cir. 2007): **Tennessee** conviction for **reckless aggravated assault** qualified as the enumerated offense of “aggravated assault” under the reentry guideline, considering the generic contemporary definition of “aggravated assault”.

*United States v. Montes-Flores*, 736 F.3d 357 (4<sup>th</sup> Cir. 2013): Post-*Descamps*. **South Carolina** conviction for **assault and battery of a high and aggravated nature (ABHAN), S.C.Code Ann. § 16-3-600**, an indivisible statute, was not a crime of violence with the meaning of § 2L1.2. (*Important to note that district court applied modified categorical approach and found statute to be a crime of violence. Circuit court, citing Descamps, found statute not divisible therefore modified categorical approach applied by district court was improper.*)

*United States v. Rojas-Gutierrez*, 510 F.3d 545 (5<sup>th</sup> Cir. 2007): **California** state court conviction of **assault with intent to commit certain enumerated felonies**, including mayhem, rape, sodomy and oral copulation, was for a “crime of violence” supporting 16-level increase.

*United States v. Villavicenio-Burrueal*, 608 F.3d 556 (9<sup>th</sup> Cir. 2010): **California** conviction for making **criminal threats** is categorically a conviction for a crime of violence warranting 16-level increase under § 2L1.2.

*United States v. Bolanos-Hernandez*, 492 F.3d 1140 (9<sup>th</sup> Cir. 2007): **California** conviction for **assault with intent to commit rape** qualified as a crime of violence.

*United States v. Gonzalez-Monterroso*, 745 F.3d 1237 (9<sup>th</sup> Cir. 2014): post-*Descamps*. **Delaware** 2010 conviction for **attempted fourth-degree rape** was not a crime of violence because Delaware’s definition of substantial-step element of attempt was broader than federal generic definitions of substantial step and attempt. Nice discussion of attempt crimes.

*United States v. Carballo-Arguelles*, 267 Fed.Appx. 416 (6<sup>th</sup> Cir. 2008): conviction for **assault with intent to murder** was for crime of violence warranting 16-level increase.

*United States v. Rios-Perez*, 380 Fed.Appx. 662 (9<sup>th</sup> Cir. 2010): **California attempted murder** is categorically a crime of violence.

*United States v. Albino-Loe*, 747 F.3d 1206 (9<sup>th</sup> Cir. 2014): post-*Descamps*. Defendant’s prior **California convictions for attempted murder and kidnapping** could qualify as crimes of violence under the Sentencing Guidelines, although California did not provide for the affirmative defense of voluntary abandonment to a charge of attempt.

*United States v. Grant-Martinez*, 511 F.Supp.2d 738 (W.D. Texas 2007): **Massachusetts** conviction for **assault and battery** was not a crime of violence, but assault and battery by means of a dangerous weapon was a crime of violence warranting 16-level increase.

*United States v. Earle*, 488 F.3d 537 (1<sup>st</sup> Cir. 2007): Conviction under **Massachusetts** law for **assault and battery** with a **dangerous weapon** constituted a conviction for a crime of violence.

*United States v. Dominguez*, 479 F.3d 345, 347-49 (5<sup>th</sup> Cir. 2007): **Florida** conviction under Fla. Stat. Ann. § 784.045(1)(a) 1 and 2 (**assault and battery**) is a crime of violence.

*Canada v. Gonzales*, 448 F.3d 560 (2d Cir. 2006): **Connecticut** conviction under C.G.S.A. § 53a-167c(a)(1) for **assault of a police officer** constituted a crime of violence aggravated felony because offense included intentional conduct.

*United States v. Garcia-Sandoval*, 703 F.3d 1278 (11<sup>th</sup> Cir. 2013): **Florida** conviction for **obstructing or opposing an officer with violence**, § 843.01, was a crime of violence under § 2L1.2.

*United States v. Sanchez-Martinez*, 633 F.3d 658 (8<sup>th</sup> Cir. 2011): **Minniesota terroristic threat statute**, § 609.713, was not categorically a crime of violence under guidelines.

*Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9<sup>th</sup> Cir. 2006): **Misdemeanor domestic violence assault** of which alien was convicted did not qualify as “crime of domestic violence” warranting removal; and neither recklessness nor gross negligence supports finding of “crime of violence” under “use of physical force” definition; overruled *United States v. Ceron-Sanchez*, 222 F.3d 1169, and *Park v. INS*, 252 F.3d 1018.

*United States v. Solorio-Nunez*, 287 Fed.Appx. 13 (9<sup>th</sup> Cir. 2008) (slip copy): Court properly enhanced reentry defendant’s sentence for conviction for **Willful Infliction of Corporal Injury to a Cohabitant** under **California** Penal Code § 273.5, a “wobbler” statute.

*United States v. Laurico-Yeno*, 590 F.3d 818 (9<sup>th</sup> Cir. 2010): **Willful Infliction of Corporal Injury to a Cohabitant** under **California** Penal Code § 273.5 is a crime of violence under § 2L1.2. See above *U.S. v. Solorio-Nunez* and below *Ayala-Nicanor*.

*United States v. Ayala-Nicanor*, 659 F.3d 744 (9<sup>th</sup> Cir. 2011): *Post-Johnson v. U.S.* decision, defendant’s prior **California** conviction of **willful infliction of corporal injury to a cohabitant** under section 275.3 is categorically a crime of violence under § 2L1.2.

*United States v. Magdaleno-Sanchez*, 169 Fed.Appx. 830 (5<sup>th</sup> Cir. 2006): **Washington** conviction for **assault-in-the-second-degree** was a “crime of violence” for purposes of 16-level sentence enhancement.

*United States v. Sanchez-Torres*, 136 Fed.Appx. 644 (5<sup>th</sup> Cir. 2005): **Washington** convictions for **assault in the fourth degree** not crimes of violence under U.S.S.G. § 2L1.2(b)(1)(E) because a “Washington state prosecutor may secure a conviction for fourth degree assault by proving that there was an intentional touching that [was] either ‘harmful’ or ‘offensive’.”

*United States v. Favela-Masuca*, 247 Fed.Appx. 464 (5<sup>th</sup> Cir. 2007): **Iowa** conviction for **misdemeanor serious domestic abuse assault** was not a crime of violence under 18 U.S.C. § 16 and therefore not an aggravated felony.

*United States v. Rodriguez-Enriquez*, 518 F.3d 1191 (10<sup>th</sup> Cir. 2008): defendant’s Colorado conviction for assault two (**drugging victim**) was not a “crime of violence” under reentry guideline.

*Chrzanoski v. Asheroft*, 327 F.3d 188 (2d Cir. 2003): Connecticut conviction under C.G.S.A. § 53a-61(a)(1) for **third-degree assault** did not constitute a crime of violence because offense lacked intent element; required only “intentional causation of injury”.

*Singh v. Gonzales*, 432 F.3d 533 (3d Cir. 2006): Pennsylvania **simple assault** conviction was a crime of violence that rendered alien removable for committing aggravated felony; but Pennsylvania **reckless endangerment** conviction was not a crime of violence (note that this case involves two misdemeanor offenses but Mr. Singh had

received the maximum sentence of one year for the offenses, thus it is an example of a misdemeanor being treated as a felony for immigration purposes).

*Popal v. Gonzales*, 416 F.3d 249 (3d Cir. 2005): **Simple assault** (reckless) in violation of 18 Pa. Cons. Stat. Ann. § 2701, is not an aggravated felony crime of violence since a *mens rea* of recklessness is insufficient to qualify as a crime of violence.

*United States v. Cordoza-Estrada*, 385 F.3d 56 (1<sup>st</sup> Cir. 2004). **Simple assault** conviction under New Hampshire law where defendant was sentenced to 12 months imprisonment with ten months suspended basis for 8-level enhancement for having an aggravated felony conviction even though NH law designated the offense a misdemeanor.

*United States v. Nason*, 269 F.3d 10 (1st Cir. 2001): Maine **general purpose assault** statute necessarily involves, as an element, use of force even though offensive touching was sufficient to violate statute.

*United States v. Torres-Diaz*, 438 F.3d 529 (5<sup>th</sup> Cir. 2006): Evidence supported finding that defendant's Connecticut conviction for **second degree assault** was for crime of violence; where statute listed multiple alternative methods of committing crime, sentencing court could look to charging instrument for limited purpose of deciding which method was at issue in prior prosecution.

*Prakash v. Holder*, 579 F.3d 1033 (9<sup>th</sup> Cir. 2009). California conviction for **solicitation to commit assault** by means of force likely to produce great bodily injury constitutes a crime of violence under 8 U.S.C. 1101(a)(43)(F). In the context of an illegal reentry case, it is likely under the above reasoning that this conviction would warrant a sixteen level increase under the guidelines.

*United States v. Perez-Vargas*, 414 F.3d 1282 (10<sup>th</sup> Cir. 2005). Colorado misdemeanor conviction for **3<sup>rd</sup> degree assault** is not categorically a crime of violence for sentencing purposes under the guidelines § 2L1.2(b)(1)(A). PSR found to be insufficient to prove prior conviction is a crime of violence in light of Defendant's objection to that conviction.

*United States v. Xocholij-Carrillo*, 263 Fed.Appx. 216 (3d Cir. 2008): **New York** conviction for **first-degree assault** was crime of violence warranting 16-level enhancement.

*United States v. Cano-Esparza*, 243 Fed.Appx. 15 (5<sup>th</sup> Cir. 2007): **Texas** state **felony assault conviction** was not a crime of violence warranting 16-level enhancement; use of force was not an element.

*United States v. Machado-Delgado*, 272 Fed.Appx. 685 (10<sup>th</sup> Cir. 2008): Without applying categorical approach and without analyzing the elements of the **Arizona** statute, Ariz. Rev. Stat. § 13-1204, court concludes that it is a crime of violence warranting 16-level enhancement; however, defendant admitted in brief **assaulting** a police officer by resisting arrest.

*United States v. Aparicio-Soria*, —F.3d—, 2013 WL 3359069 (4<sup>th</sup> Cir. 2013): **Maryland** conviction for **resisting arrest**, §9-408(b)(1), categorically qualified as a crime of violence enhancement under § 2L1.2.

*United States v. Savillon-Matute*, 636 F.3d 119 (4<sup>th</sup> Cir. 2011): **Maryland second degree assault** was not categorically a crime of violence, and district court could not consider the plea colloquy because it was entered on *Alford* plea.

*United States v. Marcia-Acosta*, 780 F.3d 1244 (9<sup>th</sup> Cir. 2015): Post-*Descamps*. Prior **Arizona** offense of **aggravated assault** in violation of A.R.S. §§ 13-1203(A)(1) and 13-1204(A)(11), did not qualify as a "crime of violence" under modified categorical approach, as required to support imposition of 16-level sentencing enhancement when defendant was previously deported, or unlawfully remained in the United States, after a conviction for a crime of violence, where conviction could have been supported by a finding of recklessness, and

there was no narrowing through indictment, information, or other charging document, and no narrowing of offense of conviction through actual conviction documents or pleas.

*United States v. Palomino Garcia*, 606 F.3d 1317 (11<sup>th</sup> Cir. 2010): **Arizona aggravated assault** statute prohibiting a simple assault on a law enforcement officer, A.R.S. § 13-1204(A)(7), did not qualify as a per se “crime of violence” under the Sentencing Guidelines; Arizona statute did not require either the use of a deadly weapon or the intent to cause serious bodily injury because it could be based on reckless conduct.

*Garcia v. Gonzales*, 455 F.3d 465 (4<sup>th</sup> Cir. 2006): alien’s **New York** state law conviction for **reckless assault** in the **second degree** was not an aggravated felony and by extension not a crime of violence.

*United States v. Diaz-Argueta*, 447 F.3d 1167 (9<sup>th</sup> Cir. 2006): State conviction for **assault with a firearm** qualified for 16-level enhancement under U.S.S.G. § 2L1.2 even though, because term of imprisonment was less than one year, offense was not an aggravated felony.

*United States v. Rede-Mendez*, 680 F.3d 552 (6<sup>th</sup> Cir. 2012). **New Mexico** conviction for **aggravated assault (deadly weapon)** not categorically a COV under § 2L1.2.

*United States v. Miranda-Ortegon*, 670 F.3d 661 (5<sup>th</sup> Cir. 2012). **Oklahoma** conviction for **domestic assault and battery, Okla.Stat. tit. 21 §644(c)**, was not a crime of violence within the meaning of crime of violence adjust under § 2L1.2.

*United States v. Salazar-Monjica*, 634 F.3d 1070 (9<sup>th</sup> Cir. 2011): Following precedent, **California assault by means of force and with a deadly weapon**, § 245(a), see below, was categorically a crime violence under U.S.S.G. § 2L1.2(b). Defendant subsequent to deportation had his assault conviction reduced to a misdemeanor, however, did not matter because following other circuits, the relevant time for evaluating a prior conviction for purposes of enhancement is the time of deportation.

*United States v. Valdovinos-Mendez*, 641 F.3d 1031 (9<sup>th</sup> Cir. 2011): Again, **California assault with a deadly weapon** or by force will likely produce great bodily injury making it a crime of violence under guidelines.

*United States v. Heron-Salinas*, 566 F.3d 898 (9<sup>th</sup> Cir. 2009): **California** statute- Cal.Penal Code § 245(a)(1)- **assault with a firearm** is categorically a crime of violence and an aggravated felony for immigration purposes.

*United States v. Guerrero-Robledo*, 565 F.3d 940 (5<sup>th</sup> Cir. 2009): **South Carolina** conviction for **assault and battery** of a high and aggravated nature (ABHAN) qualified as a crime of violence for sentencing purposes.

*United States v. Sanchez-Torres*, 136 Fed.Appx. 644 (5<sup>th</sup> Cir. 2005): **Misdemeanor Washington** convictions for **assault in the fourth degree** were not crimes of violence under U.S.S.G. § 2L1.2(b)(1)(E) because could involve “harmful” or “offensive” contact.

*United States v. Martinez-Mata*, 393 F.3d 625 (5<sup>th</sup> Cir. 2004): **Texas** crime of **retaliation** not a crime of violence for purposes of reentry guideline; statute prohibits committing or threatening to commit “harm,” defined as “anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested,” and does not include element of use of force.

*United States v. Hays*, 526 F.3d 674 (10<sup>th</sup> Cir. 2008): not a reentry case, but Court applied categorical approach in holding that **Wyoming battery** statute, West’s Wyo.Stat. Ann. § 6-2-501(b), prohibiting “unlawfully touching another in a rude, insolent, or angry manner” did not require physical force and thus was not a crime of domestic violence that could support a federal conviction for possession of a firearm by a prohibited person.

*United States v. Herrera-Alvarez*, 753 F.3d 132 (5<sup>th</sup> Cir. 2014): Post-*Descamps*. Under plain error review, **Louisiana** offense of **aggravated battery** in violation of Louisiana Revised Statutes § 14:34 is not categorically

a crime of violence because it can include administering poison. Statute is divisible, however, and under modified categorical approach, defendant's prior conviction was a crime of violence because it contained as an element the use, attempted use or threatened use of physical force.

*United States v. Ceron*, 775 F.3d 222 (5<sup>th</sup> Cir. 2014): post-*Descamps*. Applying modified categorical approach, **Florida aggravated battery conviction** was a crime of violence.

*United States v. Garcia-Figueroa*, 753 F.3d 179 (5<sup>th</sup> Cir. 2014): post-*Descamps*. (1) prior "**attempted aggravated battery on [a] law enforcement officer with a law enforcement officer's firearm**" in violation of **Florida** law had as an element the use, attempted use, or threatened use of physical force against the person of another, as required to meet the definition of a crime of violence; (2) "attempt" under Florida law was not broader than generic definition of attempt, and thus defendant's prior conviction qualified as crime of violence.

*United States v. Dominguez-Maroyoqui*, 748 F.3d 918 (9<sup>th</sup> Cir. 2014): post-*Descamps*. Defendant's 1996 conviction for **assaulting a federal officer** in violation of 18 U.S.C. § 111(a) was not a crime of violence under 2L1.2. The statute requires proof of "at least some form of assault" but "does not require that any particular level of force be used." Because the statute "criminalizes a broader swath of conduct than the conduct covered by § 2L1.2's definition," the conviction is categorically not a crime of violence.

*United States v. Treto-Martinez*, 421 F.3d 1156 (10<sup>th</sup> Cir. 2005): Defendant's **Kansas** conviction for **aggravated battery against a law enforcement officer** was a crime of violence.

*United States v. Diaz-Calderone*, 716 F.3d 1345 (11<sup>th</sup> Cir. 2013): **Florida** conviction for **aggravated battery**, Fla. Stat. § 784.045(1)(b), was not categorically a crime of violence under § 2L1.2, however, under the modified categorical approach it was warranting 16-level enhancement. Court found that arrest affidavit demonstrated that defendant used force against the victim in committing offense and plea colloquy included admission by defendant that he did was the affidavit said.

*United States v. Romo-Villalobos*, 674 F.3d 1246 (11<sup>th</sup> Cir. 2012). **Florida** conviction for **resisting an officer with violence**, Fla. Stat. § 843.01, was a COV under the illegal reentry sentencing guideline imposing 16-level increase.

*United States v. Salido-Rosas*, 662 F.3d 1254 (8<sup>th</sup> Cir. 2011): Defendant's **four misdemeanor assault and battery** convictions under **Omaha** Municipal Code § 20-16 were crimes of violence to warrant a four-level enhancement under illegal re-entry guidelines.

*United States v. Smith*, 171 F.3d 617 (8<sup>th</sup> Cir. 1999): **Iowa** conviction for **committing an act intended to cause pain, injury, or offensive or insulting physical contact** was a crime of violence.

*United States v. Adino-Ortega*, 608 F.3d 305 (5<sup>th</sup> Cir. 2010): **Texas** conviction for **causing injury to a child**, Texas Penal Code § 22.04, did not qualify as a crime of violence under USSG § 2L1.2

*United States v. Lopez-Reyes*, ----F.Supp.2d----, 2013 WL 1966883 (E.D. Va. 2013): **Virginia** conviction for **unlawful bodily injury**, Va, Code § 18.2-51, was not categorically a crime of violence under § 2L1.2.

*United States v. Aviles-Solarzano*, 623 F.3d 470 (7<sup>th</sup> Cir. 2010): On plain error review, **Illinois aggravated battery** conviction, 720 Ill.Comp.Stat. 5/12-3, was **not** categorically a crime of violence; however, under modified categorical approach, prior conviction was classified as a crime of violence (district judge relies on unsubstantiated summary of an indictment in PSR, counsel fails to object, appellate court shifts the burden to the defense to object and prove that a summary of an indictment in a PSR is not accurate, rather than being able to rely on failure of proof).

*United States v. Martinez-Sanchez*, 278 Fed.Appx. 676 (7<sup>th</sup> Cir. 2008): **Illinois aggravated battery**, 720 Ill.Comp.Stat. 5/12-3, conviction not categorically a crime of violence; however, under modified categorical

approach, defendant's conviction was a crime of violence; *see also United States v. Rodriguez-Gomez*, 608 F.3d 969 (7<sup>th</sup> Cir. 2010)(same).

*United States v. Llanos-Agostadero*, 486 F.3d 1194 (11<sup>th</sup> Cir. 2007): **Florida** conviction for **aggravated battery** on a pregnant woman, West's F.S.A. §§ 784.03(1)(a), 784.045(1)(b). The Court's analysis is flawed. Battery under Florida law can be committed either by intentionally touching or striking another person *or* by intentionally causing bodily harm to another. The Court does not distinguish between the two. Other circuits have found such statutes to not qualify as categorical crimes of violence because causation of injury does not necessarily require the intentional use of force. *See e.g. Chrzanoski v. Ashcroft*, 327 F.3d 188 (2d Cir. 2003); *United States v. Perez-Vargas*, 414 F.3d 1282 (10<sup>th</sup> Cir. 2005); *United States v. Calderon-Pena*, 383 F.3d 254 (5<sup>th</sup> Cir. 2004); *United States v. Barraza-Ramos*, 550 F.3d 1246 (10<sup>th</sup> Cir. 2008).

*United States v. Barraza-Ramos*, 550 F.3d 1246 (10<sup>th</sup> Cir. 2008): **Florida** conviction for **aggravated battery** on a pregnant woman, West's F.S.A. §§ 784.03(1)(a), 784.045(1)(b) is not categorically a felony crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii) because court documents under modified categorical approach did not demonstrate which part of the battery statute was violated.

*United States v. Ortiz*, 565 F.3d 400 (7<sup>th</sup> Cir. 2009): **Wisconsin** battery conviction as a habitual offender statute-Wis. Stat. § 939.62- (which makes a Class A misdemeanor a felony offense) was a crime of violence for purposes of U.S.S.G. § 2L1.2.

*Flores v. Ashcroft*, 350 F.3d 666 (7<sup>th</sup> Cir. 2003): **Indiana** battery offense that prohibits "rude, insolent, or angry" touching not a crime of violence.

*United States v. Venegas-Ornelas*, 348 F.3d 1273 (10<sup>th</sup> Cir. 2003). On the heels of the Court's decision in *Lucio-Lucio*, the Court, following the Fifth Circuit's reasoning in *Delgado-Enriquez*, a pre-*Chapa-Garza* case (Fives finding DWI is not an aggravated felony) holds that a Colorado conviction of first degree criminal trespass of a dwelling qualifies as a "crime of violence" under 18 U.S.C. § 16(b), and hence is a "aggravated felony" for purposes of enhancing defendant's sentence under U.S.S.G. § 2L1.2. We believe that the holding in *Delgado-Enriquez* is in question based on subsequent Fifth Circuit cases applying the categorical approach. Further, the 10<sup>th</sup> Cir. in an unpublished decision found that Colorado conviction of first degree criminal trespass is not a COV under 2L1.2 but is an aggravated felony under 18 U.S.C. § 16(b) warranting an 8 level increase. *See United States v. Ortuno-Caballero*, 187 Fed.Appx. 814 (10<sup>th</sup> Cir. 2006).

*United States v. Cornelio-Pena*, 435 F.3d 1279 (10<sup>th</sup> Cir. 2006): **Solicitation to commit burglary** of a dwelling was crime of violence for purposes of reentry sentencing guideline.

*United States v. Armendariz-Perez*, 543 Fed.Appx. 876 (10<sup>th</sup> Cir. 2013): District court did not commit plain error in determining that defendant's prior **Texas** conviction for **burglary of a dwelling** in violation of V.T.C.A., Penal Code § 30.02 was a crime of violence where defendant failed to dispute the characterization of the offense in the presentence report or at the sentencing hearing.

*United States v. Marquez*, 258 Fed.Appx. 184 (10<sup>th</sup> Cir. 2007): **Texas** conviction for **attempted burglary** of a **habitation** was not an aggravated felony.

*United States v. Morales-Mota*, 704 F.3d 410 (5<sup>th</sup> Cir. 2013): **Texas** conviction for **burglary of habitation** was crime of violence within the meaning of Sentencing Guideline's enhancement. (*See United States v. Castaneda below*).

*United States v. Castaneda*, 740 F.3d 169 (5<sup>th</sup> Cir. 2013): **Texas** conviction for **burglary of habitation**, **Texas Penal Code § 30.02(a)(3)**, does not constitute an enumerated offense, burglary of a dwelling, and thus was not a crime of violence under § 2L1.2.

*United States v. Ramirez-Flores*, 743 F.3d 816 (11<sup>th</sup> Cir. 2014): Post-*Descamps*. District court did not commit plain error in assessing 16-level enhancement for defendant’s prior **South Carolina** conviction for **second-degree burglary** in violation of S.C.Code § 16–11–312(A), which provides that “[a] person is guilty of burglary in the second degree if the person enters a dwelling without consent and with the intent to commit a crime therein.” Court explicitly did not decide if statute was divisible or not.

*United States v. Rivera-Oros*, 590 F.3d 1123 (10<sup>th</sup> Cir. 2009): **Arizona** conviction for **second-degree felony burglary** is a crime of violence.

*Descamps v. U.S.*, 133 S.Ct. 2276 (2013): California’s burglary statute, West’s Ann. Cal. Penal Code § 459, is categorically *not* a violent felony under the federal Armed Career Criminal Act because it lacks one element of the generic burglary offense – unlawful or unprivileged entry. Arguably overrules *U.S. v. Maldonado*, 696 F.3d 1095 (10<sup>th</sup> Cir. 2012) (holding this California statute was a violent felony).

*United States v. Gonzalez-Terrazas*, 516 F.3d 357 (5<sup>th</sup> Cir. 2008): **California** conviction for **residential burglary** did not qualify as “burglary of a dwelling” and was not a “crime of violence” for purpose of 16-level sentencing enhancement.

*United States v. Echeverria-Gomez*, 627 F.3d 971 (5<sup>th</sup> Cir. 2010): **California** conviction for **first degree burglary** was not a crime of violence under sentencing guidelines but was an aggravated felony under § 16(b).

*United States v. Aguila-Montes de Oca*, 553 F.3d 1229 (9<sup>th</sup> Cir. 2009): **California** conviction for **residential burglary** did not qualify as “burglary of a dwelling” and was not a “crime of violence” for purpose of 16-level enhancement. Case stands for the rule, if a state conviction does not include the elements of the “generic” crime in the Taylor categorical analysis a court *can’t move on* to the modified categorical analysis.

*United States v. Castillo-Morales*, 507 F.3d 873 (5<sup>th</sup> Cir. 2007): Applying modified categorical approach **Florida second-degree burglary** conviction was for “burglary of a dwelling” within meaning of guideline’s definition for crime of violence.

*United States v. Diaz-Morales*, 595 Fed.Appx. 932 (11<sup>th</sup> Cir. 2014): post-*Descamps*. It was not plain error for court to treat prior **Florida burglary** conviction in violation of F.S.A. § 810.02(1) as a 16-level crime of violence.

*United States v. Gomez-Guerra*, 485 F.3d 301 (5<sup>th</sup> Cir. 2007): **Florida burglary** conviction was not a crime of violence supporting 16-level enhancement.

*United States v. Carbajal-Diaz*, 508 F.3d 804 (5<sup>th</sup> Cir. 2007): Applying modified categorical approach, **Missouri** conviction for **burglary** qualified as a crime of violence under reentry guideline.

*United States v. Murillo-Lopez*, 444 F.3d 337, 344-45 (5<sup>th</sup> Cir. 2006): **California** conviction for **burglary** is the equivalent to the enumerated crime of violence offense of burglary of a dwelling, but see *United States v. Ortega-Gonzaga*, 490 F.3d 393 (5<sup>th</sup> Cir. 2007) (distinguishing *Murillo-Lopez*).

*United States v. Ortega-Gonzaga*, 490 F.3d 393 (5<sup>th</sup> Cir. 2007): **California** conviction for **burglary** did not qualify as “burglary of a dwelling” for purposes of 16-level enhancement.

*United States v. Castillo-Medina*, 251 Fed.Appx. 301 (5<sup>th</sup> Cir. 2007): **Texas** conviction of **burglary of a habitation** constituted “crime of violence” for sentencing purposes.

*United States v. Herrera-Montes*, 490 F.3d 390 (5<sup>th</sup> Cir. 2007): **Tennessee** conviction for **aggravated burglary** not a crime of violence for purposes of 16-level increase under reentry guideline.

*United States v. Lara*, 590 Fed.Appx. 574 (6<sup>th</sup> Cir. 2014): Conviction for **Tennessee aggravated burglary** (Tennessee Code Annotated § 39–14–403 was not categorically a crime of violence but statute was divisible; remand to apply modified categorical approach.

*United States v. Ortuno-Caballero*, 187 Fed.Appx. 814 (10<sup>th</sup> Cir. 2006): **Colorado attempted first degree criminal trespass of a dwelling** did not qualify as “crime of violence” for purposes of the 16-level enhancement under U.S.S.G. § 2L1.2 (note, however, under *Venegas-Ornelas*, *infra*, the offense likely qualifies as an aggravated felony and the 8-level increase).

*Reina-Rodriguez v. United States*, 655 F3d 1182 (9<sup>th</sup> Cir. 2011): **Utah offense of burglary in the second degree** does not qualify categorically as a crime of violence supporting 16-level sentencing enhancement.

*United States v. Cruz-Alonzo*, 360 Fed.Appx. 554 (5<sup>th</sup> Cir. 2010): Plain error review, district court assesses 16-level enhancement based on defendant’s **Utah conviction for burglary of a dwelling**.

*United States v. Folkes*, 622 F.3d 152 (2<sup>nd</sup> Cir. 2010): **New York convictions for burglary**, § 140.20, and for **criminal possession of a weapon**, § 265.02(4), were not crimes of violence under the illegal reentry guideline

*United States v. Garcia-Mendez*, 420 F.3d 454 (5<sup>th</sup> Cir.2005): Defendant’s **Texas conviction for burglary of a habitation** was a conviction for a crime of violence under § 2L1.2(b)(1)(A)(ii) because it was equivalent to the enumerated offense of burglary of a dwelling.

*United States v. Ventura-Perez*, 666 F.3d 670 (10<sup>th</sup> Cir. 2012). **Texas conviction for burglary of a dwelling, TX Penal Code § 30.02**, on plain error review, is not categorically a COV, however, under the modified approach the Court held that it was a COV under § 2L1.2. It is important to note the Tenth Circuit’s use of modified approach went beyond identifying which subsection of the statute that was violated. The Court took liberty to consult the *Shepard* approved judicial records to discover defense counsel admitted at the sentencing hearing that the “structure” involved was an apartment. See *Descamps v. United States*, 133 S. Ct. 2276 (2013). The issue was whether a prior conviction for **burglary** under **California** statute, **Cal. Penal Code section 459**, is a “violent felony”. The Supreme Court held that it is not a violent felony because the state statute does not contain all the elements of generic burglary: *unlawfully* entering a building. In California, it is possible to violate the burglary statute even if you do not enter a building unlawfully. Importantly, the Court held that when a state criminal statute contains a single set of indivisible elements, the modified approach does not apply.

*United States v. Conde-Castaneda*, 753 F.3d 172 (5<sup>th</sup> Cir. 2014): post-*Descamps*. Modified categorical approach applied to determine whether defendant’s prior **Texas burglary conviction** qualified for 16-level enhancement where defendant admitted to violating to both parts (1) and (3) of Tex. Penal Code § 30.02(a). Because § 30.02(a)(1) qualifies as generic burglary of a dwelling, defendant’s judicial confession established that he was convicted of a crime of violence.

*United States v. Ocon-Estrada*, 237 Fed.Appx. 369 (10<sup>th</sup> Cir. 2007): **Texas burglary conviction** was a crime of violence warranting 16-level increase where prior conviction involved **burglary of a dwelling**.

*United States v. Cornelio-Pena*, 435 F.3d 1279 (10<sup>th</sup> Cir. 2006). Defendant’s **Arizona felony conviction for solicitation to commit burglary of a dwelling** was a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A).

*United States v. Venzor-Granillo*, 668 F.3d 1224 (10<sup>th</sup> Cir. 2012). **Colorado conviction for first-degree trespass, Colo.Rev.Stat. § 18-4-502**, constituted an attempted theft offense, so as to qualify as an aggravated felony conviction. Another example, see *United States v. Ventura-Perez*, 666 F.3d 670 (10<sup>th</sup> Cir. 2012), where Court used modified categorical approach to determine which part of the statute defendant violated but continued to review *Shepard* approved documents to identify facts that supported the generic offense enhancement provision. *citing, United States v. Aguila-Montes de Oca*, 553 F.3d 1229 (9<sup>th</sup> Cir. 2009).

*Sareang Ye v. I.N.S.*, 214 F.3d 1128, 1133 (9<sup>th</sup> Cir. 2000): **California** conviction for **car burglary** not inherently violent in nature and not a crime of violence.

*United States v. Alfaro-Gramajo*, 283 F.ed.Appx. 677 (11<sup>th</sup> Cir. 2008): **Texas** conviction for **burglary of a vehicle**, V.T.C.A. Penal Code § 30.04, qualified as, alternatively, attempted theft and crime of violence aggravated felony.

*United States v. Rodriguez-Rodriguez*, 323 F.3d 317 (5<sup>th</sup> Cir. 2003). Defendant's **Texas** felony convictions for **burglary of a building and unauthorized use of a motor vehicle** were not "crimes of violence" under U.S.S.G. § 2L1.2(b)(1)(A)(ii) (Nov. 1, 2001) (note that the versions of the statutes at issue are older); see *United States v. Galvan-Rodriguez*, 169 F.3d 217 (5<sup>th</sup> Cir. 1999).

*United States v. Armendariz-Moreno*, 571 F.3d 490 (5<sup>th</sup> Cir. 2009): *Cert. grant and Supreme Court remand for consideration* in light of *Begay v. United States*, 553 U.S. 137 (2008) and *Chambers v. United States*,— U.S.—, 129 S.Ct. 687 (2009), held that **Texas** conviction of **unauthorized use of a motor vehicle** is not an aggravated felony crime of violence.

*United States v. Medina-Torres*, 703 F.3d 770 (5<sup>th</sup> Cir. 2012): **Florida conviction for theft**, Statute § 812.014(1), did not meet definition of enumerated offense of "theft" under COV, 2L1.2, because Florida theft statute encompasses conduct broader than that required for generic theft offense. Court applied modified categorical approach but government failed to produce *Shepard* type documents to prove exactly what section of statute was violated.

*Escudero-Arciniaga v. Holder*, 702 F.3d 781 (5<sup>th</sup> Cir. 2012): **New Mexico burglary of a vehicle** conviction, N.M. Stat. § 30-16-3(B), is a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony under INA.

*United States v. Huizar*, 688 F.3d 1193 (10<sup>th</sup> Cir. 2012): **California burglary of habitation**, Cal.Penal Code § 459, did **not** meet the federal "generic" definition of residential burglary under 2L1.2. Interestingly, the Tenth Circuit applied the modified categorical approach, similar to Ninth Circuit in *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (2011), even though the statute, § 459, lacks an essential element, "unlawful" entry, found in what *Taylor* calls a "generic" burglary. Compare Fifth Circuit reasoning in *United States v. Echeverria-Gomez*, 627 F.3d 971 (5<sup>th</sup> Cir. 2010): **California** conviction for **first degree burglary** was not a crime of violence under sentencing guidelines but was an aggravated burglary under § 16(b).

*United States v. Avila*, 770 F.3d 1100 (4<sup>th</sup> Cir. 2014): post-*Descamps*. **California conviction for first-degree burglary** in violation of West's Ann.Cal.Penal Code §§ 459, 460(a) was an aggravated felony crime of violence warranting an 8-level enhancement under U.S.S.G. § 2L1.2; court reasoned that it qualified under the 18 U.S.C. § 16(b) prong. **Note:** A possible argument against this holding include that the residual clause in 18 U.S.C. § 16(b) should be held void for vagueness, along the lines of Justice Scalia's dissents regarding the residual clause in ACCA. The issue of whether the residual clause in ACCA is unconstitutionally vague was argued on April 20, 2015, in *Johnson v. United States*, Docket No. 13-7120 (see case page and filings at <http://www.scotusblog.com/case-files/cases/johnson-v-united-states-3/>), and a decision should be issued by the end of this term.

*United States v. Sanchez-Garcia*, 501 F.3d 1208 (10<sup>th</sup> Cir. 2007): **Arizona Unlawful Use of a Means of Transportation (UUMT)** is not an aggravated felony nor a USSG § 2L1.2(b)(1)(C)) crime of violence (COV) under 18 U.S.C. § 16(b). The parties agreed that the UUMT does not have as an element the use, attempted use, or threatened use of force and that, therefore, the issue was whether it fell within § 16(b) as involving a "substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

*United States v. Hernandez-Castellanos*, 287 F.3d 876 (9<sup>th</sup> Cir. 2002): **Arizona** offense of felony **endangerment** Ariz. Stat. § 13-1201 was not categorically an aggravated felony for purposes of reentry guideline.

*United States v. Gomez-Hernandez*, 300 F.3d 974 (8<sup>th</sup> Cir. 2002): **Iowa** conviction for going **armed with intent** was a crime of violence warranting 16-level enhancement.

*United States v. Lopez-Torres*, 443 F.3d 1182 (9<sup>th</sup> Cir. 2006): **California** conviction for **shooting at an occupied motor vehicle** was categorically a crime of violence.

*United States v. Estrella*, 758 F.3d 1239 (11<sup>th</sup> Cir. 2014): Post-*Descamps*. Defendant's **Florida** conviction for **wantonly or maliciously throwing, hurling, or projecting a missile, stone, or other hard substance at an occupied vehicle** in violation of West's F.S.A. § 790.19 was not a crime of violence, under the categorical approach based on the type of structure targeted, for purposes of enhancing the defendant's subsequent conviction for illegal reentry; the statute also punished shooting into a building known to be unoccupied, which was conduct targeting property and not a person. *See also United States v. Estrada*, 777 F.3d 1318 (11<sup>th</sup> Cir. 2015): post-*Descamps*. Information for defendant's prior Florida state conviction charging him with wantonly or maliciously throwing a missile at an occupied vehicle did not indicate whether a wanton or malicious mens rea formed the basis of the defendant's conviction, and thus the prior conviction was not a "crime of violence" under the modified categorical approach.

*United States v. Cortez-Arias*, 403 F.3d 1111 (9<sup>th</sup> Cir. 2005): **California** conviction of **shooting at inhabited dwelling** qualified as "crime of violence," warranting 16-level increase in offense level.

*United States v. Alfaro*, 408 F.3d 204 (5<sup>th</sup> Cir. 2005): **Virginia** conviction for **shooting into an occupied dwelling** was not a crime of violence for purposes of enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii).

*United States v. Jaimes-Jaimes*, 406 F.3d 845 (7<sup>th</sup> Cir. 2005): **Wisconsin** conviction for **discharging a firearm into a vehicle or building** was not a conviction for a "crime of violence" warranting sentencing enhancement under U.S.S.G. § 2L1.2.

*Quezada-Luna v. Gonzales*, 439 F.3d 403 (7<sup>th</sup> Cir. 2006): **Aggravated discharge of a firearm** under **Illinois** law was an aggravated felony crime of violence.

*United States v. Saenz-Mendoza*, 287 F.3d 1011 (10<sup>th</sup> Cir. 2002). Defendant's state court **misdemeanor** conviction of **child abuse**, for which he received a sentence of one year, qualified as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F), notwithstanding the fact that it was not a felony; Congress could, and did, choose to include some misdemeanor offenses within the definition of "aggravated felony," and it is the definition, not the label, that controls.

*United States v. Contreras-Salas*, 387 F.3d 1095 (9<sup>th</sup> Cir. 2004): **Nevada** conviction for **Child Abuse and/or Neglect Causing Substantial Bodily Harm** was not crime of violence.

*United States v. Lopez-Patino*, 391 F.3d 1034 (9<sup>th</sup> Cir. 2004): Under categorical approach, **Arizona** conviction for **child abuse** did not qualify as a crime of violence under U.S.S.G. § 2L1.2 because a person could "cause a child" physical injury without use of force.

*United States v. Wilson*, 392 F.3d 1243 (11<sup>th</sup> Cir. 2004): **Florida** conviction for aggravated **child abuse**, which included a physical-force element, was a crime of violence under the reentry guideline.

*United States v. Gomez*, 690 F.3d 194 (4<sup>th</sup> Cir. 2012): **Maryland** conviction for **child abuse**, Maryland Code 1957, Article 27 § 35C, is categorically **not** a COV because statute may be violated without the use of force therefore does not satisfy definition of child abuse under enumerated offense of § 2L1.2.

*United States v. Cabrera-Umanzor*, 728 F.3d 347 (4<sup>th</sup> Cir. 2013): post-*Descamps*. Defendant's **Maryland** conviction under Code 1957, Art. 27, § 35C (Repealed) did not qualify as a crime of violence under USSG § 2L1.2; while Maryland statute was divisible into categories of physical abuse and sexual abuse, latter category

did not, by its elements, constitute “forcible sex offense” or “sexual abuse of a minor” crimes of violence because intent to gratify sexual urges was not element of Maryland statute, and, while crime of statutory rape required sexual intercourse, Maryland statute did not even require that defendant touch victim.

*United States v. Banos-Mejia*, 588 Fed.Appx. 522 (9<sup>th</sup> Cir. 2014): post-*Descamps*. **New York second-degree (statutory rape) conviction** (N.Y.McKinney’s Penal Law § 130.30(1)) did not warrant 16-level enhancement because it swept more broadly than generic federal definition of unlawful sexual intercourse with a person under age 16; modified approach inapplicable.

*United States v. Gomez*, 757 F.3d 885 (9<sup>th</sup> Cir. 2014): post-*Descamps*. **Arizona conviction for sexual conduct with a minor**, A.R.S. § 13-1405, was not a crime of violence for purposes of U.S.S.G. § 2L1.2 because it did not require proof of 4-year age difference between perpetrator and victim, as required to fall within generic definition of statutory rape, and it was not generic definition of sexual abuse of a minor because it could apply to victims who were not less than age 14.

*United States v. Perez-Perez*, 737 F.3d 950 (4<sup>th</sup> Cir. 2013): post-*Descamps*. **North Carolina conviction for taking indecent liberties with a minor**, N.C. Gen.Stat. § 14-202.1(a), qualified as “sexual abuse of a minor” warranting a 16-level enhancement.

*United States v. Contreras*, 739 F.3d 592 (11<sup>th</sup> Cir. 2014): **Florida conviction for second-degree sexual battery, § 799.011(5)**, was categorically a crime of violence under § 2L1.2.

*United States v. Acosta-Chavez*, 727 F.3d 903 (9<sup>th</sup> Cir. 2013): post-*Descamps*. **Illinois conviction for aggravated criminal sexual abuse, 720 Ill. Comp. Stat. 5/11-1.60(d)**, did not categorically qualify as “forcible sex offense” because the statute sweeps more broadly than the generic definition. Federal definition of minor is 16 years of age and younger whereas under this Illinois statute can be person of 17 years of age. Application of the modified categorical approach was improper because the statute is indivisible.

*United States v. Gomez*, 732 F.3d 971 (9<sup>th</sup> Cir. 2013): **Arizona conviction for sexual conduct with a minor, § 13-1405**, is not categorically a crime of violence under § 2L1.2. Further, because the statute lacks an element found in the generic definitions, the Court does not undertake the modified categorical approach citing *Descamps*.

*United States v. Quintero-Junco*, 754 F.3d 746 (9<sup>th</sup> Cir. 2014): post-*Descamps*. Defendant’s **conviction for attempted sexual abuse, in violation of Arizona Revised Statutes § 13–1404** was not categorically a “forcible sex offense”; however, under modified categorical analysis, defendant’s prior conviction qualified because the definition of “forcible sex offense” does not require actual force but merely lack of consent.

*United States v. Castro*, 607 F.3d 566 (9<sup>th</sup> Cir. 2010): **California conviction for abuse of a minor** in violation of Calif. Penal Code § 288(c)(1) does not categorically constitute a crime of violence for purposes of the 16-level increase.

*United States v. Gracia-Cantu*, 302 F.3d 308 (5<sup>th</sup> Cir. 2002). The offense of **injury to a child** under **Texas** law is not a “crime of violence” under 8 U.S.C. § 1101(a)(43)(F) and hence is not an “aggravated felony” for purposes of 8 U.S.C. § 1326(b)(2) or U.S.S.G. § 2L1.2. (Note that Texas injury to a child statute is divisible and depending on the subsection listed in the indictment it could constitute a crime of violence).

*United States v. Calderon-Peña*, 383 F.3d 254 (5<sup>th</sup> Cir. 2004): **Texas conviction of child endangerment**, for knowingly engaging in conduct that placed child younger than 15 years of age in imminent danger of bodily injury, did not have as element “the use, attempted use, or threatened use of physical force against the person of another,” and did not qualify as “crime of violence” for sentence enhancement purposes.

*United States v. Vasquez-Torres*, 134 Fed.Appx. 648 (5<sup>th</sup> Cir. 2005): **Texas conviction for injury to a child** was not for a crime of violence for purposes of sentence enhancement.

*United States v. Hernandez-Rodriguez*, 388 F.3d 779 (10<sup>th</sup> Cir. 2004). **Utah's misdemeanor** conviction of **attempted riot** using the modified categorical approach was an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), notwithstanding the fact that it was not a felony. Court resists government's request to consider the "incorporated police report" which establishes that Defendant "got into a fight" but is not part of the charging paper and judgment of conviction.

*United States v. Landeros-Gonzales*, 262 F.3d 424 (5<sup>th</sup> Cir. 2001). The offense of **criminal mischief** under **Texas** law is not a "crime of violence" under 18 U.S.C. § 16, and hence is not an "aggravated felony" under 8 U.S.C. §§ 1101(a)(43)(F) and 1326(b)(2), or U.S.S.G. § 2L1.2b)(1)(A).

*United States v. Landeros-Arreola*, 260 F.3d 407 (5<sup>th</sup> Cir. 2001). Defendant's conviction for "**menacing**" under **Colorado** law did not count as an "aggravated felony" where, although the original sentence was four years imprisonment, the sentence was subsequently reduced on reconsideration of sentence (after defendant's successful completion of a "boot camp") to 18 months probation; the probation sentence was not merely a suspension of the prior prison sentence, but was an entirely new sentence.

*United States v. Melchor-Meceno*, 620 F.3d 1180 (9<sup>th</sup> Cir. 2010): **Colorado** felony **menacing** statute qualified as an crime of violence for purposes of 16-level enhancement.

*United States v. Perez-Veleta*, 541 F.Supp.2d 1173 (D.N.M. 2008): **Colorado** conviction for **menacing** did not warrant imposition of 16-level sentencing enhancement.

*United States v. Drummond*, 240 F.3d 1333 (11<sup>th</sup> Cir. 2001): **New York** conviction for **menacing** qualified as an crime of violence for purposes of 16-level enhancement.

*United States v. Trejo-Palacios*, 418 F.Supp.2d 915 (S.D.Tex. 2006): **Tennessee** conviction for **facilitation of aggravated robbery** was not for crime of violence because it did not require intent to commit underlying offense, but merely knowing assistance of someone else who intended to commit it; however, it did qualify as an "aggravated felony" justifying 8-level increase.

*United States v. Rivera-Ramos*, 578 F.3d 1111 (9<sup>th</sup> Cir. 2009). **New York attempted robbery** conviction is a crime of violence under U.S.S.G. § 2L1.2. Court found that attempt coextensive with the common law definition.

*United States v. Flores-Vasquez*, 641 F.3d 667 (5<sup>th</sup> Cir. 2011): **District of Columbia** conviction for **robbery**, § 22-2801, fit within the generic, ordinary, contemporary meaning of the enumerated offense of robbery under U.S.S.G. § 2L1.2.

*United States v. Malacara*, 224 Fed.Appx. 439 (5<sup>th</sup> Cir. 2007): Plain error review, 16 level bump based on **Texas aggravated robbery** conviction.

*U.S. v. Avalos-Martinez*, 700 F.3d 148 (5<sup>th</sup> Cir. 2012): **Texas** conviction for **taking or attempting to take weapon from peace officer**, Tex. Penal Code § 38.14 is classified as a COV under § 2L1.2 warranting a 16-level enhancement. The court found *force* is an element of defendant's Texas conviction and therefore falls within the guideline's definition of COV.

*United States v. Bonilla*, 687 F.3d 188 (4<sup>th</sup> Cir. 2012): **Texas** conviction for **burglary of habitation**, Tex. Penal § 30.02(a)(3), qualified as a COV under § 2L1.2. See U.S. Constante, 544 F.3d 584, 587 (5<sup>th</sup> Cir. 2008) for contrary holding. In Constante the Fifth Circuit held that " a burglary conviction under § 30.02(a)(3) is not a generic burglary under the Taylor definition because it does not contain an element of intent to commit a felony, theft, or assault at the moment of entry."

*United States v. Flores-Mejia*, 687 F.3D 1213 (9<sup>th</sup> Cir. 2012): **California** conviction for **robbery**, California Penal Code § 211 is categorically a COV under the "enumerated offense" definition of § 2L1.2.

*United States v. Lopez-Gonzalez*, 492 F.Supp.2d 687 (W.D.Texas 2007): **Illinois robbery** conviction was for a crime of violence for sentencing purposes.

*United States v. Castillo-Zuniga*, 270 Fed.Appx. 342 (5<sup>th</sup> Cir. 2008): **California robbery** conviction was a crime of violence.

*U.S. v. Garcia-Caraveo*, 586 F.3d 1230 (10<sup>th</sup> Cir. 2009): **California robbery** conviction was categorically a crime of violence under U.S.S.G. § 2L1.2 warranting a 16-level increase.

*United States v. Servin-Acosta*, 534 F.3d 1362 (10<sup>th</sup> Cir. 2008): Government conceded that **California second-degree robbery** was broader than generic robbery and failed to prove that defendant's prior conviction was for generic robbery so as merit a 16-level enhancement.

*United States v. Garcia-Caraveo*, 586 F.3d 1230 (10<sup>th</sup> Cir. 2009): **California robbery** conviction (Calif. Penal Code § 211) is categorically a crime of violence.

*United States v. Obando-Landa*, 179 Fed. Appx. 477 (10<sup>th</sup> Cir. 2006): **New York** conviction for **attempted third-degree robbery**, McKinney's Penal Law § 160.05, was a crime of violence supporting 16-level enhancement.

*United States v. Obando-Landa*, 179 Fed.Appx. 477 (10<sup>th</sup> Cir. 2006): **New York** conviction for **attempted third degree robbery** was a crime of violence; 16-level increase in offense level upheld.

*United States v. Saavedra-Velazquez*, 578 F.3d 1103 (9<sup>th</sup> Cir. 2009): **California attempted robbery** under Penal Code § 211 was a crime of violence warranting a 16-level increase. The definition of an "attempt" to commit a crime, under California law, was coextensive with the federal definition of "attempt".

*United States v. Tellez-Martinez*, 517 F.3d 813 (5<sup>th</sup> Cir. 2008): **California robbery** warranted 16-level increase; court analyzed whether prior conviction qualified as the enumerated offense of "robbery" "as understood in its ordinary, contemporary, [and] common' meaning".

*United States v. Velasquez-Bosque*, 601 F.3d 955 (9<sup>th</sup> Cir. 2010): **California carjacking**, Cal. Penal Code § 215, was categorical crime of violence requiring 16-level enhancement.

*United States v. Becerril-Lopez*, 528 F.3d 1133 (9<sup>th</sup> Cir. 2008): **California robbery** conviction (West's Ann. Cal. Penal Code § 211) was crime of violence , warranting 16-level increase; the statute defined robbery as the felonious taking of property in the possession of another from his person or immediate presence, and against his will, by means of force or fear, so that it was broader than the offense generic robbery, but any conduct outside the generic definition encompassed the definition of generic extortion, also a crime of violence.

*United States v. Hernandez-Galvan*, 632 F.3d 192 (5<sup>th</sup> Cir. 2011): **North Carolina** conviction for **attempted common-law robbery** was a crime of violence requiring a 16-level increase under the sentencing guidelines.

*United States v. Flores-Hernandez*, 250 Fed.Appx. 85 (5<sup>th</sup> Cir. 2007): **Florida** conviction for "**strong arm robbery**" was a crime of violence.

*United States v. Trejo-Palacios*, 418 F.Supp.2d 915 (S.D. Tex. 2006): **Tennessee** conviction for **facilitation of aggravated robbery** was not for crime of violence meriting 16-level increase, because conviction did not require intent to commit underlying offense, but merely knowing assistance of someone else who intended to commit it; however, court held the offense was an aggravated felony and arguably used the wrong definition.

*United States v. Sanchez-Ledezma*, 630 F.3d 447 (5<sup>th</sup> Cir. 2011): **Texas** conviction of **evading arrest with motor vehicle** was a crime of violence within meaning of § 16(b) and thus an aggravated felony for purposes of 8-level sentencing enhancement.

*Bejarano-Urrutia v. Gonzales*, 413 F.3d 444 (4<sup>th</sup> Cir. 2005): **Virginia** conviction for **involuntary manslaughter** not a crime of violence and thus not an aggravated felony.

*United States v. Roblero-Ramirez*, 716 F.3d 1122 (8<sup>th</sup> Cir. 2013): **Nebraska** conviction for **manslaughter**, § 28-305, does not categorically constitute a crime of violence under § 2L1.2.

*United States v. Gomez-Leon*, 545 F.3d 777 (9<sup>th</sup> Cir. 2009): **California** conviction for **vehicular manslaughter** while intoxicated without gross negligence, Cal.Penal Code § 192(c)(3), was not a crime of violence for purposes of sentencing enhancement. *But see United States v. Duran-Hernandez*, 261 Fed.Appx. 567 (4<sup>th</sup> Cir. 2008): **Virginia involuntary manslaughter** conviction was a crime of violence warranting 16-level enhancement; court relied solely on the enumerated list in the guideline.

*United States v. Gutierrez-Salinas*, 257 Fed.Appx. 804 (5<sup>th</sup> Cir. 2007): **Oklahoma** conviction for **first degree manslaughter** was not for crime of violence and therefore 16-level enhancement was not warranted; offense was DWI-related.

*Vargas-Sarmiento v. U.S. Dept. of Justice*, 448 F.3d 159 (2d Cir. 2006): **New York first-degree manslaughter** conviction under N.Y. Penal Law § 125.20(1) and (2) was a crime of violence under 18 U.S.C. § 16(b); petitioner had stabbed victim.

*United States v. Bonilla*, 524 F.3d 647 (5<sup>th</sup> Cir. 2008): **New York second-degree manslaughter** conviction (N.Y. McKinney's Penal Law § 125.15) was not categorically a crime of violence.

*United States v. Maldonado-Lopez*, 517 F.3d 1207 (10<sup>th</sup> Cir. 2008): **Colorado harassment** statute, West's C.R.S.A. § 18-9-111(1)(a), was sufficiently broad to encompass both violent and nonviolent crimes, since it could involve conduct such as spitting on the victim, which was not violent, and thus was not categorically a crime of violence.

*United States v. Esquivel-Arellano*, 208 Fed.Appx. 758 (11<sup>th</sup> Cir. 2006): **Georgia aggravated stalking** conviction, Ga. Code Ann. § 16-5-91, not categorically a crime of violence that would support a 16-level enhancement under U.S.S.G. § 2L1.2

*Szucz-Toldy v. Gonzales*, 400 F.3d 978 (7<sup>th</sup> Cir. 2005): **Illinois** conviction for **harassment** by telephone not a crime of violence; statute criminalized making a telephone call with intent to abuse, threaten, or harass and did not require any words or threats to actually be spoken

*Singh v. Ashcroft*, 386 F.3d 1228, (9<sup>th</sup> Cir. 2004): **Oregon** crime of “**harassment**” that prohibited “offensive touching” not a crime of violence under 18 U.S.C. 16(a).

*United States v. Cruz-Rodriguez*, 625 F.3d 274 (5<sup>th</sup> Cir. 2010): **California** conviction for making **criminal threats**, § 422, was not a crime of violence under guidelines, but **California willful infliction of corporal injury**, § 273.5, was a crime of violence warranting a 16-level enhancement.

*United States v. Gonzalez-Perez*, 472 F.3d 1158 (9<sup>th</sup> Cir. 2007): **Florida false imprisonment** statute does not constitute a “crime of violence” under U.S.S.G. § 2L1.2(b)(1)(A)(ii). *But see Flores-Navarro, below.*

*Barragan-Lopez v. Holder*, 705 F.3d 1112 (9<sup>th</sup> Cir. 2013): Violation of **California's false imprisonment statute**, § 201.5, was a crime of violence making Mr. Barragan-Lopez removable as an aggravated felon.

*United States v. Flores-Navarro*, 267 Fed.Appx. 830 (11<sup>th</sup> Cir. 2008): Applying modified categorical approach, **Florida false imprisonment** conviction was for a crime of violence; charges made it clear that defendant's false imprisonment conviction had as an element the use of force.

*United States v. Rosales-Bruno*, 676 F.3d 1017 (11th Cir. 2012). **Florida conviction for false imprisonment, Fla. Stat. § 787.02**, was not a COV under § 2L1.2.

*United States v. De Jesus Ventura*, 565 F.3d 870 (DC Cir. 2009): **Virginia felonious abduction** statute, VA. Code § 18.2-47, does not categorically conform to the generic crime of **kidnaping** and is not a crime of violence for sentencing purposes.

*United States v. Ruiz-Rodriguez*, 494 F.3d 1273 (10<sup>th</sup> Cir. 2007): Defendant's conviction under **Nebraska** law for **first-degree false imprisonment** was not categorically a crime of violence for sentencing purposes.

*United States v. Hernandez-Hernandez*, 431 F.3d 1212 (9<sup>th</sup> Cir. 2005): **California false imprisonment** not categorically a crime of violence; however, applying modified categorical approach, defendant's conviction was a crime of violence.

*Delgado-Hernandez v. Holder*, 582 F.3d 930 (9<sup>th</sup> Cir. 2009): **California kidnaping** conviction under Cal. Penal Code § 207(a) is categorically an aggravated felony under 1101(a)(43)(F) referencing 18 U.S.C. § 16(b).

*United States v. Moreno-Florean*, 542 F.3d 445 (5<sup>th</sup> Cir. 2008): **California kidnaping** conviction under Cal. Penal Code § 207(a) is not categorically a crime of violence under § 2L1.2(b)(1)(A)(ii).

*United States v. Najera-Mendoza*, 683 F.3d 627 (5<sup>th</sup> Cir. 2012). **Oklahoma** conviction for **kidnaping** did not belong to the enumerated offense of "kidnaping" nor did it qualify under the residual clause under § 2L1.2.

*United States v. Marquez-Lobos*, 683 F.3d 1061 (9<sup>th</sup> Cir. 2012). **Arizona kidnaping** statute, **A.R.S. § 13-1304**, qualified as a COV as both an enumerated offense, "**kidnaping**", and under 2L1.2 residual clause.

*United States v. Soto-Sanchez*, 623 F.3d 317 (6<sup>th</sup> Cir. 2010): **Michigan** conviction for **attempted kidnaping** under § 750.349 was a crime of violence warranting a 16-level enhancement.

*United States v. Flores-Granados*, 783 F.3d 487 (4<sup>th</sup> Cir. 2015): post-*Descamps*. **North Carolina kidnaping** conviction in violation of N.C.G.S.A. § 14-39 fit within generic definition of kidnaping, and thus constituted crime of violence, as required for 16-level sentencing enhancement.

*Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003): **New York first-degree unlawful imprisonment** (N.Y. McKinney's Penal Law §§ 135.00(1)(a), (b), 135.10) is a divisible statute, and only a conviction of the section involving an adult victim is clearly a crime of violence.

*United States v. Ventura*, 650 F.3d 746 (D.C. 2011): **Virginia's abduction** statute is an aggravated felony under 8 U.S.C. § 1101(a)(43) and district judge was entitled to consider facts charged in indictment to which defendant's pleaded nolo contendere.

*United States v. Franco-Fernandez*, 511 F.3d 768 (7<sup>th</sup> Cir. 2008) **Illinois** offense of **child abduction** by putative father was not a crime of violence under U.S.S.G. § 2L1.2 nor was it an aggravated felony).

*United States v. Martinez-Jimenez*, 294 F.3d 921 (7<sup>th</sup> Cir. 2002): Convictions for **attempting to lure a child into a motor vehicle for an unlawful purpose** contrary to the **Illinois** Child Abduction statute, 720 ILCS 5/10-5(10), was a crime of violence supporting 8-level enhancement under reentry guideline.

*United States v. Cervantes-Blanco*, 504 F.3d 576 (5<sup>th</sup> Cir. 2007): **Colorado** conviction for **attempted second-degree kidnaping** did not qualify as enumerated offense of "kidnaping" and 16-level increase was not warranted.

*United States v. Campos-Fuerte*, 357 F.3d 956 (9<sup>th</sup> Cir. 2004), amended on other grounds, 366 F.3d 691 (9<sup>th</sup> Cir. 2004): conviction under **California** Veh. Code § 2800.2 (**flight from police officer** in willful and wanton

disregard for safety) was a crime of violence and aggravated felony under 8 U.S.C. § 1101(a)(43) and 18 U.S.C. § 16(b), warranting an 8-level enhancement under U.S.S.G. § 2L1.2.

*United States v. Perez-Tapia*, 241 Fed.Appx. 416 (9<sup>th</sup> Cir. 2007): California **arson** conviction was a crime of violence under guideline.

### **Sex Offenses and Crime of Violence.**

*United States v. Ortega-Galvan*, 682 F.3d 558 (7<sup>th</sup> Cir. 2012). **Illinois** conviction for **criminal sexual abuse for having sex with a 13-year old girl, 720 ILCS 5/12-15(a)**, constituted statutory rape under § 2L1.2 warranting a 16-level enhancement.

*United States v. Chavez-Hernandez*, 671 F.3d 494 (5<sup>th</sup> Cir. 2012). **Florida** conviction for **sexual activity with a minor, Fla. Stat. § 794.05(1)**, was not categorically a COV, however, under modified approach, defense counsel's admission that victim was 14 years old established victim's status as a minor and thus a COV. This Florida statute, although captioned "Sexual Activity with a Minor," applies to seventeen-year-olds, who are not "minors" under the generic definition. Compare with holding in *United States v. Sanchez*, 667 F.3d 555 (5<sup>th</sup> Cir. 2012).

*United States v. Sanchez*, 667 F.3d 555 (5<sup>th</sup> Cir. 2012). **Texas** conviction for **attempt** equals generic definition of "attempt" and conviction for **sexual assault of a child, TX Penal Code § 22.011(a)(2) and (c)(1)** (age of consent is seventeen under TX law, whereas generic age of consent is sixteen) met the definition of the enumerated offenses of "statutory rape" and "sexual abuse of a child" warranting a 16-level enhancement.

*United States v. Rangel-Castaneda*, **Tennessee** conviction for **statutory rape**, Tenn.Code.Ann. § 39-13-506©, does not equate to crime of violence under § 2L1.2.

*United States v. Martinez-Zamaripa*, 680 F.3d 1221 (10<sup>th</sup> Cir. 2012). **Oklahoma** conviction for **indecent proposal to a child, Okl.St.Ann § 1123(A)(1)**, qualified as a COV under § 2L1.2.

*United States v. Martinez*, 595 Fed.Appx. 330 (5<sup>th</sup> Cir. 2014): post-*Descamps*. On plain error review, prior **New Jersey conviction for fourth degree lewdness**, N.J.S.A. 2C:14-4b(1), was not a crime of violence; it did not qualify as sexual abuse of a minor because the statute could be violated where no actual minor was present or harmed.

*United States v. Cortes-Salazar*, 682 F.3d 953 (11<sup>th</sup> Cir. 2012). **Florida** conviction for a **lewd assault act**, Fla. Stat. § 800.04, qualified as enumerated offense of **sexual abuse of a minor**, and thus a COV under § 2L1.2. Court recognized that violations of statute might not involve any physical contact with the victim, thus not a COV under residual clause, but concluded that all possible violations involve the misuse or maltreatment of a child for sexual gratification. Contrast with *United States v. Harris*, 608 F.3d 1222 (11<sup>th</sup> Cir. 2010) that violation of same statute was not categorically a violent felony under ACCA.

*United States v. Caceres-Olla*, 738 F.3d 1051 (9<sup>th</sup> Cir. 2013): post-*Descamps*. **Florida conviction for lewd or lascivious battery**, West's F.S.A. § 800.04(4)(a), did not qualify as a crime of violence for purposes of U.S.S.G. § 2L1.2; it was neither a forcible sex offense nor statutory rape.

*United States v. Diaz-Benitez*, 567 Fed.Appx. 515 (9<sup>th</sup> Cir. 2014): post-*Descamps*. **Washington third-degree child molestation** (Wash. Rev.Code § 9A.44.089), on plain error review, is categorically not a crime of violence. It is not a forcible sex offense because it does not require lack of consent or compulsion; it is not statutory rape; and it has no element of intentional use of force. It is also indivisible.

*Campell v. Holder*, 698 F.3d 29, (1<sup>st</sup> Cir. 2012): **Connecticut** conviction for **risk of injury to a minor**, Conn.Gen.Stat. Ann. § 53-21(a)(1), is not categorically fall within sexual abuse rubric under the Immigration and

Nationality Act. First Circuit could not determine what conduct was violated under the statute because nolo contendere plea was entered.

*United States v. Romero-Rosales*, 690 F.3d 409 (5th Cir. 2012): **Florida** conviction for **lewd and lascivious act upon a child under 16 years of age**, Fla. Stat. § 800.04, constituted an enumerated COV. Court applied modified categorical approach to determine COV but had doubt that any of subdivisions would not fall within definition of a COV for purposes of § 2L1.2's sentencing enhancement.

*United States v. Quiroga-Hernandez*, 698 F.3d 227 (5th Cir. 2012): **Texas** conviction for **indecenty with a child by sexual contact**, Tex. Penal Code § 21.11(a)(1), constituted a conviction for sexual abuse of a minor as defined under COV as an enumerated offense. Defendant argued that Texas statute was broader than generic definition of minor because victim could be seventeen of age and generic definition set the age of consent at sixteen. Court indicates that previous panel has already held that Tex. Penal Code § 21.11(a)(1) constitutes sexual abuse of a minor for purposes of § 2L1.2 and absent intervening change in the law, precedent rules.

*United States v. Rodriguez*, 698 F.3d 220 (5th Cir. 2012): **Texas** conviction for **sexual assault of a child**, Tex. Penal Code § 22.011(e)(2)(A)-(B), constituted a COV under the guidelines. Defendant argued that Texas statute was broader than generic definition of minor because victim could be seventeen of age and generic definition set the age of consent at sixteen. Court indicates that previous panel has already held that Tex. Penal Code § 22.011(e)(2)(A)-(B) constitutes statutory rape for purposes of § 2L1.2 and absent intervening change in the law, precedent rules.

*Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012): **California** conviction for **sexual battery**, California Penal Code § 243.4(a), did not qualify as sexual abuse of minor under modified categorically approach, and thus not an aggravated felony under INA. The Ninth Circuit held that there is a categorical mismatch between sexual battery under CA law § 243.4(a) and federal generic offense of sexual abuse of a minor. The federal generic offense protects only minors, whereas California statute protects all persons regardless of age. The Court applied modified categorical approach but could not find age of victim in any of the *Shepard* allowable documents.

*United States v. Sandoval-Orellana*, 714 F.3d 1174 (9<sup>th</sup> Cir. 2013): **California** conviction for **sexual penetration by foreign object**, PC § 289(a)(1), categorically qualified as a crime of violence under 18 U.S.C. § 16(b) but because the crime may also be accomplished by means of “duress” and duress does not necessarily involve the use, attempted use, or threatened use of physical force, violation of statute does not qualify as a crime of violence under 16(a), § 2L1.2.

*United States v. Rodriguez*, 711 F.3d 541 (5<sup>th</sup> Cir. 2013): **Texas** conviction for **sexual assault**, Penal Code § 22.011(a)(2), was crime of violence with meaning of Sentencing Guidelines, § 2L1.2.

*United States v. Chacon*, ---F.3d---, 2014 WL 477314 (5<sup>th</sup> Cir. 2014): **Maryland** conviction for **sexual offense in the third degree, Md.Code Ann., Crim. Law § 3-307**, was a crime of violence under enumerated offense sexual abuse of a minor.

*Rodriguez v. Holder*, 705 F.3d 207 (5<sup>th</sup> Cir. 2013): **Texas** conviction for **attempted sexual assault**, § 22.011, was not categorically a crime of violence as defined in 18 U.S.C. § 16(b) and thus not an aggravated felony.

*United States v. Hernandez-Gonzalez*, 842 F.Supp.1373(M.D. Ga. 2012). **Georgia** conviction for **sexual battery involving victim under the age 16, O.C.G.A. § 16-6-22.1(d)** did not qualify as a conviction for a COV. Court determined that statute does not require as an element that a defendant was motivated by sexual desire or gratification; a defendant need only to have made intentional physical contact with an "intimate part" of the victim's body and therefore did not substantially correspond to enumerated definition of sexual abuse of a minor.

*United States v. Esqueda-Pina*, 362 Fed.Appx. 426 (5<sup>th</sup> Cir. 2010): **Ohio** conviction for **gross sexual imposition** was a crime of violence.

*United States v. Raya-Romero*, 157 Fed.Appx. 703 (5<sup>th</sup> Cir. 2005): Record did not support district court’s crime of violence finding where Defendant’s convictions were for “**oral copulation, victim unconscious**” and “**sexual penetration, victim unconscious**” under California Penal Code §§ 288a(f) and 289(d), each of which can be committed in one of four ways.

*United States v. Munoz-Ortenza*, 563 F.3d 112 (5<sup>th</sup> Cir. 2009): **California** conviction for **oral copulation of a minor**, Cal.Penal Code § 288a(b)(1), did not correspond to the generic definition of “sexual abuse of a minor” that is enumerated as a “crime of violence” in Guidelines § 2L1.2.

*United States v. Espinoza-Morales*, 621 F.3d 1141 (9<sup>th</sup> Cir. 2010): **California** convictions for **sexual battery**, Cal. Penal Code 243.4(a), and **penetration with foreign object**, Cal. Penal Code 289(a)(1), did not qualify as crimes of violence under categorical and under modified categorical approach, as would justify 16-level sentencing increase.

*United States v. Valencia-Barragan*, 608 F.3d 1103 (9<sup>th</sup> Cir. 2010): **Washington** conviction for **rape of a child** in the **second degree** categorically constituted “sexual abuse of a minor” under U.S.S.G. § 2L1.2.

*United States v. Carrillo-Rosales*, 536 Fed.Appx. 478 (5<sup>th</sup> Cir. 2013): post-*Descamps*. **Washington** conviction for **third-degree rape** in violation of West’s RCWA 9A.44.060 qualified as a forcible sex offense warranting 16-level enhancement.

*United States v. Rodriguez-Juarez*, 631 F.3d 192 (5<sup>th</sup> Cir. 2011): **Indiana** conviction for offense of **sexual battery** qualifies as a crime of violence under guidelines warranting an enhancement, 16-levels.

*United States v. Paz*, 622 F.3d 890 (8<sup>th</sup> Cir. 2010): **Arkansas** conviction of **2<sup>nd</sup> degree sexual assault** was an offense enumerated in the definition of a crimes of violence in the guidelines commentary U.S.S.G. § 2L1.2. Court determined that all enumerated offenses are crimes of violence regardless of whether force was used.

*United States v. Herrera*, 647 F.3d 172 (5<sup>th</sup> Cir. 2011): **Arkansas** conviction of **second-degree sexual assault by sexual contact with forcible compulsion and second-degree assault of a physically helpless or mentally vulnerable person** were both crimes of violence under § 2L1.2.

*United States v. Ramirez-Garcia*, 646 F.3d 778 (11<sup>th</sup> Cir. 2011): **North Carolina** conviction for **taking indecent liberties with a child**, § 14-202, qualified as crimes of violence under guidelines. (A person can violate statute without touching minor).

*Vargas v. Dept. of Homeland Security*, 451 F.3d 1105 (10<sup>th</sup> Cir. 2006): Under modified categorical approach, **Colorado** conviction for **contributing to the delinquency of a minor** by inducing the minor to engage in unlawful sexual contact, West’s C.R.S.A. § 18-6-701, was an aggravated felony conviction.

*United States v. Chacon*, 533 F.3d 250 (4<sup>th</sup> Cir. 2008): Court held that (1) a convictions under **Maryland** law for (1) **second-degree rape** by engaging in vaginal intercourse with another by force or threat of force was a conviction for a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii); (2) **statutory rape** was a conviction for a crime of violence; and (3) **second-degree rape** by engaging in vaginal intercourse with another who was mentally defective, mentally incapacitated, or physically helpless was a conviction for a crime of violence. The Court concluded that the crimes fell within the scope of “forcible sex offense” even though the offenses lacked any element of use of force.

*United States v. Gallegos-Galindo*, 704 F.3d 1269 (9<sup>th</sup> Cir. 2013): **Washington** conviction for **rape in the third degree**, § 9A.44.060(1)(a), was a crime of violence under the modified categorical approach warranting a 16-level increase under § 2L1.2.

*United States v. Gaytan*, 226 Fed.Appx. 519 (6<sup>th</sup> Cir. 2007): **Michigan** conviction for **second-degree criminal sexual conduct** for having touched breast of 12-year-old girl was “crime of violence” that justified 16-level enhancement.

*United States v. Herrera*, 647 F.3d 172 (5<sup>th</sup> Cir. 2011): **Arkansas** crime of **sexual assault in 2<sup>nd</sup> degree**, Ark.Code § 5-14-125, constitutes a crime of violence under guidelines.

*United States v. Castillo-Suarez*, 215 Fed. Appx. 361 (5<sup>th</sup> Cir. 2007): **Massachusetts** conviction under **Massachusetts** law was “sexual abuse of a minor” under U.S.S.G. § 2L1.2.

*United States v. Diaz-Ibarra*, 522 F.3d 343 (4<sup>th</sup> Cir. 2008): **Georgia** conviction for **felony attempted child molestation** contrary to Ga. Code Ann. § 16-6-4 qualified as a crime of violence for purposes of 16-level enhancement.

*United States v. Serna-Gomez*, 184 Fed.Appx. 768 (10<sup>th</sup> Cir. 2006): **Illinois** conviction for **aggravated sexual abuse** was a “crime of violence” for sentencing purposes.

*United States v. Paz*, 622 F.3d 890 (8<sup>th</sup> Cir. 2010): **Second-degree sexual assault** conviction under **Arkansas Code** § 5-14-125 was a crime of violence under U.S.S.G. § 2L1.2(b). District court found, and Eighth affirmed, that Paz pled guilty to sexual assault of a minor, and did not object to a PSR that described his touching of minor. Further, court found that “[E]numerated offenses are always ‘crimes of violence,’ regardless of whether the prior offense expressly has as an element the use, attempted use, or threatened use of physical force against the person of another.” So much for the categorical approach.

*United States v. Beltran-Munguia*, 489 F.3d 1042 (9<sup>th</sup> Cir. 2007) : **Oregon** conviction for **sexual abuse** in the **second degree** was not a crime of violence warranting 16-level enhancement because statute does not include element of use, attempted use or threatened use of physical force.

*United States v. Gonzalez-Aparicio*, 663 F.3d 419 (9<sup>th</sup> Cir. 2011): On plain error review, defendant’s **Arizona** conviction for **sexual conduct with a minor**, Ariz.Rev.Stat. § 13-1405, was a crime of violence, enumerated offense sexual abuse of a minor, warranting a 16-level enhancement under guidelines.

*United States v. Olalde-Hernandez*, 630 F.3d 372 (5<sup>th</sup> Cir. 2011): **Georgia** conviction for **child molestation**, § 16-6-4(a), constitutes the enumerated offense of “sexual abuse of a minor” and was a crime of violence under U.S.S.G. § 2L1.2.

*United States v. Medina-Villa*, 2009 WL 1758742 (9<sup>th</sup> Cir. 2009)(unpublished) **California** conviction for **lewd and lascivious acts on a child under fourteen**, Cal.Penal Code 288(a), corresponds to the generic definition of “sexual abuse of a minor” which is enumerated as a crime of violence under U.S.S.G. § 2L1.2.

*United States v. Izaguirre-Flores*, 405 F.3d 270 (5<sup>th</sup> Cir. 2005): **North Carolina** offense of taking **indecent liberties** with a child was “sexual abuse of a minor,” for purposes of § 2L1.2.

*United States v. Padilla-Reyes*, 247 F.3d 1158 (11<sup>th</sup> Cir. 2001): **Florida** conviction, West’s F.S.A. § 800.04 that criminalizes a broad variety of acts, not all of which require victim contact, against children under age 16 qualified as “**sexual abuse of a minor**” and defining the phrase as “a perpetrator’s physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification.”

*United States v. Gomez-Hernandez*, 300 F.3d 974 (8<sup>th</sup> Cir. 2002): **Unlawful sexual intercourse with a minor** in violation of **California** Penal Code § 261.5(d) (prohibiting intercourse by a person aged 21 or older with someone aged 16 or younger) was a crime of violence under reentry guideline.

*United States v. Pereira-Salmeron*, 337 F.3d 1148 (9<sup>th</sup> Cir. 2003): **Virginia** law for **carnal knowledge of a child between 13 and 15 years of age**, was a crime of violence for purposes of reentry guideline.

*United States v. Lopez-Montanez*, 421 F.3d 926 (9<sup>th</sup> Cir. 2005): **California sexual battery** conviction was not a categorical “crime of violence,” for purpose of U.S.S.G. § 2L1.2 because statute encompassed illegal touching that did not involve use of force, and statute’s requirement that victim be unlawfully restrained was not limited to physical restraint, but could be accomplished by words alone; modified categorical approach could be applied to determine that defendant was actually convicted of conduct that was a crime of violence. *But see Lisbey v. Gonzales*, 420 F.3d 930 (9<sup>th</sup> Cir. 2005): California sexual battery conviction was a crime of violence under 8 U.S.C. § 1101(a)(43) because Cal. Penal Code § 243.4(a) had a “substantial risk of use of force” and was an aggravated felony under 18 USC § 16(b).

*United States v. Lechuga*, 279 Fed.Appx. 183 (3d Cir. 2008): **California** conviction for **sexual battery** was for felony crime of violence, justifying 16-level sentence enhancement.

*United States v. Viezcas-Soto*, 562 F.3d 903 (8<sup>th</sup> Cir. 2009): Sentence vacated on plain error review where district court impose 16-level enhancement **California unlawful sexual intercourse** conviction (statutory rape) was under a wobbler statute and government failed to prove it was a felony conviction.

*United States v. Meraz-Enriquez*, 442 F.3d 331 (5<sup>th</sup> Cir. 2006): **Kansas** conviction for **attempted aggravated sexual battery** was one that could be committed by methods that did not require use of force, and so it did not qualify as a “crime of violence” under U.S.S.G. § 2L1.2.

*United States v. Munguia-Sanchez*, 365 F.3d 877 (10<sup>th</sup> Cir. 2004): **Colorado** conviction for **sexual assault of a minor** was a “crime of violence” under U.S.S.G. § 2L1.2(b)(1)(A)(2003).

*Xiong v. I.N.S.*, 173 F.3d 601 (7<sup>th</sup> Cir. 1999): **Wisconsin** conviction for **sexual assault on a child** was not a crime of violence; offense conduct was consensual sex between 18-year-old defendant and 15-year-old girlfriend.

*Lara-Ruiz v. I.N.S.*, 241 F.3d 934 (7<sup>th</sup> Cir. 2001): **Illinois** sexual assault was a **sexual abuse of a minor** aggravated felony offense.

*United States v. Rivera-Perez*, 322 F.3d 350 (5<sup>th</sup> Cir. 2003). **Texas attempted indecency** with a child was a “felony” for purposes of U.S.S.G. § 2L1.2(b)(1)(A), notwithstanding the fact that it had been sentenced as a misdemeanor pursuant to the provisions of Tex. Penal Code § 12.44(a), because by the terms of the criminal statute defendant was potentially exposed to more than one year of imprisonment and because Texas state law itself recognizes that felonies sentenced as misdemeanors under § 12.44(a) retain their character as felonies; see also *United States v. Lopez-Cortez*, 269 Fed.Appx. 360 (5<sup>th</sup> Cir. 2008).

*United States v. De La Cruz-Garcia*, 590 F.3d 1157 (10<sup>th</sup> Cir. 2010): **Colorado attempted sexual abuse** of a minor is categorically a crime of violence.

*United States v. Najera-Najera*, 519 F.3d 509 (5<sup>th</sup> Cir. 2008): **Texas** offense of **indecency with a child** was sexual abuse of a minor under the guideline.

*United States v. Ramos-Sanchez*, 483 F.3d 400 (5<sup>th</sup> Cir. 2007): **Kansas** conviction for **indecent solicitation** of a child involving soliciting or enticing a minor to perform an illegal sex act was “sexual abuse of a minor” and thus a “crime of violence” for purposes of reentry guideline.

*United States v. Balderas-Rubio*, No. 06-41153 (5<sup>th</sup> Cir. Sept. 5, 2007) (King, Garza, Benavides): **Indecency** with a child under **Oklahoma** Stat. Tit. 21, § 1123(a)(4) is “sexual abuse of minor.”

*United States v. Sarmiento-Funes*, 374 F.3d 336 (5<sup>th</sup> Cir. 2004). **Missouri sexual assault felony conviction** was not a “crime of violence” within the meaning of U.S.S.G. § 2L1.2 cmt. n.1(B)(ii)(2002).

*United States v. Lopez-DeLeon*, 513 F.3d 472 (5<sup>th</sup> Cir. 2008): **California** conviction for **sexual intercourse with minor** was “crime of violence,” given records that established equivalency to statutory rape in that victim was under age 14.

*Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9<sup>th</sup> Cir. 2008)(en banc): **California statutory rape statute** did not correspond to generic definition of “sexual abuse of a minor” and was not categorically a crime of violence.

*United States v. Medina-Villa*, 2009 WL 1758742 (9<sup>th</sup> Cir. 2009)(not pub.): **California** conviction for **lewd and lascivious acts with minor under age 14** was a 16-level crime of violence because it qualified as sexual abuse of a minor.

*United States v. Munoz-Ortenza*, 563 F.3d 112 (5<sup>th</sup> Cir. 2009): **California** statute of **oral copulation of a minor** did not categorically qualify as sexual abuse of a minor under the application notes to USSG § 2L1.2; the court noted in note 7 that the record was silent on the age of the victim.

*United States v. Lopez-Solis*, 447 F.3d 1201 (6<sup>th</sup> Cir. 2006): **Statutory rape** in violation of **Tennessee** law was not predicate “crime of violence,” under guideline providing for 16-level sentencing increase for defendant convicted of illegal reentry.

*United States v. Gomez-Gomez*, 547 F.3d 242 (5<sup>th</sup> Cir. 2008): **California rape**, Cal.Penal Code § 261(a)(2), conviction did correspond to the generic definition of “forcible sex offense” that is enumerated as a crime of violence for sentencing purposes pursuant to Guidelines § 2L1.2.

*United States v. Ruiz-Apolonio*, 657 F.3d 907 (9<sup>th</sup> Cir. 2011): **California** conviction for **forcible rape** under section 261(a)(2) is categorically a crime of violence under USSG § 2L1.2.

*United States v. Alvarez-Gutierrez*, 394 F.3d 1241 (9<sup>th</sup> Cir. 2005): **Nevada** conviction for statutory **sexual seduction** was a conviction for sexual abuse of a minor, and, though not a traditional felony in that it was not punishable by more than one year, was an aggravated felony for sentencing guideline purposes.

*Gonzalez v. Ashcroft*, 369 F.Supp.2d 442 (S.D.N.Y. 2005): **New York** conviction for **use of a child in a sexual performance** was not equivalent of federal pornography or sexual abuse offenses, both of which required scienter, and thus did not constitute aggravated felony.

*United States v. Rodriguez-Guzman*, 506 F.3d 738 (9<sup>th</sup> Cir. 2007): holding that “**statutory rape**, is a per se crime of violence under § 2L1.2(b)(1)(A)(ii) of the Guidelines. However, [the **California** statute], which sets the age of consent at eighteen, is over-broad. The generic federal definition of statutory rape, reflecting the age of consent established by the overwhelming body of authority, requires that the victim be under sixteen years of age.” Remanded for resentencing.

*Valencia v. Gonzales*, 439 F.3d 1046 (9<sup>th</sup> Cir. 2006): **California unlawful sexual intercourse with person under 18 who was more than three years his junior**, did not qualify as “crime of violence,” and thus was not an “aggravated felony” that subjected him to removal.

*Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9<sup>th</sup> Cir. 2008)(en banc): **California** conviction for **statutory rape** contrary to Cal. Penal Code § 261.5(c) did not conform to the generic definition of “sexual abuse of a minor” and therefore not categorically a crime of violence.

*United States v. Romero-Hernandez*, 505 F.3d 1082 (10<sup>th</sup> Cir. 2007): **Colorado** misdemeanor (but punishable by more than one year imprisonment) **unlawful sexual contact**, West’s C.R.S.A. § 18-3-404(1), was a “forcible sex offense” and therefore a “crime of violence” warranting 16-level increase.

*United States v. Reyes-Alfonso*, 653 F.3d 1137 (10<sup>th</sup> Cir. 2011): Post-*Johnson v. U.S.* decision of whether **Colorado misdemeanor unlawful sexual contact**, West’s C.R.S.A. § 18-3-404(1), was still a “forcible sex offense” and therefore a “crime of violence” warranting 16-level increase. It is.

*United States v. Gonzalez-Jaquez*, 566 F.3d 1250 (10<sup>th</sup> Cir. 2009): **California** conviction of **sexual battery**, Cal.Penal Code § 243.4, was a crime of violence for guideline purposes.

*United States v. Rosas-Pulido*, 526 F.3d 829 (5<sup>th</sup> Cir. 2008): **Minnesota** conviction for fourth degree criminal **sexual conduct**, contrary to Minn. Stat. Ann. § 609.345, was not for a crime of violence.

*United States v. Velazquez-Overa*, 100 F.3d 418 (5<sup>th</sup> Cir. 1996): **Texas indecency with a child by sexual contact** constituted a “crime of violence” as it applied only to child victims under the age of 17 and inherently involved a substantial risk that physical force would be used.

*United States v. Alas-Castro*, 184 F.3d 812 (8<sup>th</sup> Cir. 1999): **Nebraska** conviction for **sexual assault of a child** is a crime of violence.

*Ramsey v. I.N.S.*, 55 F.3d 580 (11<sup>th</sup> Cir. 1995): **Florida** offense of **attempted lewd assault** on a child under the age of 16 is a crime of violence even though the offense might be accomplished without use of physical force.

*United States v. Ortiz-Delgado*, 451 F.3d 752 (11<sup>th</sup> Cir. 2006): **California** conviction for **lewd acts upon a child** qualified as “sexual abuse of a minor” for purposes of reentry guideline enhancement.

*United States v. Contreras-Murillo*, 270 Fed.Appx. 693 (9<sup>th</sup> Cir. 2008): California **lewd and lascivious acts** with a child under 14, contrary to West’s Ann.Cal.Penal Code § 288, was a crime of violence warranting a 16-level upward adjustment.

*United States v. Perez-Aguilar*, 282 Fed.Appx. 516 (9<sup>th</sup> Cir. 2008) (slip copy): District court committed plain error in enhancing reentry defendant’s offense level by 16; conviction for **sodomy** with another person who is under 18 years of age contrary to Cal.Penal Code. § 286(b)(1) does not categorically qualify as statutory rape because the age of consent under **California** law is 18 and the term minor in the context of the statutory rape law means a person under age 16.

*United States v. Garcia-Juarez*, 421 F.3d 655 (8<sup>th</sup> Cir. 2005): **Lascivious acts** with a child under **Iowa** law was a crime of violence.

*United States v. Reyes-Castro*, 13 F.3d 377 (10<sup>th</sup> Cir. 1993): **Utah** conviction for **attempted sexual abuse** of a child was a crime of violence even if actual physical force was not used.

### **Weapons and Crime of Violence.**

*United States v. Martinez*, 756 F.3d 1092 (8<sup>th</sup> Cir. 2014): post-*Descamps*. Defendant’s 2001 **Arizona** conviction for misconduct involving weapons in violation of A.R.S. § 13–3102(A) did not qualify as a firearms offense justifying a 16-level enhancement; district court erred in relying on the original indictment which was superseded to determine that the prior conviction warranted the enhancement.

*United States v. Aguilera-Rios*, 769 F.3d 626 (9<sup>th</sup> Cir. 2014): post-*Descamps*. **California firearms offense** was not a categorical match for federal aggravated felony “firearms offense” because it lacked antique firearms exception.

*United States v. Rivas-Palacios*, 244 F.3d 396 (5<sup>th</sup> Cir. 2001). The **Texas** crime of **unlawful possession of a short-barreled shotgun** is a “crime of violence” under 18 U.S.C. § 16 and hence is also an “aggravated felony” for purposes of 8 U.S.C. § 1101(a)(43)(F) or U.S.S.G. § 2L1.2(b) (2000 version). (In dicta, Court indicated that the unlawful possession of any unregistered firearm would constitute a “crime of violence” under 18 U.S.C. § 16

and hence an “aggravated felony.”) This decision has been cited by subsequent panel decisions as failing to follow the *Chapa-Garza* framework and therefore lacks precedential value. See *United States v. Diaz-Diaz* and *United States v. Hernandez-Neave* described below.

*United States v. Diaz-Diaz*, 327 F.3d 410 (5<sup>th</sup> Cir. 2003). Court appeared to agree that defendant’s **Texas** conviction for **possession of a short-barrel firearm** under Tex. Penal Code § 46.05 was not a “crime of violence” under 8 U.S.C. §§ 1101(a)(43)(F) and 1326 or the U.S.S.G. § 2L1.2 (2000); however, because it was not clear that the same sixteen-level enhancement could not still be imposed as a firearms offense under 8 U.S.C. § 1101(a)(43)(E)(iii), there was no plain error in assessing the 16-level enhancement for an “aggravated felony.”

*United States v. Hernandez-Neave*, 291 F.3d 296 (5<sup>th</sup> Cir. 2001). **Texas** felony offense of **carrying a firearm** onto premises which are licensed or permitted to sell alcoholic beverages is not a “crime of violence” under 18 U.S.C. § 16 and hence not an “aggravated felony” for purposes of 8 U.S.C. § 1101(a)(43)(F) or U.S.S.G. § 2L1.2. (Court suggested that while this decision seemingly conflicted with an earlier decision in *Rivas-Palacios*, *Rivas-Palacios* conflicted with the earlier panel decision in *Chapa-Garza*; therefore *Chapa-Garza*, and not *Rivas-Palacios*, should be followed.)

*United States v. Gamez*, 577 F.3d 394 (2<sup>nd</sup> Cir. 2009). **New York** Penal Code § 265.03, **unlawful possession** of a firearm, is not a crime of violence under § 2L1.2.

*United States v. Medina-Anicacio*, 325 F.3d 638 (5<sup>th</sup> Cir. 2003). **California** felony conviction for **possession of a deadly weapon** (concealed dagger) was not a “crime of violence,” and hence not an “aggravated felony,” under 8 U.S.C. §§ 1101(a)(43)(F) and 1326 or § 2L1.2 (2000).

*United States v. Sandoval-Barajas*, 206 F.3d 853 (9<sup>th</sup> Cir. 2000): conviction for **possession of firearm** by non-citizen was not “aggravated felony,” and reentry defendant was not subject to 16-level enhancement because conviction was not described in federal statute setting forth crime of possession of firearm by illegal alien; federal statute applied to some aliens while Washington statute applied to all aliens.

*Henry v. Bureau of Immigration and Customs Enforcement*, 493 F.3d 303 (3<sup>d</sup> Cir. 2007): **Second-degree criminal possession of a weapon** under **New York** law qualified as an aggravated felony crime of violence; statute required possession of the weapon with intent to use it against another.

*United States v. Lopez-Garcia*, 565 F.3d 1306 (11<sup>th</sup> Cir. 2009): **Possession of a firearm** during the commission of a crime under **Georgia** law, Ga.Code Ann. § 16-11-106(b)(4) constituted a “firearms offense” with the meaning of U.S.S.G. § 2L1.2 and warranted a 16-level increase.

### **DUI and Crime of Violence.**

*Leocal v. Ashcroft*, 543 U.S. 1 (2004): alien’s conviction for **driving under the influence** of alcohol (**DUI**) and causing serious bodily injury in an accident, in violation of **Florida** law, was not a “crime of violence,” and therefore, was not an “aggravated felony” warranting deportation.

*United States v. Portela*, 469 F.3d 496 (6<sup>th</sup> Cir. 2006): **Florida** conviction for **reckless vehicular assault** was not “crime of violence” warranting enhancement of sentence.

*United States v. Lucio-Lucio*, 347 F.3d 1202 (10<sup>th</sup> Cir. 2003): **DWI** is not a “crime of violence” under 18 U.S.C. § 16 and hence is not an “aggravated felony” for purposes of 8 U.S.C. § 1101(a)(43)(F) or U.S.S.G. § 2L1.2(b)(1)(A).

*United States v. Torres-Ruiz*, 387 F.3d 1179 (10<sup>th</sup> Cir. 2004): The definition of “crime of violence” for purposes of U.S.S.G. § 2L1.2 incorporates an intent requirement that cannot be satisfied by negligent conduct; California conviction of **felony driving while intoxicated** was not a COV.

*United States v. Vargas-Duran*, 356 F.3d 598 (5<sup>th</sup> Cir. 2004)(en banc). Decision rendered after en banc hearing, vacating prior decision, determined that the **Texas** crime of **intoxication assault** under Tex. Penal Code § 49.07 is not a “crime of violence” as defined under U.S.S.G. § 2L1.2(b)(1)(A)(ii) (Nov. 1, 2001). The term “use” of force in this Guideline requires an intentional availment of force; even though Texas statute requires, as an element, that the defendant “cause serious bodily injury to another,” the Guideline’s requirement of an element of “use, attempted use, or threatened use of physical force against the person of another” is absent from the Texas statute. The Texas crime of intoxication assault did not qualify as “crime of violence,” for sentence enhancement purposes.

*Oyebanji v. Gonzales*, 418 F.3d 260 (3d Cir. 2005): **New Jersey** conviction for **vehicular homicide** not a crime of violence and hence not an aggravated felony.

*Francis v. Reno*, 269 F.3d 162 (3d Cir. 2001): **Homicide by vehicle** under **Pennsylvania** law not an aggravated felony.

*United States v. Hernandez-Castellanos*, 287 F.3d 876 (9<sup>th</sup> Cir. 2002): **Arizona** offense of **felony endangerment** AZ. Stat. § 13-1201 was not categorically an aggravated felony for purposes of reentry guideline.

*United States v. Chapa-Garza*, 243 F.3d 921 (5<sup>th</sup> Cir. 2001). The crime of driving while intoxicated (**DWI**) is not a “crime of violence” under 18 U.S.C. § 16 and hence is not an “aggravated felony” for purposes of 8 U.S.C. § 1101(a)(43)(F) or U.S.S.G. § 2L1.2(b)(1)(A).

*United States v. Trejo-Galvan*, 304 F.3d 406 (5<sup>th</sup> Cir. 2002). Defendant’s misdemeanor **DWI** convictions were not “crimes against the person” for purposes of the enhanced penalties of 8 U.S.C. § 1326(b)(1); a “crime against the person” is an offense that, by its nature, involves a substantial risk that the offender will intentionally employ or threaten to employ physical force against another.

*United States v. Gutierrez-Salinas*, 257 Fed.Appx. 804 (5<sup>th</sup> Cir. 2007) **Oklahoma** conviction for **first degree manslaughter** was not for crime of violence and therefore 16-level enhancement was not warranted; defendant caused offense while driving intoxicated; offense also was not generic manslaughter.

*United States v. Gomez-Leon*, 545 F.3d 777 (9<sup>th</sup> Cir. 2008): **California** conviction for **vehicular manslaughter** while intoxicated without gross negligence was not “crime of violence” for purposes of sentence enhancement under 2L1.2.

#### **Fraud and Definition of Aggravated Felony, the birth of the “circumstance-specific” approach.**

*Nijhawan v. Holder*, 129 U.S. 2294 (2009): Court distinguishes between statutes that require a categorical approach or modified categorical approach and statutes that require a “circumstance-specific” approach which allows the finder of fact to look beyond the types of evidence it could consider under the modified categorical approach. Here, the defendant committed fraud. The statute did not have as an element the amount of loss. The Court considered whether the aggravated felony definition “an offense that ... involves fraud or deceit *in which the loss to the victim or victims exceeds \$10,000.*” (quoting 8 U.S.C. § 1101(a)(43)(M)(I)). The Court concluded the categorical approach was not appropriate; consideration of this aggravated felony definition required a “circumstance-specific” approach. Under this approach it was permissible for the adjudicator to rely upon sentencing-related material to determine the amount of loss.

*Hamilton v. Holder*, 584 F.3d 1284 (10<sup>th</sup> Cir. 2009): Using a “circumstance-specific” approach the judge found that presentence investigation report (PSR) supported a finding that defendant’s conviction for conspiracy to commit mail fraud was an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(I).

*Tian v. Holder*, 576 F.3d 890 (2009): conviction for unauthorized access to computer in violation of 18 U.S.C. § 1030(a)(4) qualifies as an aggravated felony because the loss to victim exceeded \$10,000. At sentencing, the defendant agreed that the investigative loss to the victim exceeded \$10,000.

### Imposition of Sentence and Definition of Conviction.

*United States v. Medina*, 695 F.3d 702 (7th Cir. 2012): This case turns, in part, on whether criminal history points apply to 1989 drug trafficking conviction and what level of enhancement applies under guidelines in effect at time of sentencing. Defendant argued that 16-level enhancement should not apply because judge required to use version of guidelines in effect at time of prior conviction which occurred in 1989. Court declined defendant's request and applied 2010 Sentencing Guidelines which were the guidelines in effect at time of sentencing, May 31, 2011. The twist, effective November 1, 2011, the guidelines changed and defendant would have only received a 12-level enhancement because 1989 conviction was too old to receive criminal history points.

*United States v. Ruiz-Gea*, 340 F.3d 1181 (10<sup>th</sup> Cir. 2003). For purposes of determining whether defendant had a drug trafficking offense with a "sentence imposed" of greater than 13 months, so as to qualify for a sixteen-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(i), it was proper for district court to consider not only the original probation sentence but also the sentence imposed upon revocation of probation (two years' imprisonment); because the revocation sentence exceeded thirteen months, the enhancement was properly applied. This case was a plain error case. *See Bustillos-Lopez and Lopez, below.*

*United States v. Bustillos-Lopez*, 612 F.3d 863 (5<sup>th</sup> Cir. 2010): The Fifth Circuit held that part of U.S.S.G. § 2L1.2 is ambiguous and therefore the rule of lenity applied to support the reading more favorable to the defendant. Specifically, the Court concluded that where the defendant had received a probated sentence for a drug conviction, was removed, subsequently reentered, and (after receiving another, unrelated conviction) had his probation revoked and a sentence of more than 13 months imposed, the 16-level enhancement did not apply. Court notes the decision in *Ruiz-Gea, supra.*

*United States v. Lopez*, 634 F.3d 948 (7<sup>th</sup> Cir. 2011): The Seventh held that 16-level enhancement was not warranted based on defendant's sentence exceeding 13 months imposed on revocation of his probation on the underlying drug trafficking offense after he had already been deported and reentered.

*United States v. Alfaro-Antonio*, 83 Fed.Appx. 269 (10<sup>th</sup> Cir. 2003). Defendant's felony conviction for **attempted forcible sex abuse** was not an "aggravated felony" under 8 U.S.C. §§ 1101(a)(43) because sentence imposed was less than one year. (Note that *Alfaro-Antonio* was determined under the 2000 guidelines which required the prior conviction be classified as an aggravate felony to impose a 16-level increase. Under the current guidelines, it is likely a sixteen-level increase would be imposed under U.S.S.G. § 2L1.2 although the prior conviction is not an aggravated felony. *See United States v. Arguijo-Lucio*, 71 Fed. Appx. 441 (5<sup>th</sup> Cir. 2003) (Defendant's prior felony robbery conviction was not "aggravated felony" under statute; however, finding no error imposing a sixteen-level increase under § 2L1.2)).

*United States v. Gonzalez-Coronado*, 419 F.3d 1090 (10<sup>th</sup> Cir. 2005). The **Kansas** felony conviction for **attempted aggravated assault** was not an aggravated felony for sentencing purposes because Defendant received a sentence of straight probation, however, it was a crime of violence under § 2L1.2, which does have a sentence requirement, warranting a 16-level enhancement. Court rejected Defendant's argument that a two year statutory maximum applies because prior conviction was insufficient to meet 8 U.S.C. § 1001(a)(43)'s statutory definition of an aggravated felony as charged by government. Court found that Defendant never objected to whether prior was a felony conviction and government does not need to be specific between § 1326(b)(2) or 1326 (b)(1).

*United States v. Martinez-Flores*, 720 F.3d 293 (5<sup>th</sup> Cir. 2013): **New Jersey** conviction for **third degree aggravated assault**, N.J. STAT. ANN.. § 2C:12-1b(7), was not a crime of violence warranting a 16-level sentence enhancement.

*United States v. Zamudio*, 314 F.3d 517 (10<sup>th</sup> Cir. 2002). Defendant's plea in abeyance for distribution of marijuana was an aggravated felony under 8 U.S.C. § 1326(b)(2) and § 2L1.2.

*Cruz-Garza v. Ashcroft*, 396 F.3d 1125 (10<sup>th</sup> Cir. 2005). Court reversed and vacated BIA decision upholding ruling that alien's Attempted Theft felony conviction that was later vacated and replaced by Attempt Theft, a class B misdemeanor, by the state court, was a basis for removal. INS failed to prove by clear and convincing evidence, that alien's state court conviction was such as to make him subject to removal. The issue turns on whether alien's prior was reduced from a felony to a misdemeanor for rehabilitative reasons or for procedural ones. *Cf. Renteria-Gonzalez v. INS*, 322 F.3d 804 (5<sup>th</sup> Cir. 2002) (categorically allowing removal regardless of whether the predicate conviction has been vacated on grounds relating to procedural and substantive flaws).

*United States v. Sanchez-Mota*, 319 F.3d 1 (1<sup>st</sup> Cir. 2002): Defendant's sentence for illegally reentering the United States after removal could not be increased under U.S.S.G. § 2L1.2(b)(1)(C) where the defendant's removal occurred before his aggravated felony conviction; resentencing ordered because the original sentence exceeded the two-year maximum allowed under 8 U.S.C. § 1326(a).

*United States v. Rojas-Luna*, 522 F.3d 502 (5<sup>th</sup> Cir. 2008): Government must prove that the removal was subsequent to the aggravated felony conviction; it was plain error for the district court to rely on an unsupported statement in the PSR that defendant was removed in 2006, following a conviction in 2003, and enhance his sentence beyond the two-year maximum of § 1326(a).

*United States v. Simo-Lopez*, 471 F.3d 249 (1<sup>st</sup> Cir. 2006): Fact that defendant received only a six-month sentence for battery conviction was persuasive evidence that his conviction was for a misdemeanor aggravated battery conviction, rather than for the originally-charged felony aggravated battery, where at the time of the prior conviction, Puerto Rico was a "fixed sentence jurisdiction."

*United States v. Anderson*, 328 F.3d 1326 (11<sup>th</sup> Cir. 2003): "Conviction" includes a *nolo contendere* plea with adjudication withheld, as long as some punishment, penalty, or restraint on liberty is imposed; applying Florida law.

*United States v. Sanchez-Sanchez*, 779 F.3d 300 (5<sup>th</sup> Cir. 2015): post-*Descamps*. **Texas deferred adjudication** is not a final conviction; only upon revocation and adjudication of guilt does a deferred adjudication become a final conviction.

*United States v. Cisneros-Cabrera*, 110 F.3d 746 (10<sup>th</sup> Cir. 1997): Defendant was subject to enhancement for illegally reentering United States after deportation following aggravated felony conviction, though state court invalidated conviction after defendant's reentry. *See also United States v. Luna-Diaz*, 222 F.3d 1 (1<sup>st</sup> Cir. 2000).

*United States v. Banda-Zamora*, 178 F.3d 728 (5<sup>th</sup> Cir. 1999): Holding a sentence of straight probation for conviction, where there is no imposition and suspension of sentence, is not an "aggravated felony" for purposes of sentencing guideline because there was no imposition of sentence.

*United States v. Benitez-De Los Santos*, 650 F.3d 1157 (8<sup>th</sup> Cir. 2011): prior state court conviction under **California Health & Safety Code § 11351** for unlawfully possessing heroin for sale was for a "drug trafficking offense" that warranted a 12-level increase to defendant's base offense level for illegal reentry. This case is probably an example of misapplying the modified categorical approach. Defendant argued the statute was "overinclusive" because it applied to drugs that were not controlled substances under the Controlled Substances Act; the Court approved the district court's reliance on a judicial document, "Report-Indeterminate Sentence," to determine that the defendant was convicted of possessing heroin.

*United States v. Landeros-Arreola*, 260 F.3d 407 (5<sup>th</sup> Cir. 2001). Defendant's conviction for "**menacing**" under Colorado law did not count as an "aggravated felony" where, although the original sentence was four years imprisonment, the sentence was subsequently reduced on reconsideration of sentence (after defendant's successful completion of a "boot camp") to 18 months probation; the probation sentence was not merely a suspension of the prior prison sentence, but was an entirely new sentence.

*United States v. Viezcas-Soto*, 562 F.3d 903 (8<sup>th</sup> Cir. 2009): It was plain error to impose 16-level enhancement for crime of violence where defendant's **California unlawful sexual intercourse conviction** (statutory rape) was under a wobbler statute and government failed to prove it was a felony conviction.