

**The Armed Career Criminal Act  
18 U.S.C. § 924(e)**

**by**

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**I. The Statute - 18 U.S.C. § 924(e)**

- A. Applies to defendants convicted under 18 U.S.C. § 922(g) (essentially the felon in possession charge; however, it can apply to anyone who possesses a firearm as a prohibited person (i.e, dishonorably discharged from the Armed Forces, declared mentally incompetent, etc)).
- B. Increases the statutory penalty from a *maximum* of 10 years imprisonment to a *minimum mandatory* term of 15 years imprisonment. Since there is no statutory maximum described in the statute, the maximum is life imprisonment. *United States v. Brame*, 997 F.2d 1426, 1428 (11<sup>th</sup> Cir. 1993). Also increases the maximum term of supervised release from 3 years to 5 years.
- C. No *Apprendi* problem? Because the statutory maximum is increased by virtue of a prior conviction, the holding in *Apprendi* does not apply. Thus, the enhancement is considered a sentencing enhancement determined by the court at the sentencing. (However, you should still object at sentencing to preserve the issue for appeal.)
- D. All three prior qualifying convictions must have been committed and final by the time the defendant possessed the gun in the instant case. *United States v. Richardson*, 166 F.3d 1360 (11<sup>th</sup> Cir. 1999).

**II. Sentencing Guidelines (U.S.S.G § 4B1.4)**

- A. Base offense level is the greatest of

1. Offense level calculated under Chapters 2 & 3;
  2. Offense level under Career Offender guidelines (if applicable);
  3. 34, if the D used or possessed the firearm in connection with a crime of violence (as defined in the career offender guidelines) or a controlled substance offense (defined in the career offender guidelines) or if the firearm was one that is described in 26 U.S.C. § 5846(a);
  4. 33, otherwise.
- B. Criminal History Category - greatest of
1. Criminal history category calculated under 4A1.1 or 4B1.1;
  2. Category VI, if the D used or possessed the firearm in connection with a crime of violence (as defined in the career offender guidelines) or a controlled substance offense (defined in the career offender guidelines) or if the firearm was one that is described in 26 U.S.C. § 5846(a); or
  3. Category IV.

### **III. Categorical Approach**

- A. *United States v. Taylor*, 495 U.S. 575, 602 (1990): “The only plausible interpretation of § 942(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.”
- B. *Shepard v. United States*, 544 U.S. 13, 15 (2005): When presented with the issue of whether the sentencing court also look to police reports or complaint application in addition to *Taylor* documents to determine whether prior offense constituted ‘generic’ burglary, the Court held that “a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit findings of fact by the trial judge to which the defendant assented.”

#### **IV. Serious Drug Offenses**

- A. 18 U.S.C. § 924(e)(2)(A): (i) An offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.) or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), for which a maximum term of imprisonment of ten years or more is prescribed by law.
- B. Always check the state law in the jurisdiction where the defendant was convicted to see if the maximum is more than 10 years imprisonment.
- C. The maximum term of imprisonment prescribed by law, for the purposes of determining whether a prior offense qualified as a SDO under the ACCA, is determined with reference to applicable recidivist enhancements for the prior offense. *United States v. Rodriguez*, 128 S.Ct 1783 (2008).
- D. In some instances, a prior conviction labeled by the State as a ‘misdemeanor’ still counts as a felony conviction if the maximum penalty is more than one year in prison. *Burgess v. United States*, 128 S.Ct 1572 (2008).
- E. For Florida offenses, must be at least a 2<sup>nd</sup> degree felony to qualify. Thus, sale of cannabis and sale of a substance in lieu of a controlled substance do not count.
- F. *United States v. Robinson*, 583 F.3d 1292 (11<sup>th</sup> Cir. 2009) - Alabama conviction for first-degree possession of marijuana (i.e: possession for other than personal use) qualifies as a SDO.

#### **V. Violent Felonies**

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

physical force against the person of another; or

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

B. Physical Force: In *Johnson v. United States*, 130 S.Ct. 1265 (2010), the Court held that a conviction under Florida’s battery statute does not qualify as a violent felony.

1. The Court is bound by the Florida Supreme Court’s interpretation of state law, including its determination of the elements of the Florida Statute. Under Florida law, a battery can be committed by any intentional physical contact, no matter how slight. The most nominal contact, such as a tap on the shoulder without consent establishes a battery. *Id.* at 1269.
2. Since the ACCA does not define ‘physical force,’ the Court gave the phrase its ordinary meaning. *Id.* at 1270.
  - a. After considering dictionary definitions and prior precedent, the Court held that “We think it clear that in the context of a statutory definition of “*violent* felony,” the phrase “physical force” means *violent* force - that is, force capable of causing physical pain or injury to another person.” *Id.* at 1271.
  - b. [T]he term “physical force” itself normally connotes force strong enough to constitute “power”- and all the more so when it is contained in the definition of “violent felony.” *Id.* at 1272.
3. The Court approved of the use of the modified categorical approach for clause (i) cases. “When the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes, some of which require violent force and some of which do not, the “modified categorical approach” that we have approved, *Nijhawan v Holder*, 557 U.S. \_\_\_\_, 129 S.Ct. 2294, 2302, 173 L.Ed.2d 22 (2009), permits a court to determine which statutory phrase was the basis for the conviction by consulting the trial record - including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury

instructions and verdict forms.” *Id.* at 1273.

### C. Burglary

1. In *United States v. Taylor*, 495 U.S. 575, 599 (1990), the Court created a generic definition of burglary for purposes of the ACCA: any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.
2. In *James v United States*, 550 U.S. 192, 203 (2007), the Court held a Florida conviction for attempted burglary qualified as a VF by concluding that the overt conduct directed toward unlawfully entering or remaining in a dwelling, with the intent to commit a felony therein, is “conduct that presents a serious potential risk of physical injury to another.”
3. Practice note: Notice that the ACCA definition is broader than the career offender’s “crime of violence” definition and the application note to USSG § 2L1.2, which are limited to burglary of a dwelling.
4. In *United States v. Day*, 465 F.3d 1262 (11<sup>th</sup> Cir. 2006), the defendant’s prior conviction had been charged as burglary to a dwelling (2<sup>nd</sup> degree felony) but he entered a plea only to burglary (3<sup>rd</sup> degree felony) in the state court judgment. The Eleventh Circuit held that the sentencing judge erred when he relied on the charging document to find that the burglary was to a dwelling (which would have qualified as a VF) since the statute includes curtilage and conveyances in the scope of a third degree felony. “A district court may not rely on a charging document without first establishing that the crime charged was the same crime for which the defendant was convicted.” *Id.* at 1266.

### D. Residual Clause

1. In *Begay v. United States*, 128 S.Ct. 1581, 1585 (2008), the Court, in analyzing the residual or ‘otherwise’ clause, concluded that, in order for a prior conviction to qualify under this clause, it must be roughly similar in kind as well as degree of risk posed to the enumerated crimes themselves. The listed crimes all typically involve purposeful, violent, and aggressive conduct. *Id.* at 1586. The Court noted that the title of

the Act, the Armed Career Criminal Act, focuses upon the special danger created when a particular type of offender - a violent criminal or drug trafficker - possesses a gun. *Id.* at 1587.

2. In *Chambers v. United States*, 129 S.Ct. 687, 692 (2009), the Court held that the crime of failure to report for confinement did not qualify as a violent felony since it amounts for a form of inaction, very different from the ‘purposeful,’ ‘violent,’ and ‘aggressive’ conduct at issue in the enumerated crimes.

E. No longer includes (Supreme Court and 11<sup>th</sup> Circuit holdings)

1. DUI - *Begay v. United States*, 128 S.Ct 1581 (2008)
2. Failure to report for penal confinement - *Chambers v. United States*, 129 S.Ct 687 (2009)
3. Carrying a concealed firearm - *United States v. Archer*, 531 F.3d 1347 (11<sup>th</sup> Cir. 2008) (career offender / crime of violence definition in USSG §4B1.2); *United States v. Canty*, 570 F.3d 1251 (11<sup>th</sup> Cir. 2009) (violent felony definition).
4. Florida fleeing and eluding (FS §316.1925(2))- *United States v. Harrison*, 558 F.3d 1280 (11<sup>th</sup> Cir. 2009), *United States v. Smith*, 2009 WL 724034 (March 20, 2009) (unpub). However, the court held that the more aggravated form of fleeing under Fla Stat 316.1925(3) qualified as a crime of violence. *United States v. Harris*, 586 F.3d 1283 (11<sup>th</sup> Cir. 2009).
5. Leaving the Scene of Accident - *United States v. Harkness*, 2008 WL 5411455 (11<sup>th</sup> Cir. 2008) (unpub).
6. Walkaway escape - *United States v. Roberson*, 2009 WL 5125492 (11<sup>th</sup> Cir. 2009); *United States v. Lee*, 586 F.3d 859 (11<sup>th</sup> Cir. 2009). See also *United States v. Templeton*, 543 F.3d 378 (7<sup>th</sup> Cir. 2009); *United States v. Lowery*, 599 F.Supp.2d 1299 (M.D. Ala 2009); *United States v. Ford*, 560 F.3d 420 (6<sup>th</sup> Cir. 2009); *United States v. Nichols*, 563 F.Supp.2d 631 (S.D. W.Va 2008) all holding that escape did not qualify.

7. Sexual battery of a child under age 16 - *United States v. Harris*, 608 F.3d 1222 (11<sup>th</sup> Cir. 2010) - Florida conviction for sexual battery of child under age sixteen did not constitute VF. The Florida statute prohibits “union with .. The sexual organ of another” which can be contact alone. Thus mere contact does not require the use of force to satisfy part (i). Since the Florida offense is also a strict liability crime and covers such a broad range of conduct the court concluded that its violation typically involved violent, purposeful and aggressive conduct.
8. Aggravated assault under Arizona statute - *United States v. Palomino Garcia*, 606 F.3d 1317 (11<sup>th</sup> Cir. 2010) held that the Arizona statute at issue did not satisfy the generic offense of aggravated assault (a criminal assault accompanied by the aggravating factors of either the intent to cause serious bodily injury to the victim or the use of a deadly weapon) since the Arizona statute included conduct such as a simple assault on a law enforcement officer.

F. **Potential challenges** (not meant to be an all-inclusive list; limited only by a creative imagination)

1. *Any strict liability crime or crimes committed recklessly or carelessly* - In *Begay*, the Court listed several reckless or negligent crimes that it would exclude from the ACCA by stating that “We have no reason to believe that Congress intended to bring within the statute’s scope these kinds of crimes, far removed from the *deliberative* kind of behavior associated with violent criminal use of firearms. *Begay*, 128 S.Ct at 1587 (emphasis added). See also *United States v. Herrick*, 545 F.3d 53 (1<sup>st</sup> Cir. 2008) (negligent vehicular homicide is not a violent felony); *United States v. Gray*, 535 F.3d 128 (2<sup>nd</sup> Cir. 2008) (reckless endangerment not a crime of violence under USSG §4B1.2); *United States v. Baker*, 659 F.3d 443 (6<sup>th</sup> Cir. 2009) (same); *United States v. Smith*, 544 F.2d 781 (7<sup>th</sup> Cir. 2008) (crimes requiring only a *mens rea* of recklessness cannot be considered violent felonies under the residual clause of the ACCA).
2. *Firearms Offenses: United States. v Serafin*, 562 F.3d 1105 (10<sup>th</sup> Cir. 2009) (applying *Begay* modified categorical standard possession of an unregistered firearm (short barreled rifle) not a crime of violence for 924(c) purposes); *United States v. Haste*, 292 Fed Appx 249 (4<sup>th</sup> Cir. 2008) (unpub) (felonious possession of a weapon of mass destruction

(a short barreled shotgun) did not qualify as a VF); *United States v. Amos*, 501 F.3d 524 (6<sup>th</sup> Cir. 2007) (pre-*Begay*) (possession of a short barreled shotgun did not qualify as a VF).

3. *Sexual Offenses: United States v. Bartee*, 529 F.3d 357(6th Cir. 2008) (Attempted second degree criminal sexual assault on a minor not a violent felony for ACC purposes); *United States v. Christensen*, 559 F.3d 1092 (9th Cir. 2009) (California statutory rape statute not crime of violence for career offender purposes); *United States v. Thorton*, 554 F.3d 443 (4th Cir. 2008) (Statutory rape is not VF); *United States v. Dennis*, 551 F.3d 986 (10th Cir. 2008) (Knowingly taking immodest, immoral, or indecent liberties with minor not VF).
- 4 *Child endangerment: United States v. Gordon*, 557 F3d. 623 (8<sup>th</sup> Cir. 2009) (Missouri statute making it unlawful to act in a manner that creates a substantial risk to the life, body or held of a child did not qualify as a VF since the statute could be violated by actions that are neither violent nor aggressive.)

## **VI. Dangers**

- A. There is no time limit for prior offenses. Unlike criminal history scoring (USSG § 4A1.1) and career offender provisions (USSG § 4B1.1), priors never age out. *United States v. Green*, 904 F.2d 654 (11<sup>th</sup> Cir. 1990); USSG § 4B1.2, comment 1.
- B. Requires that the three previous convictions are “... committed on occasions different from one another ...” However, this does not mean that there has to be three separate cases, sentences or judgments for the underlying predicates to count. The 11<sup>th</sup> Circuit determined that “the ‘successful’ completion of one crime plus a subsequent conscious decision to commit another crime makes that second crime distinct from the first for the purposes of the ACCA.” *United States v. Pope*, 132 F.3d 684, 692 (11th Cir.1998). See also *United States v. Spears*, 443 F.3d 1358, 1360 (11<sup>th</sup> Cir. 2006); *United States v. Brown*, 181 Fed Appx 969 (11<sup>th</sup> Cir. 1996) (unpub); *United States v. Holland*, 201 Fed Appx 742 (11<sup>th</sup> Cir. 2006) (unpub).

Are *Shepard* documents necessary to prove that the prior offenses were committed on occasions different from one another? In *United States v Sneed*, 600 F.3d 1326 (11<sup>th</sup> Cir. 2010), the court overruled its prior precedent in

*United States v. Richardson*, 230 F.3d 1297 (11<sup>th</sup> Cir. 2000), a pre-*Shepard* case, and held that the sentencing court “may not use police reports to determine whether predicate offenses were committed on occasions different from another.”

- C. Under some circumstances, juvenile offenses count as violent felonies (“... or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult...” 18 U.S.C. § 924(e)(2)(B)). See also *United States v. Wilks*, 464 F.3d 1240 (11<sup>th</sup> Cir. 2006) (“Our conclusion that youthful offender sentences can qualify as predicate offense for sentence enhancement purposes remains valid .... It is one thing to prohibit capital punishment for those under the age of 18, but an entirely different thing to prohibit consideration of prior youthful offender offenses when sentencing criminals who continue their illegal activity into adulthood.”)
- D. Applies even if the defendant possessed ammunition alone, not a firearm.
- E. No way to collaterally challenge constitutional validity of prior convictions in the federal sentencing proceedings.
  - 1. In *Custis v. United States*, 511 U.S. 485 (1994), the Supreme Court held that a defendant in a federal sentencing proceeding can not collaterally attack the validity of prior state conviction (except uncounseled convictions) under the Armed Career Criminal Act of 1984.
  - 2. The defendant can always go into state court (if the remedy is available) to try to set aside a prior conviction during a collateral state court proceeding.
  - 3. “First, neither a claim that predicate conviction counsel was ineffective, nor a claim that the guilty plea leading to that conviction was not knowing and intelligent is cognizable under §924(e).” *United States v. Covington*, 565 F.3d 1336, 1345 (11<sup>th</sup> Cir. 2009). Further, “Covington's knowing and informed plea of guilty to Count Three, which included a plea colloquy that addressed the ACCA and its possible penalties, amounted to an express admission that § 924(e)(1) applied to his case.” *Id.*

### ***Object, Object, Object to the PSR***

“It is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes.” *United States v. Wade*, 458 F.3d 1273, 1277 (11<sup>th</sup> Cir. 2006). “It is also established law that the failure to object to a district court's factual findings precludes the argument that there was error in them.” *Id.*

“A sentencing court's findings of fact may be based on undisputed statements in the PSI. Where a defendant objects to the factual basis of his sentence, the government has the burden of establishing the disputed fact. However, challenges to the facts contained in the PSI must be asserted with specificity and clarity. Otherwise, the objection is waived.” *United States v. Bennett*, 472 F.3d 825, 832 (11<sup>th</sup> Cir 2006).

In *United States v. Wright*, 181 Fed Appx 914 (11th Cir. 2006) (unpub), the court added “facts found by the district court to which the defendant has assented” to the list of *Taylor / Shepard* documents and thus used the PSR in the instant case to show that the prior was in fact violent.

In *United States v. Beckles*, 565 F.3d 832, 844 (11<sup>th</sup> Cir 2009), the court cited *Bennett* for the holding that an objection to the probation officer's use of non- *Shepard* materials in preparation of the PSI did not amount to a dispute of the facts and affirmed the sentence based on a plain error standard.

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Object to:

1. The facts themselves (at least say that ‘the defendant does not admit the facts purporting to represent the circumstances of the prior conviction and demands strict proof’). (Practice Note: Know thy judge and PO to consider how far you can go without raising the possibility of losing acceptance of responsibility.)

2. The source of the facts (require the government produce and the court rely on only the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information).

3. The conclusion that the prior qualifies as a predicate offense.

## DEFINITIONS

**8 U.S.C. § 1101(a)(43)** - - the term aggravated felony means ...

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at [is] least one year.

**18 U.S.C. §16** - - The term “crime of violence” means - -

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

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

**18 U.S.C. § 921(a)(33)(A)** - - misdemeanor crime of domestic violence

(ii) has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

**18 U.S.C. §924(c)(1)(A)** - - Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

....

(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and--

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

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

**18 U.S.C. §924(e)(2)(B)** - the term "violent felony" means any crime punishable by imprisonment of exceeding one year ... that

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

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

**18 U.S.C. § 3559(c)(2)** - - the term “serious violent felony” means

(i) a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and

(ii) any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense;

**USSG §4B1.2(a) (definition used in USSG §2K2.1)** - - The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

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

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

**USSG §4B1.2, comment. 1 - -**

“Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as “crimes of violence” if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another.

“Crime of violence” does not include the offense of unlawful possession of a firearm by a felon, unless the possession was of a firearm described in 26 U.S.C. § 5845(a).

**USSG §2L1.2 comment. 1(B)(iii) - - crime of violence for 16 offense level increase**

“Crime of violence” means any of the following offenses under federal, state, or local law: Murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(Practice note: Keep in mind that this definition does not include the residual or “otherwise” clause).

**Statutes & Guidelines using § 16 definition of crime of violence**

8 U.S.C. § 1227 - Deportable aliens

18 U.S.C. § 25 - Use of Minors in crimes of violence

18 U.S.C. § 119 - Protection of individuals performing certain official duties

18 U.S.C. §373 - Solicitation to commit a crime of violence

18 U.S.C. § 931 - Prohibition on purchase, ownership, or possession of body armor by violent felons

USSG §3B1.5 - use of Body Armor in Drug Trafficking Crimes and Crimes of Violence

**Statute using 924(c) definition of crime of violence**

18 U.S.C. § 844(o) - Penalties

“Whoever knowingly transfers any explosive materials, knowing or having reasonable cause to believe that such explosive materials will be used to commit a crime of violence (as defined in section 924(c)(3)) or drug trafficking crime (as defined in section 924(c)(2)) shall be subject to the same penalties as may be imposed under subsection (h) for a first conviction for the use or carrying of an explosive material.

18 U.S.C. § 1028 - - Fraud and related activity in connection with identification documents, authentication features, and information

(b) The punishment for an offense under subsection (a) of this section is—

(3) a fine under this title or imprisonment for not more than 20 years, or both, if the offense is committed--

(A) to facilitate a drug trafficking crime (as defined in section 929(a)(2));

(B) in connection with a crime of violence (as defined in section 924(c)(3)); or

(C) after a prior conviction under this section becomes final.

## Statutes with other crime of violence references

### 18 U.S.C. § 521 - Criminal Street Gangs

(c)(2) a Federal felony crime of violence that has as an element the use or attempted use of physical force against the person of another; and (3) a conspiracy to commit an offense described in paragraph (1) or (2).

### 18 U.S.C. § 844(p) - - Distribution of information relating to explosives, destructive devices, and weapons of mass destruction

(2) Prohibition - It shall be unlawful for any person--

(A) to teach or demonstrate the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute by any means information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, with the intent that the teaching, demonstration, or information be used for, or in furtherance of, an activity that constitutes a Federal crime of violence; or

(B) to teach or demonstrate to any person the making or use of an explosive, a destructive device, or a weapon of mass destruction, or to distribute to any person, by any means, information pertaining to, in whole or in part, the manufacture or use of an explosive, destructive device, or weapon of mass destruction, knowing that such person intends to use the teaching, demonstration, or information for, or in furtherance of, an activity that constitutes a Federal crime of violence.

## Challenging a "Violent" Crime

### 1. Which federal definition at issue?

- Statute
- Guidelines

### 2. What is the effect of the federal definition?

- Creates an offense: (924(c) - use / possession of firearm in crime of violence), etc)
- Armed Career Criminal: adds mandatory minimum sentence, increases maximum to life, increases potential term of supervised release.
- Career Offender: increases offense level and criminal history category
- Guidelines calculation: adds specific offense characteristic (USSG §2K2.1 (firearms offenses); USSG § 2L1.2 (illegal reentry))

### 3. Prior conviction as COV / VF ??

- **LEGAL:** *elements of offense of conviction* - look to statutory definition of prior offense (statute, jury instructions, case law defining the elements necessary for conviction)
- **FACTUAL:** *readily ascertainable court documents*: inquiry limited to charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information