How a Person Previously Sentenced as a "Career Offender" Would Likely Receive a Lower Sentence Today

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

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

If you need help:

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

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

I. How the Career Offender Guideline Works

The Sentencing Commission promulgated the career offender guideline in response to a directive from Congress in the Sentencing Reform Act of 1984 to "assure that the guidelines specify a sentence to a term of imprisonment at or near the maximum term authorized for categories of defendants in which the defendant is eighteen years old or older and: (1) has been convicted of a felony that is (A) a "crime of violence," or (B) an offense described in" 21 U.S.C. § 841, 21 U.S.C.§§ 952(a), 955, 959, and 46 U.S.C. § 70503; "and (2) has previously been convicted of two or more prior felonies, each of which is (A) a crime of violence, or (B) an offense described in" 21 U.S.C. § 841, 21 U.S.C.§§ 952(a), 955, 959, and 46 U.S.C. § 70503. *See* 28 U.S.C. § 994(h).

A defendant is classified as a "career offender" under the guidelines if the instant offense is a felony, defined as an offense punishable by death or imprisonment exceeding one year, that is a "controlled substance offense" or a "crime of violence" committed when the defendant was at least eighteen years old, and the defendant has at least two "prior felony convictions" of either a "controlled substance offense" or a "crime of violence." USSG §§ 4B1.1, 4B1.2.

Prior diversionary dispositions count, USSG § 4A1.2(f), but unlike for § 851 enhancements and the ACCA, prior convictions are subject to a staleness limitation, USSG § 4A1.2(e), and unlike for § 851 enhancements, simple possession of drugs does not qualify as a "controlled substance offense."

As explained in Parts III.B and III.D of this memo, a prior "crime of violence" is defined broadly to encompass offenses that can be quite minor and that involved no actual violence. In addition, many offenses previously counted as "crimes of violence" do not qualify as such under current law.

The career offender guideline offense level is keyed to the statutory maximum for the federal offense of conviction, and the Criminal History Category is automatically VI. Career offenders in drug cases are subject to the following guideline penalties:

Statutory Maximum	**Offense Level**	**Guideline Range in CHC VI**
5 years to less than 10 years	17	51-63 months
10 years to less than 15 years	24	100-125 months
20 years to less than 25 years	32	210-262 months
25 years or more	34	262-327 months
Life	37	360 months to life

Sentences recommended by the career offender guideline are among the most severe and least likely to promote the statutory purposes of sentencing. *See* U.S. Sent'g Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 133-34 (2004) [*Fifteen Year Review*]. One problem is that the guideline range is keyed to the statutory maximum, the result of Congress's directive to the Commission. Another problem is that the Commission defined the class of career offenders more broadly than the congressional directive required. As a result, the typical "career offender" is a low-level, non-violent drug offender with prior state convictions for minor drug offenses or "crimes of violence" involving no actual violence, for which they received little or no jail time. Neither the severity of the guideline nor its breadth was the product of careful study, empirical research, or national experience. *See generally* Amy Baron-Evans *et al.*, *Deconstructing the Career Offender Guideline*, 2 Charlotte L. Rev. 39 (2010). Under the advisory guideline system in place today, judges frequently decline to follow the career offender guideline, and the rate of within-guideline sentences for career offenders has decreased to just 30.2% in fiscal year 2012. *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offenders* (2013), www.ussc.gov/Quick_Facts.

II. Step-by-Step Guide for Showing That a Client Previously Subject to the Career Offender Guideline Would Likely Receive a Lower Sentence Today

For clients previously sentenced under the career offender guideline, the sentence would likely be lower today for one or more of the following reasons:

- **The client would not be a career offender under current law.**

  - Prior convictions that were previously counted separately to establish career offender status would count as a single sentence today, thus eliminating one of two necessary prior convictions. *See* Part III.A.

- A prior conviction previously counted as a predicate "crime of violence" or "controlled substance offense" would not qualify as a predicate offense under current law. *See* Part III.B.

- **The career offender guideline range would be lower.**

  - In any type of drug case, the prosecutor would decline to charge drug quantity under AG Holder's August 12, 2013 Memorandum, which would lower the applicable statutory maximum and the corresponding offense level. *See* Part III.C.1.

  - In a crack case, the Fair Sentencing Act would reduce the statutory maximum and the corresponding offense level and guideline range. *See* Part III.C.2.

- **The court would impose a sentence below the career offender guideline range (or otherwise applicable range) under *Booker* and its progeny.**

  - The court would vary below the advisory career offender guideline as now permitted by Supreme Court and circuit law. *See* Part III.D.

This Part sets forth step-by-step instructions to determine whether one or more of the above reasons apply in a given case. Each step corresponds to a more detailed overview, set forth in Part III, of the relevant law and information relating to each of the reasons the sentence would be lower. For illustration purposes, consider the following typical career offender:

CLIENT A

In 1997, at age 22, Client A was convicted by guilty plea and sentenced for possession with intent to distribute 50 grams or more of crack. Under 21 U.S.C. § 841(b)(1)(A), his statutory range was 10 years to life. He had two prior convictions under Florida law: (1) carrying a concealed weapon and (2) "knowingly selling, purchasing, manufacturing, delivering, or bringing into [the] state 28 grams or more of cocaine." Both state offenses carried a statutory maximum of more than one year. He was sentenced to 180 days in the county jail for each offense.

At sentencing for the federal offense, the judge found, over the client's objection, that the client distributed 362 grams of crack over a period of several months, which corresponded to offense level 34. USSG § 2D1.1(c) (1997). He got two levels off for acceptance of responsibility, USSG § 3E1.1 (1997) (the judge, on the government's urging, declined to grant the third point because Client A disputed the drug quantity stated in the PSR), for a total offense level 32. With 4 criminal history points and in Criminal History Category III, his crack guideline range would have been 151-188 months. *See* Sentencing Table, USSG, Ch. 5, Pt. A (1997). However, the judge found that, under USSG § 4B1.2, his prior state conviction for possession of a concealed weapon was a "crime of violence" and

his prior state conviction for "knowingly selling, purchasing, manufacturing, delivering, or bringing into [the] state 28 grams or more of cocaine" was a "controlled substance offense." Based on these findings, the court determined that Client A was a career offender. As a result, Client A's offense level was increased to 37 and his criminal history category was increased to VI. With two levels off for acceptance of responsibility, his career offender range was 292-365 months. The judge sentenced Client A to 325 months, just over 27 years.

Client A has served nearly 17 years in prison. He is 38 years old. While in prison, he successfully completed BOP's residential drug abuse program. He successfully completed his GED and numerous other courses aimed at self-improvement, including money management and computer skills. He has three children, now 17, 18, and 20 years of age. He has worked in the prison bakery for 15 years.

Client A is not eligible for relief under the retroactive 2-level reduction to the drug guidelines that will be effective November 1, 2014 because his sentence was based on the career offender guideline. *See* How to Deal With the Retroactive Drugs Minus Two Amendment.

Follow these steps in order to determine whether Client A would likely receive a lower sentence today:

STEP 1 **Would the client be a career offender under current law?**

A. Would the two prior convictions be counted separately today under § 4A1.2, as amended in 2007? *See* Part III.A.

If the two prior convictions would not be counted separately under § 4A1.2 as amended in 2007, and there are no other qualifying prior convictions, the client is not a career offender. Explain why this is so, then go to step 2 to determine what his statutory range and guideline range would be if he were sentenced today, then to step 3 to determine whether the judge would likely sentence below that range under *Booker* and progeny.

Example: Client A's state offenses occurred on different days, were not separated by an intervening arrest, were charged separately, and were not formally consolidated for trial or sentencing. Due to timing and state practice, he was sentenced for both offenses on the same day. In 1997, the two offenses were counted separately because they were considered "unrelated" under Application Note 3 to USSG § 4A1.2 (1997). In 2007, the Commission amended § 4A1.2 so that sentences imposed on the same day are counted as a "single sentence." USSG § 4A1.2(a)(2) (2013). Because Client A was sentenced on the same day for both prior offenses, he only has one "prior sentence" for purposes of counting prior convictions under the career offender guideline. *Id.* § 4B1.2 cmt.(n.3). With only one prior sentence, he does not qualify as a career offender. Go to step

2 to determine his current statutory range and guideline range under the FSA, then to step 3 to determine whether the judge would vary below that range under the advisory system.

B. If the prior convictions would still be counted separately, would either or both no longer count as a predicate offense under current law—

- because a prior conviction is not a "crime of violence" under *Begay*/*Johnson*/*Chambers*? *See* Part III.B.1.

- because a prior conviction is not a "crime of violence" or "controlled substance offense" under the categorical approach or modified categorical approach after *Descamps*? *See* Part III.B.2.

- because a prior drug conviction under California or Connecticut law is not a "controlled substance offense" under the modified categorical approach, as clarified by *Descamps*? *See* Part III.B.3.

- because the sentencing judge, at the time of sentencing, incorrectly applied the modified categorical approach, as clarified by *Descamps*? *See* Part III.B.4.

- because a prior conviction under North Carolina or Kansas law is not a "felony" under *Carachuri-Rosendo*? *See* Part III.B.5.

1. If it is clear that the client is <u>not</u> a career offender, explain why. Then go to step 2 to determine what his statutory range and guideline range would be if he were sentenced today, and then to step 3 to determine whether the judge would likely sentence below that range under *Booker* and its progeny.

Example: Assume that Client A was not sentenced on the same day for his two prior offenses, and thus they would still be counted separately under § 4A1.2(a)(2). One of Client A's predicate offenses was a Florida conviction for carrying a concealed weapon. In 2008, the Eleventh Circuit reversed its precedent and held that, under *Begay v. United States*, 553 U.S. 137 (2008), carrying a concealed weapon is not a "crime of violence" for purposes of the career offender guideline. *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008). Client A's conviction is not a predicate offense. *See* Part III.B.1. Because he only has one other offense that could be a predicate, he is not a career offender. Go to steps 2 and 3.

Example: Assume that instead of carrying a concealed weapon, the conviction was for a state offense that clearly qualifies as a "crime of violence" under current law. What about his second predicate?

Client A's second predicate conviction was for violating a Florida statute that makes it a felony to "knowingly sell[], purchase[], manufacture[], deliver[], or bring into this state 28 grams or more of cocaine." Some, but not all, of the conduct prohibited by this Florida statute falls within the definition of "controlled substance offense." The career offender guideline defines "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." USSG § 4B1.2(b). This definition does not include offenses involving *purchase*. The Florida statute thus applies to conduct (purchase of cocaine) which does not qualify as a "controlled substance offense," as well as to conduct (sale of cocaine) which does qualify. *See, e.g., United States v. Shannon*, 631 F.3d 1187, 1190 (11th Cir. 2011).

In 1997, the sentencing court looked to the facts of Client A's offense as set out in the police report to determine that Client A's offense involved selling 30 grams of cocaine. This was error, as clarified by later Supreme Court decisions, most recently in *Descamps v. United States*, 133 S. Ct. 2276 (2013). The indictment charged all four of the alternative methods of violating the Florida statute. At the plea colloquy, Client A pled guilty "as charged." Looking only at these approved documents to determine the *elements* of the prior conviction, *see Shepard v. United States*, 544 U.S. 13, 25-26 (2005), a judge properly applying the modified categorical approach cannot determine which of the four alternative offenses to which Client A pled guilty. As a result, it must be assumed that he pled guilty to the least culpable offense, i.e., purchasing, which does not qualify as a "controlled substance offense." *See* Part III.B.2. Client A is not a career offender. Go to steps 2 and 3.

Example: Assume instead that Client A's second predicate offense was for violating a Connecticut drug statute. He was charged by information with "possession of narcotics with intent to sell" under Conn. Gen. Stat. § 21a-277(a). Under the career offender guideline, the term "controlled substance" refers to substances controlled by federal law. *See United States v. Sanchez-Garcia*, 642 F.3d 658, 661 (8th Cir. 2011). Connecticut's scheduled list of controlled substances matches the federal schedules under the Controlled Substance Act, except that Connecticut includes two obscure substances, benzylfentanyl and thenylfentanyl, that are not listed in the federal Controlled Substance Act. As a result, Connecticut statutes criminalizing the sale of a controlled substance apply more broadly to offenses that qualify as a career offender predicate and offenses that do not qualify as a career offender predicate. *Cf. United States v. Lopez*, 536 F. Supp. 2d 218 (D. Conn. 2008). Here, the information did not specify which narcotic was involved in the offense, and the transcript of the plea proceeding had been, by the time of the federal offense, destroyed according to the state court's policy. As a result, there was no way to determine, looking only at *Shepard-*

approved documents, which narcotic was involved. The prior conviction cannot qualify as a "controlled substance offense" under the career offender guideline. *See* Part III.B.3. Go to steps 2 and 3.

Example: Assume instead that Client A's second predicate offense was a 1994 North Carolina conviction for possession with intent sell and deliver cocaine under N.C. Gen. Stat. § 90-95. The PSR in the federal case noted that Client A could not have received a sentence of more than one year in prison under the North Carolina Structured Sentencing Act. But at the time, binding Fourth Circuit precedent held that an offense is punishable by more than one year in prison, and thus a "felony," as long as any hypothetical defendant could receive a term of imprisonment of more than one year upon conviction for that offense. In 2011, in *Simmons v. United States*, 649 F.3d 237 (4th Cir. 2011) (en banc), the Fourth Circuit overruled that precedent and made clear that a prior conviction counts as a "felony" only if the defendant, with his particular prior record level, could have actually received a sentence of more than one year. *See* Part III.B.5. Client A is not a career offender.

While many defendants like Client A have received habeas relief under *Simmons*, Client A's habeas petition, his third and filed under 28 U.S.C. § 2241, remains pending. Write in your Memorandum in Support of Petition for Sentence Commutation the following language, perhaps in a footnote: "A habeas petition has been filed, and is pending in the district court. Given the many hurdles to habeas relief and the length of time it takes for these cases to reach resolution, we ask that you consider this petition." *See* Pending and Possible Court Challenges: Appeals, Habeas Petitions, § 3582(c)(2) Motions. Go to steps 2 and 3.

2. If it is unclear to you whether the client would still be a career offender, seek assistance as noted above. Meanwhile, go to step 2 to determine what his statutory range and guideline range would be today, both as a career offender and not as a career offender, and then to step 3 to determine whether the judge would likely sentence below the applicable range. If you and/or those helping you ultimately determine that it is not sufficiently clear under current law that the client is not a career offender, you may still want to use the current uncertainty of his career offender status to boost your stronger arguments under steps 2 and/or 3.

Example: Assume that instead of carrying a concealed weapon, the conviction was for the Florida offense of third degree felony child abuse. Under the state statute, it is a crime to "knowingly or willfully abuse[] a child without causing bodily harm, permanent disability, or permanent disfigurement to the child." In *Spencer v. United States*, 727 F.3d 1076, 1099 (11th Cir. 2013), the Eleventh Circuit reversed itself and held, in a post-conviction proceeding under § 2255, that a conviction under that statute is not a "crime of violence" under *Begay* because it is akin to a strict liability crime. On March 7, 2014, however, the *en banc* court granted the government's petition for rehearing and vacated the decision. The government did not challenge the underlying finding that the conviction is not a

crime of violence, focusing instead on the question whether the claim was cognizable under § 2255. Nevertheless, the court requested that Spencer provide supplemental briefing on the question whether third degree felony child abuse is a crime of violence under *Begay* and *Sykes*. Oral argument took place on June 24, 2014. The state of the law is unclear. Meanwhile, go to steps 2 and 3.

3. If it is clear that the client is a career offender, go to step 2 to determine what his statutory range and guideline range would be today, and then to step 3 to determine whether the judge would likely sentence below that range.

Example: Assume that instead of carrying a concealed weapon, the conviction is for a state offense that clearly qualifies as a "crime of violence" under current law. His other predicate conviction was a Florida statute that makes it a felony to "knowingly sell[], purchase[], manufacture[], deliver[], or bring into this state 28 grams or more of cocaine." The indictment charged all four alternative offenses, but the transcript of the plea colloquy, a *Shepard*-approved document, makes clear that Client A necessarily pled guilty to manufacturing 30 grams of cocaine. It thus qualifies as a "controlled substance offense" under the modified categorical approach. *See* Part III.B.2. Client A would be a career offender today. Go to step 2 to determine whether the career offender guideline range would be lower.

STEP 2 Would the statutory range or guideline range (or both) be lower?

A. If the client's federal offense involved any type of drug and the client is a career offender, would the prosecutor charge drug quantity under Attorney General Holder's August 12, 2013 charging policy? *See* Appendix 2.

If the prosecutor would likely decline to charge drug quantity today under the August 12, 2013 charging policy, explain why, and determine the applicable statutory range under 21 U.S.C. § 841(b)(1)(C). *See* Appendix 3. Because the career offender guideline is tied to the statutory maximum, if the maximum would be lowered, the guideline range would be lowered. Explain why, then go to step 3.

Example: Assume that Client A is a career offender because it can be shown by *Shepard*-approved documents that both prior convictions were for the sale of small amounts of cocaine. He was a street-level dealer whose federal offense involved no violence or firearms, and he had no ties to large-scale trafficking organizations or gangs. He was charged with and pled guilty to trafficking in 50 grams or more of crack, which corresponded in 1997 to the statutory range of 10 years to life under § 841(b)(1)(A).

Today, the prosecutor would likely decline to charge drug quantity under Attorney General Holder's August 12, 2013 charging policy because Client A meets the criteria. Though he has four criminal history points, the prior

convictions were "conduct that itself represents non-violent low-level drug activity." *See* Appendix 2. As a result, the statutory range would be 0-20 years. 21 U.S.C. § 841(b)(1)(C). Under the career offender guideline, the base offense level corresponding to the 20-year statutory maximum is 32 (compared to 37 at the original 1997 sentencing).

Looking at Ameliorating Amendments to U.S. Sentencing Guidelines, you see that in 2013, the Commission amended § 3E1.1 to make clear that the government should not decline to file a motion for the third point (required as of 2003) for reasons not related to its interest in avoiding preparing for trial, *see* USSG App. C, amend. 775 (Nov. 1, 2013). Client A pled guilty without delay and today would likely get three levels off (instead of two) for acceptance of responsibility, *see* USSG § 3E1.1(b) (2013),[1] for a total offense level of 29 (compared to offense level 35 at the original 1997 sentencing). In CHC VI, his range would go down to 151-188 months, or 12.5 years at the bottom of the range.

B. If it is a crack case, the client <u>is</u> a career offender, and the prosecutor would likely charge drug quantity today, would the statutory maximum and corresponding guideline range be lower under the Fair Sentencing Act? *See* Part III.C.2 & Appendix 1. If so, explain why. Then go to step 3.

The Fair Sentencing Act lowered the statutory maximum and corresponding guideline range for some career offenders. Determine the applicable statutory penalty range based on the quantity of drugs alleged in the indictment.

Example: Client A was charged with and pled guilty to trafficking in 50 grams or more of crack. Client A's offense, as charged in the indictment, corresponded in 1997 to the statutory range of 10 years to life under 21 U.S.C. § 841(b)(1)(A). Today, it corresponds to a range of 5-40 years. *See* Appendix 3. If Client A is a career offender and sentenced today, the base offense level corresponding to the 40-year statutory maximum is 34 (compared to 37 at the 1997 sentencing).

Looking at Ameliorating Amendments to U.S. Sentencing Guidelines, you see that in 2013, the Commission amended § 3E1.1 to make clear that the government should not decline to file the motion for the third point (required as of 2003) for reasons not related to its interest in avoiding preparing for trial, *see* USSG App. C, amend. 775 (Nov. 1, 2013). Client A pled guilty without delay, and today would likely get three levels off (instead of two) for acceptance of responsibility, *see* USSG § 3E1.1(b) (2013), for a total offense level of 31 (compared to 35 at the

[1] It also appears that, at the time Client A was sentenced, the court erred by declining to grant the third point for acceptance of responsibility because he challenged drug quantity. *See, e.g.*, *United States v. Marroquin*, 136 F.3d 220 (1st Cir. 1998); *United States v. Townsend*, 73 F.3d 747, 750, 755 (7th Cir. 1996).

1997 sentencing). In CHC VI, his range would go down to 188-235 months, or 15 years and 8 months at the bottom of the range.

C. If it is a crack case and the client is not a career offender, (a) would the prosecutor charge drug quantity under Attorney General Holder's August 12, 2103 charging policy and/or (b) would the guideline range be lower? Use the current *Guidelines Manual* and be sure to check the list of ameliorating guideline amendments that may apply. Explain why, then go to step 3.

For crack offenders who would not be a career offender today, the Fair Sentencing Act may have lowered the statutory range, depending on the quantity charged, and likely lowered the otherwise applicable crack guideline range. For more detailed instructions on how to show that the statutory and/or guideline range would be lower in drug cases in which the client is not subject to § 851 or the career offender guideline, see How a Sentence for a Drug Offender May Be Lower if Imposed Today.

Example: The prosecutor today would likely decline to charge drug quantity under Attorney General Holder's charging policy because Client A meets the criteria. Though he has four criminal history points, the prior convictions were "conduct that itself represents non-violent low-level drug activity." *See* Appendix 2. As a result, the statutory range would be reduced from 10 years-life to 0-20 years. 21 U.S.C. § 841(b)(1)(C). If Client A is not a career offender, his base offense level is governed by the otherwise applicable guideline. Under advisory USSG § 2D1.1 as amended by the FSA and as further amended effective November 1, 2014, based on the quantity of crack found by the judge (362 grams), his base offense level would be 30 (compared to 34 at the original 1997 sentencing).

Looking at Ameliorating Amendments to U.S. Sentencing Guidelines, you see that in 2013, the Commission amended § 3E1.1 to make clear that the government should not decline to file the motion for the third point (required as of 2003) for reasons not related to its interest in avoiding preparing for trial, *see* USSG App. C, amend. 775 (Nov. 1, 2013). Client A pled guilty without delay, and today would likely get three levels off (instead of two) for acceptance of responsibility, *see* USSG § 3E1.1(b) (2013), for an offense level of 27. If the prior convictions would not be counted separately today under USSG § 4A1.2(a) as amended in 2007, *see* Part III.A., he would be in Criminal History Category II, resulting in a guideline range of 78-97 months. If the prior convictions still count separately, the guideline range, from which the court may decide to vary downward, is 87-108 months.

D. If it is not a crack case and the client is not a career offender, (a) would the prosecutor charge drug quantity under Attorney General Holder's August 12, 2103 charging policy, and/or (b) would the guideline range be lower today? *See* How a Sentence for a Drug Offender May Be Lower if Imposed

Today. Use the current *Guidelines Manual* and be sure to check Ameliorating Amendments to U.S. Sentencing Guidelines. Explain why, then go to step 3.

STEP 3 **Would the court likely impose a sentence below the advisory guideline range under *Booker* and its progeny?**

A. If the client is a career offender, would the court vary from the range recommended by the career offender guideline either for policy reasons under *Kimbrough*, or based on individualized circumstances under *Gall*, or both? *See* Part III.D. If so, briefly explain why.

Example: Assume that both of Client A's prior state convictions are minor but qualifying. Client A's advisory range under the post-FSA career offender guideline, with 3 levels off for acceptance of responsibility, would be 188-235 months, or 15 years and 8 months at the bottom of the range. If Client A were sentenced today, the judge would likely impose a sentence substantially below that range.

Judges today exercise their authority under *Booker*, *Kimbrough*, and *Gall* to find that the career offender guideline recommends a sentence more severe than necessary to serve sentencing purposes, and sentence below the range in 41.5% of all career offender cases and in 56.9% of all career offender cases in which the government did not seek a substantial assistance or fast track departure.[2] *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offender* (2013). Of these cases, judges vary on average by 32.7% (an average of 68 months) when the below-guideline sentence is not sponsored by the government and by 40% (an average of 80 months) when the below-guideline sentence is sponsored by the government, as is increasingly the case. *Id.* Only 30.2% of career offenders are sentenced within the guideline range. *Id.*

Client A's career offender designation is based on two minor state convictions, for which he was sentenced to 180 days in jail. Congress did not require the Commission to include prior state offenses as career offender predicates, *see* 28 U.S.C. § 994(h), and the Commission has never given a reason for doing so. The Commission has since reported that for repeat drug offenders, like Client A, the risk of recidivism is not as high as the career offender guideline assumes, and that incapacitating low-level offenders like him does not further the goal of general deterrence. *See* Part III.D.1. By classifying Client A as a career offender, the Commission has placed him in the same guideline range as a repeat drug

[2] *See* U.S. Sent'g Comm'n, *Quick Facts – Career Offender* (2014) (926 out of 2,232 cases). This includes 301 cases in which the sentence was below the range on the government's request.

trafficker engaged in a lucrative business with substantial ties outside the United States or a repeat violent offender with a history of stabbing, shooting, and robbing, the actual type of career offender Congress had in mind. *See* Part III.D.1, D.3. Exercising her authority under *Kimbrough v. United States*, 552 U.S. 85 (2007), a judge today is likely to find that the career offender guideline unfairly treats these unlike offenders the same, and vary downward to reflect that policy disagreement. *See e.g.*, *United States v. Cavera*, 550 F.3d 180, 192 (2d Cir. 2008) (en banc) (encouraging policy-based variances when defendant's criminal history is dramatically less serious than other offenses included in § 4B1.2's "wide spectrum of offenses of varying levels of seriousness, from, on the one hand, murder or rape, to, on the other hand, attempted burglary of a dwelling"); *United States v. Moreland*, 2008 WL 904652 *11 (S.D. W. Va. Apr. 3, 2008) ("Mr. Moreland spent a total of less than six months in jail for his two previous offenses, and a sentence that takes ten years from his young life will certainly promote respect for law," as opposed to the 360-month career offender guideline sentence); *see also*, *e.g.*, *United States v. Williams*, 435 F.3d 1350 (11th Cir. 2007) (per curiam) (upholding 90-month sentence where career offender range was 188 months based on prior state convictions for cocaine trafficking and carrying a concealed firearm and where district court found that the sentence recommended by the career offender guideline "does not promote respect for the law and is way out of proportion to the seriousness of the offense and to [Williams'] prior criminal conduct").

If the judge varied in this case by 32.7% (the average reduction for non-government sponsored judicial variances), she would vary from 188 to 127 months. Client A has already served almost 17 years.

B. If the client is not a career offender under current law and so is subject to the otherwise applicable guideline range, would the court likely vary downward from that range? *See* How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today. If so, briefly explain why.

The current non-career offender guideline range is likely to be near or below the amount of time already served. If so, you may want to add this analysis to show that the amount of time served is already substantially above the sentence the judge would likely impose today.

Example: As shown above, a prosecutor would likely decline to charge quantity today, so there would be no mandatory minimum. If Client A is not a career offender, his crack guideline range under the November 1, 2014 Manual is either 78-97 months (if his prior convictions are not counted separately) or 87-108 months (if they are). The judge would likely vary downward from that range.

Today, judges vary from the crack guideline in 40% of all cases in which the government does not seek a substantial assistance or fast-track departure. U.S.

Sent'g Comm'n, *Sourcebook of Federal Sentencing Statistics*, tbl. 45 (2013) (876 out of 2,195 cases).

Numerous judges have expressly exercised their authority under *Kimbrough v. United States*, 552 U.S. 85 (2007), and *Spears v. United States*, 555 U.S. 261 (2009), to hold that the 18:1 powder-to-crack ratio incorporated in the FSA and reflected in the current crack guidelines is, like the old 100:1 ratio, not based in empirical data or national experience and results in guideline ranges greater than necessary to serve sentencing purposes. Instead, they vary to a 1:1 powder-to-crack ratio in every case. *See*, *e.g.*, *United States v. Williams*, 788 F. Supp. 2d 847 (N.D. Iowa 2011); *United States v. Shull*, 793 F. Supp. 2d 1048, 1064 (S.D. Ohio 2011); *United States v. Trammell*, 2012 U.S. Dist. LEXIS 5615 (S.D. Ohio Jan. 18, 2012); *United States v. Cousin*, 2012 WL 6015817 (W.D. Pa. Dec. 1, 2012). As many note, the Department of Justice supported a 1:1 ratio. See Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary, 111th Cong. 101 (2009) (statement of Lanny A. Breuer, Assistant Att'y Gen.).

If the judge varies to the 1:1 ratio and uses the guideline for 362 grams of powder cocaine, the base offense level effective November 1, 2014 is 20. With three levels off for acceptance of responsibility, the range would be 30-37 months in CHC III.

Client A has already served more time in prison than the current guideline range would recommend, and more time than the sentence the judge would likely impose.

III. Research Guide

This Part provides more detailed guidance regarding the relevant law and information referred to in the step-by-step instructions above.

A. If the client were sentenced today, would she not be a career offender because one or more prior offenses would not be counted separately?

To be classified as a career offender, a client must have two prior predicate convictions resulting in sentences *counted separately* under the Guidelines' definition of "separate" sentences under USSG § 4A1.2(a)(2). *See* USSG § 4B1.2(c) & cmt.(n.3) (2013). Before November 1, 2007, the question whether the prior sentence would be counted separately depended on whether the prior sentences were imposed in "unrelated" or "related" cases. Prior sentences imposed in "unrelated cases" were counted separately. Prior sentences were considered "unrelated" if "they were for offenses that were separated by an intervening arrest (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." USSG § 4A1.2(a)(2), cmt.(n.3) (2006). Prior sentences in "related" cases were counted as "one sentence." Prior sentences were considered

"related" if they "resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing." *Id.*

Over the years, the "related cases" rule was interpreted so narrowly by the courts that it had become nearly impossible to show that two prior sentences were related. It was common for prior sentences to be found unrelated, and thus counted separately, even though there was no intervening arrest, the offenses occurred within hours of each other, and the offenses were charged in the same charging document and sentenced on the same day. Differing state practices resulted in significant unwarranted disparities.

Effective November 1, 2007, the Sentencing Commission promulgated Amendment 709, which altered and greatly simplified the method of determining whether multiple prior sentences are counted separately. Under USSG § 4A1.2(a)(2) as currently amended, multiple sentences are counted separately "if the sentences were imposed for offenses that were separated by an intervening arrest, (*i.e.*, the defendant is arrested for the first offense prior to committing the second offense)." If there is no intervening arrest, they are counted as a "single sentence" if the sentences "resulted from offenses contained in the same charging instrument" **or** "the sentences were imposed on the same day." USSG § 4A1.2(a)(2)(2013). The amendment had an ameliorating effect in many cases, but the Commission did not make the change retroactive.

If sentenced today, many clients classified as career offenders before November 1, 2007 would not have two or more "separate" prior sentences under amended § 4A1.2(a)(2), and thus would not be career offenders.

B. If the client were sentenced today, would she not be a career offender because a prior conviction that was necessary to her career offender status does not qualify as a career offender predicate under current law?

In some cases, one or both prior convictions upon which the career offender status was based may not qualify as a predicate offense under current law. In other cases, a prior conviction did not qualify even at the time the client was originally sentenced, but was erroneously counted. In either case, and as long as the client has no other prior convictions that would qualify, he would not be a career offender today and would be subject to the ordinary guideline range, which would be advisory.

Determining whether a client's prior offense would no longer qualify (or never qualified) as a career offender predicate may not be obvious or clear, and the law is evolving. In some cases, even recent circuit precedent squarely holding that a particular prior offense qualifies as a predicate may no longer be good law after a yet more recent Supreme Court decision—but the circuit has not yet reversed its prior precedent. The following is a research guide only. It is not a substitute for research relating to a client's particular prior conviction and relevant Supreme Court and circuit law.

RULE OF THUMB: When the Supreme Court or at least one court of appeals has held that a prior offense necessary to the client's career offender status, or one materially identical to it, does not qualify as a predicate in any case, then the client would not be a career offender and her sentence would likely be lower today.

If the court of appeals in the circuit in which the client was sentenced has held that it always qualifies or sometimes qualifies as a predicate, the client may still not be a career offender, depending on the timing of that holding and later clarifying Supreme Court law.

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

1. Would a prior conviction no longer qualify as a "crime of violence" under the Supreme Court's narrowing interpretation?

The Commission defines "crime of violence" in § 4B1.2 as follows:

> [A]ny offense under federal or state law, punishable by a term of 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 [the "force clause"], or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives [the "enumerated crimes clause"], or otherwise involves conduct that presents a serious potential risk of physical injury to another [the "residual clause"].

USSG § 4B1.2(a). The Commission derived its definition of "crime of violence" from the definition of "violent felony" in the Armed Career Criminal Act at 18 U.S.C. § 924(e),[3] then expanded on this definition through application notes, adding additional enumerated offenses and

[3] A prior "violent felony" under the ACCA is defined at § 924(e)(2)(B) as "any crime punishable by imprisonment for a term exceeding one year" that

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> (2) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

removing the link between the enumerated offenses and the residual clause.[4] As a result, courts interpreted "crime of violence" under the career offender guideline to include non-violent offenses such as tampering with a motor vehicle, burglary of a non-dwelling, fleeing and eluding, operating a motor vehicle without the owner's consent, possession of a short-barreled shotgun, carrying a concealed weapon, oral threatening, car theft, and failing to return to a halfway house.

In a series of decisions beginning in 2004, the Supreme Court narrowly interpreted the statutory definitions of "crime of violence" under 18 U.S.C. § 16[5] and "violent felony" under the ACCA,[6] and signaled (by granting, vacating and remanding in career offender cases) that courts should narrow the meaning of "crime of violence" under the career offender guideline in the same way.

- In *Leocal v. Ashcroft*, 543 U.S. 1 (2004), the Court interpreted 18 U.S.C. § 16 to apply only to a category of "violent, active crimes" requiring at least reckless disregard of a substantial risk that physical force may be used, which "cannot be said naturally to include DUI offenses."

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

- In *Chambers v. United States*, 555 U.S. 122 (2009), the Court applied *Begay* to hold that an escape conviction based on a failure to report to custody does not qualify as a "violent

[4] For a complete history of the definition of "crime of violence" under the career offender guideline, see Baron-Evans *et al.*, *Deconstructing the Career Offender Guideline*, *supra*, at 58-66.

[5] Under § 16, "crime of violence" is defined as

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

18 U.S.C. § 16.

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

felony" under ACCA's residual clause at § 924(e)(2)(B)(ii) because it does not present "a serious potential risk of physical injury to another." In the process, the Court considered statistics released by the Sentencing Commission showing that the risk of injury from offenses involving failure to report was low.

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

Every court of appeals has held that the interpretation of "violent felony" under the ACCA applies equally to "crime of violence" under the career offender guideline. Thus, for purposes of the career offender guideline, these decisions address whether an offense has "as an element" the requisite "physical force," i.e., "violent force" under the force clause at § 4B1.2(a)(1) (*Leocal*, *Johnson*) or carries the requisite *mens rea* and/or degree of risk of physical injury under the residual clause at § 4B1.2(a)(2) (*Begay*, *Chambers*).

Applying these decisions, courts have held that numerous offenses are no longer "violent felonies" under the ACCA or "crimes of violence" under the career offender guideline, including arson in the third degree,[7] auto theft and auto tampering,[8] child endangerment,[9] involuntary manslaughter,[10] walkaway escape,[11] carrying a concealed weapon,[12] conspiracy that requires no overt act toward commission of the underlying offense,[13] reckless discharge of a firearm,[14]

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

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

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

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

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

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

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

possession of a weapon in prison,[15] resisting or obstructing a police officer,[16] statutory rape,[17] sexual misconduct with a minor,[18] vehicular homicide,[19] assault and battery on a policy officer,[20] battery,[21] and numerous offenses that require only recklessness.[22]

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clause; noting circuit split regarding whether conspiracy to commit a violent felony is itself a violent felony).

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

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

[16] *United States v. Mosley*, 575 F.3d 602 (6th Cir. 2009). The Fourth Circuit has held that, under the Supreme Court's decision in *Johnson*, a Maryland conviction for resisting arrest is not a "crime of violence" for purposes of the "force clause" in the illegal reentry guideline, *United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. 2014), which is the same as the "force clause" in the career offender guideline. *Compare* USSG § 2L1.2 cmt. n.1(B)(iii) ("any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another"), *with* USSG § 4B1.2 cmt. (n.1) (offense "has an element the use, attempted use, or threatened use of physical force against the person of another"); *see also United States v. Flores-Cordero*, 723 F.3d 1085 (9th Cir. 2013) (same for Arizona conviction for resisting arrest).

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

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

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

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

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

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

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

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

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

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

Courts of appeals have understood *Sykes* to mean that if the crime is intentional, then only the risk inquiry applies, while *Begay*'s requirement of "purposeful, violent, and aggressive" conduct still applies to strict liability, negligence, and recklessness crimes.[23] Thus, regardless of the risk presented, a crime with a *mens rea* less stringent than "purposeful and deliberate" is not similar "in kind" to the enumerated offenses and so is not a "crime of violence."[24]

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

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

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

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

If neither the Supreme Court nor any court of appeals has addressed the particular prior offense but a clear-cut argument can be made under Supreme Court law or the law of any circuit regarding a materially identical statute, seek assistance as noted above.

2. Would a prior conviction no longer qualify as a "crime of violence" or "controlled substance offense" under the categorical approach or the modified categorical approach?

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

The Supreme Court first adopted the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990). As it recently reiterated, it adopted this approach—rather than a factual approach that would authorize federal sentencing courts to try to discern from a previous trial or plea record facts superfluous to the prior conviction and to find that the defendant was in fact guilty of an offense of which he was not convicted—for three reasons: (1) the categorical approach

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972 (11th Cir. 2012) (because second degree rape and second degree sodomy under Alabama law are strict liability offenses, "we cannot hold that a violation of either of them involves 'purposeful, violent, and aggressive conduct'" under *Begay* for purposes of the ACCA's residual clause).

comports with the text and history of the ACCA, which mandates a 15-year minimum sentence for the offense of being a felon in possession of a firearm or ammunition under 18 U.S.C. § 922(g)(1) when a defendant has three prior convictions for a "violent felony" or "serious drug offense"; (2) a factual approach would present practical difficulties and unfairness; and (3) it would violate the Sixth Amendment for the federal court to make findings of fact that belong to a jury. *See Descamps*, 133 S. Ct. at 2287-89.

For example, the Supreme Court instructs that "generic burglary" is defined as "having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 599 (1990). The career offender guideline lists, as one of the enumerated qualifying offenses, the narrower offense of "burglary of a dwelling." USSG § 4B1.2(a)(2). Thus, the applicable definition for purposes of the career offender guideline is (1) unprivileged (2) entry into, or remaining in, (3) a dwelling, (4) with intent to commit a crime.

Consider a defendant who was previously convicted under a state statute that defines burglary as "enter[ing] a dwelling, without consent, with intent to commit a crime therein." Under state law, "dwelling" is broadly defined to include all "houses, outhouses, buildings, sheds, and erections which are within two hundred yards" of a dwelling house. Because this definition of "dwelling" is broader than the definition of dwelling in generic burglary statutes, which requires that a "dwelling" be for purposes of human habitation, a prior conviction under this statute is not categorically a "crime of violence" under the career offender guideline. *See United States v. McFalls*, 592 F.3d 707, 712-13 (6th Cir. 2010).[25] In order to avoid a Sixth Amendment violation, a judge applying the career offender guideline in a federal sentencing may not determine for herself whether the defendant, in committing the prior state offense, in fact unlawfully entered a dwelling.

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

For example, under the career offender guideline, "controlled substance offense" is defined as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." USSG

[25] *See also, cf., United States v. Henriquez*, __ F.3d __, 2014 WL 2900935 (4th Cir. June 27, 2014) (holding that Maryland first degree burglary of a dwelling is broader than generic burglary of a dwelling because it is not limited to buildings or structures where Maryland has interpreted "dwelling" to include boats and vehicles, and thus it is not a "crime of violence" for purposes of the enumerated offense of "burglary of a dwelling' under § 2L1.2).

§ 4B1.2(b). The definition does not include offenses involving purchase, use, or simple possession.

Consider a defendant who was previously convicted under a state statute that provides: "Any person who knowingly sells, *purchases*, manufactures, delivers, or brings into this state 28 grams or more of cocaine commits a felony of the first degree, which felony shall be known as 'trafficking in cocaine.'" (Emphasis added.) The statute applies to the purchase of cocaine, which does not qualify as a "controlled substance offense," and to the sale of cocaine, which does qualify. *See, e.g.*, *United States v. Shannon*, 631 F.3d 1187, 1190 (11th Cir. 2011). The state court judgment simply cites the statute and recites all of the alternative offenses.

The Supreme Court has held that under these circumstances, the court is permitted to look beyond the judgment to a limited set of case-specific documentation—*i.e.*, the charging document and jury instructions or bench trial findings of the court if the defendant was convicted at trial, *Taylor v. United States*, 495 U. S. 575, 602 (1990), and the plea agreement and plea colloquy transcript (or "some comparable judicial record of this information") if the defendant pled guilty, *Shepard v. United States*, 544 U. S. 13, 25-26 (2005)—to determine the elements of the offense of which the defendant was convicted, *Descamps*, 133 S. Ct. at 2283-84. If the elements of the offense of conviction cannot be determined from these documents without regard to the underlying facts, it must be assumed that the conviction was for the least culpable crime, *i.e.*, the non-qualifying offense, *see Johnson v. United States*, 559 U.S. 133, 137 (2010), and thus the prior conviction under that statute cannot qualify as a predicate offense. This "modified categorical approach" is intended only as a "tool for implementing the categorical approach." *Descamps*, 133 S. Ct. at 2284.

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

Reversing the Ninth Circuit, the Supreme Court held that the modified categorical approach had "no role to play" in determining whether Descamps' conviction under a California burglary statute was a violent felony because that statute was not divisible. *Id.* at 2285. Under the categorical approach, the California burglary conviction was not a "violent felony" because the

statute of conviction did not require proof of unlawful entry, which is an element of the generic crime of burglary, and thus the district court erred in enhancing Descamps' sentence under the ACCA.

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

In addition, in light of *Descamps*, some courts of appeals have now reversed longstanding precedent to hold that the modified categorical approach has been wrongly applied to indivisible statutes to find ACCA "violent felony" predicates, such as a Maryland conviction for second degree assault, *see United States v. Royal*, 731 F.3d 333 (4th Cir. 2013), a South Carolina conviction for assault and battery of a high and aggravated nature, *see United States v. Hemingway*, 734 F.3d 323 (4th Cir. 2013), an Alabama conviction for third degree burglary, *see United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014), and a Nebraska conviction for escape from custody, *United States v. Tucker*, 740 F.3d 1177 (8th Cir. 2014).

These decisions apply equally to whether a prior conviction counts as a "crime of violence" under the career offender guideline, and the law is still evolving. There are likely many defendants whose prior convictions were based on the incorrect application of the modified categorical approach to an indivisible statute. Even relatively recent prior precedent may be fatally undermined by *Descamps*, but the court of appeals has not yet addressed the question.

A step-by-step guide to applying the categorical and modified categorical approaches after *Descamps*, with examples, appears in Appendix 4.

3. Would a prior drug offense under California or Connecticut law no longer qualify as a "controlled substance offense" under the modified categorical approach?

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

However, some clients with prior drug convictions from California and Connecticut may have been sentenced in federal court before the federal courts recognized that the state statute of conviction applies to some offenses that qualify as a "controlled substance offense" under the career offender guideline and some that do not qualify, requiring them to use the modified categorical approach to determine whether the client was *necessarily* convicted of a qualifying

offense. *See, e.g.*, *United States v. Mattis*, 14 F. App'x 773, 775 (9th Cir. 2001) (recognizing that "some controlled substances prohibited under [Cal. Health and Safety Code] § 11351 are not unlawful under the Controlled Substances Act" and applying the modified categorical approach); *United States v. Lee*, 704 F.3d 785, 789 (9th Cir. 2012) (government conceded that Cal. Health and Safety Code § 11352(a) "encompasses a broader range of conduct than the guidelines definition because § 11352(a) [] criminalizes the transportation of a controlled substance, which would not be a controlled substance offense"); *United States v. Lopez*, 536 F. Supp. 2d 218, 221 (D. Conn. 2008) (because Conn. Gen. Stat. § 21a-277(a) criminalizes offenses involving substances that are not controlled by the federal Controlled Substances Act, court was required to apply the modified categorical approach); *United States v. Savage*, 542 F.3d 959, 966 (2d Cir. 2008) (Conn. Gen. Stat. § 21a-277(b), "by criminalizing a mere offer to sell, criminalizes more conduct than falls within the federal definition of a controlled substance offense" under § 4B1.2). *But see Lee*, 704 F.3d at 790 (an "offer to sell" under Cal. Health and Safety Code § 11352(a) is a controlled substance offense).

If the client was sentenced under a California or Connecticut drug statute, consider whether the statute applies to offenses that do not qualify under the definition of "controlled substance offense" and whether the district court properly applied the modified categorical approach.

4. Did the sentencing judge, at the time of sentencing, err in its application of the modified categorical approach?

Descamps now makes clear that, in any case, the sentencing court may have incorrectly transformed what should have been an elements-based inquiry into a fact-based inquiry or otherwise incorrectly applied the elements-based inquiry. Determining whether this happened in a client's case will require research of the statute of conviction and guideline definition applicable at the time of sentencing (and its relevant history), research regarding what documents may be consulted *in that circuit* for purposes of the modified categorical approach (and obtaining those documents),[26] and a concise, rigorous application of the categorical or modified categorical approach as clarified by *Descamps*.

Below is a real-world example demonstrating how an analysis under the categorical and modified categorical approaches may go.

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

CLIENT B– ***Prior Controlled Substance Offense and the Modified Categorical Approach***

Client B was convicted sentenced in 1991 for possession with intent to distribute more than 50 grams of crack under 21 U.S.C. § 841(b)(1)(A). He had previously pled guilty to violating a California statute that makes it unlawful to "open[] or maintain[] any place for the purpose of unlawfully selling, giving away, or using a controlled substance." Cal. Health & Safety Code § 11366. Applying the 1989 Guideline Manual, the PSR relied on this conviction as one of two supporting a career offender designation. This determination was not opposed at the time because Client B was subject to two § 851 notices, which mandated a life sentence, making the guideline range irrelevant. You have already determined that a prosecutor would not file a § 851 notice today under the August 2013 Holder Memoranda. Next, you must determine what Client B's guideline range would be. Your goal is to answer the following question: Would this California conviction qualify today as a career offender predicate? If not, then Client B would not be a career offender, and his guideline range would be calculated without regard to the career offender guideline.

The first step is to determine the applicable guideline definition. As is true at an original sentencing, a complete understanding of the current guideline definition is informed by its history.

Under the 1988 career offender guideline, "controlled substance offense" was defined to include 21 U.S.C. § 856, a federal offense defined as maintaining a premises "for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance," or any "state offense that is substantially similar." USSG § 4B1.2(2) & cmt. (n.2) (Jan. 1, 1988). The Commission deleted that provision in the 1989 Manual, under which Client B was sentenced, and defined "controlled substance offense" as "an offense under a federal or state law prohibiting the manufacture, import, export, or distribution of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, or distribute." *See* App. C, Amend. 268 (Nov. 1, 1989); USSG § 4B1.2(2) (Nov. 1, 1989). This definition did not include simple possession, using, or possessing with intent to use. And it no longer referred to § 856.

Applying that definition, the Eighth Circuit assumed that a conviction under 21 U.S.C. § 856 could qualify as a career offender predicate but held that a jury verdict convicting a defendant of violating that statute by managing a residence "for the purpose of *distributing or using* a controlled substance" was not a career offender predicate because it did "not clarify whether [he] was convicted of a possession § 856 offense or a distribution § 856 offense." *United States v. Baker*, 16 F.3d 854, 857-58 (8th Cir. 1994). In 1997, the Commission added commentary to the career offender guideline stating that the federal offense of

violating 21 U.S.C. § 856 "is a 'controlled substance offense' if the offense of conviction established that the underlying offense (the offense facilitated) was a 'controlled substance offense,'" citing the Eighth Circuit's decision in *Baker*. *See* USSG App. C, Amend. 568 (Nov. 1, 1997) (Reason for Amendment); USSG § 4B1.2, cmt.(n.1) (Nov. 1, 1997).

In other words, after 1997 a conviction under 21 U.S.C. § 856 qualifies only if the underlying offense was manufacturing or distributing a controlled substance. A conviction under § 856 would not qualify if the underlying offense was "storing" or "using" a controlled substance. Through this commentary, which remains in the guideline today, the Commission effectively instructs courts to apply the modified categorical approach to determine whether a conviction under § 856, a divisible statute, qualifies as a predicate.

But the guideline said (and says) nothing about whether a similar state conviction qualifies. From 1997 forward, the guideline referred (and refers) only to the *federal* offense of maintaining a drug involved premises under 21 U.S.C. § 856. The 1994 Eighth Circuit case interpreting the definition in effect from 1989 to 1997, and cited by the Commission in support of the current definition, also referred only to the *federal* offense under § 856. This means that Client B's California state conviction did not qualify as a "controlled substance offense" under the 1989 Manual, and Client B was not a career offender even when he was originally sentenced.

Even assuming that a conviction under a state statute similar to 21 U.S.C. § 856 could be a career offender predicate under a previous or current Guidelines Manual, Client B's conviction under Cal. Health & Safety Code § 11366 cannot qualify as a predicate under the properly applied modified categorical approach set forth in the career offender guideline itself and the Supreme Court's decisions.

As with the federal offense under § 856, the alternative offense under § 11366 of maintaining a place for the purpose of "using" a controlled substance is not a "controlled substance offense" under the career offender guideline, which does not include possession or use offenses. Applying the "modified categorical approach," a court may examine the charging document and plea colloquy, but only for the limited purpose of determining the elements to which Client B pled guilty.

Client B was charged with "maintaining a place for the purpose of selling, giving away, or using a controlled substance." The transcript of the plea proceedings refers to the offense of "maintaining a place where narcotics are used" ***and*** to the offense of "maintaining a place for the purpose of selling cocaine." During the plea colloquy, Client B was asked, "to felony Information A760656, charging you in Count III with violation of 11366 of the Health and Safety Code, maintaining a

place for the purposes of selling, giving away or using a controlled substance, cocaine, a felony, how do you plead, sir?" He answered, "Guilty."

These documents do not establish that Client B was convicted of maintaining a place for "selling" as opposed to the non-qualifying offense of maintaining a place for "using." Under *Johnson*, it must be assumed that he was convicted of the non-qualifying offense. As a result, Client B's § 11366 conviction cannot be used as a predicate for the career offender guideline today. Client B would not be classified as a career offender, and his guideline range would be calculated without regard to the career offender guideline.

5. Is a prior conviction not a "felony" under the Supreme Court's decision in Carachuri-Rosendo?

In *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), the Supreme Court addressed whether a prior conviction qualifies as an "aggravated felony" under the Immigration and Nationality Act. The question presented was whether Carachuri had been "convicted of" a drug trafficking crime for which the "maximum term of imprisonment authorized exceeds one year." In 2004, Carachuri was convicted under Texas law for possessing less than two ounces of marijuana (a misdemeanor) and then in 2005 for possessing a Xanax tablet without a prescription. *Id.* at 570-71. Under Texas law, Carachuri could have received an enhanced recidivist sentence of more than 12 months for the 2005 Xanax conviction, but only if the state proved the fact of the 2004 marijuana conviction. Because the record of the 2005 Xanax conviction contained no finding of fact concerning the 2004 marijuana conviction, Carachuri could not have received a sentence in excess of one year for the 2005 Xanax conviction, and was thus not previously convicted of an "aggravated felony." *Id.* at 581-82. The Court emphasized that the question was whether Carachuri was "actually convicted of a crime that is itself punishable as a felony," not whether a hypothetical person could have received a sentence exceeding one year had he been convicted of the recidivist enhancement. *Id.* at 576, 581.[27]

In light of *Carachuri-Rosendo*, the Fourth Circuit changed course with respect to prior drug convictions under North Carolina law. Under that state's structured sentencing scheme, the maximum sentence that may be imposed is controlled by the defendant's particular prior record level. In *Simmons v. United States*, 649 F.3d 237 (4th Cir. 2011) (en banc), the Fourth Circuit held that a prior North Carolina conviction for possession with intent to sell no more than ten pounds of marijuana was not a "felony drug offense" for purposes of a § 851 enhancement because the defendant, with a "prior record level" of only 1 and where the prosecutor alleged no facts in aggravation sufficient to warrant an aggravated sentence, was subject to a statutory maximum sentence of eight months' community punishment (no imprisonment). *Id.* at 241. As a result, he was not convicted of an offense punishable by imprisonment by more than one year.

[27] The question whether a prior offense is punishable by a maximum term of imprisonment exceeding one year is determined by the law in effect at the time of conviction. *See McNeill v. United States*, 131 S. Ct. 2218, 2220 (2011).

Under *Simmons*, courts determining whether a prior offense is punishable by a term exceeding one year may no longer look at the maximum sentence that may be imposed on a hypothetical defendant with the hypothetically worst prior record level, but only at the maximum sentence that could have been imposed on the particular defendant with his actual prior record level under the law at the time of conviction.

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

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

Under *Simmons*, *Haltiwanger*, and *Brooks*, many defendants with prior North Carolina or Kansas convictions were wrongly subject to the career offender guideline. Some have gotten relief, including some in post-conviction proceedings. But many have not. If a client received a career offender enhancement under the guidelines based on a prior conviction under North Carolina or Kansas law, you will need to determine whether, under the applicable state law at the time of, his prior conviction was not actually for an offense punishable by more than one year.

Be aware that the sentencing schemes of Kansas and North Carolina are complex and difficult to decipher for the inexperienced. Unless you have experience determining actual penalties under Kansas and North Carolina law, seek assistance as noted above. Also seek assistance if the client was convicted of an offense in another state under a statutory scheme that appears to function like the statutes in *Carachuri-Rosendo*, *Simmons*, and *Brooks*, but there is no circuit law addressing the issue.

C. If the client would still be a career offender today, would the statutory maximum, and thus the career offender offense level, be lower?

1. In cases involving any drug type, including crack, where prosecutor would not charge drug quantity today—

If the prosecutor originally charged drug quantity but would likely decline to charge drug quantity today under the August 12, 2013 charging policy [28] (and assuming there was no § 851 notice or you have determined that the prosecutor would decline to file one today),[29] the statutory maximum would be 0-20 years under 21 U.S.C. § 841(b)(1)(C). The corresponding offense level under § 4B1.1 is 32.

2. In crack cases where the prosecutor would still charge quantity and/or § 851 notice—

The Fair Sentencing Act, if applied to those sentenced before 2010, would reduce the statutory maximum and corresponding guideline range for **some** career offenders sentenced for crack offenses, depending on the quantity of crack charged. Statutory penalties would be lower for the following categories of career offenders:

- Those charged and convicted of 5 grams to less than 28 grams.
- Those charged and convicted of 50 grams to less than 280 grams.

Some career offenders are *also* subject to an enhanced mandatory minimum under § 851. The Fair Sentencing Act would reduce the statutory maximum, corresponding guideline range, and mandatory minimum for **some** of these career offenders as well, again depending on the quantity of crack charged:

- Those charged and convicted of 5 grams to less than 28 grams, and where the prosecutor filed a notice of **one** prior conviction for a "felony drug offense" under § 851.
- Those charged and convicted of 5 grams to less than 28 grams of crack and where the prosecutor filed a notice of **two** prior convictions for a "felony drug offense" under § 851.

For others, the Fair Sentencing Act would reduce only the mandatory minimum:

- Those charged and convicted of 50 grams to less than 280 grams, and where the prosecutor filed a notice of **one** prior conviction for a "felony drug offense" under § 851.

[28] *See* Appendix 2.

[29] *See* How a Person Whose Sentence Was Previously Based on a "Felony Drug Offense" under 21 U.S.C. § 851 Would Receive a Lower Sentence Today.

- Those charged and convicted of 50 grams to less than 280 grams, and where the prosecutor filed a notice of **two** prior convictions for a "felony drug offense" under § 851.

To determine whether a client's statutory penalty would be lower today, use the chart at Appendix 1. If you determine that the statutory maximum would be lower, go to USSG § 4B1.1 to determine the applicable career offender offense level, then to the next section to determine whether a judge today would likely impose a sentence below the advisory range, and how much lower.

If only the minimum would be lower, go to the next section to determine whether a judge today would likely impose a sentence below the advisory guideline range, and how much lower.

D. If the client were sentenced under the advisory guidelines today, would the sentencing judge likely vary downward because the sentence recommended by the career offender guideline is greater than necessary to serve sentencing purposes?

When the guidelines were mandatory, district courts could depart below the career offender guideline only for limited reasons, tied to the individualized circumstances of the case, *i.e.*, if the defendant's criminal history category overstated the seriousness of his criminal history (limited to one criminal history category, *see* USSG § 4A1.3(b)(3)(A)), or the offense or the offender presented exceptional circumstances outside the "heartland" of career offender cases, *see* USSG § 5K2.0. Courts could not depart below the career offender guideline range based on a policy disagreement with the severity of the range or the Commission's choices to expand the class of offenders subject to the guideline, no matter how misguided. As a result of these restrictions, judges departed from the career offender range in a small minority of cases. From 1996 until the PROTECT Act (April 2003), judges departed below the career offender range without a government motion in only 14.5% of cases, and in the PROTECT Act period (May 2003 through June 2004), in only 7.4% of cases. U.S. Sent'g Comm'n, *Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing*, Part C at 12 (2012).

In 2005, the Supreme Court rendered the guidelines advisory in *United States v. Booker*, 543 U.S. 220 (2005). Nearly three years later, it clarified that district courts have broad authority to vary based on individualized circumstances, *see Gall v. United States*, 552 U.S. 38 (2007), and based on policy disagreements, *see Kimbrough v. United States*, 552 U.S. 85 (2007); *Spears v. United States*, 555 U.S. 561 (2009).[30] After these decisions, district courts are authorized to vary below the guideline range without the limitations noted above, including based on a policy determination that the career offender range itself, apart from any individualized circumstances, is greater than necessary to serve the purposes of sentencing under 18 U.S.C. § 3553(a)(2). *See, e.g.*, *United States v. Newhouse*, 919 F. Supp. 2d 955, 967 (N.D. Iowa 2013) (providing a

[30] For a more detailed discussion of these decisions and their effect on sentences and sentencing practice, see How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.

comprehensive account of the flaws in the career offender guideline and varying downward to a sentence that better serves sentencing purposes). While some circuits quickly accepted that a district court may vary based on a policy disagreement with any guideline, not just crack, others took longer to accept that district courts may vary based on a policy disagreement with the career offender guideline.[31]

In the wake of *Booker*, *Gall*, and *Kimbrough*, the rate of within-guideline sentences in career offender cases has decreased steeply since 2008, from 59% in the period just before *Booker* was decided down to 30.2% in fiscal year 2012. *See* 2012 *Booker* Report, Part C; U.S. Sent'g Comm'n, *Quick Facts – Career Offender* (2014). The rate of judicial (i.e., non-government-sponsored) below-guideline sentences in career offender cases has increased significantly, from 22.1% in fiscal year 2008 to 27.6% in fiscal year 2012. In these cases, the average reduction was 32.7% (68 months). *Quick Facts* at 2. The rate of government-sponsored below-range sentences for reasons other than substantial assistance or fast-track also increased significantly from 5.7% in fiscal year 2008 to 13.9% in fiscal year 2012. *Id.* In these cases, the average reduction was 40% (80 months). *Id.* Overall, judges determined that the career offender guideline recommends a sentence more severe than necessary to serve sentencing purposes and sentenced below the range in **41.5%** of all career offender cases, and in **56.9%** of all cases in which the government did not seek a substantial assistance or fast track departure. *Id.* (926 out of 2,232 cases).[32]

Note the timing of the client's sentencing. Most clients were sentenced while the guidelines were still mandatory, or after *Booker* but before *Kimbrough* and *Gall*, or before the relevant circuit accepted policy-based variances with the career offender guideline. Given that judges currently impose a below-guideline sentence in nearly half of career offender cases, apart from government-sponsored substantial assistance and fast-track departures, and impose within-guideline sentences in only 30.2% of all career offender cases, it is probable that a client

[31] *See United States v. Martin*, 520 F.3d 87, 96 (1st Cir. 2008); *United States v. Sanchez*, 517 F.3d 651, 662-63 (2d Cir. 2008); *United States v. Michael*, 576 F.3d 323, 327-28 (6th Cir. 2009); *United States v. Corner*, 598 F.3d 411, 415-16 (7th Cir. 2010) (en banc); *United States v. Mitchell*, 624 F.3d 1023, 1028-30 (9th Cir. 2010); *United States v. Bailey*, 622 F.3d 1, 10-11 (D.C. Cir. 2010). Some circuits had expressly prohibited judges from from disagreeing with the career offender guideline for a period of time. In 2008, the Sixth Circuit held that district courts were not authorized to disagree with the career offender guideline, *United States v. Funk*, 534 F.3d 422, 530 (6th Cir. 2008), but that decision was vacated by the *en banc* court and the government voluntarily dismissed the appeal. In 2009, the Seventh Circuit held in *United States v. Welton*, 583 F.3d 494 (7th Cir. 2009), that district courts could not disagree with the career offender guideline, but that decision was overruled by the *en banc* court in 2010 in *Corner*, 598 F.3d at 415-16. In 2009, the Eleventh Circuit held in *United States v. Vazquez*, 558 F.3d 1224 (11th Cir. 2009), that district courts could not disagree with the career offender guideline, but that decision was vacated and remanded by the Supreme Court after the Solicitor General conceded error, *see Vazquez v. United States*, 558 U.S. 1144 (2010).

[32] This includes 301 cases in which the sentence was below the range on the government's request.

previously sentenced within or near[33] the career offender range would, if sentenced today, receive a lower sentence under the advisory guideline system. The judge may have even made a statement on the record to that effect, which you should quote directly in your petition (do not paraphrase). If not, ask the judge if s/he will write a letter to attach to the petition.[34]

In some cases, it will be clear that the client's career offender designation was based on considerations expressly recognized by judges and/or the Sentencing Commission to produce sentences greater than necessary to serve the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2). If so, you may wish to include that information. Below is an overview of the primary ways the career offender guideline produces sentences more severe than necessary, as recognized by judges and/or the Commission.

1. When the Career Offender Designation Was Based on Drug Offenses

Congress directed the Commission to specify a term of imprisonment at or near the statutory maximum for a defendant "[c]onvicted of a felony that *is* . . . an offense *described in*" 21 U.S.C. § 841, 21 U.S.C. §§ 952(a), 955, 959, and 46 U.S.C. § 70503, and has two or more prior "felonies," each of which is one of these enumerated federal drug offenses or a "crime of violence." *See* 28 U.S.C. § 994(h)(1)(B), (2)(B) (emphasis added).

Congress had in mind "repeat drug traffickers" engaged in an "extremely lucrative" business with substantial ties outside the United States.[35] Yet, rather than define the class of controlled substance offenses subject to the career offender guideline as the federal offenses specifically listed in the directive, the Commission added a number of less serious state and federal drug offenses, including:

- inchoate offenses—aiding and abetting, attempt, conspiracy;
- any state offense punishable by more than one year that prohibits the manufacture, import, export, distribution or dispensing of a controlled substance or possession with intent to do so;
- unlawfully possessing a listed chemical with intent to manufacture a controlled substance, 21 U.S.C. § 841(c)(1);
- unlawfully possessing a prohibited flask or equipment with intent to manufacture, 21 U.S.C. § 843(a)(6);
- maintaining any place for purpose of facilitating a controlled substance offense, 21 U.S.C. § 856, if the offense of conviction established that the offense facilitated was a controlled substance offense;

[33] Since 2003, the Commission has limited downward departures in career offender cases based on overrepresentation of criminal history to only one criminal history category. *See* USSG § 4A1.3(b)(3)(A).

[34] If there is litigation pending before the judge, however, check with the prosecutor before approaching the judge for a letter.

[35] S. Rep. No. 98-225, at 20, 175, 256 (1983).

- using a communications facility [*i.e.*, a telephone] in committing, causing or facilitating a drug offense, 21 U.S.C. § 843(b), if the offense of conviction established that the offense committed, caused or facilitated was a controlled substance offense.

It should likewise be clear that Congress intentionally excluded state drug offenses. If Congress wished to include prior state drug convictions as a basis for punishment at or near the maximum under 28 U.S.C. § 994(h), it knew how to do so. *See United States v. Knox*, 573 F.3d 441, 448 (7th Cir. 2009) (recognizing that "the precision with which § 994(h) includes certain drug offenses but excludes others" indicates that their omission "was no oversight").

As a result of the Commission's choices, the typical "career offender" sells small quantities on the street corner, acts as a courier, or provides low-level assistance to a boyfriend in his drug trafficking business, is poor and often an addict acting to support a habit or provide for children or other family, with two relatively minor state drug convictions.

In 2004, the Commission reported that the career offender guideline, especially as it applies to repeat drug offenders, does not "clearly promote an important purpose of sentencing" because their recidivism rates more closely resemble the recidivism rates of offenders in the lower criminal history categories in which they would be placed under the normal criminal history rules (recall that career offenders are automatically placed in the highest criminal history category of IV), and because incapacitating lower-level drug sellers fails to prevent drug crime because when one goes to prison, another takes his place. *Fifteen Year Review* at 134. While this is true regardless of the race of any particular repeat drug offender, the majority of career offenders are African-American, not because they engage in more drug crimes but because it is easy to arrest and prosecute offenders in "open-air drug markets, which are most often found in impoverished minority neighborhoods." *Id.* at 133-34. The Commission concluded that for repeat drug traffickers, the guideline has "unwarranted adverse impacts on minority groups without clearly advancing a purpose of sentencing." *Id.* at 134.

Under the advisory guideline system, district courts consider these policy flaws as grounds for varying below the career offender guideline range. *See, e.g.*, Baron-Evans *et al.*, *Deconstructing the Career Offender Guideline*, *supra*, at 83-85 (collecting cases); *see also United States v. Newhouse*, 919 F. Supp. 2d 955, 967 (N.D. Iowa 2013). A client whose career offender range was predicated on relatively minor drug offenses, such as those listed above, would likely receive a lower sentence today.

2. When the Career Offender Designation Was Based on Prior State Misdemeanors

Congress directed the Commission to specify a term of imprisonment at or near the statutory maximum if the defendant "has previously been convicted of two or more prior *felonies*." *See* 28 U.S.C. § 994(h)(2) (emphasis added). At the time § 994(h) was enacted, the unadorned term "felony" (as opposed to the term "felony drug offense" under 21 U.S.C. § 841) was, and continues to be, defined as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. § 802(13). But the Commission defines "felony" in the career

offender guideline to include offenses classified by the convicting jurisdiction as misdemeanors. USSG § 4B1.2, cmt. n.1 ("[p]rior felony conviction" is "an offense punishable by … imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed"). Some states, such as Colorado, Connecticut, Iowa, Maryland, Massachusetts, Michigan, Pennsylvania, South Carolina, and Vermont, classify certain offenses that are punishable by imprisonment for more than one year as misdemeanors. For example, in Maryland, Massachusetts, and Pennsylvania, and unlike in any other state, misdemeanor assault and battery is punishable for a term of imprisonment of more than one year. In South Carolina, "failure to stop for a blue light" is a misdemeanor punishable up to three years. Defendants with prior convictions in these states can be classified as a "career offender" based on such misdemeanors, where they would not be in most other states, which make misdemeanors punishable by imprisonment for up to one year. This creates unwarranted disparity.

Under the advisory guideline system, district courts vary downward when a defendant's career offender designation is based on prior state misdemeanors. *See, e.g.*, *United States v. Colon*, 2007 WL 4246470 (D. Vt. Nov. 29, 2007). If a client was classified as a "career offender" based on a prior conviction that was a state misdemeanor, that would be grounds for a departure or variance today.

3. When the Career Offender Designation Was Based on Prior "Crimes of Violence"

Congress had in mind "repeat violent offenders," "a relatively small number of repeat offenders [who] are responsible for the bulk of violent crime on our streets," those "who stab, shoot, mug, and rob."[36] Rather than define "crime of violence" to require actual violence or actual risk of physical injury, the Commission expanded the definition of "crime of violence" beyond even the later-enacted definition of "violent felony" under the ACCA. Under the Commission's definition, a "crime of violence" for purposes of the career offender guideline requires no more than an abstract possibility of risk of injury. In 1993, the Commission itself acknowledged that its definition reaches offenses not traditionally considered crimes of violence, but took no action to narrow its definition or provide evidence to support it.[37]

As described above in Part III.B.1, the Supreme Court eventually stepped in, narrowing the definition of "crime of violence" under the force clause at § 4B1.2(a)(1) and the residual clause at § 4B1.2(a)(2). But the fix is not perfect. The Commission has not narrowed its definition or commentary to accord with the Supreme Court decisions interpreting the ACCA. As a result, some courts continue to interpret § 4B1.2 more broadly than the ACCA, finding that § 4B1.2's commentary reaches offenses that courts have held do not satisfy the Supreme Court's

[36] *Id.* at 175; 128 Cong. Rec. 26,512, 26,518 (daily ed. Sept. 30, 1982).

[37] *See* 58 Fed. Reg. 67,552, 67,533 (Dec. 21, 1993).

interpretation of "violent felony" under ACCA, such as such as possession of a sawed-off shotgun[38] and attempted second degree burglary.[39]

If a client's prior conviction is for an offense that would not be a "crime of violence" under the Supreme Court's narrowing interpretations, but is nevertheless deemed by the Commission to be a "crime of violence" under its broader definition in the commentary to § 4B1.2, that would be grounds for a variance under the advisory system today.

Courts also often vary under the advisory guidelines when a prior offense, though technically a "crime of violence," was not actually violent or indicative of a "career" of violence. *See, e.g.*, *United States v. Monroe*, 2009 WL 2391541 (E.D. Wis. July 31, 2009) (varying in part because the prior conviction of fleeing from police "did not involve assaultive behavior or weapon possession"); *United States v. Harris*, 2008 WL 2228526 (E.D. Va. May 29, 2008) (varying based on finding that the "application of the career offender provision in this context of this particular crack-cocaine case—where the career offender status is based on a ten year-old conviction for larceny from a person [i.e., pickpocketing]—reveals the inherent harshness of the crack cocaine/powder disparity and reflects unsound sentencing policy"); *United States v. Gavin*, 2008 WL 4418932 (E.D. Ark. Sept. 29, 2008) (varying in part because "defendant's criminal history [consisting of crimes of violence] reflects criminal behavior consistent with a vagrant and substance abuser as opposed to a violent offender"); *United States v. Overton*, 2008 WL 3896111 (E.D. Tenn. Aug. 19, 2008) (varying substantially because "defendant's career offender status greatly overstates the seriousness of the defendant's prior criminal history" in that he "has never spent any time in jail or prison—in all likelihood because the convictions did not warrant it," *i.e.* his "vehicular homicide conviction occurred when he was a very young man and his drug conviction was for mere possession"). If a client's prior conviction technically qualifies but involved no actual violence and is not indicative of a "career" of violence, that would be grounds for a variance.

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[38] *Compare United States v. Moore*, 326 F. App'x 794, 795 (5th Cir. 2009) (possession of a sawed-off shotgun is a crime of violence based on express inclusion in the commentary to § 4B1.2), *with United States v. Miller*, 721 F.3d 435, 443 (7th Cir. 2013) (holding that possession of a sawed-off shotgun is not an ACCA predicate after *Begay*, while assuming without deciding that the offense still qualifies as a predicate under § 4B1.2). **NOTE:** On April 21, 2014, the Supreme Court granted *certiorari* to resolve a circuit split regarding whether possession of a sawed-off shotgun is a violent felony under the ACCA's residual clause. *Johnson v. United States*, No. 13-7120.

[39] *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010) (attempted second degree burglary under Arizona law, which includes possessing burglary tools, is a crime of violence under § 4B1.2, though not a violent felony under the ACCA, because guideline commentary includes "attempt"); *see also United States v. Rooks*, 556 F.3d 1145, 1149-50 (10th Cir. 2009) ("Unlike the ACCA and § 4B1.2(a), the [career offender guideline's] Application Note definition is not directly preceded by an 'otherwise' clause. Application Note 1 therefore arguably supports a broader reading of § 4B1.2(a)'s scope.").

Another ground for variance would be unwarranted uniformity, *i.e.*, sentencing unlike offenders the same, which is just another form of unwarranted disparity. A 1988 Commission study noted that the career offender guideline "makes no distinction between defendants convicted of the same offenses, either as to seriousness of their instant offense or their previous convictions." U.S. Sent'g Comm'n, *Career Offender Guidelines Working Group Memorandum* at 13 (1988).[40] In *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc), the Second Circuit encouraged policy-based variances where the defendant's criminal history is dramatically less serious than other offenses included in § 4B1.2, described as a "wide spectrum of offenses of varying levels of seriousness, from, on the one hand, murder or rape, to, on the other hand, attempted burglary of a dwelling." *Id.* at 192. In other words, it is unsound policy to treat a defendant with a relatively minor prior conviction involving no actual violence (possession of burglary tools or resisting arrest) the same as a defendant who previously committed murder.

4. When individualized circumstances support a finding that long term of imprisonment is not necessary to serve sentencing purposes.

The sentence would also likely be lower today under the judge's broad authority to consider relevant individualized circumstances, *see Gall v. United States*, 552 U.S. 38 (2007), and to impose a sentence that ties the individualized circumstances to the purposes of sentencing. *See* How the Supreme Court's Decisions Rendering the Guidelines Advisory Would Result in a Lower Sentence Today.

For example, in *United States v. Preacely*, 628 F.3d 72 (2d Cir. 2010), Jamar Preacely qualified as a career offender under § 4B1.1, with a guideline range of 188-235 months. After his arrest and release pretrial, he overcame his drug addiction. He then underwent voluntary counseling, became a model employee after completing a competitive workforce training program sponsored by the local district attorney, married his girlfriend and was a responsible father to their child, and become a youth advisor for a gang prevention program. The sentencing court departed downward to 94 months based on the government's substantial assistance motion, but otherwise appeared to believe it could not depart from the career offender range for any other reason.

The Second Circuit vacated the sentence and remanded for resentencing specifically for the district court to consider Preacely's rehabilitation because "evidence of rehabilitation was particularly relevant to determining whether the Career Offender Guideline was appropriate." In a concurring opinion, Judge Lynch noted that "great harm would be done if we upheld a sentence that imposed long years in prison on an offender [subject to the career offender guideline] who no longer presents a danger, when a lesser sentence would better serve the purposes of the criminal law." *Id.* at 85 n.* (Lynch, J., concurring). On remand, the court sentenced Preacely to 72 months.

[40] This report is available at http://www.src-project.org/wpcontent/uploads/2009/08/ussc_report_careeroffender_19880325.pdf.

In *United States v. Newhouse*, 919 F. Supp. 2d 955 (N.D. Iowa 2013), the defendant qualified as a career offender with a "mind-numbing" range of 262-327 months. In an extensive written opinion, the sentencing judge first determined, following *Kimbrough* and *Spears*, that the career offender guideline "yield[s] an excessive and unjust sentence" for any low-level, non-violent drug addict. *Id.* at 991. He then considered the defendant's individualized circumstances under § 3553(a), and that the defendant herself had no history of violence and was "a long-term, chronic drug addict whose entire criminal history is tied to her addiction," and whose "height of [] involvement in the drug trade has been as a low-level pill smurfer." Also considering the sentences of co-defendants and the need to avoid unwarranted sentencing disparities, the judge concluded that the mandatory minimum of 120 months was sufficient to serve sentencing purposes under § 3553(a), if not greater than necessary. *Id.*

Appendix 1

Effect of Fair Sentencing Act on Statutory Ranges		
Statutory Range	Pre-FSA	Post-FSA
21 USC 841(b)(1)(A)		
10-life	50 grams or more	280 grams or more
20-life	50 grams or more + one 851	280 grams or more + one 851
	50 grams or more + the drug was the but for cause of death or serious bodily injury	280 grams or more + the drug was the but for cause of death or serious bodily injury
Life	50 grams or more + two 851s	280 grams or more + two 851s
21 USC 841(b)(1)(B)		
5-40 years	5 grams or more	28 grams or more
10-life	5 grams or more + any number of 851s	28 grams or more + any number of 851s
20-life	5 grams or more + the drug was the but for cause of death or serious bodily injury	28 grams or more + the drug was the but for cause of death or serious bodily injury
life	5 grams or more + any number of 851s + the drug was the but for cause of death or serious bodily injury	28 grams or more + any number of 851s + the drug was the but for cause of death or serious bodily injury
21 USC 841(b)(1)(C)		
0-20 years	Less than 5 grams	Less than 28 grams
0-30 years	Less than 5 grams + any number of 851s	Less than 28 grams + any number of 851s
20-life	Less than 5 grams + the drug was the but for cause of death or serious bodily injury	Less than 28 grams + the drug was the but for cause of death or serious bodily injury
life	Less than 5 grams + any number of 851s + the drug was the but for cause of death or serious bodily injury	Less than 28 grams + any number of 851s + the drug was the but for cause of death or serious bodily injury

Appendix 2 – Attorney General Holder's Charging Policies

The August 12, 2013 memo[41] states that prosecutors "should decline to charge the quantity necessary to trigger a mandatory minimum sentence if the defendant meets *each*" of four criteria:

- "relevant conduct" does not involve violence, credible threat of violence, possession of a weapon, trafficking drugs to or with minors, death or serious bodily injury
- not an organizer, leader, manager, or supervisor of others within a criminal organization
- does not have "*significant* ties" to "*large-scale* drug trafficking organizations, gangs, or cartels"
- does not have a "significant criminal history," "normally evidenced by three or more criminal history points but may involve fewer or greater depending on the nature of any prior convictions." The Aug. 29 memo[42] states that 3 or more points "may not be significant if, for example, a conviction is remote in time, aberrational, or for conduct that itself represents non-violent low-level drug activity"

The August 12, 2013 memo states that prosecutors "should decline to file an information pursuant to 21 U.S.C. § 851 unless the defendant is involved in conduct that makes the case appropriate for severe sanctions[,] . . . consider[ing]" six factors [need not meet *each* of these criteria – it's a totality of the circumstances test]:

- Whether D "was an organizer, leader, manager or supervisor of others within a criminal organization"
- Whether "the *defendant* was involved in the use or threat of violence in connection with the offense" [*not* relevant conduct]
- "The nature of the defendant's criminal history, including any prior history of *violent* conduct or *recent* prior convictions for *serious* offenses"
- "Whether the defendant has *significant* ties to *large-scale* drug trafficking organizations, gangs, or cartels"
- "Whether the filing would create a gross sentencing disparity with equally or more culpable co-defendants"
- "Other case-specific aggravating or mitigating factors."

The defendant is not required to plead guilty or cooperate in order to be charged fairly. Rather, the defendant need only "meet[] the above criteria." Holder Memo, Aug. 12, 2013, at 2 ("Timing

[41] Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 12, 2013).

[42] *See* Memorandum from Eric H. Holder, Jr., Attorney General, to the United States Attorneys and Assistant Attorney General for the Criminal Division on Retroactive Application of Department Policy on Charging Mandatory Minimum Sentences and Recidivist Enhancements in Certain Drug Cases (Aug. 29, 2013).

and Plea Agreements"). For defendants "charged but not yet convicted," "prosecutors should apply the new policy and pursue an appropriate disposition consistent with the policy's section, 'Timing and Plea Agreements.'" For defendants who already pled guilty or were convicted by a jury but have not yet been sentenced, prosecutors are "encouraged" to "consider" withdrawing § 851s. Holder Memo, Aug. 29, 2013, at 1-2.

The May 19, 2010 Holder Memo states: "Charges should not be filed simply to exert leverage to induce a plea."[43] Section 9-27.320 of the United States Attorney's Manual states: "Proper charge selection also requires consideration of the end result of successful prosecution—the imposition of an appropriate sentence under all the circumstances of the case. In order to achieve this result, it ordinarily should not be necessary to charge a person with every offense for which he/she may technically be liable (indeed, charging every such offense may in some cases be perceived as an unfair attempt to induce a guilty plea)."

[43] Memorandum from Eric H. Holder, Jr., Attorney General, to All Federal Prosecutors on Department Policy on Charging and Sentencing 2 (May 19, 2010).

Appendix 3

<table>
<tr><th colspan="4">21 USC 841(b)(1)(A)</th></tr>
<tr><th colspan="2">Mandatory 10 Years-
Maximum Life
weight of “mixture or substance containing a detectable amount of” the drug</th><th>Mandatory 20 Years-
Maximum Life</th><th>Mandatory Life</th></tr>
<tr><td>Heroin</td><td>1,000 grams or more</td><td rowspan="9">• prosecutor files one § 851 enhancement for prior “felony drug offense”

• death or serious bodily injury results</td><td rowspan="9">• prosecutor files two § 851 enhancements for prior “felony drug offenses”

• prosecutor files one § 851 enhancement for prior “felony drug offense” and death or serious bodily injury results</td></tr>
<tr><td>Powder cocaine</td><td>5,000 grams or more</td></tr>
<tr><td>Crack cocaine</td><td>280 grams or more</td></tr>
<tr><td>PCP</td><td>1 kg. or more, or 100 grams or more pure</td></tr>
<tr><td>LSD</td><td>10 grams or more</td></tr>
<tr><td>N-phenyl-N-propanamide</td><td>400 grams or more, or 100 grams or more analogue</td></tr>
<tr><td>Marijuana</td><td>1,000 kg. or more, or 1,000 or more plants</td></tr>
<tr><td>Methamphetamine</td><td>500 grams or more, or 50 grams or more pure</td></tr>
<tr><th colspan="4">21 USC 841(b)(1)(B)</th></tr>
<tr><th colspan="2">Mandatory 5 Years-
Maximum 40 Years
weight of “mixture or substance containing a detectable amount of” the drug</th><th>Mandatory 10 Years-
Maximum Life</th><th>Mandatory 20 Years-
Maximum Life</th><th>Mandatory Life</th></tr>
<tr><td>Heroin</td><td>100 grams or more</td><td rowspan="3">prosecutor files any number of § 851 enhancements for prior “felony drug offense”</td><td rowspan="3">death or serious bodily injury results</td><td rowspan="3">prosecutor files any number of § 851 enhancements for prior “felony drug offense” and death or serious bodily injury results</td></tr>
<tr><td>Powder cocaine</td><td>500 grams or more</td></tr>
<tr><td>Crack cocaine</td><td>28 grams or more</td></tr>
</table>

PCP	100 grams or more, or 10 grams or more pure			
LSD	1 gram or more			
N-phenyl-N-propanamide	40 grams or more, or 10 grams or more analogue			
Marijuana	100 kg. or more, or 100 or more plants			
Methamphetamine	50 grams or more, or 5 grams or more pure			

21 USC 841(b)(1)(C)			
0-20 Years	**0-30 Years**	**Mandatory 20 Years -Maximum Life**	**Mandatory Life**
Weight less than above or unspecified for any controlled substance in Schedule I or II except less than 50 kg. or an unspecified weight of marijuana (see below, 841(b)(1)(D)) 50 or more marijuana plants regardless of weight; 10 kg. hashish; 1 kg. hashish oil; any amount of gamma hydroxybutric acid; 1 gram flunitrazepam	prosecutor files any number of § 851 enhancements for prior "felony drug offense"	death or serious bodily injury results	prosecutor files any number of § 851 enhancements for prior "felony drug offense" and death or serious bodily injury results

21 USC 841(b)(1)(D)	
0-5 Years	**0-10 Years**
Less than 50 kg. marijuana or unspecified But "distributing a small amount of marihuana for no remuneration" is punishable as simple possession by not more than 1 year, or by 15 days-2 years if committed after a prior conviction for	prosecutor files any number of § 851 enhancements for prior "felony drug offense"

any drug offense, or by 90 days-3 years if committed after 2 or more prior convictions for any drug offense. 21 USC 841(b)(4), 844.	

Appendix 4

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

Step 1: Determine the applicable definition under the career offender guideline (a "crime of violence" or a "controlled substance offense").

Step 2: Determine the elements of the prior offense of conviction by looking at the face of the statute of conviction, both state and federal case law interpreting the statute or common law offense, and standard jury instructions. At this point, you may find that a federal court has already determined whether a conviction categorically qualifies as a career offender predicate in accordance with the relevant definition properly construed under current Supreme Court law.[44] If so, that is the end of the inquiry. If not, go to Step 3.

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

The Supreme Court held in *Sykes v. United States*, 131 S. Ct. 2267 (2011), that the Indiana offense is a "violent felony" under the residual clause of the ACCA, which is the same as the residual clause under the career offender guideline. USSG § 4B1.2(a)(2). A prior conviction under the Indiana statute is therefore a "crime of violence."

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

Step 3: Determine whether the elements of the prior offense **always** fit within the applicable definition of the federal predicate. The prior offense always qualifies as a career offender predicate if the elements of the prior offense **match or are**

[44] As explained in Part II.B of the accompanying Memorandum, and with very few exceptions, *see* Part III.D.3, a prior offense that does not qualify as a "violent felony" under the ACCA also does not qualify as a career offender under the guidelines.

narrower than the applicable definition. If this match occurs, that is the end of the inquiry, and the modified categorical approach does not apply. The prior offense is categorically a career offender predicate. If not, go to Step 4.

Example: A state burglary statute requires proof of four elements: (1) unlawful entry (2) into a building (3) that is a dwelling (4) with intent to commit a crime. State law limits the definition of "dwelling" to a building or structure.

The career offender guideline lists "burglary of a dwelling" as a crime of violence. USSG § 4B1.2(a)(2). "Generic" burglary of a dwelling under the guideline requires proof of four elements: (1) unlawful entry (2) into a building (3) that is a dwelling, (4) with intent to commit a crime.

A conviction under this state statute always qualifies as a "crime of violence" under the career offender guideline because the elements of the state offense match the four elements of "generic" burglary of a dwelling. There is no need to determine whether it qualifies under the force clause or the residual clause.

Be careful: Be sure to research state law. Some states have interpreted "dwelling" to include boats or motor vehicles.

A conviction under a state statute that has done so does not qualify as "burglary of a dwelling" under the career offender guideline because the element of "dwelling" of the state offense is broader than "generic" burglary of a dwelling.[45] You must go on to determine whether the conviction qualifies under the residual clause.

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

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

[45] *Cf. United States v. Henriquez*, __ F.3d __, 2014 WL 2900935 (4th Cir. June 27, 2014) (holding that Maryland first degree "burglary of a dwelling" is broader than generic burglary because it is not limited to buildings or structures where Maryland has interpreted "dwelling" to include boats and vehicles, and thus does not qualify as the enumerated "burglary of a dwelling' under § 2L1.2).

Subsection (a) requires proof of (1) unlawful entry (2) into a building (3) that is a dwelling (4) with intent to commit a crime.

Subsection (b) requires proof of (1) entry (2) into a building (3) that is a dwelling (4) with intent to commit a crime.

Subsection (a) has all four "generic" elements of burglary of a dwelling, but subsection (b) is missing the *unlawful* entry element. Subsection (b) does not fit the generic definition of burglary of a dwelling, and so does not qualify as an enumerated offense under § 4B1.2(a)(2). Therefore, the modified categorical approach applies. Go to Step 5.

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

a. Sometimes these phrases are just a non-exhaustive list of examples of different factual means through which an element can be met. The jury does not ever have to find these factual means to convict the defendant. Factual means are not elements. In these circumstances, the modified categorical approach does not apply.

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

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

The applicable career offender definitions are as follows:

- Under the "force clause," "force" means "violent force," i.e., force capable of causing physical injury or pain. *Johnson v. United States*, 559 U.S. 133, 140 (2010).

- In commentary, the career offender guideline lists "aggravated assault" as a "crime of violence." USSG § 4B1.2 cmt. (n.1). Generic aggravated assault is defined as (1) knowingly (2) causing or attempting to cause (3) bodily injury to another (4) with a deadly weapon. *See United States v. Cooper*, 739 F.3d 873, 882 (6th Cir. 2014).
- Under the residual clause, a "crime of violence" is an offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another." USSG § 4B1.2(a)(2); *Begay v. United States*, 553 U.S. 137 (2008); *Sykes v. United States*, 131 S. Ct. 2267 (2011).

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

Under the categorical approach, the government conceded that the offense is "not categorically a generic aggravated assault." *Id.* at 337 n. 12.[46] The court held that, under *Johnson*, it does not satisfy the "force clause" because the first element—an act of "violent injury"—does not necessarily involve force capable of causing physical injury. *Id.* at 327. Under *Begay*, the second element—"circumstances in aggravation"—"can be satisfied simply by showing, for example, a disparity in age," which does not present the same "'serious potential risk of physical injury as the ACCA's enumerated offenses-burglary, arson, or extortion, [or offenses that] involve[] use of explosives.'" *Id.* at 337 (quoting *Begay*, 553 U.S. at 144).

Because the South Carolina offense fails to qualify as a "violent felony" under the ACCA, it is also not a "crime of violence" under the career offender guideline.

[46] *See also United States v. McFalls*, 592 F.3d 707, 717 (6th Cir. 2010) (holding that, under *Begay*, South Carolina assault and battery of a high and aggravated nature is not a generic aggravated assault for purposes of the career offender guideline because it requires only recklessness). As explained in Part III.B.1 of the accompanying memo, this holding remains good law after *Sykes*.

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

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

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

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

Under the "force clause" of the career offender guideline, a "crime of violence" "has as an element the use, attempted use, or threatened use of physical force against the person of another." USSG § 4B1.2(a)(1).

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

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

Example: Maryland second degree assault prohibits

"offensive physical contact with" *or* "physical harm" to the victim.

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

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

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

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

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

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

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

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

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

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

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

b. If the charging document and judgment simply note the statute or set forth both sets of elements, and the plea colloquy does not explicitly note the subset of elements to which defendant pled guilty, but reflects that defendant admitted to facts that conform with both sets of elements—the ones that match the relevant career offender definition and the ones that do not—then it must be assumed that the defendant pled guilty to the set of elements that do not qualify as a career offender predicate.

Example: A state burglary statute has two subsections with alternative elements. Subsection (a) requires (1) unlawful entry (2) into a building (3) that is a dwelling, (4) with intent to commit a crime. This satisfies the generic definition of burglary under the career offender definition of "crime of violence."

Subsection (b) requires (1) entry (2) into a building (3) that is a dwelling. It does not satisfy the generic burglary definition because it does not have the element of "unlawful" entry or the element of "with intent to commit a crime." Nor does it satisfy the force clause under *Johnson* or the residual clause, *see*, *e.g.*, *United States v. Martin*, __ F.3d __, 2014 WL 2525214 (4th Cir. June 5, 2014).

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

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

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

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

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

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

Whoever, wantonly or maliciously, shoots at, within, or into, or throws any missile or hurls or projects a stone or

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

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

Step 6: If the prior offense does not fit in the always or sometimes categories in Steps 3, 4, and 5, that means the prior offense will **never** qualify as a career offender predicate. Under the never category, the prior offense has no subset of elements that conforms with the career offender definition of "controlled substance" or "crime of violence." Thus, the prior offense categorically fails to qualify as a career offender predicate.

Example: A state burglary statute requires (1) entry (2) into building (3) that is a dwelling, (4) with intent to commit a crime.

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

See also "be careful" examples in Step 4.