

**CHALLENGING SENTENCING ENHANCEMENTS  
BASED ON PRIOR CONVICTIONS  
(With a Focus on Violent Felonies)**

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\*Cases cited in this paper are not necessarily the most current example of a stated principle of law. You will need to do further research. You may also consult “Federal Sentencing Update” by Marjorie Meyers and “Significant Decisions” by Tim Crooks.

## I. INTRODUCTION

- A. Prior convictions play a significant role in the advice that you give to your client, for example, about:
1. the decision to plead guilty or to go to trial;
  2. sentencing strategies; or
  3. qualification for certain prison “early release” programs.
- B. Prior convictions can be determinative of:
1. whether certain conduct constitutes a federal offense, see, e.g., 18 U.S.C. § 922(g)(1) (felon in possession of a firearm); 18 U.S.C. § 922(g)(9) (unlawful possession of a firearm subsequent to a “misdemeanor crime of domestic violence”);
  2. whether client will be released or detained pending trial, see 18 U.S.C. § 3142(e) & (f)(1)(A) (a rebuttable presumption for detention if, among other things, defendant has a prior conviction for a “crime of violence”), or sentencing, or appeal, see 18 U.S.C. § 3143(a) & (b).
  3. whether client is subject to greater minimum and/or maximum statutory sentence:
    - a. 18 U.S.C. § 2247 (“prior sex offense conviction” – maximum term of imprisonment is twice term otherwise provided for violation of chapter proscribing sexual abuse offense if committed after prior sex offense conviction); see also, e.g., 18 U.S.C. § 2251(e) (sexual exploitation of children), § 2252(b) (activities relating to material involving sexual exploitation of minors), § 2252A(b) (activities relating to material constituting or containing child pornography), § 2265A (repeat domestic violence or stalking offender), § 2426 (repeat offender of transporting for illegal sexual activity and related crimes).
    - b. 21 U.S.C. § 841(b)(1) (prior final felony drug conviction(s)); § 960(b); see also 21 U.S.C. § 851 (procedures to challenge prior convictions).

4. whether client is classified and sentenced as an armed career criminal, see 18 U.S.C. § 924(e)(1) (ACCA) (increasing statutory minimum and maximum punishment for person with three previous convictions for a “violent felony,” “serious drug offense,” or both); see also USSG § 4B1.4 (Armed Career Criminal Guideline);
5. whether client is subject to mandatory life sentence, see 18 U.S.C. § 3559(c)(1) (person convicted of a “serious violent felony” has final convictions on separate prior occasions for either (1) two or more “serious violent felonies” or (2) one or more “serious violent felonies” and one or more “serious drug offenses”);
6. whether client’s base offense level is enhanced under Sentencing Guidelines:
  - a. USSG §§ 2K1.3(a)(1)-(2) & 2K2.1(a)(1)-(4) (increased offense level for firearms conviction depending on number of prior convictions for “crime of violence” or “controlled substances offense”);
  - b. USSG § 2L1.2(b)(1) (increased offense level in varying degrees depending on whether prior felony conviction is for “drug trafficking offense,” “crime of violence,” “firearms offense,” “child pornography offense,” “national security or terrorism offense,” “human trafficking offense,” or “alien smuggling offense,” or on whether defendant has prior conviction for “aggravated felony,” “any other felony,” or three or more misdemeanor convictions for “crimes of violence” or “drug trafficking offenses”);
7. whether client is subject to criminal history points under Sentencing Guidelines, see, e.g., USSG § 4A1.1.
8. whether client is subject to upward departure under Sentencing Guidelines, see USSG § 5K2.17 (for defendant possessing high-capacity, semiautomatic firearm in connection with a “crime of violence” or “controlled substance offense”);
9. whether victim is given opportunity to allocute at sentencing, see Fed. R. Crim. P. 32(i)(4)(B);
10. whether client is eligible for early release from prison, see 18 U.S.C. § 3621(e) & 28 C.F.R. § 550.58.

C. *This checklist is by no means complete.*

1. It presents practice tips for determining the identity, reliability, and nature of the offense of a predicate conviction.
2. It discusses the analytical constructs involved in the most common sentencing enhancements related to “crimes of violence,” “violent felonies,” and “serious violent felonies.”
  - a. Many of these principles and practice points also apply to enhancements based on drug convictions.
  - b. For the most common issues associated with enhancements based on prior drug convictions, look at “Federal Sentencing Update” by Marjorie Meyers.
3. It emphasizes the need to pay particular attention to each word in the definition at issue and not to take any word or phrase for granted.
4. Many of the federal statutory and Guidelines provisions noted above include *multiple* requirements, most of which will *not* be addressed in this checklist.
5. **Remember:** Read the entire definition and identify each component part that is required for a predicate conviction to qualify for its intended purpose.
6. Document your research and reasons for decision in the file.

II. **WAS YOUR CLIENT CONVICTED OF THE ALLEGED PREDICATE CONVICTION?**

- A. Get copies (certified, if possible) of judicially noticeable documents that are sufficiently reliable to identify the predicate conviction and your client as the person convicted.
- B. **Remember:** Government has the burden to prove the fact of conviction and that the offense of conviction qualifies for the stated purpose. It must establish with legal certainty the specific offense of which your client was convicted in order to determine whether the prior conviction qualifies for the stated purpose.
  1. Supreme Court said so. See Taylor v. United States, 495 U.S. 575 (1990); see also Shepard v. United States, 544 U.S. 13 (2005).

2. Fifth Circuit did too. See, e.g., United States v. Bonilla-Mungia, 422 F.3d 316, 321 (5th Cir.2005); United States v. Gonzalez-Chavez, 432 F.3d 334, 338 (5th Cir. 2005).
- C. The Supreme Court in Taylor and Shepard instruct that courts may consider the following documents or similar conclusive records made or used in adjudicating guilt, and these are the documents we should have in our file:
1. In all cases:
    - a. Charging document
    - b. Judgment
  2. Also in guilty plea cases:
    - a. Written plea agreement
    - b. Transcript of plea colloquy in which factual basis for plea was confirmed by client
    - c. Explicit factual findings by trial judge to which client assented
  3. Also in jury trial cases:
    - a. Jury instructions
    - b. Jury verdict
- D. Courts may **not** consider the following documents, or documents similar to them, because they lack the required legal certainty:
1. Facts set forth in PSR, see, e.g., United States v. Gonzalez-Chavez, 432 F.3d 334, 338 (5th Cir. 2005);
  2. Abstract of judgment, see, e.g., United States v. Gutierrez-Ramirez, 405 F.3d 352, 357-59 (5th Cir. 2005);
  3. Court minutes, see, e.g., United States v. Lopez-Solis, 447 F.3d 1201, 1210 n.61 (9th Cir. 2006);
  4. Certificate of disposition, see, e.g., United States v. Hernandez, 218 F.3d 272, 278-79 (3d Cir. 2000); but see United States v. Neri-Hernandes, 504 F.3d 587, 591-92 (5th Cir. 2007) (can use certificate of disposition to establish “fact” or “existence” of prior conviction);

5. Docket sheet, *see, e.g., United States v. Jimenez-Banegas*, 209 Fed. Appx. 384, 389 n.3 (5th Cir. 2006).
  6. Police reports or complaint applications, *see Shepard v. United States*, 544 U.S. 13, 16 (2005).
- E. Identify the exact offense of conviction.
1. Did client plead guilty to, or was client found guilty of, the offense charged?
  2. Did client plead guilty to, or was client found guilty of, a lesser-included or different offense?
  3. If client pleaded guilty or was found guilty of lesser-included or different offense, then the original charging document **cannot** be used in the analysis of whether the predicate conviction qualifies for enhancement purposes. *See United States v. Turner*, 349 F.3d 833, 836 (5th Cir. 2003).
  4. **Least Culpable Act:** “If an indictment is silent as to the offender’s actual conduct, [the court] must proceed under the assumption that his conduct constituted the least culpable act satisfying the count of conviction.” *United States v. Houston*, 364 F.3d 243, 246 (5th Cir. 2004) (applying analysis to conclude that Texas statutory rape did not qualify as “crime of violence” under USSG § 4B1.2(a)); *United States v. Insaugarat*, 378 F.3d 456, 467-71 (5th Cir. 2004) (applying *Houston*’s “least culpable act” rule to hold that Florida aggravated stalking was not “crime of violence” under USSG §§ 4B1.1 and 4B1.2); *see also Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010) (analyzing whether prior conviction for battery was “violent felony” within meaning of ACCA by considering “the least of” three disjunctive means of committing offense under state statute and concluding “nothing in the record of . . . conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts”).
  5. **Pleading Practices of Jurisdiction:** In many jurisdictions, where the charging document contains conjunctive or disjunctive allegations of different ways a statute was violated, a jury’s verdict or a guilty plea may rest upon proof of facts that a defendant violated the statute in any one of the ways listed.
    - a. A conviction on such an indictment does not necessarily establish that the defendant was “convicted” of any particular one of those ways.

- b. If one of the alleged ways would not qualify for enhancement, and the government does not come forward with further evidence to demonstrate the basis on which the conviction rested, enhancement is improper. See, e.g., United States v. Gonzales, 484 F.3d 712 (5th Cir. 2007) (state jury trial); see also, e.g., United States v. Morales-Martinez, 496 F.3d 356, 357-61 (5th Cir. 2007) (state guilty plea).
  - c. **Remember:** Government has the burden to prove which specific offense is the basis of the prior conviction. Government cannot simply argue that, because your client pleaded guilty to an indictment charging all of the various ways of committing an offense, the client admitted to committing the offense in all of the ways alleged. *Texas, in particular, does not permit such a conclusion.*
- F. Get a copy of the statute of conviction.
- 1. Look at the statute *in effect at the time of the offense*.
  - 2. You can search Westlaw for the particular version by following these steps:
    - a. Search Westlaw Directory under “U.S. Federal Materials” or “U.S. State Materials,” whichever applies.
    - b. If using “Federal Materials, select “Federal Statutes,” then select “United States Code Annotated – Historical Versions,” then select particular year at issue, and then type in key words to locate statute.
    - c. If using “State Materials,” select “Texas” or “Other U.S. States,” then select particular state, then select “Statutes & Legislative Materials,” then select particular states “Historical Statutes Annotated,” then select particular year at issue, and then type in key words to locate statute.
- G. If the statute provides alternative ways of committing the offense, identify the particular statutory subsection or provision under which your client was convicted or the particular manner in which your client committed the offense by using the judicially noticeable documents obtained for the prior conviction.
- 1. **Remember:** If the statute of conviction contains a series of disjunctive elements, the court may look to the judicially noticeable documents for the limited purpose of determining which of a series of disjunctive elements a

defendant's conviction satisfies. See United States v. Calderon-Pena, 383 F.3d 254, 257 (5th Cir. 2004) (en banc).

2. **Remember:** Narrowing the prior offense of conviction and the particular statutory subdivision or alternative way of committing the offense plays an important role in the legal analysis used.

### III. WAS YOUR CLIENT REPRESENTED BY COUNSEL FOR THE PREDICATE CONVICTION?

A. To make this determination, look at the following:

1. Transcript of "waiver of counsel" colloquy
2. Written waiver documents
3. If there are no transcripts or written waiver documents, determine what the custom and practice was in the particular jurisdiction at the time of the prior proceedings.

B. Was your client denied the right to counsel altogether in the prior proceeding?

1. A conviction obtained in violation of the right to counsel may not be used to enhance a defendant's sentence in a subsequent case. See United States v. Tucker, 404 U.S. 443, 449 (1972); Burgett v. Texas, 389 U.S. 109, 115-16 (1967).
2. A defendant may challenge the enhancement of his sentence on the ground that he was denied counsel in the predicate conviction, even if the predicate conviction has not been invalidated on that ground. See Custis v. United States, 511 U.S. 485, 493-96 (1994).
3. A defendant may challenge the denial of counsel in the following types of cases:
  - a. Felonies. See Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963).
  - b. Misdemeanors and petty offenses for which a term of imprisonment was imposed. See Scott v. Illinois, 440 U.S. 367, 373-74 (1979); Argersinger v. Hamlin, 407 U.S. 25, 36 (1972).
  - c. Misdemeanors and petty offenses for which a suspended sentence of imprisonment was imposed. See Alabama v. Shelton, 535 U.S. 654, 658, 674 (2002).

- d. **Note:** Fifth Circuit has held that rule of Alabama v. Shelton does not apply to “stand alone” probation sentences, like those imposed in the federal criminal justice system since 1987. See United States v. Perez-Macias, 335 F.3d 421, 427-28 (5th Cir. 2003).
  - e. **Note:** Fifth Circuit has held that a prison sentence imposed upon revocation of a “stand-alone” probation sentence does not retroactively invalidate an uncounseled plea and conviction. See United States v. Rios-Cruz, 376 F.3d 303, 304 (5th Cir. 2004).
  - f. **Note:** Fifth Circuit left open the question of whether the uncounseled plea and conviction prevents a district court from imposing a prison sentence following revocation of a defendant’s “stand-alone” probation. Id.
4. **Remember:** Defendant has the burden of proving that he was indigent and therefore qualified for the appointment of counsel. See, e.g., Kitchens v. Smith, 401 U.S. 847, 848 (1971); Potts v. Estelle, 529 F.2d 450, 452 (5th Cir. 1976). Defendant’s testimony or affidavit should suffice for this purpose. See, e.g., Loper v. Beto, 405 U.S. 473, 479 n.6 (1972) (plurality op.).
- C. If client waived counsel in the prior proceeding, did client do so competently and validly?
- 1. **Remember:** Defendant has the burden to prove that he did not competently and validly waive his right to the assistance of counsel. Iowa v. Tovar, 541 U.S. 77, 92 (2004).
  - 2. The Supreme Court held in Iowa v. Tovar, 541 U.S. at 81, that the constitutional requirement for a valid waiver of counsel is satisfied when the trial court informs the defendant of the following:
    - a. Nature of the charges against him;
    - b. Right to be counseled regarding his plea;
    - c. Right to appointed counsel at no cost to him if he cannot afford counsel; and
    - d. Range of allowable punishments attendant upon entering a guilty plea.
  - 3. Methods of proving that the waiver was invalid because of the trial court’s failure to inform the defendant of the above, include, in order of preference:

- a. Transcript of waiver of counsel colloquy.
- b. Written waiver documentation.
- c. Evidence of custom and practice in the particular jurisdiction at the time of the prior conviction, such as affidavit from practitioner from that jurisdiction.
- d. Client's testimony or affidavit, *but only as a last resort* and after weighing all of the ramifications.

4. **Remember:** Whether a waiver is invalid depends on the “particular facts and circumstances” of each case.

- a. For example, you may be able to challenge a waiver of counsel for an uneducated or non-citizen client with little or no previous experience with the American criminal justice system, even if the plea colloquy was satisfactory. See, e.g., United States v. Rea-Tapia, 134 Fed. Appx. 711, 714-15 (5th Cir. 2005) (unpublished) (though found waiver valid, noted that factors Court considers in assessing voluntariness of waiver include defendant's background, age, experience, and straight-forwardness of charge).

D. If your client was denied counsel or client did not knowingly and voluntarily waive counsel, then argue that the predicate conviction *cannot* be used to enhance the punishment, either under the United States Code or the Guidelines (for either offense-level or criminal-history calculation purposes).

#### IV. HOW IS THE PREDICATE CONVICTION USED IN YOUR CASE?

A. As an element of the offense? See, e.g., 18 U.S.C. § 922(g)(1) & (9).

- 1. Even where they are used to increase the statutory maximum sentence, prior convictions are generally considered to be sentencing enhancements, not elements of the offense. See *Almendarez-Torres v. United States*, 523 U.S. 224, 239-47 (1998) (holding in a 5-4 opinion that, even where prior convictions raise the applicable statutory maximum sentence, the Constitution does not require that they be treated as elements).

B. To enhance the statutory minimum and/or maximum punishment? See, e.g., 18 U.S.C. §§ 924(e)(1), 3559(c)(1), and 21 U.S.C. §§ 841 & 960 (see also 21 U.S.C. § 851).

- C. To calculate the Guidelines?
1. To increase the Guidelines offense level? See, e.g., USSG §§ 2K1.3(a)(1)-(2), 2K2.1(a)(1)-(4), 2L1.1(a)(1), 2L1.2(b)(1), 2L2.2(b)(2).
  2. To assess criminal history points? See, e.g., USSG § 4A1.1.
  3. To apply the Career Offender Guideline (USSG § 4B1.1)?
  4. To apply the Armed Career Criminal Guideline (USSG § 4B1.4)?
  5. To apply the Repeat and Dangerous Sex Offender Against Minors Guideline (USSG § 4B1.5)?

**V. HOW IS THE PREDICATE CONVICTION CLASSIFIED?**

- A. As a “felony,” “aggravated felony,” or “misdemeanor”?
1. See 18 U.S.C. § 16(b) (felony); 18 U.S.C. 922(g)(1) (felony); USSG § 2L1.2(b)(1)(A), (B) & (D) (felony);
  2. See USSG § 2L1.2(b)(1)(C) (aggravated felony);
  3. See 18 U.S.C. § 922(g)(9) (misdemeanor); USSG § 2L1.2(b)(1)(E) (misdemeanor).
- B. As “an offense under” a certain identified federal Act, or state law, see, e.g. 18 U.S.C. § 924(e)(2)(A).
- C. As some kind of violent crime?
1. “crime of domestic violence”? See 18 U.S.C. § 922(g)(9).
  2. “crime of violence”? See 8 U.S.C. § 1101(a)(43)(F); 18 U.S.C. § 3142(f)(1); USSG §§ 2K1.3(a)(1)-(2), 2K2.1(a)(1)-(4), 2L1.2(b)(1)(A)(ii) & (E); 4B1.1(a), 4B1.4(b)(3)(A); Fed. R. Crim. P. 32(i)(4)(B). [See also 18 U.S.C. § 924(c)(1)(A)]
  3. “violent felony”? See 18 U.S.C. § 924(e)(1).
  4. “serious violent felony”? See 18 U.S.C. § 3559(c)(1).

- D. As some kind of drug crime?
1. “drug trafficking crime”? See 18 U.S.C. § 924(c)(1)(A).
  2. “serious drug offense”? See 18 U.S.C. §§ 924(e)(1), 3559(c)(1).
  3. “drug trafficking offense”? See USSG § 2L1.2(b)(1)(A)(i), (B) & (E).
  4. “controlled substances offense”? See USSG §§ 2K1.3(a)(1)-(2), 2K2.1(a)(1)-(4), 4B1.1(a), 4B1.4(b)(3)(A).
- E. In some other way?
1. USSG § 2L1.2(b)(1)(A)(iii) (“firearms offense”).
  2. USSG § 2L1.2(b)(1)(A)(iv) (“child pornography offense”).
  3. USSG § 2L1.2(b)(1)(A)(v) (“national security or terrorism offense”).
  4. USSG § 2L1.2(b)(1)(A)(vi) (“human trafficking offense”).
  5. USSG § 2L1.2(b)(1)(A)(vii) (“alien smuggling offense”).
  6. USSG § 4B1.5(a) (“sex offense”).
- F. Can the prior conviction be an act of juvenile delinquency? See, e.g., 18 U.S.C. § 924(e)(2)(B) & (C).
- G. Must the prior conviction be final? See, e.g., 18 U.S.C. 3559(c)(1)(A).
- H. Is more than one predicate conviction required? See, e.g., 18 U.S.C. § 924(e)(1); 18 U.S.C. § 3559(c)(1).
1. If so, must the offenses of conviction have been committed on occasions different from one another? See 18 U.S.C. § 924(e)(1); 18 U.S.C. § 3559(c)(1)(B).
  2. Or, must the prior convictions have become final on separate occasions? See 18 U.S.C. § 3559(c)(1)(A).
- I. Must the government, either before trial or entry of a guilty plea, file an information (and serve it on defendant or defendant’s counsel) stating in writing the prior convictions used for enhancement? See, e.g., 18 U.S.C. § 3559(c)(4); 21 U.S.C. § 851.

## VI. WHAT SENTENCING-ENHANCEMENT DEFINITION APPLIES IN YOUR CASE?

- A. Identify the applicable definition and read it carefully to determine precisely what it means or requires.
1. Does the definition require you to determine whether:
    - a. an offense is “described in” a certain statute, see, e.g., USSG § 2L1.2, comment. (n.1(B)(ii)) (“child pornography offense”), comment. (n.1(B)(v)(VI)) (“firearms offense”), comment. (n.1(B)(vi)) (“human trafficking offense”);
    - b. an offense “consists of” certain conduct that would have been an offense under the statute if it had occurred within the jurisdiction of the United States, see, e.g., USSG § 2L1.2, comment. (n.1(B)(ii)) (“child pornography offense”), comment. (n.1(B)(v)(VI)) (“firearms offense”), comment. (n.1(B)(vi)) (“human trafficking offense”).
    - c. an offense “involves” or “tends to promote,” see, e.g., USSG § 2L1.2, comment. (n.1(B)(viii)) (“terrorism offense”).
  2. Must the offense be “punishable by” a certain amount of imprisonment? See, e.g., 18 U.S.C. § 924(e)(1)(B).
  3. Must a certain punishment have been imposed? See, e.g., 8 U.S.C. § U.S.C. § 1101(a)(43)(F) & (G); USSG § 2L1.2(b)(1)(A)(i) & (B).
- B. **Remember:** Many of the “crime-of-violence” and “drug-trafficking-offense” type of definitions are similar, or portions of their definitions overlap. But, they also differ in material ways. ***Read each definition carefully in the context in which it is used.***
- C. “Crime-of-violence”-type definitions are generally grouped into the following categories:
1. Definitions that require you to determine whether the elements of the offense of conviction are substantially similar to the elements of an “***enumerated offense.***” See, e.g., 18 U.S.C. § 924(e)(2)(B)(ii); USSG § 2L1.2(b)(1)(A)(ii) & comment. (n.1(B)(iii)); USSG § 4B1.2(a)(2).

2. Definitions that require you to determine whether the statute of conviction contains a specific element (“*has as an element*”) – for example, the use, attempted use, or threatened use of physical force against the person (or property) of another. See, e.g., 18 U.S.C. § 16(a) (against person or property); 18 U.S.C. § 924(c)(3)(A) (against person or property); 18 U.S.C. § 924(e)(2)(B)(i) (against person); 18 U.S.C. §3559(c)(2)(F)(ii); USSG § 2L1.2(b)(1)(A)(ii) & comment. (n.1(B)(iii)) (against person); USSG § 4B1.2(a)(1) (against person).
  3. Definitions that require you to determine whether, “*by its nature,*” it:
    - a. otherwise involves conduct that presents a serious potential risk of physical injury to another, see, e.g., 18 U.S.C. § 924(e)(2)(B)(ii); USSG § 4B1.2(a)(2), or
    - b. involves a substantial risk that physical force against the person (or property) of another may be used in the course of committing the offense. See, e.g., 18 U.S.C. § 16(b) (against person or property); 18 U.S.C. § 924(c)(3)(B) (against person or property); 18 U.S.C. § 3553(c)(2)(F)(ii) (against person).
  4. Definitions that require you to determine whether the charging document alleges certain conduct – for example, conduct that presented a serious potential risk of physical injury to another? See, e.g. USSG § 4B1.2(a)(2) & comment. (n.1).
- D. “Drug-trafficking-offense”-type definitions are generally grouped into the following categories:
1. An offense that “prohibits” certain conduct. See, e.g., 21 U.S.C. § 802(44).
  2. “Any felony punishable under” certain identified federal Acts, such as the Controlled Substances Act. See, e.g., 18 U.S.C. § 924(c)(2); 18 U.S.C. § 924(e)(2)(A)(i); 18 U.S.C. § 3559(c)(2)(H)(i).
  3. An offense under certain identified federal Acts or state law “involving” certain conduct. See, e.g., 18 U.S.C. § 924(e)(2)(A)(ii).

- E. Details that distinguish similar definitions include:
1. Requirement that offense be punishable by a certain amount of imprisonment, see, e.g., USSG § 4B1.2(a) (requiring “crime of violence” offense be punishable by term of imprisonment exceeding one year).
  2. Requirement that defendant have been punished by a certain term of imprisonment. See, e.g., 8 U.S.C. § 1101(a)(43)(F) (requiring sentence imposed for “crime of violence” conviction be at least one year).

## VII. BASIC ANALYTICAL CONSTRUCTS

### A. Categorical/Modified Categorical Approach

1. The United States Supreme Court in Taylor v. United States, 495 U.S. 575 (1990), and Shepard v. United States, 544 U.S. 13 (2005), announced the starting point in analyzing most federal sentencing enhancements based on prior convictions.
2. That starting point is the “categorical approach,” which requires a court to look at:
  - a. the fact of conviction and
  - b. the statutory definition of the prior offense.
3. Where a statute may be violated both in ways that qualify for enhancement and in ways that do not qualify for enhancement, a court may apply a “modified categorical approach,” which permits the court to look at certain judicially noticeable, as well as relevant and reliable, documents to determine precisely what the basis for your client’s conviction was.
  - a. Examples of these kinds of documents are (see also Section II.C):
    - (1) charging document and judgment
    - (2) also in guilty pleas: written plea agreement, guilty plea colloquy, explicit factual finding by court to which client assented
    - (3) also in jury trial: jury instructions and jury verdict

4. The “categorical approach” is an elements-based analysis, in which the underlying facts do *not* play a part.
5. The “categorical approach” is limited to the inquiry of what your client was “*convicted of*,” not what acts your client actually “committed.” For example:
  - a. Was client convicted of an offense that “has as an element the use, attempted use, or threatened use of physical force against the person or property of another”? 18 U.S.C. § 18(a).
  - b. Was client convicted of generic “burglary”? 18 U.S.C. § 924(e)(2)(B)(ii); USSG § 4B1.2(a)(2).
6. Recent Supreme Court cases have muddled the “categorical approach” making sentencing- enhancement arguments even more challenging than they already were.

**B. “Realistic Probability” Rather than “Theoretical Possibility” that Jurisdiction Prosecutes for Certain Conduct**

1. In the context of determining whether a prior conviction is for an enumerated “generic” offense, *see* Section IX, the Supreme Court has instructed that “to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language. It requires a *realistic probability*, not a theoretical possibility, *that the State would apply its statute to conduct that falls outside the generic definition* of a crime.” Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) (emphasis added).
2. Courts have interpreted Duenas-Alvarez in two contradictory ways:
  - a. The “evidentiary-burden” view
  - b. The “novel-interpretation” view
3. The Fifth Circuit appears to follow the “evidentiary burden” view, but has not explained why. *See, e.g., United States v. Ramos-Sanchez*, 483 F.3d 400, 403-04 (5th Cir. 2007); United States v. Balderas-Rubio, 499 F.3d 470, 473-74 (5th Cir. 2007).
  - a. This version ignores the categorical approach’s focus on the elements of the prior offense as defined by statute, and, instead, places an

evidentiary burden on the defendant to prove that a given state actually prosecutes people for the non-generic conduct clearly prohibited by the plain language of the statute.

- b. In Ramos-Sanchez, even though the Fifth Circuit recognized that the Kansas “indecent solicitation of a child” statute, as written, clearly prohibited consensual sex between fifteen-year olds, the Fifth Circuit held that there was “no evidence of the realistic probability of such a prosecution.” In other words, the defendant had failed to prove that the state of Kansas would, as a matter of fact, prosecute two fifteen-year-olds for having consensual sex.
  - c. In Balderas-Rubio, the Fifth Circuit assumed for the sake of argument that the Oklahoma statute prohibiting “indecent or lewd acts with a child under sixteen” covered lewdly or lasciviously looking at a minor from a distance, even if the minor had no knowledge of the defendant’s presence. But, the Fifth Circuit held that the defendant had “identified no instance of a person being convicted” under the statute involving those facts.
4. The Third Circuit seems to follow the “novel-interpretation” view. See, e.g., Jean-Louis v. Attorney General, 582 F.3d 462 (3d Cir. 2009).
    - a. This view limits Duenas-Alvarez’s “realistic probability” approach to those instances in which a defendant offers a novel interpretation of state law to establish that the state statute is broader than the generic offense.
  5. For a thorough discussion of these competing views, read Doug Keller, Causing Mischief for Taylor’s Categorical Approach: Applying “Legal Imagination” to Duenas-Alvarez, 18 Geo. Mason L. Rev. 625 (2011).
  6. Keller persuasively argues that the Supreme Court probably meant for the lower courts to take the “novel interpretation” approach, because a close reading of Duenas-Alvarez reflects that the Court’s approach is consistent with the “novel-interpretation” view and inconsistent with the “evidentiary burden” view. See Keller, Causing Mischief for Taylor’s Categorical Approach, 18 Geo. Mason L. Review, at 647-51.
  7. The defendant in Duenas-Alvarez argued that California’s generically worded “aiding and abetting” statute meant something very different from how other states defined those same words.

8. The Supreme Court’s remarks about “legal imagination,” realistic probability,” and “theoretical possibility,” must be read in context, and when done so reveal that what the Court meant was “that if one uses ‘legal imagination’ to interpret a state statute, there would only be a ‘theoretical possibility,’ rather than a ‘realistic probability,’ that the statute actually covers such conduct. Keller, *Causing Mischief for Taylor’s Categorical Approach*, 18 Geo. Mason L. Review, at 648-49.
9. As subsequent cases from the Supreme Court suggest, the Court in Duenas-Alvarez was merely “responding to a defendant’s argument for a novel judicial interpretation. It was not faced with a statute that covered generic and non-generic conduct; rather, the Court believed the state statute covered only generic conduct.” Id. at 649; see also id. at 651-58.
10. In the end, “Duenas-Alvarez was a case about how to interpret (or, really, not misinterpret) state law – nothing more.” Id. at 649.
11. “Where . . . a state statute explicitly defines a crime more broadly than the generic definition, no ‘legal imagination’ is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute’s greater breadth is evident from the text.” United States v. Grisel, 488 F.3d 844, 850 (9th Cir. 2007) (en banc); see also, e.g., United States v. Vidal, 504 F.3d 1072, 1082 (9th Cir. 2007 ) (en banc) (following and applying Grisel).
12. **Remember:** Although the Fifth Circuit seems to follow the “evidentiary burden” view, the Fifth Circuit has not explained why such a view is compelled by Duenas-Alvarez.
  - a. Stick to the categorical approach.
  - b. Show (if you can) why the plain meaning of the words of the statute include non-generic conduct.
  - c. Try to find case law to support your argument.
  - d. If there is no case addressing the non-generic conduct clearly prohibited by the statute, use Keller’s and other circuits’ reasoning to rebut any government argument that, because there is no case, there is no realistic probability that the state convicts for the non-generic conduct and it therefore does not have to narrow the prior conviction to one for a qualifying generic offense.

### C. “Circumstance-Specific” Approach

1. In the context of “aggravated felonies” in the area of immigration law, the Supreme Court has engrafted onto the categorical approach a “circumstance-specific analysis.” See Nijhawan v. Holder, 129 S. Ct. 2294 (2009) (Breyer, J., writing for a unanimous Court).
2. In Nijhawan, the alien/petitioner was ordered deported for having been convicted of the “aggravated felony” defined in 8 U.S.C. § 1101(a)(43)(M)(i) as “an offense that . . . involves fraud or deceit *in which the loss to the victim or victims exceeds \$10,000.*”
3. The specific question before the Court in Nijhawan was “whether the italicized language refers to an element of the fraud or deceit “offense” as set forth in the particular fraud or deceit statute defining the offense of which the alien was previously convicted” or whether “it refers to the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion.”
4. The Court found that it referred to the particular circumstances in which the offender had committed the fraud or deceit on a particular occasion.
5. In so doing, the Court adopted a mixed “categorical” and “circumstance specific” approach to “aggravated felonies” listed 8 U.S.C. § 1101(a)(43) that, like 8 U.S.C. § 1101(a)(43)(M)(i), are defined in terms of both a generic crime and specific circumstances. See Nijhawan, 129 S. Ct. at 2299-2303.
  - a. The Court was careful to note that § 1101(a)(43) “lists several of its ‘offenses’ in language that must refer to generic crimes,” but it also lists “other ‘offenses’ using language that almost certainly does not refer to generic crimes but refers to specific circumstances.” Id. at 2300.
  - b. The Court identified a few (but not all) of the “aggravated felonies” that are defined by language that “must refer to generic crimes,” such as:
    - (1) 8 U.S.C. § 1101(a)(43)(A) (murder, rape, or sexual abuse of a minor”).
    - (2) 8 U.S.C. § 1101(a)(43)(B) (“illicit trafficking in a controlled substance”)

- (3) 8 U.S.C. § 1101(a)(43)(C) (“illicit trafficking in firearms or destructive devices”).
  - (4) 8 U.S.C. § 1101(a)(43)(E), (H), (I), (J), and (L) (listing “offense described in” a particular section of the Federal Criminal Code).
- c. The Court also identified a few “aggravated felonies” that use language that does not refer exclusively to generic crimes but also contains qualifying language that refers to “specific circumstances,” such as:
- (1) 8 U.S.C. § 1101(a)(43)(P) (“falsely making, forging, counterfeiting, mutilating, or altering a passport [generic crime], *except in the case of a first offense for which the alien . . . committed the offense for the purpose of assisting . . . the aliens’ spouse, child, or parent . . . to violate a provision of this chapter* [specific circumstances]”).
  - (2) 8 U.S.C. § 1101(a)(43)(K)(ii) (“offense[s] . . . described in section 2421, 2422, or 2423 of title 18 (relating to transportation for the purpose of prostitution) [generic crime] *if committed for commercial advantage* [specific circumstances]”).
  - (3) 8 U.S.C. § 1101(a)(43)(M)(ii) (offense “described in section 7201 of title 26 (relating to tax evasion) [generic crime] *in which the revenue loss to the Government exceeds \$10,000* [specific circumstances]”).
- d. **Note:** If your answer to the following questions is “no,” then the language at issue may be referring to specific circumstances:
- (1) Does the language refer to a generic crime?
  - (2) Is there is a criminal statute that contains the language used?
  - (3) Does the language render pointless any reference to a specific statute?
6. The Court rejected Nijhawan’s argument that judicially reliable documents, like those used in the “categorical/modified categorical” approach and approved in Taylor and Shepard be consulted to see if they embody the

specific circumstances at issue – in that case, the victim’s loss amount.

7. The Court understood that such a determination would require the use of “fundamentally fair procedures, including procedures that give an alien a fair opportunity to dispute a Government claim that a prior conviction involved a fraud with the relevant loss to victims.”
8. The Court held that, consistent with the government’s burden in civil deportation hearings, the government must prove the “specific circumstance” by “clear and convincing” evidence.
9. In Nijhawan, sentencing-related materials, consisting of the defendant’s own stipulation and a restitution order, met the “clear and convincing” standard to show the “specific circumstance” (victim’s loss exceeded \$10,000).
10. Nijhawan clearly alters the way we analyze “aggravated felonies” for sentencing enhancement under USSG § 2L1.2(b)(1)(C), as well as for other sentencing enhancements that are defined in terms of both “generic offenses” and “specific circumstances.”
11. **Note:** The government has started to use a “circumstance-specific” approach in cases where the “categorical/modified categorical” approach clearly applies.
  - a. In essence, the government is asking the court to consider the underlying facts of the prior conviction when the analysis clearly calls for an elements-based analysis.
12. **Remember:** Nijhawan does not eschew the “categorical/modified categorical” approach. It recognizes that some “aggravated felonies” are defined in terms of a generic offense that is narrowed to specific circumstances.
  - a. Separate the generic offense from the specific circumstances.
  - b. Do not let the court treat the elements of the generic crime as specific circumstances.
  - c. The government must prove the “specific circumstance” by “clear and convincing” evidence.

#### D. “Levels of Risk” Analysis

1. In the context of the ACCA’s residual clause definition of a “violent felony,” which requires that the offense “otherwise involve[] conduct that presents a serious potential risk of physical injury to another,” 18 U.S.C. § 924(e)(2)(B)(ii), the Supreme Court has diverged from the categorical approach to what appears to be an ad hoc method of “levels of risk” analysis.
2. This area of the law is in turmoil and will require thoughtful analysis and argument to preserve sentencing enhancement issues under ACCA’s residual clause and under similarly worded sentencing enhancement statutes (or Guidelines).
3. For a discussion of the Supreme Court’s cases, see Section XI.

#### VIII. “HAS AS AN ELEMENT” ANALYSIS

- A. Does the offense of conviction “ha[ve] as an element the use, attempted use, or threatened use of physical force against the person [or property] of another?”
- B. An *element* is a constituent part of an offense that must be proved in order for a conviction to stand.
  1. “The elements of an offense come from the statute of conviction, not from the particular manner and means that attend a given violation of the statute.” United States v. Calderon-Pena, 383 F.3d 254, 257 (5th Cir. 2004) (en banc) (citation and footnote omitted).
    - a. Where a statute contains disjunctive elements, it is permissible to use an indictment to “pare down” a statute to the particular provision under which the defendant was convicted. See id.
  2. “If any set of facts would support a conviction without proof of that component [the use of force], then the component [the use of force] most decidedly is not an element – implicit or explicit – of the crime.” United States v. Vargas-Duran, 356 F.3d 598, 605 (5th Cir. 2004) (en banc).
  3. Sometimes words in a statute that seem to require the use of force do not really require the use of force. Look to see how the state court has interpreted those words to see if a defendant has been prosecuted under the statute for conduct other than the use, attempted use, or threatened use of the destructive and violent force required by the “has an element” analysis.

- C. Examples of statutes and Guidelines that require the “use, attempted use, or threatened use of force” element:
1. for “crimes of violence,” see 18 U.S.C. § 16(a); 18 U.S.C. § 921(a)(33)(A)(ii); Fed. R. Crim. P. 32(a)(1)(A); USSG § 2L1.2, comment. (n.1(B)(iii)); USSG § 4B1.2(a)(1) & comment. (n.1). [See also 18 U.S.C. § 924(c)(3)(A)]
  2. for “violent felonies,” see 18 U.S.C. § 924(e)(2)(B)(i);
  3. for “serious violent felonies,” see 18 U.S.C. § 3559(c)(2)(F)(ii).
- D. The term “use” implies the *intentional* application of force. United States v. Vargas-Duran, 356 F.3d 598, 602 (5th Cir. 2004) (en banc); see also United States v. Chapa-Garza, 243 F.3d 921, 926-27 (5th Cir. 2001).
1. **Note:** The Supreme Court in Leocal v. Ashcroft, 543 U.S. 1, 9-10 (2004), instructed that the “use of physical force against the person of another” in the definition of “crime of violence” in 18 U.S.C. § 16(a) “most naturally suggests a higher degree of intent than negligent or merely accidental conduct” and thus held that petitioner’s Florida conviction for DUI causing serious bodily injury was not a “crime of violence” in § 16 because no proof of a particular mental state was required.
  2. Leocal left open the question whether the reckless application of force could constitute the “use” of force. See id. at 13.
- E. The “physical force” required is ““destructive or violent force.”” United States v. Dominquez, 479 F.3d 345, 348 (5th Cir. 2007) (quoting United States v. Landeros-Gonzales, 262 F.3d 424, 426 (5th Cir. 2001)).
- F. The Supreme Court recently defined “physical force against the person” in the “violent felony” definition in 18 U.S.C. § 924(e)(2)(B)(i) (ACCA) as “violent force – that is force capable of causing physical pain or injury to another person.” Johnson v. United States, 130 S. Ct. 1265, 1271 (2010) (citing Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003)).
- G. Merely touching someone in an offensive manner is *not* the “use or attempted use of physical force.” See, e.g., United States v. Sanchez-Torres, 136 Fed. Appx. 644, 647-48 (5th Cir. 2005) (unpublished) (Washington fourth-degree assault statute proscribes an “offense touching,” which does not equate with either the use or attempted use of physical force); see also Johnson v. United States, 130 S. Ct. 1265,

1269-74 (2010) (holding that Florida battery committed by “actually and intentionally touching,” which, under Florida law, allowed for any intentional physical contact, no matter how slight, did not have as an element “use of physical force against the person” within the meaning of § 924(e)(2)(B)(i)).

H. An offense defined in terms of “causing bodily injury” is *not* one that “has as an element the use of physical force against the person of another.” See United States v. Vargas-Duran, 356 F.3d 598, 605 n.10 & 606 (5th Cir. 2004) (en banc) (so holding for Texas intoxication assault); United States v. Gracia-Cantu, 302 F.3d 308 (5th Cir. 2002) (so holding for Texas offense of injury to a child); United States v. Andino-Ortega, 608 F.3d 305 (5th Cir. 2010) (affirming Gracia-Cantu); see also United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006) (so holding for Texas misdemeanor assault).

1. “Causing bodily injury” focuses on the result of the conduct.
2. “Use, attempted use, threatened use of physical force” focuses on the actual conduct.

I. **Always keep these points in mind**

1. This analysis employs a “categorical approach” that requires an examination of the elements of the offense only.
2. Do not consider the underlying facts or the defendant’s actual conduct.
3. If the statute (or common law offense) of conviction contains a series of disjunctive elements, a court may look to the charging document and jury instructions [or other Taylor/Shepard-approved documents] for the *limited purpose* of determining which of a series of disjunctive elements a defendant’s conviction satisfies.
4. Pay attention to whether the “has as an element” definition refers to the physical force directed at a person only or at property as well. See, e.g., 18 U.S.C. § 16(a) (against person or property); 18 U.S.C. § 924(e)(2)(B)(i) (against person).
5. While the “has as an element” analysis generally appears in the “crime of violence” context, the same principles apply whenever you are asked whether a particular offense has a particular element. See, e.g., 18 U.S.C. § 924(c)(3)(A). Focus only on the particular element required and make sure that the statute of conviction actually requires proof of that specific element.

6. Look for scenarios in state case law where defendants have been successfully prosecuted for the offense in question without their having used, attempted to use, or threatened to use physical force against the person (or property) of another.
7. Even if there appears to be a Fifth Circuit case that has held that a particular state statute has the required element, double check to determine whether your client's particular offense of conviction actually has the required element.
  - a. The Court's decision may address a completely different offense.
  - b. Sometimes the Court's decision goes to only one prong of a multi-pronged statute or definition.
  - c. Sometimes the Court's decision addresses a different version of the statute at issue in your case.
  - d. Sometimes the Court's review has been for plain error, and de novo review will yield a more thorough analysis and, perhaps, different result.
  - e. Sometimes the Court's decision has been limited by subsequent en banc decisions.

**J. Some examples of Fifth Circuit Cases Discussing "Use of Force"**

1. Merely touching someone in an offensive manner is *not* the "use or attempted use of physical force." See, e.g., United States v. Sanchez-Torres, 136 Fed. Appx. 644, 647-48 (5th Cir. 2005) (unpublished) (Washington fourth-degree assault statute proscribes an "offense touching," which does not equate with either the use or attempted use of physical force).
2. The act of penetration in consensual sexual intercourse is *not* the "use of physical force." See United States v. Houston, 364 F.3d 243, 246-48 (5th Cir. 2004) (analyzing "has as an element" in USSG § 4B1.2(a) "crime of violence" definition and concluding Texas statutory rape did not have "use of physical force" element); see also United States v. Sarmiento-Funes, 374 F.3d 336, 339-42 (5th Cir. 2004) (following Houston for Missouri sexual assault statute in context of USSG § 2L1.2), overruled in part by United States v. Gomez-Gomez, 547 F.3d 242, 246 (5th Cir. 2008) (en banc) (limiting to a sex offense when the victim consents in fact).

3. An offense defined in terms of “causing bodily injury” is *not* one that “has as an element the use of physical force against the person of another.” See United States v. Vargas-Duran, 356 F.3d 598, 605 n.10 & 606 (5th Cir. 2004) (en banc) (so holding in context of Texas intoxication assault); United States v. Gracia-Cantu, 302 F.3d 308 (5th Cir. 2002) (so holding in context of Texas offense of injury to a child); see also United States v. Dominguez-Hernandez, 98 Fed. Appx. 331 (5th Cir. 2004) (unpublished) (so holding in context of Texas manslaughter).
  - a. See, e.g. United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006) (holding that the “use of physical force” in “crime of violence” definition in 18 U.S.C. § 16(a) is *not* an element of Texas misdemeanor assault because causing bodily injury may be done without use of force).
4. *However*, “*use of a deadly weapon* to cause bodily harm” *has* as an element the use of physical force against the person of another. United States v. Velasco, 465 F.3d 633, 640-41 (5th Cir. 2006).
5. Mere possession of a deadly weapon does *not* require the actual use of the weapon to commit the offense. United States v. Medina-Anicacio, 325 F.3d 638, 644 (5th Cir. 2003) (holding that California concealed dagger offense does *not* have element of use of physical force required by “crime of violence” definition in 18 U.S.C. § 16(a)).
6. Discharging a firearm inside or at an occupied building *does not necessarily* have as an element the use of physical force against the person of another. See United States v. Alfaro, 408 F.3d 204 (5th Cir. 2005) (holding that Virginia conviction for shooting into an occupied dwelling could be violated by shooting a gun at a building that happens to be occupied without actually shooting, attempting to shoot, or threatening to shoot another person).
7. Attempting to engage in or cause sexual contact “by using force” *has* as an element the use of physical force. United States v. Jimenez-Banegas, 209 Fed. Appx. 384, 387-89 (5th Cir. 2006) (unpublished) (holding that transcript of state guilty plea demonstrated defendant pleaded guilty to attempted sexual contact by using force and thus met the “has as an element” “crime of violence” definition in USSG § 2L1.2).
8. Kansas aggravated battery by intentional physical contact in any manner whereby great bodily harm, disfigurement or death can be inflicted does *not* have as an element the use of force against the person. Larin-Ulloa v. Gonzales, 462 F.3d 456 (5th Cir. 2006).

9. Louisiana simple robbery does *not* meet the elements definition. United States v. Brown, 437 F.3d 450 (5th Cir. 2006).
10. Texas burglary of a building does *not* meet the elements definition. United States v. Rodriguez-Rodriguez, 388 F.3d 466 (5th Cir. 2004).
11. Texas unauthorized use of a motor vehicle does *not* meet the elements definition. United States v. Rodriguez-Rodriguez, 388 F.3d 466 (5th Cir. 2004).
12. Texas retaliation does *not* meet the elements definition. United States v. Acuna-Cuadros, 385 F.3d 875 (5th Cir. 2004) (discussing Texas statute).
13. Florida aggravated stalking does *not* meet the elements definition. United States v. Insaugarat, 378 F.3d 456 (5th Cir. 2004).
14. Colorado third-degree assault does *not necessarily* meet the elements definition. United States v. Garcia, 470 F.3d 1143 (5th Cir. 2006).
15. California sexual battery does *not necessarily* meet the elements definition. United States v. Bonilla-Mungia, 422 F.3d 316 (5th Cir. 2005).

**K. Example of Fifth Circuit Case Discussing “Attempted Use of Force”**

1. Merely touching someone in an offensive manner is *not* the “use or attempted use of physical force.” See, e.g., United States v. Sanchez-Torres, 136 Fed. Appx. 644, 647-48 (5th Cir. 2005) (unpublished) (Washington fourth-degree assault statute proscribes an “offense touching,” which does not equate with either the use or attempted use of physical force).

**L. Some examples of Fifth Circuit Cases Discussing “Threatened Use of Physical Force”**

1. The “touching of an individual with a *deadly weapon* creates a sufficient threat of force to qualify as a crime of violence.” United States v. Dominguez, 479 F.3d 345 (5th Cir. 2007) (emphasis added) (holding that Florida aggravated battery with a deadly weapon *is* a “crime of violence” under USSG § 2L1.2, comment. (n.1(B)(iii)) “because it has as an element at least a threatened use of force”).
2. Knowingly discharging a firearm at or in the direction of another person *has* the element of “threatened use of physical force against the person.” United States v. Hernandez-Rodriguez, 467 F.3d 492, 494-95 (5th Cir. 2006)

(holding that Texas offense of deadly conduct as narrowed by indictment has as an element the threatened use of physical force against the person of another).

3. Threatening to use a weapon of mass destruction *involves* the threatened use of physical force. See United v. Guevara, 408 F.3d 252, 259-60 (5th Cir. 2005) (discussing conviction under 18 U.S.C. § 2332a for offense involving an anthrax hoax).
4. Minnesota terroristic threats does *not necessarily* have as an element “threatened use of physical force.” United States v. Naranjo-Hernandez, 133 Fed. Appx. 96 (5th Cir. 2005) (unpublished).
5. Pennsylvania’s terroristic threats does *not necessarily* have as an element “threatened use of physical force.” See United States v. Martinez-Paramo, 380 F.3d 799 (5th Cir. 2004).

## IX. “ENUMERATED OFFENSES” ANALYSIS

- A. Is the predicate conviction for an offense that the statute or Guideline at issue lists as an offense that qualifies for enhancement purposes (or for other stated purposes)?
- B. Examples of statutes and Guidelines that include enumerated offenses:
  1. for “crimes of violence,” see 18 U.S.C. § 3559(c)(2)(F)(i); Fed. R. Crim. P. 32(a)(1)(B); USSG § 2L1.2, comment. (n.1(B)(iii)); USSG § 4B1.2(a)(2) & comment. (n.1).
  2. for “violent felonies,” see 18 U.S.C. § 924(e)(2)(B)(ii);
  3. for “serious violent felonies,” see 18 U.S.C. § 3559(c)(2)(F)(i).
- C. Generally, the enhancement or other provision at issue does not define the enumerated offenses.
  1. **Exception:** some lists include cross-references to particular federal offenses. See, .e.g., 18 U.S.C. § 3559(c)(2)(F)(i).
- D. When a statute (or Guideline) does not specifically define an enumerated offense, you must determine the uniform “generic, contemporary” meaning of the particular listed offense. See Taylor v. United States, 495 U.S. 575 (1990); United States v. Dominguez-Ochoa, 386 F.3d 639, 642-43 (5th Cir. 2004).

1. The uniform, generic definition represents a consensus of how the enumerated offense at issue is “now [defined] in the criminal codes of most States.” Taylor, 495 U.S. at 598.
  2. In other words, identify the common-denominator elements of the enumerated offense as found in the majority of the states’ criminal codes or common law.
- E. **Note:** Some enumerated offenses are not traditional offenses. For example, the Fifth Circuit has treated “sexual abuse of a minor,” listed as a “crime of violence” in USSG § 2L1.2, as a non-traditional offense, for which it uses a “common sense approach” to find the “ordinary, contemporary meaning” of that offense. See United States v. Izaguirre-Flores, 405 F.3d 270, 274-75 (5th Cir. 2005).
1. In Izaguirre-Flores, the Court looked to the ordinary dictionary definitions of “sexual” and “abuse” to formulate the definition of “sexual abuse of a minor.” Izaguirre-Flores, 405 F.3d at 275).
  2. Do not let the government argue that this approach applies to traditional offenses. Conduct the state by state comparison to discern the elements of the generic offense.
  3. Still consult the sources (listed in subsection E below) that are helpful in deciphering the generic meaning of a traditional offense. These sources will often discuss the nontraditional offenses and provide support for an argument that the nontraditional offense has been equated to, or defined consistently in a majority of the states, though under different labels.
- F. Good sources for help in defining the generic offense include:
1. W. LaFave & A. Scott, Jr., Substantive Criminal Law
  2. The Model Penal Code
  3. Black’s Law Dictionary
  4. The most reliable method for finding the “generic, contemporary meaning” of the listed offense is to: (1) find the elements of the equivalent offense in each state’s statute or common law, as interpreted by each state’s case law, and (2) identify the common-denominator elements.
  5. Look for law review articles and studies by criminal-law related, or other relevant, organizations.

G. **Always keep these points in mind:**

1. The “categorical/modified categorical” approach applies.
  - a. Compare the elements of the offense of conviction to the elements of the generic offense.
2. The court should **not** look at the underlying facts of the prior offense of conviction.
3. The court should look only to the fact of conviction and the statutory definition of the prior offense.
4. Look at the statute of conviction as it existed at the time of your client’s prior offense.
5. Do not use the label of the offense to make your determination.
6. Do not rely on the PSR’s label (or characterization) of the prior offense.
7. Get the underlying conviction documents to identify the precise offense of conviction.
8. Be sure you compare **each** element of the predicate offense of conviction with **each** element of the “generic, contemporary” offense. Sometimes it is only one element that makes the difference. See, e.g. United States v. Dominguez-Ochoa, 386 F.3d 639, 646 (5th Cir. 2004) (criminally negligent mens rea in Texas offense versus reckless mens rea in generic, contemporary manslaughter); but see United States v. Mungia-Portillo, 484 F.3d 813, 816-17 (5th Cir. 2007) (reckless mens rea for Tennessee aggravated assault provision versus “depraved heart” recklessness in generic, contemporary “aggravated assault” defined in Model Penal Code).
9. Even if there appears to be a Fifth Circuit case that has held that a particular state statute meets the generic, contemporary definition, double check to determine whether your client’s particular predicate offense of conviction falls within that decision.
  - a. The Court’s decision may address a completely different offense.
  - b. Sometimes the Court’s decision goes to only one prong of a multi-pronged statute or definition.

- c. Sometimes the Court’s decision focuses on only one element of the generic, contemporary definition.
- d. Sometimes the Court’s decision addresses a different version of the statute at issue in your case.
- e. Sometimes the Court’s review has been for plain error, and de novo review will yield a more thorough analysis and, perhaps, different result.
- f. Sometimes the Court’s decision is contrary to prior, controlling precedent.

**H. Some examples of Fifth Circuit Cases addressing enumerated offenses**

1. **Manslaughter:** Fifth Circuit recognized that generic manslaughter includes both voluntary and involuntary manslaughter. See United States v. Dominguez-Ochoa, 386 F.3d 639, 642 (5th Cir. 2004). It has defined generic involuntary manslaughter as requiring at least a reckless mens rea. Id. at 646 (Texas criminally negligent homicide is *not* “manslaughter” in USSG § 2L1.2); see also United States v. Valenzuela, 389 F.3d 1305 (5th Cir. 2004) (Florida DUI/manslaughter is *not* “manslaughter” under § 2L1.2).
2. **Kidnaping:** Fifth Circuit used the Model Penal Code definition of “kidnaping” and a review of states’ kidnaping statutes to find that Tennessee’s basic kidnaping statute required conduct “that is well-within what is commonly considered to be kidnaping” in USSG § 2L1.2. United States v. Gonzalez-Ramirez, 477 F.3d 310, 317 (5th Cir. 2007); see id. at 318-19 (listing elements of Tennessee kidnaping statute that fall within generic kidnaping). See also United States v. Iniguez-Barba, 485 F.3d 790 (5th Cir. 2007) (conviction for New York Kidnaping *was* for “kidnaping” under USSG § 2L1.2);
3. **Aggravated Assault:** Fifth Circuit has used the Model Penal Code definition of “aggravated assault” as the generic definition of “aggravated assault” in USSG § 2L12. United States v. Torres-Diaz, 438 F.3d 529, 536-37 (5th Cir. 2006). See id. at 537-38 (Connecticut conviction for second-degree assault *was* for “aggravated assault”). Compare United States v. Fierra-Reyna, 466 F.3d 324 (5th Cir. 2006) (Texas conviction for assault on a peace officer was *not* for “aggravated assault”); United States v. Gonzalez-Chavez, 432 F.3d 334 (5th Cir. 2005) (Florida conviction for aggravated battery *not necessarily* for “aggravated assault”), with United States v. Guillen-Alvarez, 489 F.3d 197 (5th Cir. 2007) (Texas conviction for aggravated assault *was* for

“aggravated assault”); United States v. Mungia-Portillo, 484 F.3d 813 (5th Cir. 2007) (Tennessee conviction for reckless aggravated assault *was* for “aggravated assault”); United States v. Sanchez-Ruedas, 452 F.3d 409 (5th Cir. 2006) (California conviction for assault with a deadly weapon *was* for “aggravated assault”).

4. **Sexual abuse of a minor:** Fifth Circuit has approved the following definition of sexual abuse of a minor: “a perpetrator’s physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification.” United States v. Izaguirre-Flores, 405 F.3d 270, 276 n.26 (5th Cir. 2005); see id. at 276-77 (North Carolina indecent liberties with a child *is* “sexual abuse of a minor”); see also United States v. Ramos-Sanchez, 483 F.3d 400 (5th Cir. 2007) (Kansas soliciting or enticing a minor to perform an illegal sex act *is* “sexual abuse of a minor”); United States v. Zavala-Sustaita, 214 F.3d 601 (5th Cir. 2000) (Texas indecency with a child by exposure *is* sexual abuse of a minor, “because of the psychological harm inflicted irrespective of the presence of physical injury”).
5. **Robbery:** Fifth Circuit has instructed that generic robbery in USSG § 2L1.2 “‘may be thought of as aggravated larceny,’ containing at least the elements of ‘misappropriation of property under circumstances involving [immediate] danger to the person,’” and that the “immediate danger” requirement can be satisfied by either using force, placing in fear (threatening the use of force), or causing bodily injury. United States v. Santiesteban-Hernandez, 469 F.3d 376, 380081 (5th Cir. 2006); see id. at 381-82 (Texas robbery conviction *was* for generic “robbery”); see also United States v. Gonzalez-Flores, 228 Fed. Appx. 491 (5th Cir. 2007) (unpublished) (Georgia robbery conviction *was* for generic “robbery”); United States v. Moore, 223 Fed. Appx. 422 (5th Cir. 2007) (unpublished) (North Carolina conviction for common-law robbery *was* for generic “robbery”).
6. **Burglary:** Taylor v. United States, 495 U.S. 575, 598 (1990) (defined “generic burglary” for purposes of 18 U.S.C. § 924(e) as “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime”); James v. United States, 550 U.S. 192 (2007) (Florida burglary differs from “generic burglary” in § 924(e) because it includes “curtilage”); United States v. McGee, 460 F.3d 667 (5th Cir. 2006) (South Carolina second-degree burglary *is* generic burglary in § 924(e)); United States v. Simon, 153 Fed. Appx. 326 (5th Cir. 2005) (unpublished) (Louisiana burglary convictions *were* for generic burglary in § 924(e) because buildings burglarized were a high school, a business, and a lounge); United States v. DeCarlo, 88 Fed. Appx. 707 (5th Cir. 2004) (Utah burglary conviction *was* for generic burglary in § 924(e)); United States v. Silva, 957

F.2d 157 (5th Cir. 1992) (Texas convictions for burglary of a building and burglary of a habitation *were* generic burglary in § 924(e)).

7. **Burglary of a Dwelling:** Fifth Circuit has defined “burglary of a dwelling” as “a subset of generic burglary”: “‘burglary of a dwelling’ ‘includes the elements of generic burglary as stated in Taylor but it also includes, at a minimum, tents or vessels used for human habitation.’” United States v. Murillo-Lopez, 444 F.3d 337, 344-45 (5th Cir. 2006) (California burglary conviction *was* for “burglary of a dwelling” in USSG § 2L1.2 because defendant pleaded guilty to complaint charging burglary of “an inhabited dwelling house”); *see also* United States v. Ortega-Gonzaga, 490 F.3d 393 (5th Cir. 2007) (California burglary conviction *was not necessarily* for “burglary of a dwelling” in § 2L1.2 because no showing that entry was unlawful); United States v. Herrera-Montes, 490 F.3d 390 (5th Cir. 2007) (Tennessee burglary conviction *was not necessarily* for “burglary of a dwelling” in § 2L1.2 because statute allows for unlawful entry without intent to commit a crime); United States v. Rees, 233 Fed. Appx. 362 (5th Cir. 2007) (unpublished) (Ohio burglary conviction *was not necessarily* for “burglary of a dwelling” in § 2L1.2 because included such structures as “any outbuilding”); United States v. Gomez-Guerra, 485 F.3d 301 (5th Cir. 2007) (Florida burglary conviction *was not necessarily* for “burglary of a dwelling” in § 2L1.2 because statute includes “curtilage”); United States v. Mendoza-Sanchez, 456 F.3d 479 (5th Cir. 2006) (Arkansas burglary conviction *was not necessarily* for “burglary of a dwelling” in § 2L1.2 because included structures that were not dwellings).

## X. “RISK OF USE OF PHYSICAL FORCE” ANALYSIS

- A. Does the offense “by its nature involve a substantial risk that physical force against the person [or “person or property”] of another may be used in the course of committing the offense”?
- B. Examples of statutes and Guidelines that include this definition:
  1. Limited to the risk of use of physical against the person only:
    - a. 18 U.S.C. § 3559(c)(2)(F)(ii) (“three strikes” statute”)
  2. Limited to the risk of use of physical force against the person or property:
    - a. 18 U.S.C. § 16(b)
    - b. 18 U.S.C. § 924(c)(3)(B)
    - c. 18 U.S.C. § 3156(a)(4)(B)

- C. The words “*by its nature*” signal that courts are to employ a “categorical approach.” See United States v. Gracia-Cantu, 302 F.3d 308, 312 (5th Cir. 2002) (construing “crime of violence” definition in 18 U.S.C. § 16(b)); United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001) (same)
- D. “[T]he particular facts of the defendant’s prior conviction do not matter, e.g., whether the defendant actually did use force against the person or property of another to commit the offense.” Chapa-Garza, 243 F.3d at 924; Gracia-Cantu, 302 F.3d at 312.
- E. “The proper inquiry is whether a particular defined offense, in the abstract,” meets the “by its nature” definition. Chapa-Garza, 243 F.3d at 924.
- F. “A *substantial risk* that an event may occur does not mean that it must occur in every instance; rather, a substantial risk requires only a strong probability that the event, in this case the application of physical force during the commission of the crime, will occur.” United States v. Rodriguez-Guzman, 56 F.3d 18, 20 (5th Cir. 1995), as limited by United States v. Charles, 301 F.3d 309, 314 (5th Cir. 2002) (en banc).
1. The offense must involve “the substantial likelihood that the offender will *intentionally* employ force against the person or property of another in order to effectuate the commission of the offense.” Chapa-Garza, 243 F.3d at 927.
  2. “[E]ither a crime is violent ‘by its nature’ or it is not. It cannot be a crime of violence ‘by its nature’ in some cases, but not others, depending on the circumstances.” United States v. Velazquez-Overa, 100 F.3d 418, 420-21 (5th Cir. 1996).
  3. If an offense is always committed negligently or accidentally, then there is no risk that force will be “used” so as to trigger application of provisions like these. See, e.g., Leocal v. Ashcroft, 543 U.S. 1, 10-11 (2004).
  4. **Note:** The government may start to apply a “levels of risk” analysis that has evolved in recent Supreme Court ACCA decisions interpreting the residual clause of the “violent felony” definition. Section XI discusses these cases and possible arguments.
- G. The phrase “*in the course of committing the offense*” refers “to the force necessary *to* effectuate the offense.” It does “*not* encompass force used *while* effectuating the offense.” United States v. Medina-Anicacio, 325 F.3d 638, 646 (5th Cir. 2003) (emphasis in original; citation omitted).
1. The force inquiry is limited to the strict parameters of the offense of conviction; and

2. Any force used coincidentally with (but not as part of) that offense does not count.
3. Force that is a secondary result of the offense is not considered.

H. **Always keep these points in mind:**

1. The categorical approach applies.
2. Focus on the intrinsic nature of the offense.
3. Look to the minimum conduct necessary to commit the offense.
4. Underlying facts of the offense are *not* relevant.
5. There must be a *strong probability* that *intentional* physical force will be used against the person (or property) to *effectuate* the offense.
6. Even if there appears to be a Fifth Circuit case that has held that a particular state statute meets the “by its nature” definition, double check to determine whether your client’s particular predicate conviction categorically qualifies.
  - a. The Court’s decision may address a completely different offense.
  - b. Sometimes the Court’s decision goes to only one prong of a multi-pronged statute or definition.
  - c. Sometimes the Court’s review has been for plain error, and de novo review will yield a more thorough analysis and, perhaps, different result.
  - d. Sometimes the Court’s decision addresses a different version of the statute at issue in your case.
  - e. Sometimes the Court’s decision is contrary to subsequent controlling en banc decisions.

I. **Examples of Fifth Circuit Cases Discussing This “By Its Nature” Analysis (Prior to James, Begay, Chambers, and Sykes (Discussed Later))**

1. Texas driving while intoxicated does *not* involve the substantial risk that physical force against another’s person or property will be used to commit the offense. United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001); see also United States v. Trejo-Galvan, 304 F.3d 406 (5th Cir. 2002).
2. California offense of possession of a concealed dagger does *not* involve this kind of risk of use of force. United States v. Medina-Anicacio, 325 F.3d 638 (5th Cir. 2003).
3. Texas offense of injury to a child does *not* involve this kind of risk of use of force. United States v. Gracia-Cantu, 302 F.3d 308 (5th Cir. 2002); but see Perez-Munoz v. Keisler, 507 F.3d 357, 362 (5th Cir. 2007) (finding that, if charging documents demonstrated offense was committed by intentional act rather than omission, Texas injury to a child may have this kind of risk of use of force).
4. Texas offense of unlawful carrying of a weapon on a licensed premises does *not* involve this kind of risk of use of force. United States v. Hernandez-Neave, 291 F.3d 296 (5th Cir. 2001).
5. Texas criminal mischief by marking another’s property does *not* involve this kind of risk of use of force against property. United States v. Landeros-Gonzalez, 262 F.3d 424 (5th Cir. 2001).
6. Texas possession of a short-barrel shotgun does *not* involve such a risk of use of force. United States v. Diaz-Diaz, 327 F.3d 410, 414 (5th Cir. 2003).
7. Texas manslaughter does *not* involve such a risk of use of force against the person. United States v. Dominguez-Hernandez, 98 Fed. Appx. 331 (5th Cir. 2004).
8. Kansas aggravated battery by intentional physical contact in any manner whereby great bodily harm, disfigurement or death can be inflicted does *not* involve such a risk of use of force against the person. Larin-Ulloa v. Gonzales, 462 F.3d 456 (5th Cir. 2006).
9. Kansas aggravated battery by intentional physical contact with a deadly weapon in a rude, insulting or angry manner *does* involve such a risk of use of force against the person. Larin-Ulloa v. Gonzales, 462 F.3d 456 (5th Cir. 2006).

10. Colorado offense of criminal trespass **does** involve such a risk of use of force against the person. United States v. Delgado-Enriquez, 188 F.3d 592 (5th Cir. 1999).
11. Texas burglary of a building and Texas burglary of a vehicle **do** involve such a risk of use of force against the property. United States v. Rodriguez-Guzman, 56 F.3d 18 (5th Cir. 1995), as limited by United States v. Charles, 301 F.3d 309, 314 (5th Cir. 2002) (en banc).  
  
**Note:** Supreme Court in Leocal v. Ashcroft, 543 U.S. 1, 10 (2004), commented during its discussion of 18 U.S.C. § 16(b) that “[a] burglary would be covered under § 16(b) **not** because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.”
12. Texas unauthorized use of a motor vehicle **does not** involve such a risk of use of force against the property. See United States v. Armendariz-Moreno, 571 F.3d 490, 491 (5th Cir. 2009) (holding, in light of Chambers v. United States, 129 S. Ct. 687 (2009), that Texas UUMV does not have essential element of violent and aggressive conduct and therefore does not involve such a risk of use of force); see also Serna-Guerra, 354 Fed. Appx. 929 (5th Cir. 2009) (unpublished) (following Armendariz-Moreno). Armendariz-Moreno overruled United States v. Galvan-Rodriguez, 169 F.3d 217 (5th Cir. 1999), which had held Texas UUMV did involve that risk of force,
13. Texas burglary of a habitation **does** involve such a risk of use of force against the person. United States v. Guadardo, 40 F.3d 102 (5th Cir. 1994).
14. possession of an unregistered pipe bomb **does** involve such a risk of use of force against the person. United States v. Jennings, 195 F.3d 795 (5th Cir. 1999).
15. federal car jacking **does** involve such a risk of use of force against the person. United States v. Singelton, 16 F.3d 1419 (5th Cir. 1994).
16. Oklahoma facilitation of a drive-by shooting **does** involve such a risk of use of force. Nguyen v. Ashcroft, 366 F.3d 386 (5th Cir. 2004).
17. conspiracy to deprive citizens of their civil rights under 18 U.S.C. § 241 (prohibiting a conspiracy with the specific intention to injure, oppress, threaten, or intimidate) **does** involve such a risk of use of force. United States v. Greer, 939 F.2d 1076 (5th Cir. 1991).

## XI. “RISK OF CAUSING PHYSICAL INJURY” ANALYSIS

- A. Does the offense “involve[] conduct that presents a serious potential risk of physical injury to another”?
- B. Examples of statutes and Guidelines that include this definition:
1. 18 U.S.C. § 924(e)(2)(B)(ii) (ACCA)
  2. USSG § 4B1.2(a)(2) & comment. (n.1) (career offender Guideline).
  3. **Note:** USSG § 4B1.2(a)(2), *unlike* 18 U.S.C. § 924(e)(2)(B)(ii), permits the “by its nature” analysis to include consideration of the actual conduct alleged in the indictment (if it is) rather than just the charged elements of the offense.
- C. “*By its nature*” requires a categorical approach. See *United States v. Charles*, 301 F.3d 309 (5th Cir. 2002) (en banc).
- D. The court *cannot* consider the facts underlying the count of conviction. *Charles*, 310 F.3d at 314; see also *United States v. Serna*, 309 F.3d 859, 862 (5th Cir. 2002) (“[W]e do not consider the underlying conduct of the crime unless it is specifically referenced in the indictment.”).
- E. This categorical approach focuses on the serious potential risk of physical injury to another (result of conduct), rather than on the substantial risk that physical force against another will be used in the course of committing the offense (conduct) (as discussed in previous section).
- F. The Fifth Circuit has defined a “*serious potential risk*” as “a significant possible chance.” *United States v. Charles*, 310 F.3d 309, 315 (5th Cir. 2002) (en banc).
- G. **Examples of Fifth Circuit Cases Discussing This “By Its Nature” Analysis (Prior to *James*, *Begay*, *Chambers*, and *Sykes* (Discussed Later))**
1. Texas simple motor vehicle theft does *not* present serious potential risk of injury to a person. *United States v. Charles*, 301 F.3d 309 (5th Cir. 2002) (en banc) (noting that it does present serious potential risk of injury to property, which is not part of this definition).
  2. Texas unauthorized use of a motor vehicle likely does *not* present such a risk of injury. *United States v. Lee*, 310 F.3d 787 (5th Cir. 2002).

3. Texas retaliation does *not* present such a risk of injury. United States v. Montgomery, 402 F.3d 482 (5th Cir. 2005).
4. Florida aggravated stalking does *not* present such a risk of injury. United States v. Insaulgarat, 378 F.3d 456 (5th Cir. 2004).
5. Colorado third-degree assault statute *does not necessarily* present such a risk of injury. United States v. Garcia, 470 F.3d 1143 (5th Cir. 2006).
6. Texas possession of a prohibited weapon *does* present serious potential risk of injury to a person. United States v. Serna, 309 F.3d 859 (5th Cir. 2002) (discussing possession of sawed-off shotgun).
7. Texas possession of a deadly weapon in a penal institution *does* present such a risk of injury. United States v. Rodriguez-Jaimes, 481 F.3d 283 (5th Cir. 2007); see also United States v. Marquez, 626 F.3d 214 (5th Cir. 2010) (New Mexico possession of a deadly weapon by a prison presents such a risk).
8. Texas driving while intoxicated *does* present such a risk of injury. United States v. DeSantiago-Gonzalez, 207 F.3d 261 (5th Cir. 2000).
9. federal escape *does* present such a risk of injury. United States v. Ruiz, 180 F.3d 675 (5th Cir. 1999) (escape under 18 U.S.C. § 751(a)).
10. Louisiana attempted unauthorized entry of an inhabited dwelling *does* present such a risk of injury. United States v. Claiborne, 132 F.3d 253 (5th Cir. 1998); see also United States v. Arteaga, No. 10-30320, 2011 WL 3476608 (5th Cir. Aug. 9, 2011) (unpublished) (upholding Claiborne)).
11. Florida attempted burglary *does* present such a risk of injury. James v. United States, 550 U.S. 192 (2007).
12. Texas attempted burglary of a building does *not* present such a risk. United States v. Martinez, 954 F.2d 1050 (5th Cir. 1992); but see United States v. Gore, 636 F.3d 728 (5th Cir. 2011) (calling Martinez into question following recent Supreme Court ACCA cases, particularly James, and holding that Texas conspiracy to commit robbery presents such a risk).
13. Texas unlawful restraint of a person less than 17 *does* present such a risk of injury. United States v. Riva, 440 F.3d 722 (5th Cir. 2006).
14. Utah discharging a firearm from a vehicle *does* present such a risk of injury. United States v. Valenzuela-Quevedo, 407 F.3d 728 (5th Cir. 2005).

- H. **Post-James, Begay, Chambers, and Sykes Era.** Since 2007, the Supreme Court has issued divergent opinions on the “risk of injury” analysis in the context of ACCA’s residual clause definition of “violent felony.”
- I. In fact, the Supreme Court’s most recent iteration of the “residual clause” analysis caused Justice Scalia, in a dissent from denial of certiorari in four cases raising “residual clause” issues, to call for the residual clause to be held constitutionally vague. Derby v. United States, 131 S. Ct. 2858 (2011) (Scalia, J., dissenting from denial of certiorari).
- J. The Court’s most recent decision interpreting the ACCA’s “residual clause,” and the case to which Justice Scalia was referring, is **Sykes v. United States, 131 S. Ct. 2267 (June 9, 2011)**.
1. In Sykes, the Court held that the Indiana offense of evading arrest with a motor vehicle “involves a serious potential risk of physical injury to another.”
  2. In so holding, the Court has raised questions about its three earlier ACCA “residual clause” cases: James v. United States, 550 U.S. 192 (2007); Begay v. United States, 553 U.S. 137 (2008); and Chambers v. United States, 555 U.S. 122 (2009).
  3. Before discussing Sykes, it is important to review the holdings of James, Begay, and Chambers, because, at least in the risk-of-injury-type tests like that in ACCA’s “residual clause,” these cases have blurred the categorical approach and seem to promote an “objective dangerous” test.
- K. In **James**, the Court held that, even though the Florida attempted burglary offense at issue there did not comport with the generic meaning of the enumerated violent felony of burglary, it still could constitute a violent felony if it fell within the definition of a violent felony in the “residual clause.”
1. The Court held that the proper inquiry under the residual clause was “whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.” James, 550 U.S. at 208.
  2. This inquiry involves the following two-step analysis:
    - a. A court should first identify the enumerated crime to which the predicate crime is most closely analogous. In other words, is the predicate offense of conviction most closely analogous to burglary, arson, extortion, or an offense that involves use of explosives?



- a. The Court explained, “That conduct is such that it makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim. Crimes committed in such a purposeful, violent, and aggressive manner are ‘potentially more dangerous when firearms are involved.’” Begay, 553 U.S. at 145.
3. The Court anchored this new requirement in the underlying purpose of ACCA: the prevention of future armed crimes by focusing upon the special danger created when a violent criminal or drug trafficker possesses a gun.
4. Applying its spin on the residual clause analysis, the Court in Begay held that New Mexico DUI was not a violent felony under ACCA’s residual clause because it did not involve purposeful, violent, and aggressive conduct.
  - a. Rather, explained the Court, DUI statutes “typically do not insist on purposeful, violent, and aggressive conduct; rather, they are, or are most nearly comparable to, crimes that impose strict liability, criminalizing conduct in respect to which the offense need not have any criminal intent at all.” Begay, 553 U.S. at 145.
5. Justice Scalia concurred in the judgment. But, contrary to the Court, concluded that “the residual clause unambiguously encompasses *all* crimes that present a serious risk of injury to another.” Begay, 553 U.S. at 148 (Scalia, J., concurring).
  - a. Applying the test he announced in James –whether DUI posed at least as serious a risk of physical injury to another as burglary – Justice Scalia could not come to a conclusion based on the evidence in the case and instead applied the rule of lenity to resolve the issue in favor of the defendant. See id. at 152-54.
6. Justice Alito, in dissent, found no textual support for the limiting ACCA’s “violent felony” definition to “purposeful, violent, and aggressive” offenses. See Begay, 553 U.S. at 155 (Alito, J., dissenting).
  - a. Statistics dramatically showed that DUI was very dangerous, that repeated DUI offenders presented a greatly enhanced danger that they and others would be injured as a result, that the risk was surely “serious,” and that James’s offense fell squarely within the residual clause. Id. at 155-58.
  - b. Justice Alito rejected Justice Scalia’s proposed method of measuring the degree of risk of injury. Id. at 162-63.

- M. In Chambers, the Court applied Begay's "purposeful, violent, and aggressive" test to an Illinois conviction for failure to report to a penal institution.
1. Specifically, the Court held that, "[c]onceptually speaking, the crime amounts to a form of inaction, a far cry from the 'purposeful, violent, and aggressive conduct' potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion."
  2. But, the Court went further and made a statistical inquiry about the offense of conviction, looking to a Sentencing Commission report that surveyed two years of federal sentences involving failure to report and found that none involved violence.
    - a. This statistical inquiry appears to have been justified, as was the decision in Begay, by ACCA's core concern about whether such an offender is significantly more likely than others to commit the offense using violence.
  3. The test that many observers gleaned from Begay and Chambers was that a prior conviction does not count under ACCA unless it satisfies *both* the "purposeful, violent, and aggressive test" and a statistically demonstrated likelihood of physical injury.
  4. Justice Alito, in concurrence, empathized with the Court's "efforts to provide a workable solution to the 'residual clause' . . . while retaining the 'categorical approach'" announced in Taylor and would also remand for resentencing, but wrote to emphasize that only Congress could "rescue the federal courts from the mire into which ACCA's draftsmanship and *Taylor*'s 'categorical approach' have pushed us." Chambers, 555 U.S. at 131-32 (Alito, J., concurring).
    - a. Justice Alito reiterated that the Court's approach in Begay could not be reconciled with the statutory text. Id. at 131.
    - b. Justice Alito complained that:
      - (1) ACCA's residual clause was nearly impossible to apply consistently; and
      - (2) Each new application of the residual clause has further and further away from the statutory text. Id. at 132-34.

- (3) “The only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA’s sentencing enhancement.” Id. at 134.
  4. And then came Sykes, which suggests an even more expansive interpretation of the residual clause.
- N. In Sykes, the Court addressed the question of whether an Indiana “vehicular flight” provision was conduct that presented a serious potential risk of physical injury to another.
  1. The vehicular flight provision at issue was Ind. Code § 35-44-3-3(a)(3) & (b)(1)(A), which provide that a person commits a Class D felony when the “person knowingly or intentionally . . . flees from a law enforcement officer after the officer has, by visible or audible means, identified himself and ordered the person to stop” and the person “uses a vehicle to commit the offense.”
  2. The Court did not mention the “purposeful, aggressive, and violent” language of Begay, and it did not require the government to prove dangerousness in a rigorous, empirical fashion, as suggested by Chambers.
  3. Instead, the Court focused on what it believed to be the inherent character of the crime relying heavily on his own “commonsense conclusion”:

“Risk of violence is inherent to vehicle flight. Between the confrontations that initiate and terminate the incident, the intervening pursuit creates high risks of crashes. It presents more certain risk as a categorical matter than burglary. It is well known that when offenders use motor vehicles as their means of escape they create serious potential risks of physical injury to others. Flight from a law enforcement officer invites, even demands, pursuit. As that pursuit continues, the risk of an accident accumulates. And having chosen to flee, and thereby commit a crime, the perpetrator has all the more reason to seek to avoid capture.” Sykes, 131 S. Ct. at 2274.
  4. The Court found that, although statistics were not dispositive, they did, in that case, “confirm the commonsense conclusion that Indiana’s vehicle flight crime is a violent felony” and showed that injuries resulted more frequently from police car chases than from offenses specifically listed as “violence felonies,” such as burglary and arson. Id. at 2274-75.

5. In the end, the Court seems to be instructing the lower courts to look at the levels of risk that an armed career criminal might deliberately point a gun and pull the trigger during the course of the offense.
  - a. As some commentators have noted, the Court seems to be promoting an “objective dangerousness” test.
6. The Sykes opinion seems to retain Begay’s “purposeful, aggressive, and violent” inquiry as to strict liability, negligent, and reckless crimes, but, it went out of its way to highlight that test’s lack of a “textual link” to ACCA.
  - a. So the Court may be signaling its demise.
7. **Note:** In her dissent in Sykes, Justice Kagan noted that the Court’s approach might be limited to the particular Indiana vehicular flight provision at issue in that case. See Sykes, 131 S. Ct. at 2295 (Kagan, J., dissenting; joined by Ginsburg, J.). Justice Kagan noted that:
  - a. The Court had reserved the question whether a vehicular flight provision like the one at issue there, but with a lesser penalty, would be a crime of violence.
  - b. That reservation described the great majority of vehicular flight statutes across the country.
  - c. A majority of states separately prohibited and differently punished simple and aggravated vehicular flight.
  - d. But, Indiana’s vehicular flight statute was idiosyncratic, in that, from 1998 to 2006, it punished together and equally both simple and aggravated vehicular flight.
8. **Note:** In his dissent, Justice Scalia criticized the statistical reports in this and other ACCA cases as “untested judicial factfinding masquerading as statutory interpretation[,] noting that “[m]ost of the statistics on which the Court relies today come from government-funded studies, and did not make an appearance in this litigation until the Government’s merits brief to this Court.” Sykes, 131 S. Ct. at 2286 (Scalia, J., dissenting).
  - a. In other words, the statistical reports, which provided key facts in the case, were produced for the first time in the Supreme Court briefs and thus were subject to the discovery process or adversarial testing in the district court (as to the methodologies used and their reliability).

- b. Moreover, the statistical reports increased the vagueness of the residual clause, noting that it was unlikely that the average citizen would be familiar with the numerous statistical studies (if they were to be believed) showing that one crime is more likely than another to carry the risk of physical injury.
9. **Note:** In his dissent in Sykes, Justice Scalia also expressed that the recent ACCA cases are incomprehensible to judges and that the residual clause does not give persons of ordinary intelligence fair notice of its reach. Sykes, 131 S. Ct. at 2284-88 (Scalia, J., dissenting).
- a. Justice Scalia has indicated that he would grant certiorari to declare ACCA's residual clause to be unconstitutionally vague.
  - b. Use Justice Scalia's reasoning to argue that ACCA's residual clause is void for vagueness.
  - c. Argue, as did Justice Scalia, that ACCA should be limited to the enumerated violent crimes, and let Congress add whatever it crimes it wishes to the list of qualifying crimes.

O. **Always keep these points in mind:**

- 1. Focus on the intrinsic nature of the offense charged.
  - a. In USSG § 4B1.2 cases only, court can look to specific facts alleged in the charging document.
- 2. Underlying facts of offense are *not* relevant.
- 3. Look to the minimum conduct necessary to commit the offense.
- 4. There must be a *serious potential risk* inherently a part of the offense.
- 5. Argue for a pre-Sykes analysis that focuses on the elements of the offense and whether those elements both (1) involve the “purposeful, aggressive, and violent” conduct of the enumerated offenses and (2) present a risk of physical injury closely analogous to the risk of physical injury in the enumerated offenses.

- a. Support your argument with statistical studies, if reliable.
  - b. Attack the government's use of statistical studies by showing that they are (1) biased, (2) the result of flawed methodology, and/or (3) misinterpret the results.
  - c. If forced to confront an "objective dangerousness" test, argue that the offense, as defined, is not "objectively dangerous" and do so by focusing on the elements of the offense and their specific meaning.
    - (1) Do not let the government broaden the nature of an offense to include a "parade of potential [but not inherent] horrors."
  - d. Use Justice Scalia's dissent in Sykes to argue that recent Supreme Court cases have rendered the "risk of injury" analysis incomprehensible and that the language of the residual clause should be held to be void for vagueness.
6. Even if there appears to be a Fifth Circuit case that has held that a particular state statute meets the "by its nature" definition, double check to determine whether your client's particular predicate conviction categorically qualifies.
- a. The Court's decision may address a completely different offense.
  - b. Sometimes the Court's decision goes to only one prong of a multi-pronged statute or definition.
  - c. Sometimes the Court's review has been for plain error, and de novo review will yield a more thorough analysis and, perhaps, different result.
  - d. Sometimes the Court's decision addresses a different version of the statute at issue in your case.
  - e. Sometimes the Court's decision is contrary to subsequent controlling en banc decisions.

P. **Some Post-Sykes Cases**

1. Circuits may be promoting a James risk-comparison analysis.
  - a. The Fifth Circuit upheld pre-Sykes case law to hold that Louisiana attempted unauthorized entry of a dwelling presented a serious potential risk of physical injury as required under ACCA's residual clause. United States v. Arteaga, No. 10-30320, 2011 WL 3476608 (5th Cir. Aug. 9, 2011) (unpublished).
  - b. attempted unauthorized entry of an inhabited dwelling presented the same kind of risk as unauthorized entry of an uninhabited dwelling, which in turn presented the same kind of risk as the enumerated offense of burglary.
2. Some circuits seem to be eschewing the "purposeful, aggressive and violent" requirement and following a risk-comparison analysis.
  - a. See, e.g., United States v. Watson, No. 11-1169, 2011 WL 3568918 (8th Cir. Aug. 16, 2011) (applying risk-comparison analysis to hold that Oklahoma possession of a firearm while committing a drug trafficking offense presents a serious potential risk of physical injury to another and was therefore a "crime of violence" under USSG § 4A1.1(e)).
  - b. See, e.g., United States v. Scudder, No. 10-3154, 2011 WL 3331823 (8th Cir. Aug. 4, 2011) (applying risk-comparison analysis to hold that Indiana child molestation fell with ACCA's residual clause).
3. It appears that the Tenth Circuit abides by the "purposeful, violent and aggressive conduct" requirement of Begay.
  - a. See, e.g., United States v. Armijo, No. 09-1533, 2011 WL 2687274 (10th Cir. July 12, 2011) (holding that Colorado manslaughter is not a "crime of violence" under residual clause definition in USSG § 4B1.2 because it only requires a reckless mens rea, and noting that this decision was consistent with Sykes).
  - b. **Note:** Colorado defines manslaughter as recklessly causing the death of another, which is how the Fifth Circuit defines the generic, contemporary meaning of "manslaughter" in the context of the "crime of violence" definition in USSG § 2L1.2(b)(1)(A)(ii). See United States v. Dominguez-Ochoa, 386 F.3d 639, 642 (5th Cir. 2004).

- c. The Court in Armijo, however, noted that there was a significant structural difference between the “crime of violence” definitions in USSG § 2L1.2(b)(1)(A)(ii) and USSG § 4B1.2.
- d. The distinction was that the Guideline § 4B1.2 definition did not include manslaughter in the listed offenses; manslaughter was listed only in the application note.
- e. The Guideline § 4B1.2 list (which comports with the ACCA list – burglary, arson, extortion, and offense involving the use of explosives) – required purposeful, violent and aggressive conduct.”
- f. To read the listed crimes in the application note to Guideline § 4B1.2 (including manslaughter) as reaching reckless conduct would render the application note inconsistent with the text of the Guideline.
- g. Think about making the same argument in the Fifth Circuit in the context of the USSG § 4B1.2 “crime of violence” definition.

## **XII. COMPARE THE ELEMENTS OF OFFENSE OF PRIOR CONVICTION TO THE DEFINITION AT ISSUE.**

- A. After having used the tools in the previous sections to identify the particular definition at issue, compare the offense of conviction (or statute of the prior conviction if you were unable to narrow the offense) to that definition.
  - 1. If required by the particular definition at issue, compare the conduct alleged in the charging document to the definition.
  - 2. **Remember:** If there is no charging document, then this is not possible and that particular definition or portion of the definition will not apply.
- B. Review court decisions (Supreme Court, Fifth Circuit, other circuits if no Fifth Circuit cases, and district courts).
  - 1. Is there a case that discusses the applicable definition and your offense or statute of prior conviction?
  - 2. Is there a case that discusses a substantially similar offense or statute?
  - 3. Is there a case that discusses a substantially similar definition in the same or different context?

### **XIII. DOES THE PREDICATE CONVICTION QUALIFY FOR THE STATED PURPOSE?**

- A. If yes, go to Section XIV below.
- B. If no, go to Section XV below.

### **XIV. WHAT TO DO IF THE PREDICATE CONVICTION QUALIFIES FOR THE STATED PURPOSE**

- A. **Remember:** The government has the burden of proving by a preponderance of relevant and sufficiently reliable evidence that the prior conviction qualifies for enhancement purposes. See United States v. Herrera-Solorzano, 114 F.3d 48, 50 (5th Cir. 1997) (quoting United States v. Alfaro, 919 F.2d 962, 965 (5th Cir. 1990)).
- B. Did either the government or the Probation Office supply the requisite documentation to meet its burden?
- C. If not, you need to decide whether to challenge the enhancement on the basis of the government's failure to prove it with the proper documentation.
- D. In making this determination, consider the following:
  - 1. It is almost always in your client's best interest to object when the government has failed to meet its burden of proof.
    - a. Sometimes there is no documentation available.
  - 2. Consider whether there is a risk that the objection will prompt further investigation with negative consequences, including whether there is a risk that an increased enhancement may apply, more prior convictions may be discovered, or aggravating factors may be discovered leading to the risk of an upward departure.
  - 3. Determine whether or not your client is in agreement with your decision to challenge or not challenge the enhancement after discussing the advantages and disadvantages.
    - a. If the sentencing issue will be moot by the time of the appeal, explain this to your client. See, e.g., United States v. Rosenbaum-Alanis, 483 F.3d 381 (5th Cir. 2007) (holding that appellant's release from prison and presumed deportation rendered Court incapable of granting appellant the relief he sought).

- b. Document this communication in the file.
- 4. Determine whether or not your client is likely to appeal his conviction and sentence. If it appears that the client is likely to appeal, make an objection that the government has failed to meet its burden of proving the enhancement with the requisite (Taylor/Shepard) documentation.
- E. If the government meets its burden of proof, and there is no reason to challenge the predicate conviction, then write a note to file about why the predicate conviction qualifies for enhancement and thus why you are not challenging the enhancement in the district court.

**XV. WHAT TO DO IF THE PREDICATE CONVICTION DOES *NOT* QUALIFY FOR THE STATED PURPOSE.**

- A. Evaluate the advantages and risks of challenging whether the predicate conviction qualifies for enhancement.
  - 1. Reasons to challenge prior convictions include:
    - a. Client hopefully will receive a lower sentence.
    - b. **Remember:** Generally, there is no reason not to challenge a non-qualifying predicate conviction, and failure to raise the issue in the district court relegates the issue to harsh plain-error review on appeal.
    - c. Generally, a cogent and compelling *legal* argument of why a predicate conviction does not qualify should not prejudice your client.
  - 2. Reasons *not* to challenge prior convictions include:
    - a. Investigation of prior conviction will yield more prior convictions of which neither the government nor the probation officer are aware.
    - b. Investigation of prior conviction will result in assignment of higher statutory minimum and/or maximum punishment, higher Guidelines offense level, and/or higher criminal history score.
    - c. Investigation of prior conviction will provide “aggravating factors” that justify either an upward departure or a variance from the applicable Guidelines range.

- d. Investigation of prior conviction may lead to discovery of a disqualifying conviction for fast track downward departure.
- B. If you decide to challenge the prior conviction, submit a written objection, detail reasons why prior conviction does not qualify, and provide supporting authority.
1. Do not make a general objection that, for example, the prior conviction does not qualify as a “crime of violence” or a “drug trafficking” offense. Such an objection will result in plain-error review on appeal.
  2. At the federal arraignment or sentencing, do not concede that client has a qualifying predicate conviction, and do not let client talk about the underlying facts of the predicate conviction.
    - a. ***This applies even if you do not challenge the prior conviction.***
    - b. If judge tries to make client talk about facts of predicate conviction, cite to Mitchell v. United States, 526 U.S. 314, 316-17, 325-30 (1999), and explain that client retains Fifth Amendment privilege to remain silent at sentencing hearing, and that court cannot make adverse inferences from his silence.
  3. At sentencing, do not concede that underlying facts of predicate conviction in PSR are correct.
    - a. ***This applies even if you do not challenge the prior conviction.***
    - b. Do not admit to underlying facts of predicate conviction.
      - (1) See, e.g., United States v. Mendoza-Sanchez, 456 F.3d 479, 483 (5th Cir. 2006) (Court looked to exchange between defendant and trial court at ***federal arraignment*** [rather than state guilty plea proceeding] and concluded that defendant’s comments about his underlying offense were admissions of the conclusive nature required by Taylor and Shepard to establish that prior conviction was for “crime of violence”).
    - c. If judge tries to make client talk about underlying facts, explain that:
      - (1) legal analysis involved does not permit consideration of these facts, see Taylor v. United States, 495 U.S. 575, 598-603 (1990); Shepard v. United States, 544 U.S. 13, 19-26 (2005),

(2) and invoke client’s right to remain silent on the sentencing facts. See Mitchell v. United States, 526 U.S. 314, 316-17, 325-30 (1999) (a defendant retains Fifth Amendment privilege to remain silent at sentencing hearing, from which court cannot make adverse inferences).

d. At most, respond that client neither confirms nor denies underlying facts.

e. Do not admit that “everything in the PSR is correct.”

**Note:** On plain-error review on appeal, this is deadly. See, e.g., United States v. Martinez-Vega, 471 F.3d 559, 563 (5th Cir. 2006).

C. If you decide *not* to challenge the prior conviction, write a note to file detailing the following:

1. You have discussed the pros and cons of raising the issue with your client; and
2. The reasons why you are not raising the issue.

## XVI. USEFUL RESOURCES

A. Useful Websites

1. <http://www.fd.org>
2. <http://sentencing.typepad.com> (Sentencing Law and Policy by Douglas A. Berman) (containing links to other useful resources)
3. <http://circuit5.blogspot.com> (Fifth Circuit Blog)
4. <http://circuit9.blogspot.com> (Ninth Circuit Blog)

B. Useful Treatises

1. Roger W. Haines, Jr., Frank O. Bowman III; and Jennifer C. Woll, Federal Sentencing Guidelines Handbook: Text and Analysis (2007)
2. Thomas W. Hutchison, Peter B. Hoffman, Deborah Young, and Sigmund G. Popko, Federal Sentencing Law and Practice (Westlaw Directory FSLP)

3. Wayne R. LaFave, Substantive Criminal Law (Westlaw Directory SUBCRL)
4. Charles E. Torcia, Wharton's Criminal Law (Westlaw Directory CRIMLAW)

C. Useful Law Review Articles

1. Doug Keller, Causing Mischief for Taylor's Categorical Approach: Applying "Legal Imagination" to Duenas-Alvarez, 18 Geo. Mason L. Rev. 625 (Spring 2011).
2. David C. Holman, Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act, 43 Conn. L. Rev. 209 (Nov. 2010).
3. Rebecca Sharpless, Toward a True Elements Tests: Taylor and the Categorical Analysis of Crimes in Immigration Law, 62 U. Miami L. Rev. 979 (July 2008)
4. Sarah French Russell, Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing, 43 U.C. Davis L. Rev. 1135 (Apr. 2010).

D. Appellate Briefs

1. Check Westlaw, which contains links to briefing on many published opinions.

E. Unpublished opinions

1. Although unpublished opinions are not precedential, they are sometimes persuasive.
2. Fifth Circuit addresses novel arguments (often under plain-error review) in the "crime of violence" and "drug trafficking" scenarios in unpublished opinions.