

CHALLENGING CRIMINAL HISTORY CALCULATIONS

I. Challenging Predicates for Career Offender

- The Basic Rule for Career Offender 4B1.1

A defendant is a career offender if:

1. The defendant is at least 18 years old at the time he committed the instant offense;
2. The instant offense is a felony that is either a crime of violence or a controlled substance offense; and
3. The defendant has at least two prior felony convictions of either a crime of violence or controlled substance offense

- Definition of Crime of Violence under this Guideline

A “crime of violence” is any offense under federal or state law, punishable by imprisonment for a term exceeding one year that:

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

- Specifics regarding the definition of crime of violence:

1. Difference between commercial and residential burglary
2. Fifteen year time limitation applies (See Application Note 3 to U.S.S.G. § 4B1.2)
3. Includes a sawed-off shotgun, rifle, silencer, bomb or machine gun but not a garden variety 922(g).

- Definition of “controlled substance offense” under this Guideline

A “controlled substance offense” is an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (of a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense. U.S.S.G. § 4B1.2(b)

- Specifics regarding the definition of controlled substance offense:
 1. Fifteen year time limitation applies
 2. Possession excluded - i.e. possession of cocaine (see Salinas v. U.S. 126 S.Ct. 1675 (2006) A prior conviction for simple possession of a controlled substance is not a controlled substance offense for purposes of 4B1.1(a)).

- Reasonable sentence now available for career offender:

U.S. v. Williams 435 F.3d 1350 (11th Cir. 2006). Mr. Williams was charged with selling \$350 worth of crack cocaine. He had two priors which made him a career offender - (I) possession of cocaine with intent to sell or deliver and (ii) carrying a concealed firearm. The district court found that the second predicate, carrying a concealed firearm was a crime of violence. The district court then found that as a career offender Mr. Williams was facing a range of 188 to 235 months. The district court imposed a reasonable sentence of 90 months. On appeal the Eleventh Circuit affirmed. In footnote 2, the Eleventh Circuit stated that: "After Booker, the sentencing Guidelines are advisory, and the sentencing court, in its own discretion, can move below the advisory Guidelines range without a motion for downward departure as long as the resulting sentence is reasonable."

II. Challenging Predicates for Armed Career Criminal

- The Basic Rule for Armed Career Criminal 4B1.4
A defendant is an armed career criminal if:
 1. The offense of conviction is a violation of 922(g)
 2. The defendant has at least three prior convictions for a "violent felony" or a "serious drug offense" or both, committed on occasions different from one another.

- Definition of "violent felony" under this Guideline (refers you to 924(e)(2) (B))
Any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that :
 - (1) has as an element the use, attempted use, or threatened use of

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

- Specifics regarding definition of “violent felony”
 1. No predicate is time barred
 2. No distinction between commercial and residential burglary - but see Taylor & Shephard discussion below
- Case law interpreting the “otherwise clause” - potential risk of physical injury to another

James v. U.S. 550 U.S. ___, 127 S. Ct. 1586, 167 L. Ed. 2d 532 (2007):
The Court considered whether an attempted burglary qualified as a “violent felony” under the Otherwise Clause of § 924(e). . In that case, the Court answered the question by first identifying the enumerated crime to which the predicate crime is most closely associated. Then, it determined to whether the risk imposed by the predicate crime was roughly equivalent to the risk posed by the predicate crime. There, the Court found attempted burglary closely associated with the enumerated offense of burglary and judged the risk imposed by both were roughly equivalent, thus qualifying attempted burglary as a violent felony for purposes of the “otherwise clause.”

Begay v. U.S. ___ U.S. ___ 128 S. Ct. 1581, 170 L. Ed. 2d 490 (2008): In its opinion, the Begay Court analyzed the Otherwise Clause in light of the preceding enumerated offenses of clause (ii) - burglary, arson, extortion and crimes involving the use of explosives. The Court reviewed the Congressional record and reasoned that the listed offenses should be viewed as limiting the Otherwise Clause to crimes that are “roughly similar, in kind as well as in degree of risk posed, to the examples themselves.” Begay, ___ U.S. ___, 128 S. Ct. at 1585. Turning to whether a DUI fit within the enumerated offenses, the Court recognized the dangerous nature of the offense of driving under the influence. Id., ___ U.S. ___, 128 S. Ct. at 1584. However, the Court found that DUI statutes are more akin to strict liability crimes which penalizes conduct rather than intent. Id., ___ U.S. ___, 128 S. Ct. at 1586. Therefore, the Court held DUI statutes lack the requisite violence or aggression behavior that the ACCA was designed to target, thus it does not qualify as a “violent felony.”

- Definition of “serious drug offense” under this Guideline (refers you to 924(e)(2)(A))
Offense under Controlled Substances Act or the Controlled Substances Import and Export Act or the Maritime Drug Law Enforcement Act for

which a maximum term of imprisonment of 10 years or more is prescribed by law; or
an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance for which a maximum term of imprisonment fo 10 years or more is prescribed by law.

- Specifics regarding definition of “serious drug offense”
 1. No predicate is time barred
 2. If drug offense has less than a ten year maximum it is not a predicate.

III. Challenging Predicates in Three Strike Cases

- The Basic Rule in Three Strike Cases 18 U.S.C. § 3559©
A person who is convicted in a court of the U.S. of a serious violent felony shall be sentenced to life imprisonment if -

The person has been convicted on separate prior occasions in a court of the U.S. or of a State of:
 - 2 or more serious violent felonies; or
 - 1 or more serious violent felonies and 1 or more serious drug offenses
- Government must formally file a bill of information with the court either prior to trial or guilty plea 21 U.S.C. 851(a)
- Definition of “serious violent felony” 18 U.S.C. § 3559(c)F includes:
Murder, manslaughter, other than involuntary manslaughter, assault with intent to commit murder, assault with intent to commit rape, aggravated sexual abuse and sexual abuse, abusive sexual contact, kidnapping, aircraft piracy, robbery (but see below), carjacking, extortion, arson, firearms use, firearms possession (924©) or attempt, conspiracy, or solicitation to commit any of the above offenses and any other offense punishable by 10 or more years that has as an element the use, attempted use or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.
- Definition of “serious drug offense” 18 U.S.C. § 3559(c)H
Offense punishable under 21 U.S.C. §§ 841, 846 or 960(b)(1)(A) or their State equivalent.

- Specifics in Three Strike Cases
 1. Non qualifying felonies:
 1. Robbery shall not serve as a predicate if the defendant establishes by clear and convincing evidence: (1) that no firearm or other dangerous weapons was used and no threat of use of a firearm or other dangerous weapon was involved in the offense and (2) there was no death or serious bodily injury
 2. Arson shall not serve as a predicate if the defendant: establishes by clear and convincing evidence that (1) the offense posed no threat to human life and (2) the defendant reasonably believed the offense posed no threat to human life.
 2. Possible argument that placing burden on defendant to prove by clear and convincing evidence that prior is a non qualifying felony is unconstitutional. The argument was rejected by the Eleventh Circuit in U.S. Gray 260 F. 3d 1267 (11th Cir. 2001) but it may be worth raising.

IV. The Effect of Taylor and Shephard in Challenging Predicates

- Taylor v. U.S. 495 US 575, 110 S.Ct. 2143 (1990). Armed career criminal case. Two of the defendant's priors were for second-degree burglary. At issue, whether these two burglaries could be considered as "violent felonies" under the ACCA statute. Held:
 - Court must employ a "formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions."
 - The prior burglary conviction should be counted only if it is a "generic" burglary conviction that involves:
 - Unlawful entry
 - Into a building or other structure
 - With intent to commit a crime
 - In making this determination, court may consider the following documents relating to the prior conviction: indictment or information and jury instructions
- Shepard v. U.S. 544 U.S. 13, 125 S. Ct. 1254 (2005) Armed career criminal case. The defendant's predicate felonies were burglary convictions from Massachusetts, which has a broad burglary definition. The district court followed the Taylor categorical approach and refused to consider police reports and applications for a complaint. Ultimately, the Supreme Court upheld this approach. Held:
 - Taylor categorical approach must be followed

- When prior involves a guilty plea, sentencing court may only consider:
 - The statutory definition
 - Charging document
 - Written plea agreement
 - Transcript of plea colloquy
 - Any explicit factual finding by the trial judge to which the defendant assented.
- Court may not consider:
 - Police reports
 - Preliminary complaints
 - Police affidavits
 - Charges not plead to
 - Presentence investigation reports
 - Other documents containing allegations not pled to

V. Prior Conviction is Part of Relevant Conduct

- Prior offenses which are part of “relevant conduct” are not counted. U.S.S.G. 4A1.2, Application Note 1.
- Relevant conduct includes “all acts and omissions committed...by the defendant that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense.” U.S.S.G. 1B1.3(a)(1).
- For example, a client charged with drug conspiracy covering a period of time during which the client received another substantive drug conviction based on a transaction within the same judicial district. This would fall within the U.S.S.G. definition of “relevant conduct.” Therefore, this prior conviction would NOT be eligible to enhance the client.