CRIMINAL HISTORY: CALCULATION AND VARIANCE

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I. INTRODUCTION

A defendant's criminal record can affect his or her sentence in a variety of ways. First, statutory enhancements may result in mandatory minimum sentences and increased statutory maximums. Second, certain criminal convictions, generally crimes of violence and drug offenses, may increase the defendant's Guideline offense level. Finally, the defendant's criminal history category, combined with the total offense level, determines the advisory Guideline range.

Criminal history has always been a significant factor in determining punishment. It presumably offers guidance with respect to the likelihood of recidivism and the need for deterrence and incapacitation of the individual. See 18 U.S.C. § 3553(a)(2)(B), (C). Yet, criminal history is a flawed proxy for data predicting the likelihood that a particular individual will continue to commit crime. Further, because criminal history relies on disparate state sentencing schemes, it often results in disparate sentencing ranges for similarly situated individuals. See USSG § 4A1.1, Background. Not surprisingly, Guideline departures and variances based on both over-representation and under-representation of criminal conduct are relatively frequent.

This paper addresses some of the issues raised when sentences are based on criminal history. First, the paper discusses statutory and Guideline offense level enhancements based on the nature of the previous offense. Second, it addresses the Guideline criminal history calculations and career offender provisions. Finally, it discusses circumstances where courts have rejected the flawed criminal history proxy and imposed non-Guideline sentences.

II. ENHANCEMENTS BASED ON PRIOR CONVICTIONS

A. Statutory and Guideline Enhancements

A number of statutory provisions provide for substantial enhancements based on certain types of prior convictions. See, e.g., 21 U.S.C. § 851 (felony drug offense); 18 U.S.C. § 924(e) ("serious drug offense" and "violent felonies"); 8 U.S.C. § 1326(b) ("aggravated felony," felony and certain misdemeanors). In contrast to other facts that raise the statutory maximum, the Supreme Court has held that the Constitution does not require that the fact of a prior conviction be alleged in the indictment or proven to a jury beyond a reasonable doubt. Almendarez-Torres v. United States, 523 U.S. 224, 239-47 (1998); see also Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Based on Almendarez-Torres, courts have also held that the three prior qualifying convictions under 18 U.S.C. § 924(e) need not be alleged in the indictment, see, e.g., United States v. Santiago, 268 F.3d 151, 154 (2d Cir. 2001); United States v. Ankeny, 502 F.3d 829, 839 (9th Cir. 2001), but the due process clause requires notice and an opportunity to be heard prior to sentencing. See, e.g., United States v. Wilson, 7 F.3d 828, 838 (9th Cir. 1993) (and cases cited therein) (citing Oyler v. Boles, 368 U.S. 448 (1962)). The drug statute expressly requires written pretrial notice of the enhancements, albeit not necessarily in the indictment. 21 U.S.C. § 851(a).

The Guidelines also contain offense level enhancements based on prior convictions. See, e.g., USSG § 2K2.1(a) (firearms, enhancement for a controlled substance offense or crime of violence); USSG § 2L1.2 (illegal reentry subject to enhancement for a variety of prior offenses including, drug trafficking, aggravated felony, and crimes of violence); USSG § 4B1.1 (career offender based on two prior convictions for controlled substance offense or crime of violence). Each provision has a different definition of the enhancing offense. Some enumerate certain offenses as crimes of violence.

Four rules should guide any analysis of criminal conviction enhancements:

1. **Always** read the particular "crime of violence" or drug offense definition at issue carefully and narrowly to determine if the defendant's prior conviction fits.
2. **Never** rely on the label of the offense.
3. **Always** look at the particular statute in the jurisdiction of conviction , as well as the case law interpreting and explaining that statute.
4. **Do not** rely on the underlying facts of the offense or the description of the offense in the presentence report.

B. The Categorical Approach

The "categorical approach" to analyzing prior convictions originates with the Supreme Court's decision in Taylor v. United States, 495 U.S. 575 (1990). The question in Taylor was whether a Missouri burglary conviction was a crime of violence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), which specifically lists burglary as a "violent felony." The Court held that the enhancement only applied to convictions that met the "generic, contemporary meaning of burglary," [which contains] at least the following elements: an unlawful or unprivileged entry into, or remaining in a building or other structure, with intent to commit a crime." Taylor, 495 U.S. at 602. Normally, the trial court can look only to the fact of conviction and the statutory definition of the prior offense. Id. In Taylor, the Court recognized a limited exception, allowing the court to determine whether the offense of conviction had been narrowed by the jury charge.

In Shepard v. United States, 544 U.S. 13 (2005), the Court was presented with a conviction obtained through a guilty plea under the same statute. Again, the Court rejected any effort to determine the nature of the prior conviction based on a factual description of the underlying conduct, whether it be in a presentence report, a police report, or other such document. 544 U.S. at 21. Instead, the sentencing court is "generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." Id. It is arguable that this categorical approach is constitutionally required, at least where the enhancement raises a statutory maximum. See Id. at 27 (Thomas, J. specially concurring).

As discussed below, the categorical approach has generally been applied irrespective of the particular definition of the offense. See, e.g., United States v. Dominguez-Ochoa, 386 F.3d 639 (5th Cir. 2004) (negligent homicide not crime of violence under § 2L1.2); United States v. Houston, 364

F.3d 243 (5th Cir. 2004) (statutory rape not crime of violence for felon in possession of firearm under § 2K2.1); United States v. Charles, 301 F.3d 309 (5th Cir. 2003) (en banc) (auto theft not crime of violence under USSG § 4B1.2).

Note that the Shepard-approved documents will not necessarily establish the predicate conviction. For example, in many instances, the indictment will not establish the requisite predicate. "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." See United States v. Houston, 364 F.3d 243, 246 (5th Cir. 2004) (emphasis added); accord United States v. Insalgarat, 378 F.3d 456, 467-71 (5th Cir. 2004). A plea to a conjunctive indictment will establish the predicate only if the pleading practice in the convicting jurisdiction interprets such a plea as an admission to every allegation. Compare United States v. Morales-Martinez, 496 F.3d 356 (5th Cir.), cert. denied, 128 S. Ct. 410 (2007) (no admission under Texas pleading practice); with United States v. Gutierrez-Bautista, 507 F.3d 305 (5th Cir. 2007) (plea to conjunctive indictment admitted elements in Georgia). The court cannot rely on allegations in the indictment where the defendant pled guilty to a lesser offense. United States v. Turner, 349 F.3d 833, 836 (5th Cir. 2003).

A document deemed sufficient by prison authorities may not have the necessary imprimatur of the court to prove the necessary predicate. See, e.g., United States v. Garza-Lopez, 410 F.3d 268, 273 (5th Cir. 2005) (California abstract of judgment not sufficient to establish drug trafficking offense); see also United States v. Gutierrez-Ramirez, 405 F.3d 352 (5th Cir. 2005) (same); see also United States v. Lopez-Salas, 447 F.3d 1201, 1210 n.6 (9th Cir. 2006) (court minutes insufficient); United States v. Hernandez, 218 F.3d 272, 278-79 (3d Cir. 2000) (certificate of disposition insufficient).

C. Crime of Violence Definitions

There are generally four types of definitions of crimes of violence.

1. Enumerated Offenses

Some statutes and Guidelines contain a list of enumerated offenses that ipso facto qualify as "crimes of violence." For example, the term "aggravated felony" in the immigration statute includes murder, rape, sexual abuse of a minor, 8 U.S.C. § 1101(a)(43)(A), and burglary, if the term of imprisonment was at least one year. 8 U.S.C. § 1101(a)(43)(G). The illegal reentry guideline contains its own enumerated list of violent offenses: "murder, manslaughter, kidnapping, aggravated assault, forcible sex offense (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, [and] burglary of a dwelling." USSG § 2L1.2 comment. (n.1(B)(iii)).

In the firearms context, a felon in possession of a firearm who has three "prior" convictions for "violent felonies" or "serious drug offenses" is subject to a mandatory minimum sentence of fifteen years and a maximum term of life. 18 U.S.C. § 924(e). A violent felony under this statute includes "burglary, arson, or extortion [or] involves use of explosives." 18 U.S.C. § 924(e)(2)(B).

The "career offender," who commits a "crime of violence" or "controlled substance offense," and has two prior convictions for such offenses, and the felon who has only one or two prior convictions for a "crime of violence," or a "controlled substance offense" is subject to dramatic Guideline enhancements. See USSG §§ 2K2.1(a); 4B1.1. Under Guideline 4B1.2, the term "crime of violence" includes "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, [and] burglary of a dwelling." USSG § 4B1.2 & comment. (n.1).

To qualify for an enumerated enhancement, the elements of the offense of conviction must fit the generic, contemporary definition of the offense. See, e.g., Taylor, 495 U.S. at 602; United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004). In determining the generic definition, labels are not controlling. United States v. Fierro-Reyna, 466 F.3d 324, 327 (5th Cir. 2006). The courts look to other sources of authority such as the Model Penal Code, Black's Law Dictionary and W. LaFave & A. Scott, Substantive Criminal Law (1986). See, e.g., Fierro-Reyna, 466 F.3d at 327-28 (citing Dominguez-Ochoa, 386 F.3d at 643). When the statute of conviction "encompasses prohibited behavior that is not within the plain, ordinary meaning of the enumerated offense, the conviction does not qualify." Fierro-Reyna, 466 F.3d at 327 (citation omitted). Further, where only a small minority of states support the viewpoint of the state statute at issue and the Model Penal Code supports a contrary position, the courts reject the position of the minority and adopt the Model Penal Code definition. See,e.g., id. at 329. To determine whether a state statute creates a crime outside the generic definition, the court may look to how the state courts have applied the statute to the defendant's case or other cases but should not engage in fanciful hypotheses about how the statute might be applied. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).

The crime of burglary is a good example. As the Supreme Court noted in Taylor, the "generic, contemporary meaning of burglary," contains "at least the following elements: an unlawful or unprivileged entry into, or remaining in a building or other structure, with intent to commit a crime." Taylor, 495 U.S. at 602. Because the Missouri burglary statute included breaking into vehicles, which are not normally considered structures, the statute covered more than generic burglary. Id.; see also United States v. Gomez-Guerra, 485 F.3d 301 (5th Cir. 2007) (curtilage not a "structure" within meaning of Taylor). The generic crime requires an "unlawful" entry. The Fifth Circuit recently held that a Texas conviction for burglary of a habitation may not qualify as generic, contemporary "burglary" because Texas Penal Code 30.02(a)(3) permits conviction where the defendant did not enter with intent to commit a felony. United States v. Constante, 584 F.3d 584 (5th Cir. 2008); see also United States v. Aguila-Montes, 553 F.3d 1229 (9th Cir. 2009) (California first degree burglary not crime of violence because entry may be lawful); but see United States v. Valdez-Maltos, 443 F.3d 910 (5th Cir. 2006) (burglary of habitation under Tex. Penal Code § 30.02 (a)(1) crime of violence under § 2L1.2). Both ACCA, 18 U.S.C. § 924(e), and 8 U.S.C. § 1101(43)(F) (aggravated felony) include all "burglaries," see, e.g., United States v. Rodriguez-Guzman, 56 F.3d 18 (5th Cir. 1995), but the Guidelines generally limit crimes of violence to burglary of a "dwelling," which must be a structure fit for habitation. United States v. Mendoza-Sanchez, 456 F.3d 337 (5th Cir. 2006).

Another enumerated offense is aggravated assault. In Fierro-Reyna, the Fifth Circuit held that an assault deemed aggravated solely because the victim was a law enforcement officer did not meet the generic definition of aggravated assault. 466 F.3d at 328. Using the categorical approach, the Ninth Circuit held that an Arizona "aggravated assault" did not meet the generic definition because the Model Penal Code and a majority of the states require a heightened standard of reckless, that is, "manifesting extreme indifference," while Arizona does not. United States v. Esparza-Herrera, 557 F.3d 1019, 1022-25 (9th Cir. 2009) (per curiam). The Fifth Circuit, however, has held that the essential elements of the generic offense are 1) causation of serious bodily injury and use of a deadly weapon, and 2) reckless conduct. United States v. Mungia-Portillo, 484 F.3d 813, 815 (5th Cir. 2007).

When an enumerated "offense" is not a specific one, but rather a genus of offenses, the analysis becomes even more complicated. Both Guidelines 2L1.2 and 4B1.2 define crimes of violence to include a "forcible sex offense." Defining "forcible" as "violent or destructive force," the Fifth Circuit held that a number of sexual assault statutes, which applied to sexual conduct with minors, unconscious individuals, or an imbalance of power, did not necessarily constitute a forcible sex offense. United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004); United States v. Houston, 364 F.3d 243 (5th Cir. 2004); see also United States v. Luciano-Rodriguez, 442 F.3d 320 (5th Cir. 2004). Both the en banc court and the Sentencing Commission revised this understanding, at least in the immigration context, defining forcible sex offenses to include conduct where consent was coerced or invalid. United States v. Gomez-Gomez, 547 F.3d 242 (5th Cir. 2008)(en banc). The definition in USSG § 4B1.2, however, has not been changed.

Both the aggravated felony statute and the immigration guideline impose crime of violence enhancements for "sexual abuse of a minor." Again, different jurisdictions have different ages of consent, with Texas being in the distinct minority, proscribing sexual relations with persons under the age of seventeen. Under these outlier provisions, the statute may be broader than the enumerated crime of violence. United States v. Lopez-De Leon, 513 F.3d 472 (5th Cir. 2008) (age of consent below 18 broader than generic offense); United States v. Rodriguez-Guzman, 506 F.3d 738 (9th Cir. 2007)(same); but see United States v. Najera-Najera, 519 F.3d 509, 511 (5th Cir.)(Texas age of consent below 17 constitutes generic definition of minor) (citing United States v. Zavala-Sustaita, 214 F.3d 601, 604 (5th Cir. 2000)), cert. denied, 129 S. Ct. 139 (2008).

2. Force is an Element

Most provisions permit enhancement if the offense "has as an element the use, attempted use, or threatened use of physical force against the person [or property] of another." Examples include 18 U.S.C. § 16(a) (person or property) (general U.S. Code definition of "crime of violence"); 18 U.S.C. § 924(c)(3)(A) (person or property) (possess/use/carry firearm during "crime of violence"); 18 U.S.C. § 924(e)(2)(B)(i) (person only) (ACCA); USSG § 2L1.2, Application Note 1(B)(iii) (person only) (illegal reentry guideline); USSG § 4B1.2(a)(1) & Application Note 1, ¶ 2 (career offender guideline). Again, the courts use the categorical approach, Leocal v. Ashcroft, 543 U.S. 1, 8-9 (2004), which limits the analysis to the Shepard-approved conclusive court documents. See United States v. Calderon-Pena, 383 F.3d 254, 257-59 (5th Cir. 2004) (en banc).

In Johnson v. United States, 130 S.Ct. 1265 (2010), the Supreme Court held that the meaning of the term "physical force" is a question of federal law, not state law. The federal court is not bound by a state court's interpretation of a similar statute, but *is* bound by the state court's interpretation of state law including the determination of the elements of the state offense. The Court also noted that while common law defined "force" required for a battery to include mere offensive touching, a term of art used to define a misdemeanor should not be imported into a definition of the term "violent felony."

The "use" of force requires the "active employment" of physical force. Leocal, 543 U.S. at 7 (citing Bailey v. United States, 516 U.S. 137, 144 (1995)). Thus, the term requires a "higher degree of intent than negligent or merely accidental conduct." Id. at 9. Although the Supreme Court left open the question whether reckless application of force could constitute use, id. at 13, the Fifth Circuit has held that the application of force must be intentional. United States v. Vargas-Duran, 356 F.3d 598, 602-05 (5th Cir. 2004) (en banc). Further, the focus is on the use of force not the result of injury. Leocal, 543 U.S. at 10 n.7. The use of force means the use of "violent or destructive force," not mere physical contact. United States v. Rodriguez-Guzman, 56 F.3d 18, 20 n.8 (5th Cir. 1995); accord United States v. Villegas-Hernandez, 468 F.3d 874, 879 (5th Cir. 2006); United States v. Landeros-Gonzalez, 262 F.3d 424, 426 (5th Cir. 2001); see also Johnson, supra.

3. Offense By Its Nature Involves Substantial Risk of Physical Force

A number of statutes provide enhancement if the offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Examples include: 18 U.S.C. § 16(b) (general U.S. Code definition of "crime of violence"); 18 U.S.C. § 924(c)(3)(B) (possess/use/carry firearm during "crime of violence"). Again, the approach is categorical, that is, whether the offense necessarily involves the use of force. See Leocal, 543 U.S. at 8-9; United States v. Gracia-Cantu, 302 F.3d 308, 312 (5th Cir. 2002). A "substantial risk" requires a "strong probability that the conduct, in this case the application of physical force during the commission of the crime, will occur." United States v. Rodriguez-Guzman, 50 F.3d 18, 20 (5th Cir. 2000).

In United States v. Charles, 301 F.3d 309 (5th Cir. 2002) (en banc), the Fifth Circuit held that auto theft did not constitute a crime of violence under USSG § 4B1.2. In United States v. Armendariz-Moreno, 571 F.3d 490 (5th Cir. 2009), on remand from the Supreme Court, the Fifth Circuit overruled its previous deicisions held that unauthorized use of a motor vehicle is likewise not an aggravated felony. See also United States v. Sanchez-Garcia, 501 F.3d 1208 (10th Cir. 2007); United States v. Vidal, 504 F.3d 1072 (9th Cir. 2007) (en banc).

4. Conduct Presents Serious Potential Risk of Physical Injury

Finally, a few provisions allow enhancement if the offense otherwise involves conduct that, by its nature, presents a serious potential risk of physical injury to another. Examples include: 18 U.S.C. § 924(e)(2)(B)(ii) (ACCA); USSG § 4B1.2(a)(2) & comment. (n.1, ¶ 2) (career offender Guideline). The crime is considered "generically," that is, in terms of how the law defines the offense, not how the individual commits it on a particular occasion. Begay v. United States, 128 S.

Ct. 1581, 1584 (2008). In Begay, the Court also looked to the enumerated offenses to guide its determination whether a particular offense was a crime of violence and held that the residual provision applied only to similar crimes. The offense must still constitute the sort of "purposeful, violent and aggressive" offense characteristic of the enumerated crimes. Emphasizing that those offenses - burglary, arson and extortion - involved documented risks of violence, the Court held that driving while intoxicated was not a predicate offense under the statute. 128 S. Ct. at 584-85.

In contrast to the use of force provisions, this provision is focused on the potential for injury. Thus in James v. United States, 550 U.S. 192 (2007), the Supreme Court held that any attempted burglary poses a serious potential risk of physical injury regardless of whether injury was intended. The Supreme Court assumed that the risk was inherent when someone breaks into a residence or a building that might be protected by another. On the other hand, in Chambers v. United States, 129 S. Ct. 687 (2009), the Court held that an "escape" statute that included walkaways and failure to report defined a range of conduct broader than the statutory crime of violence. Id. at 690-93. Indeed, data from the Sentencing Commission revealed that the risk of violence associated with these types of offenses was minimal. Id. at 692-93. In United States v. Hart, 578 F.3d 674, 681 (7th Cir. 2009), the Seventh Circuit held that a conviction under the federal escape statute, 18 U.S.C. § 751(a), which covers conduct ranging from escape from a prison to failure to report to prison, is not a crime of violence. But see United States v. Hughes, 2010 WL 1268084 (5th Cir. April 5, 2010) (federal conviction for escape from institution was crime of violence because it involved purposeful conduct and serious risk of aggressive behavior and injury)

D. Drug Offenses

Enhancements based on prior drug offenses are also subject to different statutory definitions with sentencing implications. The broadest enhancement is contained in Title 21, which basically doubles the statutory penalties, and in some instances requires a life sentence, if the defendant has prior convictions for a "felony drug offense." See, e.g., 21 U.S.C. § 841(b). The enhancement applies to any prior offense punishable by more than one year, regardless of whether it is labeled as a felony in the convicting jurisdiction. Burgess v. United States, 128 S. Ct. 1572 (2008). The statute covers any felony drug conviction, including mere possession, not just trafficking. United States v. Sandle, 123 F.3d 809, 810-12 (5th Cir. 1997). The conviction must be final, 21 U.S.C. § 841(b)(1)(A), that is, no longer subject to direct appeal. United States v. Puig-Infante, 19 F.3d 929, 947 (5th Cir. 1994). The statute applies to probation, United States v. Morales, 854 F.2d 65 (5th Cir. 1988), and deferred adjudication. United States v. Cisneros, 112 F.3d 1272 (5th Cir. 1997).

The aggravated felony provisions of the immigration statute include "drug trafficking," 8 U.S.C. § 1101(a)(43)(B), which is defined in 18 U.S.C. § 924(c)(2) as any felony punishable under Title 21. In Lopez v. Gonzales, 549 U.S. 625 (2006), the Supreme Court held that a conviction for simple possession of a controlled substance was not an aggravated felony because the offense would not have been a felony under federal law. 127 S. Ct. at 633. The Supreme Court will decide this term whether a second possession conviction, which could have been enhanced to a felony under federal law, is a "drug trafficking" offense under this provision. Carachuri-Rosendo v. Holder, 570 F.3d 263 (5th Cir.), cert. granted, 130 S.Ct. 1012 (2009); see United States v. Cepeda-Rios, 530 F.3d 333

(5th Cir. 2008) (second drug conviction is aggravated felony); but see United States v. Ayon-Robles, 557 F.3d110 (2d Cir. 2009) (second possession conviction not aggravated felony); Rashid v. Mukasey, 531 F.3d 438 (6th Cir. 2008) (and cases cited therein) (second conviction not aggravated if not actually enhanced).

The Guidelines limit the "drug trafficking" or "controlled substance offense" enhancements to an offense punishable by imprisonment for a term exceeding one year, that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or counterfeit substance)" or possession with intent to do the same. USSG §§ 2L1.2, 4B1.2(b). Again, the categorical approach applies. For example, a California statute that prescribes both delivery, offer to sell and transportation of drugs was deemed broader than the guideline definition. United States v. Garza-Lopez, 410 F.3d 268 (5th Cir. 2005); United States v. Gutierrez-Ramirez, 405 F.3d 352 (5th Cir. 2005). Similarly, the Fifth Circuit held that the Texas delivery statute, which included offer to sell was overly broad under the immigration Guideline, United States v. Gonzalez, 484 F.3d 712 (5th Cir. 2007). The 2008 Guidelines amendments specify that "an offer to sell" is included within the drug trafficking enhancements for immigration offenses. USSG § 2L1.2, comment. (n.1(B)(iv)).

The ACCA enhancements apply to convictions for a "serious drug offense," defined as a drug offense for which the maximum punishment is at least ten years in prison and which is either a drug offense under Title 21 or Title 46 of the United States Code or is a state offense "involving manufacturing, distributing, or possessing with intent to distribute" as defined at 21 U.S.C. § 802. 18 U.S.C. § 924(e)(2)(A)(i), (ii). In United States v. Vickers, 540 F.3d 356 (5th Cir.), cert. denied, 129 S. Ct. 771 (2008), the Fifth Circuit distinguished the Guidelines cases such as Gonzalez, and held that possession with intent to deliver was a "serious drug offense" under ACCA. The appellate court emphasized that the statute includes offenses "involving" trafficking type activities as opposed to actual trafficking. Vickers, 540 F.3d at 364-65.

In contrast to other statutory and Guideline provisions, a "serious drug offense" is limited to offenses punishable by a maximum sentence of at least ten years. Where a prior conviction has been enhanced under a recidivist provision, the maximum sentence is the enhanced punishment. United States v. Rodriquez, 553 U.S. 377 (2008) (Note that the defendant had actually been enhanced). The court determines the statutory maximum on the basis of the date of the prior conviction, not the federal offense. United States v. Allen, 282 F.3d 339 (5th Cir. 2002).

E. Timing

While each statutory and Guideline provision contains different definitions of the predicate offenses, attention must also be paid to the timing requirements of each provision. Chapter Four and the firearms Guideline have remoteness constraints on consideration of prior convictions as discussed below, see USSG § 4A1.1, but the statutes do not. 8 U.S.C. § 1326(b), 18 U.S.C. § 924(e); 21 U.S.C. § 841(b). United States v. Fuller, 453 F.3d 274, 278 (5th Cir. 2006). The illegal reentry Guideline, alone among other Guidelines, likewise contains no time bar to consideration of prior conviction enhancements. USSG § 2L1.2.

On the other hand, the statutory enhancements apply only if the instant offense occurred after the defendant had been convicted of the predicate. See, e.g., 18 U.S.C. § 924(e); 8 U.S.C. § 1326(b);

United States v. Rojas-Luna, 522 F.3d 502 (5th Cir. 2008); United States v. Covian-Sandoval, 462 F.3d 1090, 1097-98 (9th Cir. 2006), cert. denied, 127 S. Ct. 1866 (2007); 18 U.S.C. § 924(e)(1). Under the drug statute, the prior conviction must also be final. 21 U.S.C. § 841(b); United States v. Puig-Infante, 929 F.2d 947 (5th Cir. 1994). The parallel guideline provisions likewise require the conviction to precede the federal offense. The firearm enhancements apply only if the "defendant committed any part of the instant offense *subsequent* to sustaining" one or two predicate convictions. USSG § 2K1.2(a)(1)-(4) (emphasis added). The illegal reentry guideline enhancements apply if the defendant "previously was deported, or unlawfully remained in the United States *after*" a conviction for a predicate offense. USSG § 2L1.2(b) (emphasis added); United States v. Sanchez-Mota, 319 F.3d 1, 3-4 (1st Cir. 2002); United States v. Mendoza-Alvarez, 79 F.3d 96, 97-98 (8th Cir. 1996). The career offender Guideline is limited to previous "convictions." USSG § 4B1.2(c); United States v. Gooden, 116 F.3d 721 (5th Cir. 1997). Under the general criminal history provisions, however, a conviction is deemed to be a "prior sentence" as long as it precedes the federal sentencing. USSG § 4A1.2, comment. (n.1).

There are also differences concerning multiple convictions. A felon in possession of a firearm is subject to the ACCA enhancements if the prior offenses were "committed on occasions different from one another," 18 U.S.C. § 924(e)(1), even if he was convicted in a single proceeding. See, e.g., United States v. Herbert, 860 F.2d 620 (5th Cir. 1988) (and cases cited therein). The ACCA test is whether the first offense was completed when the second commenced. United States v. Fuller, 453 F.3d 274, 278 (5th Cir. 2006); compare United States v. Brady, 988 F.2d 664, 668-70 (6th Cir. 1993) (en banc) (two robberies an hour apart counted separate); United States v. Washington, 898 F.2d 439 (5th Cir. 1990) (two robberies of same convenience store separate); United States v. Pope, 132 F.3d 684, 692 (11th Cir. 1998) (two drug buys 200 yards apart separate), with United States v. Towne, 870 F.2d 880, 889 (2d Cir. 1989) (rape and kidnapping of single victim part of single continuous criminal episode); United States v. Montgomery, 819 F.2d 847, 850 n.2 (8th Cir. 1987) (simultaneous robberies). The court is permitted to examine only the Shepard-approved documents in determining whether two offenses were sequential or simultaneous. See Fuller, 453 F.3d at 279. Because the indictment in Fuller did not rule out the possibility that he had been convicted as an aider and abettor, which could have involved simultaneous offenses, the Fifth Circuit held that ACCA did not apply. Id., see also United States v. McElyea, 158 F.3d 1016, 1021 (9th Cir. 1998). On the other hand, under the Guidelines, absent an intervening arrest, sentences for offenses contained in a single charging instrument or imposed on the same day are considered to be a single sentence. USSG § 4A1.2(a)(2).

III. CRIMINAL HISTORY

A. Computation

Computation of the criminal history category is based on the length of the sentence, the date of imposition or release, and whether the current offense was committed while the defendant was under and/or had recently completed another sentence. Guideline 4A1.1 provides as follows:

> (a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
> (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
> (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this item.
> (d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release or escape status.
> (e) Add **2** points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such sentence. If **2** points are added for item (d), add only **1** point for this item.
> (f) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a),(b), or (c) above because such sentence was counted as a single sentence, up to a total of **3** points.

USSG § 4A1.1. The 2010 amendments eliminate the recency points for commission of the offense within two years of release or while serving a prison sentence. USSG § 4A1.1(e) (Nov. 1, 2010).

B. Definition of a Sentence

1. What is a "prior" Sentence?

A "prior sentence" is "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial or plea of nolo contendere, for conduct not part of the instant offense." USSG § 4A1.2(a)(1). A conviction counts as a sentence even if it was for conduct that occurred after the offense of conviction, United States v. Lara, 975 F.2d 1120, 1129 (5th Cir. 1992), see also United States v. Flowers, 995 F.2d 315, 317-18 (1st Cir. 1993); United States v. Lopez, 349 F.3d 39, 41 (2d Cir. 2003); United States v. Tabaka, 982 F.2d 100, 102 (3d Cir. 1992).[1] The courts are divided over whether to consider a sentence imposed after the original sentencing but before resentencing. Compare United States v. Klump, 57 F.3d 801 (9th Cir. 1995) (can consider); United States v. Bleike, 950 F.2d 214, 291-21(5th Cir. 1991) (not plain error to consider), with United States v. Ticchiarelli, 171 F.3d 24, 35-37 (1st Cir. 1999) (improper to consider intervening sentence under law of the case doctrine).

A sentence is not counted for conduct that is considered "part of the instant offense" if it would be relevant conduct under guideline 1B1.3. USSG § 4A1.2, comment. (n.1). Compare United

[1]If convicted of failure to appear, the underlying offense is not considered a prior sentence unless the defendant failed to appear for sentencing. USSG § 2J1.6, comment. (n.5); United States v. Cherry, 10 F.3d 1003, 1014 (3d Cir. 1993).

States v. Henry, 288 F.3d 657 (5th Cir. 2002) (firearms and trespass); United States v. Salter, 241 F.3d 392 (5th Cir. 2001) (tax evasion related to money laundering and drug offenses), and United States v. Thomas, 54 F.3d 73 (2d. Cir. 1995) (state larceny related to federal forgery), with United States v. Yerena-Magana, 478 F.3d 683 (5th Cir. 2007) (illegal reentry not part of drug offense); United States v. Williamson, 53 F.3d 1500 (10th Cir. 1995) (state cocaine conviction not relevant conduct and therefore not related to federal drug case). A prior conviction may be counted, however, even if it is also an element of the offense. United States v. Hawkins, 69 F.3d 11, 15 (5th Cir. 1995) (felon in possession); see also United States v. Alesandroni, 982 F.2d 419 (10th Cir. 1992).

Related sentences are treated as a single sentence. The longest sentence is used if concurrent sentences were imposed and the aggregate sentence is used if the sentences were consecutive. USSG § 4A1.2(a)(2). Revocation of probation, parole or supervised release is counted with the original sentence, but the ultimate prison sentence is the sentence to be counted. USSG § 4A1.2(k)(1).

In 2007, Guideline § 4A1.2(a)(2) was rewritten to explain that where a defendant has multiple prior sentences, the court must determine whether to count them separately or as a single sentence. Prior sentences are always counted separately if the offenses were separated by an intervening arrest. The "intervening arrest" is an arrest that precedes commission of the second offense. Compare United States v. Williams, 533 F.3d 673, 676 (8th Cir. 2008) (defendant arrested on first offense after commission of second), with United States v. Smith, 549 F.3d 355, 361 (6th Cir. 2008) (count second offense committed while on bond for the first). The new provision eliminates the need to evaluate the scheme or consolidation. If there is no intervening arrest, prior sentences are counted separately "unless (A) the sentences resulted from offenses contained in the same charging instrument; *or* (B) *the sentences were imposed on the same day*." USSG § 4A1.2(a)(Nov. 1, 2007) (emphasis added). Convictions for violent offenses considered as a single sentence will still result in some additional points. USSG § 4A1.1(f). The Commission also suggests an upward departure if treating serious non-violent offenses committed on different occasions as a single sentence fails adequately to capture the nature of the defendant's criminal history. USSG § 4A1.2, comment. (n.3) (Nov. 1, 2007).

2. Minor Offenses

Certain misdemeanors, -- gambling, driving without a license, disorderly conduct, prostitution, resisting arrest, trespassing -- are counted only if they resulted in a prison sentence of at least thirty days or more than one year of probation, or they are similar to the instant offense. USSG § 4A1.2(c)(1). Other petty offenses -- fish and game violations, juvenile status offenses, hitchhiking, loitering, minor traffic infractions, public intoxication, vagrancy -- are never counted. USSG § 4A1.2(c)(2). In determining whether an offense is "similar" to uncounted offenses, the court should consider "all possible factors of similarity, including punishment, elements of the offense, level of culpability and the likelihood of recidivism." Compare United States v. Garrett, 528 F.3d 525, 529 (7th Cir. 2008) (misdemeanor bail jumping like contempt of court, not counted); United States v. Hardeman, 933 F.2d 278, 281 (5th Cir. 1991) (holding that failure to maintain auto insurance should not be counted), United States v. Reyes-Maya, 305 F.3d 362 (5th Cir. 2002) (criminal mischief similar to disorderly conduct), and United States v. Gadison, 8 F.3d 186, 193 (5th

Cir. 1993) (theft by check not counted), with United States v. Sanchez-Cortez, 530 F.3d 357 (5th Cir. 2008) (military AWOL counts, not similar to truancy); United States v. McDonald, 106 F.3d 1218 (5th Cir. 1997) (lying to police officer counted); United States v. West, 58 F.3d 133 (5th Cir. 1995) (possession of gambling paraphernalia counted). The circuits are split over whether petty theft is countable. Compare United States v. Lopez-Pastrana, 244 F.3d 1025 (9th Cir. 2001) (petty theft is like hot check not countable unless 30 day sentence), with United States v. Lamm, 392 F.3d 130 (5th Cir. 2004)(shoplifting should be counted); see also United States v. Ubiera, 486 F.3d 71 (2d Cir.) (same), cert. denied, 128 S. Ct. 173 (2007); United States v. Spaulding, 339 F.3d 20 (1st Cir. 2003); United States v. Harris, 325 F.3d 865 (7th Cir. 2003).

3. Non-traditional Sentences

A sentence of diversion is counted if there was a finding of guilt regardless of whether the conviction was set aside. USSG § 4A1.2(f). Compare United States v. Daniels, 588 F.3d 835 (5th Cir. 2009) (completed deferred adjudication counted); United States v. Giraldo-Lara, 919 F.2d 19, 23 (5th Cir. 1990) (defendant on deferred adjudication admitted guilt), with United States v. Kozinski, 16 F.3d 795, 811-12 (7th Cir. 1994) (no points if no adjudication of guilt). An expunged conviction is not counted, USSG § 4A1.2(j); United States v. Johnson, 941 F.2d 1102 (10th Cir. 1991) (deferred not counted where expungement was automatic); see also United States v. Hidalgo, 932 F.2d 805 (9th Cir. 1991) (cannot count prior conviction that was set aside and expunged), but there must actually be an expunction. United States v. Cerverizzo, 74 F.3d 629 (5th Cir. 1996). The court will count a conviction that has merely been set aside for reasons other than innocence or the validity of the conviction. USSG § 4A1.2, comment. (n.10); see, e.g., United States v. Ashburn, 20 F.3d 1336, 1341-43 (5th Cir.) (counting Youth Corrections Act sentence that had been set aside), aff'd in relevant part, 38 F.3d 803 (5th Cir. 1994) (en banc). A conviction and sentence counts even if the case is on appeal, unless the execution of sentence has been suspended pending appeal. USSG § 4A1.2(l).

4. Other Jurisdictions

Military sentences count only if imposed by general or special court martial. USSG § 4A1.2(g). Foreign convictions and tribal convictions are not counted. USSG § 4A1.3(h), (I).

5. Unconstitutional Sentences

Sentences resulting from convictions that have been vacated or reversed because of "errors of law, -- because of subsequently-discovered evidence exonerating the defendant," or convictions that the defendant shows to have been previously ruled constitutionally invalid, are not counted. USSG § 4A1.2, comment.(n.6). The court can consider even constitutionally invalid convictions if they are "reliable evidence of past criminal activity." Id.

There is no constitutional violation in requiring the defendant to prove the invalidity of prior convictions by a preponderance of the evidence. Parke v. Raley, 506 U.S. 20 (1992); see also United States v. Barlow, 17 F.3d 85, 89 (5th Cir. 1994) (prior conviction presumptively valid, and defendant has burden of proving unconstitutional); see also United States v. Osborne, 68 F.3d 94 (5th Cir.

1995) (defendant failed to prove conviction was uncounseled). The Commission does "not intend to confer upon the defendant any right to attack collaterally a prior conviction or sentence beyond any such rights otherwise recognized in law." USSG § 4A1.2, comment. (n.6). In Custis v. United States, 511 U.S. 485 (1994), the Supreme Court held that defendants could challenge prior convictions used for enhancement under the Armed Career Criminal Act, 18 U.S.C. § 924(e), only if those convictions were obtained in violation of the right to counsel. The Court left open the possibility, however, that a defendant could reopen the federal case if he subsequently invalidated his convictions. See Maleng v. Cook, 490 U.S. 488 (1989). The circuit courts have concluded that a defendant is entitled to habeas corpus relief if a prior conviction used to enhance his sentence is subsequently invalidated. United States v. Nichols, 30 F.3d 35 (5th Cir. 1994). A defendant cannot, however, obtain federal habeas corpus relief for an expired state conviction even if relief is no longer available to him in state court. Daniels v. United States, 532 U.S. 374 (2001).

Normally, a conviction obtained in violation of the right to counsel cannot be used to enhance a defendant's sentence. United States v. Tucker, 404 U.S. 443 (1972); Burgett v. Texas, 389 U.S. 109 (1967). In Nichols v. United States, 511 U.S. 738 (1994), the Supreme Court held that a previous uncounseled conviction that did not expose the defendant to a jail sentence could be used to enhance a prison sentence. (overruling Baldasar v. Illinois, 446 U.S. 222 (1980)); see also United States v. Haymer, 995 F.2d 550 (5th Cir. 1993). In Alabama v. Shelton, 535 U.S. 654 (2002), the Court held for the first time that a defendant is entitled under the Sixth Amendment to counsel even if he receives probation if he could subsequently be sent to prison. Many prior misdemeanor convictions may prove to be invalid if the defendant did not have counsel and there was no valid waiver. But see United States v. Perez-Macias, 335 F.3d 421 (5th Cir. 2003) (holding attorney not needed for misdemeanor federal probation). The court need only advise a defendant of his right to counsel during the plea and obtain a waiver but the validity of the waiver is case specific. Iowa v. Tovar, 541 U.S. 987 (2004).

C. Imprisonment

A "sentence of imprisonment" means the maximum sentence imposed, USSG § 4A1.2(b)(1), that is, the sentence pronounced by the court, not the time actually served. An indeterminate sentence is treated as the maximum sentence. USSG § 4A1.2, comment. (n.2); See, e.g., United States v. Levenite, 277 F.3d 454 (4th Cir. 2002) (counting indeterminate sentence of two days to twenty-three months under § 4A1.1(a)(1) even though defendant actually served two days). If the court reduces the prison sentence, however, the reduced sentence controls. United States v. Kristl, 437 F.3d 1050, 1056-57 (10th Cir. 2006); see also United States v. Jasso, 587 F.3d 706 (5th Cir. 2009) (shock probation).

If part of the sentence was suspended, the "sentence of imprisonment" includes only the portion that was not suspended. USSG § 4A1.2(b)(2); see, e.g., United States v. Tabaka, 982 F.2d 100, 102 (3d Cir. 1992)(all but two days suspended). If a defendant receives a "time served" served sentence, the actual time spent in custody will be counted. Compare United States v. Rodriguez-Lopez, 170 F.3d 1244, 1246 (9th Cir. 1999) (adding two points for sixty-two days served), with United States v. Dixon, 230 F.3d 109 (4th Cir. 2000) (58-days spent in custody did not warrant two

points); see also United States v. Hall, 531 F.3d 414 (6th Cir. 2008) (time credited on another sentence did not count).

In determining whether a defendant has been sentenced to a term of imprisonment, the court looks to the nature of the facility, rather than its purpose. United States v. Brooks, 166 F.3d 723 (5th Cir. 1999); United States v. Latimer, 991 F.2d 1509 (9th Cir. 1993). For example, the Fifth Circuit held in Brooks, that incarceration boot camp was a prison sentence. 166 F.3d at 725-26. The court distinguished between facilities like the boot camp "requiring 24 hours a day physical confinement" and other dispositions such as "probation, fines and residency in a halfway house." Id. USSG § 4A1.1, comment. (n.1). Indeed, the Commission generally considers community type confinement to be a substitute for imprisonment. USSG §§ 5B1.3(c)(1), (2), 5C1.1(c), (d); see United States v. Phipps, 68 F.3d 159, 162 (7th Cir. 1995); Latimer, 991 F.2d at 1512-13. A six-month sentence of home detention is not considered a sentence of imprisonment. United States v. Gordon, 346 F.3d 135 (5th Cir. 2003); see also United States v. Jones, 107 F.3d 1147, 1161-65 (6th Cir. 1997) (home detention is not imprisonment); United States v. Compton, 82 F.3d 179, 183 (7th Cir. 1996). The courts have also held that community treatment centers or halfway houses are not imprisonment. United States v. Pielago, 135 F.3d 703, 711-14 (11th Cir. 1998); Latimer, 991 F.2d at 1511. But see United States v. Rasco, 963 F.2d 132 (6th Cir. 1992) (community treatment center upon revocation of parole is incarceration).

D. Timing

Under USSG § 4A1.1(a), three points are assigned to each adult sentence of imprisonment exceeding one year and one month imposed within fifteen years of the instant offense **or** resulting in incarceration during the fifteen year period. USSG §4A1.2 (e)(1). This provision can result in the counting of remote convictions, especially where a defendant was on parole or supervised release and keeps getting revoked because he may have been incarcerated during the fifteen-year period. USSG § 4A1.2(k)(2)(B). See, e.g., United States v. Semsak, 336 F.3d 1123, 1128 (9th Cir. 2003) (revocation of parole). The court will count a conviction of a defendant whose parole is revoked during the operative time period, even if the defendant is incarcerated for a new offense at the time of revocation. United States v. Ybarra, 70 F.3d 362, 365-66 (5th Cir. 1995). A defendant on escape status is deemed incarcerated. United States v. Radziercz, 7 F.3d 1193 (5th Cir. 1993).

With the exception of prison sentences in excess of thirteen months, the time limitation normally runs from the date sentence is imposed, not when it is served. USSG § 4A1.2(c)(2). The time limit runs from the original imposition date, not the revocation date, unless the defendant received more than one year and one month on revocation. USSG §§ 4A1.2 (a)(1), (e)(2), (k)(2)(B); United States v. Arviso-Mata, 442 F.3d 382 (5th Cir. 2006) (sentence imposed when defendant found guilty and sentence was suspended); United States v. Arnold, 213 F.3d 894, 895-96 (5th Cir. 2000).

Two points are added if the instant offense was committed while the defendant was under a criminal justice sentence. USSG § 4A1.1(d). This provisions covers virtually all forms of suspended sentences at least where there is a possibility of a custodial sentence, see, e.g., United States v. Giraldo-Lara, 919 F.2d 19 (5th Cir. 1990) (diversion); see also United States v. Perales, 487

F.3d 588 (8th Cir. 2007) (same) , even if there is no active supervision. See, e.g., United States v. Miller, 56 F.3d 719 (6th Cir. 1995) (conditional discharge similar to unsupervised probation). On the other hand, a suspended sentence where a fine is the only sanction is not considered to be a criminal justice sentence. USSG § 4A1.1, comment.(n.4); United States v. Kipp, 10 F.3d 1463 (9th Cir. 1993). A defendant is deemed to be on probation even if the State did not use due diligence to arrest him. United States v. Anderson, 184 F.3d 479 (5th Cir. 1999); see also United States v. McCowan, 469 F.3d 386, 393 (5th Cir. 2006). A defendant who escapes while awaiting sentencing is deemed to be under a criminal justice sentence, United States v. Arellano-Rocha, 946 F.2d 1105 (5th Cir. 1991), as is a defendant who has yet to surrender. See, e.g., United States v. Fisher, 137 F.3d 1158, 1167 (9th Cir. 1998). The defendant must actually be serving the sentence at the time she commits the federal offense. Thus, a defendant whose probation was imposed following indictment is not under a criminal justice sentence. United States v. Brazell, 489 F.3d 666, 668-69 (5th Cir. 2007); see also United States v. Caldwell,585 F.3d 1347 (7th Cir. 2009).

Two points are also added if the offense was committed less than two years after release from prison on a sentence of at least sixty days or while the defendant was serving a sentence of imprisonment including while on escape status. § 4A1.1(e); United States v. Trevino, 131 F.3d 1140, 1141 (5th Cir. 1997) (release occurred less than two years after defendant admitted joining conspiracy). Only one point is added if the defendant was given two points for having committed the offense while serving another sentence. Id. Although time spent in custody after revocation of probation or parole counts, see, e.g., United States v. Morgan, 390 F.3d 1072 (8th Cir. 2004), time spent waiting for the revocation hearing does not. United States v. Stewart, 49 F.3d 121 (4th Cir. 1995).

Continuing offenses create particularly complex calculation scenarios. Compare United States v. Stephenson, 887 F.2d 57, 62 (5th Cir. 1989) (government failed to establish defendant was in conspiracy within requisite 15 years); United States v. Gabel, 85 F.3d 1217 (7th Cir. 1996) (reversing relevant conduct finding and resulting criminal history points), with Trevino, 141 F.3d at 114 (conspiracy occurred within two years of release). A defendant who admitted that he obtained the firearm within ten years of his previous sentence received criminal history points. United States v. McGee, 494 F.3d 551, 555-56 (6th Cir. 2007). A defendant "found" unlawfully in the United States while serving a prison sentence is deemed to have committed the offense while serving another sentence. United States v. Santana-Castellano, 74 F.3d 593 (5th Cir. 1996). On the other hand, the illegal reentry offense is complete once the defendant is found, United States v. Alvarado-Santillano, 434 F.3d 794 (5th Cir. 2006), and therefore, subsequent sentences should not be counted. See also United States v. Sosa-Carabantes, 561 F.3d 256,259-60 (4th Cir. 2009).

E. Youthful Convictions

There are certain limitations on consideration of convictions prior to the defendant's eighteenth birthday. Adult convictions, where a prison sentence of more than thirteen months was imposed, are counted within the standard fifteen-year period, even if the defendant was not yet eighteen at the time of the offense. USSG § 4A1.1(d)(1); United States v. Gipson, 46 F.3d 472 (5th Cir. 1994). Other convictions prior to the defendant's eighteenth birthday are counted only if the

sentence was **imposed within five years** of the federal offense. USSG § 4A1.1(d)(2); United States v. Green, 46 F.3d 461, 467 (5th Cir. 1995). Juvenile adjudications are counted even though not considered "convictions" in state court. United States v. Holland, 26 F.3d 26 (5th Cir. 1994). A juvenile sentence is deemed to be a sentence of confinement if the defendant was sent to the state agency responsible for confining juveniles. See, e.g., United States v. Birch, 39 F.3d 1089, 1095 (10th Cir. 1994) (and cases cited therein). The juvenile's age at the time of a revocation resulting in confinement, rather than the time of the offense, controls. United States v. Female Juvenile, 103 F.3d 14, 17 (5th Cir. 1996). Juvenile detention that does not result in an adjudication does not count. United States v. Johnson, 205 F.3d 1197, 1200 (9th Cir. 2000).

F. Revocations

Where a defendant's supervision (probation, parole, etc.) has been revoked, the court assesses criminal history points based on the entire length of the term of imprisonment imposed both before and after the revocation. USSG § 4A1.2(k)(1). As discussed above, however, different timing rules will affect the criminal calculation. For example, a defendant who is sentenced to 180 days in prison, all but thirty days suspended, would normally receive only one criminal history point. USSG § 4A1.1(c). If his suspended sentence is then revoked and he is sentenced to serve sixty days in custody, he would instead receive two criminal history points for a ninety-day sentence, pursuant to USSG § 4A1.1(b). Even the sentence upon revocation would only count, however, if the original sentence was imposed within ten years of the federal offense. Arviso-Mata, 442 F.3d at 385.

On the other hand, a defendant sentenced to serve ten years in prison suspended for ten years would likewise initially receive only a single criminal history point. USSG § 4A1.1(c). If his sentence is revoked, however, and he is sentenced to serve two years in prison, he will receive three criminal history points, USSG § 4A1.1(a), as long as he is incarcerated within fifteen years of the federal offense. USSG § 4A1.2(k)(2)(B). Had the same defendant originally received a ten-year sentence that was not suspended and had he then been paroled and revoked, he would still receive only the original three points and he will continue to receive those points as long as he is incarcerated within the fifteen-year period preceding the instant offense.

Another complication arises when multiple terms of supervision, arising from separate sentences under USSG § 4A1.2(a)(2), are revoked. In this case, the court adds the term of imprisonment imposed upon revocation to the sentence "that will result in the greatest increase in criminal history points." USSG § 4A1.2, comment. (n.11). This addition applies, however, only to one of the convictions and the other retains the original criminal history point, pursuant to USSG § 4A1.1(c). For example, a defendant is serving three probated sentences for separate offenses. Based on a single violation, all three probated sentences are revoked and the defendant is sentenced to serve three concurrent two-year prison terms. Under this rule, the defendant receives three criminal history points for one of the prison terms, but only one point for each of the two remaining terms of supervision that were simultaneously revoked. United States v. Streat, 22 F.3d 109, 111-12 (6th Cir. 1994); United States v. Flores, 93 F.3d 587, 592 (9th Cir. 1996).

IV. CAREER OFFENDERS

A. General Application

An individual is a "career offender" if (1) he or she was at least eighteen at the time of the instant offense, (2) the offense of conviction is a felony crime of violence or felony controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense. USSG § 4B1.1. The guidelines provide significantly enhanced offense levels for career offenders and mandate that such individuals receive a criminal history category of VI. The enhancements increase depending on the statutory maximum for the offense of conviction. Id. The statutory maximum is the enhanced maximum. Id., comment. (n.2). United States v. LaBonte, 520 U.S. 751, 762 (1997).

In contrast to other criminal history provisions, only adult convictions can serve as a predicate under the career offender guideline. USSG § 4B1.2, comment. (n.1). A defendant who was convicted as an adult, however, but who was only seventeen can be considered a career offender. See, e.g., United States v. Moorer, 383 F.3d 164 (3d Cir. 2004); United States v. Otero, 495 F.3d 393, 400-01 (7th Cir. 2007); United States v. Hazelett, 32 F.3d 1313, 1320 (8th Cir. 1994) but see United States v. Mason, 284 F.3d 555, 558-62 (4th Cir. 2002) (holding that adult conviction could not count because defendant sentenced as juvenile). Second, the enhancement applies to criminal "convictions," not sentences. To count as a prior conviction, the defendant must have been convicted of the offense before he committed the federal offense. USSG § 4B1.2(c); United States v. Gooden, 116 F.3d 721 (5th Cir. 1997); United States v. McCary, 14 F.3d 1502 (10th Cir. 1994). The date that guilt is established is the date of conviction. USSG § 4B1.2(c).

B. Crimes of Violence

The criminal history Guideline defines "crimes of violence" as follows:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that _
>
> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another.

USSG § 4B1.2(a). The commentary lists additional offenses that are crimes of violence including "murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling." USSG § 4B1.1, comment. (n.1). It also explains that the "conduct" referenced in the residual clause must be expressly charged in the count of conviction and must "by its nature" present a "serious potential risk of physical injury to another." Id., see also United States v. Charles, 301 F.3d 309, 311-12 (5th Cir. 2002) (en banc).

As discussed earlier, the categorical approach applies to both the list of enumerated offenses and the residual offenses. See, e.g., Houston, 364 F.3d at 245-48 (statutory rape neither forcible sex offense nor otherwise crime of violence); United States v. Butler, 207 F.3d 839 (6th Cir. 2000). Interpreting virtually identical language in the ACCA, the Supreme Court held that the "violent felony" definition requires an offense "of a type that, by its nature, presents a serious potential risk of injury to another." James v. United States, 550 U.S. 192, 209 (2007). The relevant inquiry is whether the "conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." Id. More recently, in Begay v. United States, 128 S. Ct. 1581, 1584 (2008), the Court elaborated that the use of physical force entails "purposeful, violent and aggressive" force that must be characteristic of the enumerated offenses, and this year concluded that a failure to report does not entail such a risk. Chambers v. United States, 129 S. Ct. 687 (2009). See also Johnson v. United States, 130 S.Ct. 1265 (2010) (force is a violent act, it is a degree of power greater than mere touching).

The lower courts have applied the Begay ACCA analysis in determining that various offenses were not crimes of violence under the career offender guideline. See, e.g., United States v. Herrick, 545 F.3d 53, 58 (1st Cir. 2008) (negligent vehicular homicide); United States v. Gray, 535 F.3d 128, 129 (2d Cir. 2008) (reckless endangerment); United States v. Bartee, 529 F.3d 357, 363 (6th Cir. 2008) (attempted criminal sexual conduct); United States v. Templeton, 543 F.3d 378, 380 (7th Cir. 2008) (DUI and escape); United States v. Williams, 537 F.3d 969, 971 (8th Cir. 2008) (auto tampering and remanding on auto theft); United States v. Tiger, 538 F.3d 1297, 1298 (10th Cir. 2008) (DUI, on remand from Supreme Court); United States v. Archer, 531 F.3d 1347 (11th Cir. 2008) (carrying concealed weapon, on remand from Supreme Court).

Even before Begay, numerous courts had limited the application of the Guidelines crime of violence definition. See, e.g., United States v. Garcia, 470 F.3d 1143 (5th Cir. 2006) (Colorado assault not crime of violence);United States v. Piccolo, 441 F.3d 1084 (9th Cir. 2006) (walkaway from halfway house not violent). United States v. Kelly, 422 F.3d 889 (9th Cir. 2005)(eluding police not crime of violence); United States v. Insaulgarat, 378 F.3d 456 (5th Cir. 2004) (aggravated stalking not crime of violence); Charles, 301 F.3d at 313 (holding auto theft was not a crime of violence); United States v. Jones, 235 F.3d 342 (7th Cir. 2000) assault and battery not necessarily crime of violence); but see United States v. Rodriguez-Jaimes, 481 F.3d 283 (5th Cir. 2007) (possession of weapon in penal institution); United States v. Rivas, 440 F.3d 722 (5th Cir. 2006) (unlawful restraint); United States v. Guevara,408 F.3d 252 (5th Cir. 2005) (threat to use weapon of mass destruction). Numerous courts have also held that non-residential burglary was not a crime of violence. See, e.g., United States v. Matthews, 374 F.3d 872 (9th Cir. 2004); United States v. Turner, 349 F.3d 833, 836-37 (5th Cir. 2003); United States v. Hoults, 240 F.3d 647, 650-52 (7th Cir. 2001). Similarly, the courts have limited the application of the enumerated burglary offense to convictions involving generic burglary of a generic dwelling. See, e.g., United States v. Bennett, 108 F.3d 1315, 1317-19 (10th Cir. 1997); see also United States v. Gomez-Guerra, 485 F.3d 301 (5th Cir. 2007) (Florida burglary not crime of violence under USSG § 2L1.2 because curtilage included).

C. Controlled Substance Offense

The Guideline defines a "controlled substance offense" as follows:

> [A]n offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

USSG § 4B1.2 (b).

Note that this Guideline covers trafficking offenses punishable by just more than a year and therefore applies to a number of minor drug offenses not covered by ACCA, which limits "serious drug offenses" to offenses punishable by at least ten years. 18 U.S.C. § 924(e)(2)(A). On the other hand, in contrast to the statutory drug enhancements, e.g., 21 U.S.C. § 841(b), this provision is limited to trafficking-type-offenses and does not cover mere possession of a controlled substance. Salinas v. United States, 126 S. Ct. 1675 (2006) (per curiam); United States v. Gaitan, 954 F.2d 1005 (5th Cir. 1992) (categorical approach precludes going behind offense of conviction).

Again, the categorical approach applies to the determination whether an offense is a "controlled substance offense." United States v. Price, 516 F.3d 285, 287-89 (5th Cir. 2008) (Texas delivery not controlled substance offense because includes offer to sell); United States v. Rivera-Sanchez, 247 F.3d 905, 908-09 (9th Cir. 2001) (en banc) (holding that violation of California Health and Safety Code § 11360(a) was not categorically an aggravated felony because it also proscribes transportation); see also United States v. Martinez, 232 F.3d 728, 732-35 (9th Cir. 2000) (§ 11360(a) not controlled substance offense for career offender Guideline); but see United States v. Ford, 509 F.3d 714, 716-17 (5th Cir.) (Texas offense of possession with intent to deliver is controlled substance offense), cert. denied, 129 S. Ct. 44 (2008).

The Sentencing Commission has specified that certain drug related offenses constitute controlled substance offenses including possession of listed chemicals and equipment with intent to manufacture a controlled substance, 21 U.S.C. § 841(d)(1), 843 (a)(6), using a communication facility to commit a felony drug offense, 21 U.S.C. § 843(b), and maintaining premises to facilitate a drug offense, 21 U.S.C. § 856. USSG § 4B1.2, comment. (n.1). See also United States v. Rinard, 956 F.2d 85 (5th Cir. 1992) (illegal investment); United States v. Crittenden, 372 F.3d 706 (5th Cir. 2004) (sale of substance in lieu of controlled substance). Use of a communication facility to buy drugs for personal use is not a violation of 21 U.S.C. § 843(b) because mere possession of a controlled substance is a federal misdemeanor. Abuelhawa v. United States, 129 S. Ct. 2102 (2009); see also United States v. Henao-Melo, 591 F.3d 798 (5th Cir. 2009) (use of communication facility not categorically drug trafficking).

D. Firearm Offenses

Being a felon in possession of a firearm is not a crime of violence. USSG § 4B1.2, comment. (n.2); United States v. Fitzhugh, 954 F.2d 253 (5th Cir. 1992); see generally Stinson v. United States, 508 U.S. 36 (1993). Possession of a sawed off shotgun, however, may be a crime of violence as such

a weapon has no legitimate use. USSG § 4B1.1, comment. (n.2); United States v. Serna, 309 F.3d 859 (5th Cir. 2002). A prior conviction for using (carrying or possessing) a firearm during a violent felony or drug trafficking offense is counted under the career offender provision. USSG § 4B1.2, comment. (n.1).

While being a felon in possession of a firearm is not itself a crime of violence, USSG §4B1.2, comment. (n.2), a defendant subject to an enhanced sentence under 18 U.S.C. § 924(e) as an armed career criminal is likewise subject to a significantly enhanced sentence of a level 34 if he used or possessed the firearm, or ammunition, in connection with a crime of violence, or a controlled substance offense, or possessed a firearm described in 26 U.S.C. § 5845 (a), USSG § 4B1.4(a) & (b)(3), or a level 33 in other circumstances. The criminal history category is likewise raised to a minimum level of IV or VI if the prior convictions are for crimes of violence or drug trafficking. USSG § 4B1.4(c). For example, a defendant who used the firearm to kill someone is subject to the enhancement for a crime of violence. United States v. Ford, 996 F.2d 83, 87 (5th Cir. 1993). A defendant is not subject to the armed career criminal enhancement if he is convicted of making a false statement rather than being a felon in possession of a firearm. United States v. Williams, 198 F.3d 988, 991 (7th Cir. 1999).

The 2002 amendments to the career offender provision addressed Congressional interest in serious firearms offenses, i.e., offenses where defendants are convicted of possessing or otherwise using firearms during drug trafficking or violent crimes. 18 U.S.C. §§ 924(c), 929(a). The Commission left unchanged the provision that the guideline sentence for a section 924(c) violation is the statutory minimum if the career offender provisions do not apply. USSG § 2K2.4 . The sentence for arson is the statutory term. USSG § 2K2.4(a). In both of these cases, the adjustments in Chapters Three and Four do not apply. Id.

There is a specific provision for defendants convicted of these firearms offenses who qualify as career offenders. USSG § 4B1.1(c). If the defendant is only convicted of the firearms offense, the guideline range is 360 months to life, although the reduction for acceptance of responsibility is still available. USSG § 4B1.1(c)(1)-(3). If there are multiple counts of conviction, the range is the mandatory minimum consecutive sentence plus the range for the underlying offense and an addition from a special firearms table, whichever is greater. USSG § 4B1.1(c)(2). The sentence is apportioned among the counts to meet any mandatory minimum requirements. USSG § 5G1.2(e). If the defendant is not a career offender but has multiple convictions, pursuant to 18 U.S.C. § 924(c), the court can depart upward. USSG § 2K2.4, comment. (n.2(B)). The court can also depart if the defendant's guideline range is lower than if he did not have a section 924(c) conviction. USSG § 2K2.4, comment. (n.4).

E. Inchoate Crimes

The career offender guideline includes convictions for inchoate offenses such as aiding and abetting, conspiracy and attempt. USSG § 4B1.2, comment. (n.1). See, e.g., United States v. Walker, 181 F.3d 774, 781 (6th Cir. 1999) (solicitation of crime of violence); see also United States v. Shumate, 341 F.3d 852 (9th Cir. 2003)(solicitation of controlled substance offense); United States v. Lightbourn, 115 F.3d 291 (5th Cir. 1997) (conspiracy). This provision is limited, however, to

circumstances where the defendant intended to commit or facilitate the substantive offense. Accordingly, the Ninth Circuit has held that accessory after the fact does not constitute a predicate offense, United States v. Vidal, 504 F.3d 1072 (9th Cir. 2007) (en banc) (not drug trafficking under USSG § 2L1.2), and the Second Circuit held that a New York facilitation conviction did not count because there was no requirement that the defendant intend to commit the offense. United States v. Liranzo, 944 F.2d 73, 78 (2d Cir. 1991).

V. DEPARTURE AND VARIANCE

In United States v. Booker, 543 U.S. 220 (2005), in order to avoid a potential violation of the Sixth Amendment, the Supreme Court held that henceforth the federal sentencing guidelines would be advisory. 543 U.S. at 245, 259-61. No longer may a sentencing court presume that the Guideline range is the appropriate sentence in a given case. Rita v. United States, 551 U.S. 347, 351 (2007); see also Nelson v. United States, 129 S. Ct. 890 (2009) (per curiam). Instead, the sentencing court should consider the Guideline range as a starting point and then, after considering the factors set forth in 18 U.S.C. § 3553(a) and the presentation of the parties, the court shall impose a sentence that is "sufficient but not greater than necessary" to meet the purposes expressed in the statute. Gall v. United States, 552 U.S. 38, 50 (2007). These Supreme Court decisions have "significantly broadened" the sentencing court's discretion, even allowing the court to disagree with the policy choices of the Commission, at least where those choices are not empirically grounded. Kimbrough v. United States, 552 U.S. 85 (2007); see also Spears v. United States, 129 S. Ct. 840 (2009) (per curiam).

A. Inadequate Criminal History

The Sentencing Commission encourages upward and downward departures where the criminal history overstates or understates the seriousness of a defendant's criminal record or the likelihood of recidivism. USSG § 4A1.3. Effective November 1, 2003, the Commission reorganized and revised this policy statement, pursuant to Congressional directive. The revised provision contained some limitations on the availability of the departure, particularly for career and sex offenders. These limitations presumably do not survive Booker.

The Sentencing Commission advises that an upward departure may be warranted if "reliable information indicates that the criminal history category *substantially under-represents* the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." USSG § 4A1.3(a)(1) (Nov. 1, 2003) (Emphasis added). Examples offered include: (1) a sentence not used in computing criminal history, e.g., tribal or foreign convictions, USSG § 4A1.3(a)(2)(A); United States v. Barakett, 994 F.2d 1107 (5th Cir. 1993); (2) prior sentences of *substantially* more than one year imposed as a result of *independent* crimes committed on different occasions, § 4A1.3(a)(2)(B); see United States v. Taylor, 868 F.2d 125, 127 (5th Cir. 1989); (3) similar misconduct adjudicated in a civil proceeding, § 4A1.3(a)(2)(C); (4) an offense committed while the defendant was pending trial or sentencing, §4A1.3(a)(2)(D); United States v. Ravitch, 128 F.3d 865, 871 (5th Cir. 1997); or (5) similar adult conduct not resulting in conviction. USSG §

4A1.3(a)(2)(E); United States v. Luna-Trujillo, 868 F.2d 122, 124-25 (5th Cir. 1989); see also United States v. Hefferon, 314 F.3d 211 (5th Cir. 2002). Note that the offenses must be similar, United States v. Leake, 908 F.2d 550 (9th Cir. 1990); see also United States v. Allen, 488 F.3d 1244 (10th Cir. 2007) (post-Booker reversal of departure based on uncharged, unrelated misconduct), and significant. United States v. Martinez-Perez, 916 F.2d 1020, 1025-26 (5th Cir. 1990) (departure not justified by remote misdemeanor conviction). The nature, rather than the number, of prior convictions is more indicative of the seriousness of a defendant's criminal record. USSG § 4A1.3, comment. (n.2(B)). See, e.g., United States v. Carillo-Alvarez, 3 F.3d 316 (9th Cir. 1993) (reversing upward departure where criminal history not egregious). The court may also depart because the defendant previously received "extreme leniency" for a serious offense. USSG § 4A1.3, backg'd comment.; United States v. Delgado-Nunez, 295 F.3d 494 (5th Cir. 2002).

The court cannot depart on the basis of prior cases not counted because they were included in relevant conduct. United States v. Cade, 279 F.3d 265 (5th Cir. 2002) (citing United States v. Hunerlach, 258 F.3d 1282 (11th Cir. 2001). Nor can the court depart based on arrests not resulting in convictions without proof the defendant committed the offense. USSG § 4A1.3(a)(3) & comment. (n.3); Williams v. United States, 503 U.S. 193 (1992); United States v. Jones, 444 F.3d 430 (5th Cir. 2006)(cannot depart based on arrest but error harmless); United States v. Cantu-Dominguez, 898 F.2d 968 (5th Cir. 1990); see also United States v. Wright, 24 F.3d 732 (5th Cir. 1994) (insufficient evidence defendant possessed firearm where he was passenger in car).

In United States v. Gutierrez-Hernandez, 581 F.3d 251 (5th Cir. 2009), the district court departed above the guideline range 1) because a misdemeanor state firearm conviction could have been prosecuted as a more serious federal felony, and 2) the police report suggested that a drug conviction was actually trafficking even though the categorical approach prohibited treating it as such. The Fifth Circuit reversed, holding first that the court could not adjust the offense level based upon a hypothetical federal crime. Second, the court could not escape the requirement of the categorical approach by relying on a police report to depart on the ground that the enhancement should have applied. 581 F.3d at 255-56.

The Commission encourages downward departure where "reliable information indicates that the criminal history category *substantially over-represents* the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes." USSG § 4A1.3(b)(1) (Nov. 1, 2004). See, e.g., United States v. Shoupe, 988 F.2d 440 (3d Cir. 1993); United States v. Lacy, 99 F.S.2d 108 (D. Mass. 2000); United States v. Leviner, 31 F. Supp. 2d 23 (D. Mass. 1998) (numerous points for misdemeanors and suspicious stops of minority defendant); see also United States v. Weaver, 920 F.2d 1570 (11th Cir. 1991) (delayed parole eligibility based on criminal history); United States v. Santos, 406 F.Supp.2d 320 (S.D. N.Y. 2005) (criminal convictions unnecessarily counted twice); United States v. Frappier, 377 F.Supp.2d 220 (D. Me. 2005); United States v. Swan, 327 F.Supp.2d 1068 (D. Neb. 2004). Additionally, the Sentencing Commission's Symposium on Alternatives to Incarceration revealed that lengthy prison sentences may actually increase recidivism, while alternatives including intensive supervision and training might reduce it.

The criminal history departures were procedurally regulated as well. In considering an upward departure based on inadequacy of the criminal history, the court used "as a reference, [the]

criminal history category applicable to defendants whose criminal history or likelihood to recidivate most closely resembles the defendant's." USSG § 4A1.3(a)(4)(A). If a defendant was already at the highest criminal history category, the court moved incrementally along the offense levels. USSG § 4A1.3(a)(4)(B). United States v. Pennington, 9 F.3d 1116, 1118 (5th Cir. 1993). The courts had previously held that the sentencing court must consider adjacent categories, determine on the record whether each category is inadequate and must provide reasons for these findings. United States v. Lambert, 984 F.2d 658 (5th Cir. 1993) (en banc); see also USSG § 4A1.3(c)(1). The same findings should be made for downward departures. USSG § 4A1.3(c)(2). In a post-Booker world, strict compliance with this procedure may no longer be required. See United States v. Colon, 474 F.3d 95 (3d Cir. 2007); United States v. Zuniga-Peralta, 442 F.3d 345, 348 & n.2 (5th Cir.), cert. denied, 126 S. Ct. 2954 (2006). The Sixth Circuit reviews criminal history departures under the Gall framework for both procedural and substantive reasonableness. United States v. Smith, 474 F.3d 888 (6th Cir. 2007).

While a defendant's criminal history has traditionally been a basis for both upward and downward departures, USSG § 4A1.3, the court now has additional discretion to consider the nature of the prior criminal conduct in determining whether the guideline range is appropriate. See, e.g., United States v. Foreman, 436 F.3d 638, 643 (6th Cir. 2006) (sentencing court must determine whether Guideline range places "over- or under-inflated significance" on prior conviction for crime of violence); see also United States v. Diaz-Argueta, 447 F.3d 1167 (9th Cir. 2006).

B. Career Offender

Sentences under the career offender guideline are among the most severe and the Commission itself has recognized that the sentences do not necessarily promote the statutory sentencing purposes. See USSC, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* (Nov. 2004) (hereinafter "*Fifteen Year Review*") at 133-34; available at http://www.ussc.gov//15_year//5year.htm. One problem is that, by Congressional directive, the Guideline is keyed to statutory maximums, including maximums themselves based on recidivist provisions. See United States v. LaBonte, 520 U.S. 751 (1997). Thus, the career offender guideline, like the crack guideline criticized in Kimbrough, is more the result of political directives than of empirical study.

The Commission, however, has also compounded the problem by defining "crimes of violence" and "controlled substance offenses" more broadly than required by statute. For example, as early as 1992, the Third Circuit noted that a "defendant could be deemed a career violent offender . . .even when he or she never intended harm, nor was there a substantial risk that he or she would have to use intentional force. United States v. Parson, 955 F.2d 858, 874 (3d Cir. 1992). Because some states impose sentences of more than one year on misdemeanors, minor drug offenses can be swept up into the career offender paradigm. See United States v. Colon, 2007 WL 4246470 (D. Vt. Nov. 29, 2007) (departing down where two Massachusetts misdemeanors were considered).

Significantly, while Congress directed the Sentencing Commission to set the guideline at or near the statutory maximum, this directive is addressed to the Commission and does not limit the court's ability to impose a lower sentence in in an individual case. United States v. Martin, 520 F.3d

87, 88-96 (1st Cir. 2008); United States v. Sanchez, 517 F.3d 651, 662-65 (2d Cir. 2008); see also United States v. Corner, 2010 WL 935754 (7th Cir. Mar. 17, 2010) (noting that the Solicitor General had conceded this in United States v. Vasquez, 558 F.3d. 1224 (11th Cir. 2009), cert. granted, vacated and remanded, 130 S.Ct. 1135 (2010)).

As the courts have recognized, the career offender guideline creates both unwarranted disparity and unwarranted similarity by treating alike the three-time convicted felons regardless of the severity of their predicate offenses. For example, in United States v. Moreland, 568 F. Supp.2d 674 (S.D.W.Va. 2008), the defendant was facing a career offender sentence of thirty years to life based on his federal conviction for two sales of crack cocaine totaling 7.85 grams and two prior drug convictions involving delivery of a single marijuana cigarette to a prison inmate and delivery of 6.92 grams of crack. He was a relatively young man, a father and a high school graduate with the "ability and potential to become a productive member of society." 568 F. Supp.2d at 685. The sentencing court noted that the Guidelines had "moved beyond the elimination of *unwarranted* sentencing disparities and toward the goal of eliminating *all* disparities," which is both "impractical" and "undesirable." Id. at 688 (emphasis in original). The court found this to be particularly true of the career offender guideline:

> The career offender provisions of the Guidelines, as applied to this case, perfectly exhibit the limits of a Guideline-centric approach. Two relatively minor and non-violent prior drug offenses, cumulatively penalized by much less than a year in prison, vaulted this defendant into the same category as major drug traffickers engaged in gun crimes or acts of extreme violence. The career offender guideline provision provides no mechanism for evaluating the relative seriousness of the underlying prior convictions. Instead of reducing unwarranted sentencing disparities, such a mechanical approach ends up creating additional disparities because this Guideline instructs courts to substitute an artificial offense level and criminal history in place of each individual defendant's precise characteristics. This substitution ignores the severity and character of the predicate offenses.

Id. In light of Mr. Moreland's non-violent and relatively minor criminal history, the court decided to impose the statutory ten-year minimum rather than the career offender sentence.

Numerous courts have sentenced below the career offender Guideline because the guideline resulted in a sentence greater than necessary, particularly in light of the actual severity of the defendant's criminal record, and the need for deterrence and incapacitation. See, e.g., United States v. MacKinnon, 401 F.3d 8 (1st Cir. 2005) (remanding for Booker error where district court stated career offender sentence was "obscene" and "unwarranted"); United States v. Williams, 435 F.3d 1350, 1355-56 (11th Cir. 2006) (reduced from 360 months to 204 months based on small drug amounts); United States v. Malone, 2008 U.S. Dist. LEXIS 13648 (E.D. Mich. Feb. 22, 2008) (unwarranted racial disparity); United States v. Fernandez, 436 F. Supp. 2d 983 (E.D. Wis. 2006) (prior deliveries for small amounts, child abuse, education, family responsibilities, and potential for rehabilitation); United States v. Nielsen, 427 F.Supp.2d 872 (N.D. Iowa, 2006) (career offender

guideline grossly overstates sentence based on long term conspiracy involving deliveries of small amounts and defendant's poor health); United States v. Person, 377 F. Supp. 2d 308 (D. Mass. 2005) (reduced from 262 months to 84 months); United States v. Carvajal, 2005 WL 476125 (S.D.N.Y. Feb. 22, 2005).

VI. CONCLUSION

Careful analysis of a defendant's criminal history is necessary in determining the ultimate sentence. Enhancements based on the nature of the offense require an examination of the statute and documents of conviction and comparison of the specific offense with the provision defining the predicate. Calculation of the criminal history score itself requires attention to the timing and relationship of the offenses. Finally, the sentencing court has the duty to evaluate this criminal record under 18 U.S.C. § 3553(a) in determining what sentence is sufficient but not greater than necessary to meet the sentencing purposes set forth in the statute.

VII. BIBLIOGRAPHY

1. A. Baron-Evans, J.N. Coffin & S. Noonan, *Deconstructing the Career Offender Guideline* (August 29, 2008), available at www.fd.org/odstb_sentDECON.htm

2. T. Crooks & M. A. Katze, "*Begay* and Beyond: Chipping Away at 'Crimes of Violence,'" (May 29, 2008), available at www.fd.org/pdf_lib/Begay_and_Beyond.pdf

3. R. W. Haines, F.O. Bowman & J.C. Woll, Federal Sentencing Guidelines Handbook (West 2009).