Potential Uses of *Begay*, *Chambers* & *Johnson*: Annotated Caselaw Outline

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A. Holdings of *Begay*, *Chambers*, and *Johnson*

In *Begay v. United States*, 128 S. Ct. 1581 (2008), the Supreme Court held that the Armed Career Criminal Act's definition of "violent felony" at 18 U.S.C. § 924(e)(2)(B)(ii) ("subparagraph (ii)") requires that the predicate offense be "similar in kind" to the listed offenses – meaning that it must involve "purposeful, violent, and aggressive conduct." *See Begay*, 128 S. Ct. at 1586 (applying new test to find that driving under the influence does not qualify as an ACCA predicate). The Court has since applied *Begay* to find that an escape conviction based on a failure to report to custody also does not qualify as a violent felony under ACCA's "otherwise" clause. *See Chambers v. United States*, 129 S. Ct. 687 (2009). *See* Part C(7)(a), *infra.*, for further discussion of *Chambers*.

In *Johnson v. United States*, 130 S. Ct. 1265 (2010), the Court held that the ACCA's definition of "violent felony" at 18 U.S.C. § 924(e)(2)(B)(i) ("subparagraph (i)") requires that the predicate offense's element of "physical force" involve "*violent* force – that is, force capable of causing physical pain or injury to another person." *See Johnson*, 130 S. Ct. at 1271. *Johnson* held that the crime of battery by offensive touching does not satisfy this definition. *Id.*

Begay, *Chambers* and *Johnson* reach far beyond their facts. They apply to career offender cases as well as ACCA cases, and can be used to knock out more predicates than just those involving drunk driving, failure to report, and battery by offensive touching. The following reflects some of the ways that *Begay*, *Chambers* and *Johnson* can be used. Note, however, that this list is not intended to be a substitute for your own research because it is not comprehensive and focuses primarily on winning cases. There may be e contrary case law in your circuit. We hope instead that it will provide you with a place to start your research and frame your arguments. .

B. Relief from Career Offender Predicates Using the *Begay* Analysis

Although *Begay* directly dealt with ACCA, every circuit court to have reached the issue has applied *Begay*'s reasoning to the career offender guideline based on similarity of the two provisions.[1] So be sure to raise *Begay* challenges to predicate offenses in both ACCA cases ***and*** career offender cases.

First Circuit: *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008) ("Precedent in this circuit, as well as in others, requires the application of case law interpreting 'violent felony' in ACCA to 'crime of violence' in U.S.S.G. § 4B1.2 because of the substantial similarity between the two sections.") (represented by CJA attorney Susan E. Taylor of New Bedford, MA).

[1] The D.C. Circuit has not yet ruled on the issue.

<u>Second Circuit</u>: *United States v. Gray*, 535 F.3d 128, 129 (2nd Cir. 2008) ("In analyzing the definition of 'crime of violence,' we have looked to cases examining the statutory definition of 'violent felony,' as found in the Armed Career Criminal Act ('ACCA') because the operative language of U.S.S.G. § 4B1.2(a)(2) and the statute is identical . . . Thus we are hard pressed to reject the views of the Supreme Court's most recent decision explaining the scope of the definition of 'violent felony' in understanding the reach of the term 'crime of violence.' The Government and defendant share that view.").

<u>Third Circuit</u>: *United States v. Polk*, 577 F.3d 515, 519 n.1 (3rd Cir. 2009) ("though *Parson* says the definitions of 'violent felony' and 'crime of violence' in the ACCA and the Career Offender Guidelines, respectively, are not coextensive, *Begay* and the remands from the Supreme Court indicate that the definitions are close enough that precedent under the former must be considered in dealing with the latter") (represented by CJA attorney Stephen F. Becker of Lewisburg, PA); *United States v. Hopkins*, 577 F.3d 507, 511 (3rd Cir. 2009) ("the definition of a violent felony under ACCA is sufficiently similar to the definition of a crime of violence under the Sentencing Guidelines that authority interpreting one is generally applied to the other, as demonstrated by the Supreme Court's remand order in this [career offender] case") (represented by AFPD Frederick Ulrich of the Middle District of Pennsylvania Federal Public Defender (Jim Wade, Defender)).

<u>Fourth Circuit</u>: *United States v. Seay*, 553 F.3d 732, 739(4th Cir. 2009) (concluding that "*Begay*'s analysis is applicable to U.S.S.G. § 4B1.2") (represented by CJA attorney Russell Warren Mace, III, of Myrtle Beach, South Carolina).

<u>Fifth Circuit</u>: *United States v. Mohr*, 554 F.3d 604, 608-09 (5th Cir. 2009) ("The definition of 'violent felony' is identical to that of 'crime of violence' in the Guidelines context. Thus, the Supreme Court's interpretation of § 924(e)(2)(B) [in *Begay*] guides us in applying the categorical approach to the residual clause of §4B1.2.") (represented by AFPD George Lowrey Lucas of the Southern District of Mississippi Federal Public Defender (Samuel Dennis Joiner, Defender)).

<u>Sixth Circuit</u>: *United States v. Bartee*, 529 F.3d 357, 363 (6th Cir. 2008) ("Adhering to our view that the parallel provisions in the definitions of a 'violent felony' under the ACCA and a 'crime of violence' under USSG § 4B1.2(a)(2) should be interpreted in a consistent manner, we conclude that § 4B1.2(a)(2) also should be limited to crimes that are similar in both kind and in degree of risk to the enumerated examples – burglary of a dwelling, arson, extortion, or crimes involving the use of explosives.") (represented by AFPD Richard D. Strouba of the Western District of Michigan Federal Public Defender (Ray Kent, Defender)).

<u>Seventh Circuit</u>: *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008) ("[T]he Court [in *Begay*] interpreted the words of § 924(e), which the Sentencing Commission repeated verbatim in § 4B1.2. It would be inappropriate to treat identical texts differently just because of a different caption.") (represented by CJA attorney David R. Karpe of Madison, Wisconsin); *United States v. Adams*, Slip. Op., 2008 WL 3889935, *1 (7th Cir. Aug. 22, 2008) (relying on prior cases treating "violent felony" and "crime of violence" the same to conclude that *Begay* abrogated prior conclusion that drunk driving is a "crime of violence" under § 4B1.2)

(represented by AFPD H. Jay Stevens of the Northern District of Indiana Community Defenders (Jerome T. Flynn, Director)).

Eighth Circuit: *United States v. Williams*, 537 F.3d 969, 971 (8th Cir. 2008) ("we are bound by cases interpreting whether an offense is a crime of violence under the Guidelines as well as cases interpreting whether an offense is a violent felony under the Armed Career Criminal Act") (citing *United States v. Johnson*, 417 F.3d 990, 996 (8th Cir. 2005)) (represented by AFPD Diane Dragan of the Eastern District of Missouri Federal Public Defender (Lee Lawless, Defender)).

Ninth Circuit: *United States v. Coronado*, 603 F.3d 706 (9th Cir. 2010) (when analyzing the definition of "crime of violence" in the career offender guideline, "[t]he *Begay* analysis controls") (represented by AFPD Jennifer Jue Uyeda of the Central District of California Federal Public Defender (Sean Kennedy, Defender)).

Tenth Circuit: *United States v. Tiger*, 538 F.3d 1297, 1298 (10th Cir. 2008) (applying *Begay* standard to career offender case because "the definition of 'crime of violence' contained in USSG § 4B1.2(a) is virtually identical to that contained in the ACCA") (represented by CJA attorney Jimmy Lance Hopkins of Tahlequah, Oklahoma).

Eleventh Circuit: *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008) ("This court has repeatedly read the definition of a 'violent felony' under § 924(e) of the Armed Career Criminal Act as 'virtually identical' to the definition of a 'crime of violence' under U.S.S.G. § 4B1.2.") (represented by AFPD Maurice C. Grant II of the Middle District of Florida Federal Public Defender (Donna Elm, Defender)).

C. Post-*Begay* Non-Qualifying Offenses: Case Summaries

Obviously, drunk driving offenses do not satisfy the *Begay* standard. *See, e.g., United States v. Webster*, 524 F.3d 890, 891 (8th Cir. 2008) (ACCA case) (represented by CJA attorney John Keith Rigg of Des Moines, Iowa); *United States v. Morris*, 527 F.3d 1059 (10th Cir. 2008) (ACCA case) (represented by CJA attorney Jimmy Lance Hopkins of Tahlequah, Oklahoma). But *Begay*'s reasoning goes further than that. The following is a list of offenses that courts have found are not necessarily "violent felonies" under ACCA and/or "crimes of violence" under the career offender guideline since *Begay*. Although some are ACCA cases and some are career offender cases, they each use reasoning that should apply equally to both provisions, as discussed in Part B, *supra.* These cases should be used whenever your client has the same or an analogous predicate offense. Note, though, that this list is not exclusive and there may be contrary case law in your circuit, so be sure to shepardize any cases upon which you rely.

1. Assault

United States v. Heilman, 2010 WL 1583097 (3rd Cir. April 21, 2010) (career offender case)

In *Heilman*, the Third Circuit held that a conviction for simple assault under 18 Pa. Const. Stat. § 2701 does is not a crime of violence because the statute criminalizes purposeful, knowing and reckless conduct. The government conceded that recklessness was insufficient to satisfy the "purposeful" standard, and the admissible record of the defendant's conviction merely tracked the statutory language. *Id.* at *49, 50-51; *see also United States v. Brice*, 2010 WL 1063865 (3rd Cir. Mar. 24, 2010) (simple assault committed recklessly is not a crime of violence; remanded for further fact-finding) (represented by CJA attorney Howard Popper of Philadelphia, PA); *cf. United States v. Sloane*, 2010 WL 925863 (3rd Cir. Mar. 16, 2010) (affirming career offender designation based on conviction for simple assault under § 2701 because jury found defendant guilty of charged conduct of "knowingly caus[ing] bodily injury" to his girlfriend).

United States v. McFalls, 592 F.3d 707 (6th Cir. 2010) (career offender case) (represented by AFPDs Michael Holley and C. Douglas Thoresen of the M.D. of Tennessee Federal Public Defender (Henry Martin, Defender)).

In *McFalls*, the Sixth Circuit held that assault and battery of a high and aggravated nature under South Carolina law is not a crime of violence. The court first found that the statute applies to reckless as well as intentional conduct. It then reviewed the law to find that "aggravated assault" as listed in comment (n. 1) to §4B1.2 generically requires either specific intent or "malignant recklessness" under "circumstances manifesting extreme indifference to the value of human life" and causing serious bodily injury. Because South Carolina's statute could be satisfied by a lesser showing of recklessness, it was broader than "generic" aggravated assault and thus did not qualify as a career offender predicate.[2]

2. Auto Theft and Auto Tampering

United States v. Williams, 537 F.3d 969 (8th Cir. 2008), *rehearing en banc denied*, 546 F.3d 961 (8th Cir. 2008) (career offender case) (represented by AFPD Diane Dragan of the Eastern District of Missouri Federal Public Defender (Lee Lawless, Defender)).

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[2] In *Palomino-Garcia*, the Eleventh Circuit found that aggravated assault under Ariz. Stat. § 13-1204(A)(7) is not a crime of violence under §2L1.2 (which includes both a list of enumerated offenses and the same definition as §924(e)(2)(B)(i)). *United States v. Palomino-Garcia*, __ F.3d __, 2010 WL 2011038 (11th Cir. May 21, 2010) (represented by AFPDs George Allen Couture and Jim Skuthan, and Defender Donna Lee Elm of the Middle District of Florida Federal Public Defender). The court first held that the Arizona statute is broader than generic aggravated assault and thus did not fit within the enumerated "aggravated assault" offense listed under §2L1.2. Whereas the generic form of the offense requires the aggravating factors of either intent to cause serious bodily injury or the use of a deadly weapon, the court noted that the Arizona statute would permit a conviction based purely on the status of the victim as a law enforcement officer. The court then held that the statute also did not satisfy the 'use of physical force' requirement under §2L1.2 because it permitted a conviction based on recklessness, which is insufficient after *Leocal*.

The Eighth Circuit has completely altered its approach to auto theft and auto tampering cases after *Begay*. In *Williams*, the court recognized that the line of cases treating those two offenses as crimes of violence or violent felonies focused solely on the risk of injury, and did not analyze whether the offenses were similar in kind to the enumerated offenses. *Id.* at 972. Analyzing Mo. Rev. Stat. § 570.030, the court determined that there were three ways to commit auto theft: theft without consent, theft by deceit, and theft by coercion. *Id.* at 973. The court had no trouble deciding that "auto theft by deception is not a qualifying predicate offense under *Begay*." It also concluded that auto theft without consent, although similar in kind to burglary, did not carry the same degree of risk because the risk of violent confrontation is far less. *Id.* at 974. For support, the court noted that auto theft by force is prosecuted by Missouri as robbery, and auto theft by force or intimidation can be prosecuted federally as carjacking. *Id.* It also cited the Supreme Court's language in *Taylor v. United States*, 495 U.S. 575, 588 (1990), that "Congress singled out burglary (as opposed to other frequently committed property crimes such as larceny and auto theft) for inclusion as a predicate offense, both in 1984 and in 1986, because of its inherent potential for harm to persons." *Williams*, 537 F.3d at 974. "While auto theft without consent or by deceit is certainly purposeful, . . . it does not involve the same level of violence and aggression as the example crimes." *Id.* at 975. The court found that only auto theft by coercion satisfies the *Begay* standard. *Id.* at 973.

With respect to auto tampering, the court held that "it does not involve conduct that is similar in kind to the example crimes" because (1) "it includes a range of conduct that is neither violent nor aggressive," such as receiving, possessing, selling, altering or defacing an automobile; (2) it does not require an intent to permanently deprive the owner of the vehicle; (3) it is a non-serious crime akin to joyriding; and (4) it is a lesser included offense of auto theft, and thus it would be odd to count auto tampering as a violent felony when auto theft without consent and auto theft by deception are not. *Id.* at 974-75 ("[O]ur holding that auto tampering and auto theft without consent or by deceit are not crimes of violence brings us in line with all the other circuits that have addressed these issues.") (citations omitted); *see also United States v. Rush*, 551 F.3d 749 (8th Cir. 2008) (following *Williams* as to prior convictions under Wisconsin auto theft statute and remanding for additional consideration of prior Virginia convictions for grand larceny auto, where statute criminalized both larceny from the person, which the court hinted would qualify as a "violent felony," and larceny of property worth over $200, which would not); *United States v. Boaz*, 558 F.3d 800 (8th Cir. 2009) (same result under Arizona's auto theft statute, which criminalizes taking another's motor vehicle with intent to deprive) (represented by AFPDs David Randolph Mercer and Michelle Kay Nahon of the Western District of Missouri Federal Public Defender (Raymond C. Conrad, Jr., Defender)); *United States v. Steward*, 598 F.3d 960 (8th Cir. 2010) (same for operating a motor vehicle without the owner's consent under Iowa Code § 714.7) (represented by CJA attorney Frederic Montgomery Brown of West Des Moines, IA).[3]

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[3] Courts have also begun to hold post-*Begay* and *Chambers* that unauthorized use or theft of a motor vehicle is not a crime of violence under §2L1.2's definition of "aggravated felony," which tracks 18 U.S.C. § 16(b). *See United States v. Armendariz-Moreno*, 571 F.3d 490, 491 (5th Cir. 2009) (holding in illegal reentry case that Texas crime of unauthorized use of motor vehicle does not satisfy *Begay* because "[t]he risk of physical force may exist where the defendant commits the offense of unauthorized use of a vehicle, but the crime itself has no essential element of violent and aggressive conduct") (represented by AFPDs Timoteo E. Gomez & Laura Fletcher Leavitt of the Southern District of Texas Federal Public

3. Battery

Johnson v. United States, 130 S. Ct. 1265 (2010) (ACCA case) (represented by AFPD Lisa Call of the Middle District of Florida Federal Public Defender (Donna Elm, Defender))

In *Johnson v. United States*, 130 S.Ct 1265 (2010), the Court for the first time analyzed subparagraph (i) of ACCA, which defines as a "violent felony" a prior conviction "that has as an element the use, threatened use, or attempted use of physical force against the person of another." *See* 18 U.S.C. § 924(e)(2)(B)(i). The defendant had been convicted of battery under a Florida statute. Like the offense in *Chambers* (*see* Part C(7)(a), *infra*.), the Court noted that Florida's battery statute could be violated in multiple ways (or categories). Unlike *Chambers*, however, nothing in the admissible record suggested that the defendant had been convicted of any particular offense category. As a result, the Court analyzed whether the least serious offense category set forth in the battery statute satisfied subparagraph (i)'s definition. *See Johnson*, 120 S. Ct. at 1269 ("Since nothing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts, his conviction was a predicate conviction for a 'violent felony' under the Armed Career Criminal Act only if '[a]ctually and intentionally touch[ing] another person constitutes the use of 'physical force' within the meaning of § 924(e)(2)(B)(i).") (citations omitted).

Next, the Court looked to how the elements of the battery statute had been interpreted by the state courts. *Id.* ("We are bound . . . by the Florida Supreme Court's interpretation of state law, including its determination of the elements" of the battery statute). Because the Florida Supreme Court had found that the element of "actually and intentionally touching" another person could be "satisfied by any physical contact, no matter how slight," *id.* at 1269-70 (citations omitted), the Court used that same interpretation in its ACCA analysis. The question then became whether "any physical contact, no matter how slight," constitutes "physical force" under subparagraph (i), and thus constitutes a "violent felony" under ACCA. The Court concluded that the term "physical force" in subparagraph (i) means "violent force – that is force capable of causing physical pain or injury to another person." *Id.* at 1271 (emphasis in original). The Court reasoned that even though an unwanted touching constituted "physical force" under common law battery, it must interpret the phrase "physical force" in subparagraph (i) in context – that is, as defining what is and is not a "violent felony" for purposes of ACCA. *Id.* The Court determined that a "violent felony" necessarily required strong physical force, because the term "violent . . . connotes a substantial degree of force" and when attached to the term "felony, its connotation of strong physical force is even clearer." *Id.* The Court also found significant that

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Defender (Marjorie A. Meyers, Defender)); *United States v. Lopez-Solis*, 330 Fed. Appx. 497 (5th Cir. 2009) (same) (represented by CJA attorney Richard S. Mattersdorff of El Paso, TX); *United States v. Castillo-Lucio*, 2009 WL 1904524 (5th Cir. July 2, 2009) (same) (represented by AFPDs Philip G. Gallagher & Laura Fletcher Leavitt of the Southern District of Texas Federal Public Defender (Marjorie A. Meyers, Defender)); *Van Don Nguyen v. Holder*, 571 F.3d 524 (6th Cir. 2009) (same for purposes of deportation order); *United States v. Murueta-Espinosa*, 325 Fed. Appx. 468 (8th Cir. 2009) (represented by Defender Nicholas Drees of the Southern District of Iowa Federal Public Defender); *Serna-Guerra v. Holder*, 354 Fed. Appx. 929 (5th Cir. 2009) (following *Armendariz-Moreno*).

battery by offensive touching was typically a nonviolent misdemeanor at common law, leading it to question even more the appropriateness of importing its definition of "force" into ACCA's definition of "violent felony." *Id.* at 1271-72.

Even though *Johnson* specifically addressed subparagraph (i), certain aspects of it are applicable to ACCA cases under subparagraph (ii) as well. First, *Johnson* makes clear that when a statute criminalizes multiple categories of behavior and nothing in the admissible record suggests which particular offense category is at issue, the court must analyze whether the least serious offense category set forth in the statute satisfies ACCA's definition of a "violent felony," irrespective of whether subparagraph (i) or subparagraph (ii) of that definition is at issue. Second, the reviewing court is bound by state court interpretations of state law, including anything that bears of the meaning of the statute at issue or under what offense category the defendant was actually convicted. *See Johnson*, 120 S. Ct. at 1269 (noting that the court is bound by the state's "interpretation of state law, including its determination of the elements" of the relevant statute) (emphasis added). Third, the Court's determination that a "violent felony" necessarily requires strong physical force, because the term "violent . . . connotes a substantial degree of force" and when attached to the term "felony, its connotation of strong physical force is even clearer," applies with equal force to offenses analyzed under subparagraph (ii). Thus, the argument should be that the "violent" aspect of *Begay*'s "purposeful, violent and aggressive" test must mean, at a minimum, that "a substantial degree of strong physical force" will or is likely to be used during the commission of the crime.[4]

United States v. Evans, 576 F.3d 766 (7th Cir. 2009) (career offender case) (represented by CJA attorney Mark Maciolek of Madison, WI)

Before *Johnson* was decided, the Seventh Circuit in *Evans* determined that Illinois' aggravated battery statute criminalizes conduct that is not similar in kind or degree of risk to the enumerated offenses. The court noted that the statute prohibited contact of an "insulting" or "provoking" nature. Under common law, this standard requires contact that is merely offensive, as opposed to contact involving physical force or bodily harm, with the typical offense being to spit on another person. *See Evans*, 576 F.3d at 767-68 (analyzing 720 ILCS 5/12-3(a), 5/12-4(b)). Under Illinois law, such a battery would be considered "aggravated" only if the defendant knew the victim was pregnant. *Id.* at 767. The court found that spitting on a pregnant woman was not comparably violent to the enumerated offenses. *Id.* at 768. It also found that spitting does not present a "*serious* risk of physical injury." *Id.* (emphasis in original). It thus failed

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[4] *Johnson* left open the question of whether its holding would apply to the definition of "domestic violence" under 18 U.S.C. § 921(a)(33)(A). Shortly thereafter, the Fourth Circuit reached that precise issue, holding that assault and battery of a family member in violation of Va. Code Ann. § 18.2-57.2 is not a "misdemeanor crime of domestic violence" under § 921(a)(33)(A) because the Virginia statute includes the common law definition of battery by offensive touching. *See United States v. White*, __ F.3d __, 2010 WL 2169487 (4th Cir. June 1, 2010) (represented by CJA attorneys Eric Hans Kichman and Kenneth M. Robinson of Washington, D.C.). The court reasoned that, after *Leocal* and *Johnson*, there is "no principled basis upon which to say a 'crime of domestic violence' [under § 921(a)(33)(A)] would include nonviolent force," and interpreted the phrase "physical force" as used in § 921(a)(33)(A)(ii) to mean "force, greater than a mere offensive touching, that is capable of causing physical pain or injury to the victim."

categorically to satisfy *Begay*; *see also United States v. Johnson*. 2010 WL 411113 (7th Cir. Feb. 4, 2010) (career offender case) (government concedes that aggravated battery in a public place under 720 Ill. Comp. Stat. 5/12-4(b)(8) is not a crime of violence after *Evans*) (represented by AFPD Robert Alvarado and Defender Richard Parsons of the Central District of Illinois Federal Public Defender); *but see United States v. Hampton*, 2010 WL 744393 (C.D. Ill. Feb. 25, 2010) (aggravated battery on a police officer by knowingly making physical contact of an insulting or provoking nature with a police officer in violation of 720 Ill. Comp. Stat. 5/12-3 is a violent felony because it is generally expected that a police officer will respond to an aggravated battery against him or her by making an arrest of the already aggressive person, thereby increasing the risk of violent confrontation with and physical injury to the officer).

4. Burglary

a. Burglary of a Non-Dwelling under Career Offender Guideline

United States v. Giggey, 551 F.3d 27 (1st Cir. 2008) (career offender case) (represented by CJA Attorney James S. Hewes of Portland, Maine, with Judith Mizner, Chief of Appeals for the Massachusetts Office of the Federal Public Defender (Miriam Conrad, Defender), appearing for the FDO as *amicus*).

In *Giggey*, the *en banc* First Circuit overruled itself to hold that burglary of a non-residence is not necessarily a "crime of violence" under the career offender guideline. The court rested its decision on the following: (1) the Sentencing Commission's decision to list only "burglary of a dwelling" in §4B1.2's enumerated list, thereby suggesting all other burglaries are not necessarily crimes of violence; (2) §4B1.2's administrative history, including that the Commission considered but decided not to amend the guideline to include "all burglaries" in 1992; (3) the Commission's decision to pattern the "crime of violence" definition after ACCA's definition of "violent felony," except for its use of the phrase "burglary of a dwelling," which narrowed ACCA's "burglary" language; and (4) the absence of a congressional directive for the Commission to include all burglaries in its definition of "crime of violence." *Giggey*, 551 F.3d at 33-37. The court then acknowledged that whether the defendant's non-residential burglary constituted a crime of violence should be decided pursuant to the categorical method, as elucidated by *Begay*, and remanded the case to the district court for further factfinding. *Id.* at 41; *cf. United States v. Stymiest*, 581 F.3d 759 (8th Cir. 2009) (reaffirming pre-*Begay* caselaw that burglary of a non-dwelling may still qualify as a career offender predicate under the "otherwise" clause of §4B1.2).

United States v. McFalls, 592 F.3d 707 (6th Cir. 2010) (career offender case) (represented by AFPDs Michael Holley and C. Douglas Thoresen of the M.D. of Tennessee Federal Public Defender (Henry Martin, Defender))

McFalls similarly held that second degree burglary of a dwelling under S.C. Code Ann. § 16-11-32(A) is not a crime of violence. The Sixth Circuit first determined that the statute's broad definition of "dwelling" includes uninhabitable structures as far as 200 yards away from a dwelling house. It then determined this meant not only that the statute is broader than the

enumerated offense of "burglary of a dwelling" under §4B1.2, but also that the risk of a face to face confrontation is "obviously much lower" than that present under the enumerated offenses.

b. Non-Generic Burglary

United States v. Lewis, 330 Fed. Appx. 353 (3rd Cir. 2009) (ACCA case) (represented by AFPD Thomas W. Patton of the Western District of Pennsylvania Federal Public Defender (Lisa B. Freeland, Defender))

In *Lewis*, the Third Circuit found that Ohio's burglary statute, which criminalizes trespass by force, stealth or deception in an "occupied" structure with intent to commit a felony, is broader than generic burglary and thus does not categorically satisfy ACCA's otherwise clause. *Id.* at 356 n.1. In determining that Ohio's statute is broader than generic burglary, the court noted that the relevant portion of Ohio law defines an "occupied" structure as either a habitation when there is no likelihood of a person being present or a dwelling whether or not there is a likelihood of a person being present. *Id.* at 359-60. The court next reviewed Ohio case law and determined that the overwhelming majority of cases involved intrusions into habitations when there is no likelihood of a person being present. *Id.* at 363. It then determined that Ohio courts define such offenses as those committed "at a time when the occupants are normally absent for a reason like work or school, and no one else has any reason to be there." *Id.* at 364. "Because the offense is narrowly defined to exclude situations with the greatest potential for confrontation, Ohio burglary involving no likelihood of presence poses less risk of physical injury than typical burglary." *Id.*[5]

c. <u>Attempted Burglary</u>

United States v. Martinez, 602 F.3d 1166 (8th Cir. 2010) (ACCA case) (represented by AFPD Vicki Mandell-King and Defender Ray Moore of the Districts of Colorado and Wyoming Federal Public Defender's Office)

In *Martinez* ,the Eighth Circuit held that attempted second degree burglary under Ariz Rev. Stat. § 13-1507(A) is not a violent felony because it permits conviction if the person took "any step" toward committing the offense. This, the court found, was too attenuated from the attempt statute approved in *James v. United States*, 550 U.S. 192 (2007), which required a "substantial step" toward entering or remaining in the property. The *Martinez* court further held that because the Arizona statute did not require an attempt to enter, the prohibited conduct was too attenuated from the risk of violent confrontation between an attempted burglar and a third party. The court held, however, that the statute did set forth a crime of violence under §4B1.2, because the guideline commentary specifically includes "attempts" to commit a crime of

[5] *But see United States v. Holycross*, 333 Fed. Appx. 81 (6th Cir. 2009) (relying on pre-*Begay* case law to find that attempted burglary and burglary under Ohio law satisfy ACCA's otherwise clause); *United States v. Hampton*, __ F.3d __, 2009 WL 3617465 (7th Cir. Nov. 4, 2009) (residential entry satisfies ACCA's otherwise clause despite missing element of intent to commit a felony because it is similar in kind and degree of risk to burglary); *United States v. Mayer*, 560 F.3d 948 (9th Cir. 2009) (Oregon's first-degree burglary statute satisfies ACCA's otherwise clause even though it is broader than generic burglary).

violence, and burglary is clearly an enumerated crime of violence. Note that the court's statement that it "cannot invalidate an application note merely because our view of the empirical data differs from that of the Sentencing Commission" is incorrect insofar as it suggests that a district court is bound to follow the Commission's conclusions when imposing a sentence that is sufficient but not greater than necessary to satisfy the purposes of sentencing under 18 U.S.C. § 3553(a), or that a court of appeals owes more deference to the Commission's determination than it does to determinations made by a district court judge. *See Rita v. United States*, 127 S. Ct. 2456, 2463, 2465 (2007) (no presumption in favor of a guideline sentence at district court level, and court of appeals may not "grant greater factfinding leeway to [the Commission] than to [the] district judge").

5. Child Endangerment

United States v. Gordon, 557 F.3d 623 (8th Cir. 2009) (ACCA case) (represented by CJA attorney Susan M. Hunt of Kansas City, MO)

In *Gordon*, the Eighth Circuit held that a Missouri conviction for endangering a child in the first degree, which makes it unlawful to "knowingly act in a manner that creates a substantial risk to the life, body, or health of a child less than seventeen years old," was not a violent felony under ACCA. *Id.* at 623. The court assumed that the crime involved conduct that presents a serious potential risk of physical injury to another, and that the risk was comparable to that presented by ACCA's enumerated offenses. Nonetheless, it found that it was not similar in kind because "it does not typically involve the three types of conduct characteristic of those crimes. Rather, a person can create a substantial risk to a child's life, body, or health through knowing actions that are neither violent nor aggressive." *Id.* at 626. The court noted that the subsection was routinely applied to such passive behavior as leaving a child unsupervised near a pond or leaving a child with a known abuser, *id.*, and found that given this, it was "not the kind of prior offense 'show[ing] an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger.'" *Id.* at 626-27 (*citing Begay*, 128 S. Ct. at 1587).

The *Gordon* court rejected the government's attempt to distinguish *Begay* on the ground that it involved a strict liability crime, whereas endangering a child requires knowledge. Specifically, the government argued that it was critical under *Begay* to focus on the "purposeful" aspect of the predicate offense because the enumerated offense of burglary was clearly still an ACCA predicate after *Begay* even though it need not be either violent or aggressive. The *Gordon* court responded that, while "it is possible to imagine scenarios – however atypical – in which several of the example crimes could be committed in a purposeful but not particularly violent or aggressive manner," *Begay* had focused on the "typical" manner in which the crime was committed. *Id.* at 627. The *Gordon* court also noted *Begay*'s repeated use of the word "and" to connect the "purposeful," "violent," and "aggressive" elements, and pointed out that because DUI is so obviously neither violent nor aggressive, the Court did not need to discuss that aspect of its opinion much. *Gordon* found that burglary was a violent and aggressive crime because the intentional and unlawful entry into a building created a possibility of a violent confrontation with an occupant, and because the burglar's own awareness of this possibility indicates s/he is prepared to commit that violence if necessary. In contrast, "nothing in the definition of [child endangerment] suggests it typically involves a similar potential for either

violence or aggression." *Id.* at 628; *see also United States v. Wilson*, 562 F.3d 965, 967-68 (8th Cir. 2009) (same result for §2K2.1 enhancement based on career offender guideline's definition of "crime of violence").

6. Conspiracy

United States v. Whitson, 597 F.3d 1218 (11th Cir. 2010) (career offender case) (represented by AFPDs Brenda Vryn and Chantel Doakes and Defender Kathleen Williams of the Southern District of Florida Federal Public Defender).

In *Whitson*, the Eleventh Circuit rejected the government's argument that conspiracy to commit a crime of violence ("strong-arm robbery") in violation of S.C. Code Ann. § 16-17-410 is itself a crime of violence. The court held that the crime of conspiracy must be analyzed separately from its object offense to determine whether its elements satisfy *Begay.* Here, the court found that although conspiring to commit a violent crime increases the risk of harm to another and is purposeful, the conspiracy itself is not violent or aggressive because the statute does not require an overt act. This is an important case for any statute that permits conviction for an inchoate offense without requiring an overt act toward commission of the underlying offense.

7. Domestic Violence

United States v. Ramirez, __ F.3d __, 2010 WL 2011501 (7th Cir. May 21, 2010) (career offender case)

In *Ramirez*, the government conceded that domestic assault in violation of Tex Stat. § 22.01(a)(1) & (b)(2) is not a crime of violence because it permits convictions for reckless conduct. Although the court nonetheless affirmed the defendant's sentence because he failed to object to the facts set forth in the PSR in the lower court and failed to demonstrate that those facts were incorrect or could not be supported by admissible sources, the concession is an important one and should be cited by counsel in any case involving this and other reckless-based statutes. *See also* n. 3, *supra.*

7. Escape

a. Failure to Report

Chambers v. United States, 129 S. Ct. 687 (2009) (ACCA case)

In *Chambers*, the Supreme Court held that an escape conviction based on a failure to report to custody does not qualify as a violent felony under ACCA's "otherwise" clause. The Court began by reaffirming the categorical approach to determining whether a particular statute criminalizes "violent" conduct within ACCA's meaning, but noted that some statutes criminalize more than one "category" of crime. *Id.* at 690-91. For example, the escape statute before the Court covered "several different kinds of behavior" – escape from a penal institution, escape from the custody of a penal institution employee, failing to report to a penal institution, failing to

report for intermittent confinement, failing to return from work or day release, and failing to abide by the terms of home confinement. *Id.* at 691.

The Court determined from the charging document that Mr. Chambers' escape conviction was based on a failure to report for intermittent confinement, and then reasoned that a "failure to report" constitutes a different crime – or, rather, a different category of crime – than "escape" because the nature of "[t]he behavior that likely underlies a failure to report would seem less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody." *Id.* Moreover, the Court noted, the statute lists escape and failure to report separately in the title and in the text, and places them in different felony classes with differing degrees of seriousness. *Id.*

Having thus "categorized" the relevant crime as a failure to report, the Court then held that it failed to satisfy ACCA's "otherwise" clause for two reasons. First, "the crime amounts to a form of inaction, a far cry from the 'purposeful, "violent," and "aggressive" conduct' potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion." *Id.* at 692.[6] Second, the government failed to raise statistical or other proof showing that those people who fail to return to custody are "significantly more likely than others to attack, or physically resist, an apprehender," as required under the "otherwise" clause. *Id.* at 692-93. With respect to this second finding, the Court looked to a Sentencing Commission report on the incidents of violence in escape cases in fiscal years 2007 and 2008, and found "conclusive" that no failure to report cases in those two years involved any violence.[7] *Id.* at 692. It was also unimpressed with the results of the government's case law search, which reflected only three failures to report in the past 30 years that involved violence under both state and federal law. *Id.* at 692-93.

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[6] This does not mean that *Begay*'s "purposeful, violent and aggressive" requirement is satisfied if the offense requires something more than merely passive conduct or non-action. Recall that *Begay* itself involved active conduct – drinking to intoxication and driving a car – but the Supreme Court nonetheless held that the active conduct at issue failed to satisfy the "purposeful, violent and aggressive" requirement because it did not show "an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Begay*, 128 S. Ct. at 1587. *Chambers* focused on the passivity involved in a failure to report, not because failure to act is necessary to find that an offense is not violent, but rather because the inaction inherent in a failure to report casts doubt on the government's "powder keg" theory – the notion that an escapee will be likely to resort to violence to avoid recapture. It was this theory upon which the government relied to argue that a failure to report "involves *conduct* that presents a serious potential risk of physical injury to another," *see* 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added), and it is this theory that *Chambers* rejected. Indeed, in the very next line, the Court makes its point clear: "While an offender who fails to report must of course be doing *something* at the relevant time, there is no reason to believe that the *something* poses a serious potential risk of physical injury. To the contrary, an individual who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct." *Chambers*, 129 S. Ct. at 692. *See* Part D(1), *infra* for further discussion of the Court's rejection of the "powder keg" theory.

[7] *See* U.S. Sentencing Commission, *Report on Federal Escape Offenses in Fiscal Years 2006 and 2007* (Nov. 2008), available at http://www.ussc.gov/general/escape_FY0607_final.pdf.

Two aspects of *Chambers* stand out: its rejection of the "powder keg" theory and its reliance on statistics. *See* n. 4 and Parts D(1) & D(2), *infra.* for further discussion of these aspects of the decision.

b. Walkaway Escape

Since *Chambers*, the government has conceded – and every circuit to have reached the issue has found – that walkaway escape does not constitute a violent felony or a crime of violence:[8]

Sixth Circuit: *United States v. Ford*, 560 F.3d 420 (6th Cir. 2009) (government conceded and court found that walkaway escape is not a violent felony or a crime of violence) (represented by CJA attorney Andrew Martin Stephens of Lexington, KY); *United States v. Anglin*, 601 F.3d 523 (6th Cir. 2010) (conviction for escape under 18 U.S.C. § 751(a) is not categorically a crime of violence because in addition to escape from secure custody, § 751(a) criminalizes failure to report, which is out under *Chambers*, and walkaway escape, which is out under *Ford*) (represented by AFPDs Caryll Alpert and Michael Holley of the Middle District of Tennessee Federal Public Defender (Henry Martin, Defender)).

Seventh Circuit: *United States v. Hart*, 578 F.3d 674 (7th Cir. 2009) (a prior escape conviction under 18 U.S.C. § 751(a) does not satisfy *Begay* because it does not distinguish between escapes from secure custody and other forms of escape) (represented by CJA attorney Heather L. Winslow of Chicago, IL).

Eighth Circuit: *United States v. Jackson*, 594 F.3d 1027 (8th Cir. 2010) (noting without reaching issue that government conceded a prior conviction under § 751(a) based on walkaway escape does not qualify as a crime of violence under the career offender guideline) (represented by AFPDs Andrea George and Katherine Menedez of the District of Minnesota Federal Public Defender (Katherian Roe, Defender)).

Eleventh Circuit: *United States v. Lee*, 586 F.3d 859 (11th Cir. Oct. 26, 2009) (government conceded that, "after *Chambers*, a walkaway escape is not a violent felony or a crime of violence") (represented by CJA attorney Michael Millians of Augusta, GA); *United States v. Roberson*, 591 F.3d 1337 (11th Cir. 2009) (agreeing with government's concession that walkaway escape is not a crime of violence for purposes of the career offender guideline) (represented by CJA attorney Edward Coleman of Augusta, GA).

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[8] At least one court has found that walkaway escape is also not a crime of violence under 18 U.S.C. § 16. *See Addo v. Attorney General of the U.S.*, 2009 WL 4755712 (3rd Cir. 2009) (finding prior conviction under § 751(a) did not qualify as crime of violence under 18 U.S.C. § 16 where the bench trial judge adopted the factual findings in the PSR that the defendant had signed out of a community treatment center and never returned, reasoning that "if there is no serious potential risk of physical injury, there is not likely to be a serious risk that physical force will be used")

c. Escaping Arrest

United States v. Hopkins, 577 F.3d 507 (3rd Cir. 2009) (career offender case) (represented by AFPD Frederick Ulrich of the Middle District of Pennsylvania Federal Public Defender (Jim Wade, Defender))

In *Hopkins*, the Third Circuit held that the crime of unlawfully removing oneself from arrest on a misdemeanor charge without employing force, threat, deadly weapon, or other dangerous instrumentality does not qualify as a career offender predicate under *Begay*. *See Hopkins*, 577 F.3d at 513-15 (analyzing 18 Pa. Const. Stat. Ann. § 5121). First, although the "typical commission" of the crime "does, indeed, present some potential risk of physical injury to another because it requires the arresting officer to use force to overcome the offender's behavior," the court found that it did not pose the same degree of risk as the enumerated offenses: "[G]iven that the detention relates to an unadjudicated misdemeanor, we would expect that the force with which the officer would be willing and/or required to employ would present materially less of a potential for physical injury to the officer than the potential for physical injury presented by the enumerated offenses." *Id.* at 514. Second, although the conduct involved was certainly purposeful (running away from an arresting officer), the court found that it is "materially less violent and aggressive than the enumerated offenses" because it is, by statutory definition, "unaccompanied by force, threat, deadly weapon or other dangerous instrumentality." *Id.* at 514 (internal punctuation marks omitted).

8. Failure to Stop for a Blue Light / Fleeing or Eluding a Police Officer

United States v. Rivers, 595 F.3d 558 (4th Cir. 2010) (ACCA case) (represented by represented by AFPD Mary Gordon Baker of the District of South Carolina (Parks Small, Defender)); *United States v. Roseboro*, 551 F.3d 226 (4th Cir. 2009) (ACCA case) (represented by Executive Director Claire J. Rauscher and AFPDs Ross Hall Richardson and Kevin Andre Tate of the Federal Defenders for the Western District of North Carolina, Inc.).

The Fourth Circuit has ruled that failure to stop for a blue light under S.C. Code Ann. § 56-5-750(A) is categorically not a violent felony after *Begay*. First in *Roseboro*, the Fourth Circuit held that *Begay* overruled a prior line of cases finding that failure to stop for a blue light categorically constitutes a "violent felony" under ACCA:

> Under [pre-*Begay* Fourth Circuit precedent], an offense presented a serious potential risk of physical injury to another if the offense conduct had the potential for serious physical injury to another. The Supreme Court, however, explicitly rejected this inquiry as outcome determinative, observing that the proper inquiry involved far more than an analysis of the risk associated with the prior crime.

Roseboro, 551 F.3d at 233. Finding that it was bound to apply the *Begay* standard, the *Roseboro* court noted that the South Carolina statute criminalizing the failure to stop for a blue light punishes both intentional and unintentional conduct. *Id.* at 235. Although the court stated that "[t]he intentional act of disobeying a law enforcement officer by refusing to stop for his blue

light signal, without justification, is inherently an aggressive and violent act," *id.* at 240,[9] it could not say the same for a negligent failure to stop. The court remanded the case to the district court for further factfinding.

In *Rivers*, the court revisited *Roseboro* to find that *Roseboro* had incorrectly divided § 56-5-750(A) into different categories of crime when in fact the statute proscribed only one – failure to stop. The court held that the statute set forth a strict liability crime that explicitly criminalizes a broad swath of unintentional conduct and, as a result, employing the modified categorical approach to determine whether the defendant had acted "purposefully" was inappropriate. Because the statute itself failed to satisfy the "purposeful" requirement, it was out under *Begay*. *But see United States v. Owens*, 2010 WL 23163 (4th Cir. Jan. 4, 2010) (felony eluding arrest with a motor vehicle with three aggravating factors under N.C. Gen. Stat. § 20-141.5 is a crime of violence because the statute requires that the failure to stop for a blue light be purposeful).[10]

United States v. Harrison, 558 F.3d 1280 (11th Cir. 2009) (ACCA case) (represented by AFPDs Gwendolyn L. Spivey and Thomas S. Keith of the Northern District of Florida Federal Public Defender (Randolph P. Murrell, Defender))

In *Harrison*, the Eleventh Circuit held that the crime of willfully fleeing a police officer in a marked vehicle with lights and sirens activated did not constitute a crime of violence under ACCA for two reasons. *See id.* at, 1282, 1301.

First, it found the degree of risk posed by willfully fleeing did not rise to the same level as that posed by the enumerated offenses. "[T]he behavior underlying Florida's willful-fleeing crime, in the ordinary case, involves only a driver who willfully refuses to stop and continues driving on – but without high speed or recklessness." *Id.* at 1294 The court found this made it "unlikely that the confrontation will escalate into a high-speed chase that threatens pedestrians, other drivers, or the officer." *Id.* *Harrison* rejected the argument that willful fleeing is a form of escape and thus that it carries the same level of risk, finding that even if it is, all escapes are not the same after *Chambers*. *Id.* Similarly, it refused to treat all forms of willful fleeing equally, especially because the state does not. *Id.* It also noted that although proving the offense fit ACCA's residual clause was the government's burden, the government had failed to present any

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[9] *See also id.* at *242-43 (distinguishing *United States v. Spells*, 537 F.3d 743, 752 (7th Cir. 2008), which affirmed an ACCA conviction based on fleeing a police officer where the statute required "purposeful" conduct).

[10] Note that since *Rivers*, the Fourth Circuit has held that a conviction for felony fleeing to elude arrest with a motor vehicle with two aggravating factors (speeding in excess of 15 miles per hour and driving recklessly) in violation of N.C. Gen. Stat. § 20-141.5 satisfies the *Begay* test for violent felonies. *See United States v. Warren*, 2010 WL 2465249 (4th Cir. June 18, 2010). The *Warren* decision should not, however, carry much persuasive authority as it is unpublished, fails to cite either *Roseboro* or *Rivers*, and is based on an unexplained tautology. *See id.* at *3 ("The violent and aggressive conduct must only carry the potential for violence and physical injury to another, but does not require intent to cause such injury. We conclude that Warren's crime of intentional fleeing to elude arrest, coupled with the aggravating factors of speeding in excess of fifteen miles above the posted speed limit and reckless driving, is similarly violent and aggressive as [sic] the residual clause enumerated crimes. Therefore, the court did not plainly err in applying the enhancement.") (citations omitted).

empirical evidence on the amount of risk in this case. Although it claimed not to set a "hard and fast rule requiring the use of statistical evidence in residual-clause cases, this type of case would benefit from empirical evidence of the likelihood of physical injury in statutory willful fleeing crimes that do not have the elements of high speed or reckless disregard." *Id.* at 1295.

Second, *Harrison* held that even if willful fleeing did pose the same degree of risk as ACCA's enumerated offenses, it still would not qualify as an ACCA predicate because, although purposeful, "without high speed or reckless conduct, [it] is not sufficiently aggressive and violent enough to be like the enumerated ACCA crimes:"

> A person who refuses to stop and drives on, without anything more, . . .is not, in our mind, cut from the same cloth as burglars, arsonists, extortionists, or those that criminally detonate explosives. The fleeing crime . . . seems more appropriately characterized as the crime of a fleeing coward – not an armed career criminal bent on inflicting physical injury.

Id. at 1295-96. The court again highlighted the government's failure to carry its burden by producing empirical support for the argument that a person who flees is likely to be violent. *Id.* at 13. It also declined to follow the Seventh Circuit's contrary decision in *United States v. Spells*, 537 F.3d 743 (7th Cir. 2008) based on what it described as *Spells*' flawed use of statistics – a useful critique for those practicing in the Seventh Circuit and those in circuits that have not yet reached the issue. *See Harrison*, 558 F.3d at 1299-1300.

Although *Harrison* remains good law, the Eleventh Circuit has held that willful fleeing and eluding under Fla. Stat. § 316.1935(3) is a crime of violence because "fleeing at high speed or with wanton disregard for safety amounts to holding a finger on the trigger of a deadly weapon, without care for whom the bullet may strike." *See United States v. Layton*, 356 Fed. Appx. 286 (11th Cir. 2009) (citing *United States v. Harris*, 586 F.3d 1283 (11th Cir. 2009) (same)). *Layton* noted that *Harrison* itself relied on the finding that "<u>without</u> high speed or reckless conduct, [it] is not sufficiently aggressive and violent enough to be like the enumerated ACCA crimes;" where the statute at issue requires high speed or wanton disregard for safety, the Eleventh Circuit finds that it satisfies the "violent and aggressive" aspect of *Begay*.

United States v. Tyler, 580 F.3d 722 (8th Cir. 2009) (career offender case) (represented by CJA attorney Jennifer Marie MacAuley of St. Paul, MN).

In *Tyler*, the Eighth Circuit followed *Harrison* to find that Minnesota's crime of fleeing a police officer in a motor vehicle did not count as a career offender predicate after *Begay*. The court first found that the crime did not present a serious potential risk of physical injury to another, in part because the statute did not require either high speed or reckless driving, and because a separate part of the statute provided enhanced penalties when death or any bodily injury resulted. *See Tyler*, 580 F.3d at 725. Even assuming the conduct did create a serious potential risk, however, the court still found that it was not similar in kind because, although purposeful, it did not require violence or aggression. *Id.* In fact, merely extinguishing one's lights would be sufficient under the statute – an action the court found would not imply a "propensity to act violently." *Id.*

The Eighth Circuit correctly noted that a circuit split exists on the issue. *See id.* at 726 (citing *United States v. LaCasse*, 567 F.3d 763 (6th Cir. 2009) (fleeing and eluding under Michigan law is crime of violence post-*Begay*); *United States v. Harrimon*, 568 F.3d 531 (5th Cir. 2009) (same under Texas law); *United States v. West*, 550 F.3d 952 (10th Cir. 2008) (same under Utah law)). While the Fifth and Tenth Circuit decisions could be distinguished on the ground that those statutes were not so broad as to apply to nonviolent conduct, the court simply disagreed with the Sixth Circuit that increasing the speed of a vehicle, extinguishing lights, or taking other such action to elude police was categorically violent under *Begay*. *Id.* at 726; *see also United States v. Johnson*, 601 F.3d 869 (8th Cir. 2010) (fleeing a peace officer in a motor vehicle under Minn. Stat. § 609.487, subd. 3 is not a violent felony under *Tyler*) (represented by CJA attorney Thomas Harold Shiah of Minneapolis, MN).[11]

9. Firearms and Other Weapons Offenses

a. Carrying a Concealed Weapon

United States v. Archer, 531 F.3d 1347 (11th Cir. 2008) (career offender guideline case) (represented by AFPD Maurice C. Grant II of the Middle District of Florida Federal Public Defender (James T. Skuthan, Acting Defender)).

The Eleventh Circuit reversed itself post-*Begay* to hold that carrying a concealed weapon "does not involve the aggressive, violent conduct that the Supreme Court noted is inherent in the enumerated crimes:"

> Burglary of a dwelling, arson, extortion, and the use of explosives are all aggressive, violent acts aimed at other persons or property where persons might be located and thereby injured. Carrying a concealed weapon, however, is a passive crime centering around possession, rather than around any overt action.

[11] Since *Tyler*, the Seventh Circuit has also weighed in to find that fleeing an officer under certain conditions constitutes a crime of violence or violent felony. *See United States v. Dismuke*, 593 F.3d 582 (7th Cir. 2010) (increasing the speed of a vehicle in an attempt to flee a police officer in violation of Wis. Stat. § 346.04(3) satisfies subparagraph (ii) because it requires that the person act "knowingly," which is the same as "purposefully," and is "violent and aggressive" because it is "characterized by aggressive conduct that carries the genuine potential for violence and thus physical injury to another" by making a confrontation with the police likely); *United States v. Sykes*, 598 F.3d 334 (7th Cir. 2010) (fleeing police in a vehicle in violation of Ind. Code § 35-44-3-3(b)(1)(A) is a violent felony under ACCA because it requires knowing and intentional conduct, dares the police officer to chase, and endangers other drivers and pedestrians). Similarly, the Eighth Circuit has found that a statute precluding particularly dangerous forms of fleeing and eluding can constitute a predicate offenses under the career offender guideline. *See United States v. Wise*, 597 F.3d 1141 (8th Cir. 2010) (failing to stop at command of a police officer in violation of Utah Code § 41-6A-210 is a career offender predicate under subparagraph (ii) because it requires deliberate action to either operate a motor vehicle in willful or wanton disregard of a police officer's signal or attempt to flee or elude a police officer, necessarily occurs in the police officer's presence, thereby increasing the risk of a direct confrontation, and is likely to endanger third parties (who are likely to be present)); *see also Warren*, 2010 WL 2465249, n. , *supra*.

Archer, 531 F.3d at 1351. The court further distinguished carrying a concealed weapon from the enumerated crimes because it does not require specific intent to conceal, nor is it universally considered violent. *Id.* In fact, the court pointed out that only thirteen states have a statutory maximum of more than one year for the offense (thereby rendering it even potentially a career offender predicate in only those thirteen states), and that in Florida, carrying a concealed weapon is legal with a license. *Id.*; *accord United States v. Townsley*, 2009 WL 929986, *3 (11th Cir. April 8, 2009).

b. Possession of a Sawed-Off Shotgun

United States v. Haste, Slip. Op., 2008 WL 4218771 (4th Cir. Sept. 9, 2008) ("*Haste II*") (ACCA case) (represented by Defender Louis Carr Allen III and AFPD Eric David Placke of the Middle District of North Carolina Federal Public Defender).

Haste II is a two-paragraph opinion that relies on *Begay* to find that felonious possession of a weapon of mass destruction (a sawed-off shotgun) is not a violent felony under ACCA. In doing so, the court implicitly overruled prior Fourth Circuit precedent, *United States v. Johnson*, 246 F.3d 330 (4th Cir. 2001), which held that possession of a sawed-off shotgun is a crime of violence under the career offender guideline. *See United States v. Haste*, 234 Fed. Appx. 70, 71 (4th Cir. 2007) ("*Haste I*") (holding *Johnson* governs ACCA cases as well as career offender cases), *vacated and remanded by Haste v. United States*, 128 S. Ct. 2048 (2008). Here is the entirety of the court's reasoning: "Having carefully reviewed the Supreme Court's opinion, we conclude that a violation of N.C. Gen. Stat. § 14-288.8 is not a 'violent felony' under the ACCA." *See Haste II* at *1.[12]

c. Negligent / Reckless Discharge of a Firearm

United States v. Gear, 577 F.3d 810 (7th Cir. 2009) (career offender) (represented by Defender Richard H. Parsons and AFPD Daniel T. Hansmeier of the Central District of Illinois Federal Public Defender)

In *Gear*, the Seventh Circuit found that recklessly discharging a firearm under Illinois law failed to satisfy *Begay* because the statute "includes at least two varieties of weapons offenses": those involving defendants who recklessly discharge a firearm (for example, by recklessly pulling the trigger while showing a friend what is believed to be an unloaded firearm) and those involving defendants who deliberately discharge a firearm but are reckless about the consequences. *See Gear*, 577 F.3d at 812-13 (analyzing 720 ILCS 5/24-1.5(a)). Although the court found the latter offense was sufficiently purposeful, violent and aggressive to satisfy *Begay*, the former was not. *Id.* at 813.

[12] Courts have also held post-*Begay*, *Chambers*, and *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that possession of an unregistered firearm is not a crime of violence under 18 U.S.C. § 924(c), which tracks 18 U.S.C. § 16. *See United States v. Serafin*, 562 F.3d 1105, 1108-09, 1115-16 (10th Cir. 2009) (represented by CJA attorney Ronald G. Pretty of Cheyenne, WY).

United States v. Coronado, 603 F.3d 706 (9th Cir. 2010) (career offender case) (represented by AFPD Jennifer Jue Uyeda of the Central Distric of California Federal Public Defender (Sean Kennedy, Defender)).

The Ninth Circuit has similarly held that a conviction for discharging a firearm with gross negligence under Cal. Penal Code § 246.3 is not a crime of violence for the simple reason that "crimes with a mens rea of recklessness or gross negligence do not satisfy *Begay's* requirement of 'purposeful' conduct." The court also noted that the statute at issue does not require an intent to cause harm.

d. Possession of a Weapon in Prison

United States v. Polk, 577 F.3d 515 (3rd Cir. 2009) (career offender case) (represented by CJA attorney Stephen F. Becker of Lewisburg, PA)

The Third Circuit held that possessing a prohibited object designed to be used as a weapon while in federal prison in violation of 18 U.S.C. § 1791(a)(2) does not constitute a crime of violence because it is not similar in kind to the "overt, active conduct" required by the enumerated offenses:

> Post-*Begay*, the distinction between active and passive crimes is vital when evaluating offenses under the Career Offender Guidelines to determine if they entail "purposeful, violent and aggressive conduct." While possessing a weapon in prison is purposeful, in that we may assume one who possesses a shank intends that possession, it cannot properly be characterized as conduct that is itself aggressive or violent, as only the potential exists for aggressive or violent conduct. Much like carrying a concealed weapon, the offense is a "passive crime centering around *possession* rather than around any overt action."

Polk, 577 F.3d at 519 (citing *Archer*, 531 F.3d at 1351) (emphasis in original). In so holding, the court rejected the government's argument that the prison setting automatically rendered the crime violent: "We do not dispute the inherent dangers of possessing a shank in prison, but this alone cannot transform a mere possession offense into one that is similar to the crimes listed." *Id.* It also recognized that its decision "is at odds with the Tenth Circuit Court's recent decision in *United States v. Zuniga*, 553 F.3d 1330 (10th Cir. 2009)," but found that it could not agree with *Zuniga*'s outcome after *Begay*.

10. Leaving the Scene of an Accident

United States v. Harkness, 305 Fed. Appx. 578 (11th Cir. 2008) (ACCA case) (represented by CJA attorney Ryan Thomas Truskoski of Orlando, Florida)

In *Harkness*, the government conceded that a conviction for leaving the scene of an accident does not satisfy the *Begay* standard for an ACCA predicate because, although purposeful, it involves neither violent nor aggressive conduct; the Eleventh Circuit agreed. *See Harkness*, 305 Fed. Appx. at 585.

11. Reckless Offenses

Always closely examine the *mens rea* required for the predicate offense. If it is a strict liability crime, or can be committed through negligence or recklessness, argue that it is not similar in kind to the enumerated offenses because it is not "*purposeful*, violent and aggressive" conduct.[13] Even the Department of Justice admites that, after *Begay*, "reckless conduct, standing alone, is not the type of purposeful conduct that can constitute a crime of violence under §4B1.2(a)(2)'s residual clause." *See United States v. Johnson*, 587 F.3d 203 (3rd Cir. Nov. 18, 2009) (career offender case) (represented by AFPD Renee Pietropaolo of the Western District of Pennsylvania Federal Public Defender (Lisa Freeland, Defender)); *see also United States v. Shatzer*, 2010 WL 850197 (3rd Cir. Mar. 12, 2010) (recklessly endangering another person under 18 Pa. Const. Stat. Ann. § 2705 is not a crime of violence because it is not purposeful, as government conceded).

Three other circuits in addition to the Third Circuit have ruled favorably on this issue and, given the government's concessions in the Third Circuit, we can expect more circuits to follow. In *United States v. Gray*, 535 F.3d 128 (2nd Cir. 2008), a case analyzing the definition of "crime of violence" under the career offender guideline, the Second Circuit held that:

> Reckless endangerment on its face does not criminalize purposeful or deliberate conduct. Despite coming close to crossing the threshold into purposeful conduct, the criminal acts defined by the reckless endangerment statute are not intentional, a distinction stressed by the Supreme Court in *Begay*. Thus, pursuant to *Begay*, we conclude that the district court procedurally erred in calculating the appropriate Guidelines range because reckless endangerment is not a "crime of violence."

Id. at 129 (analyzing N.Y. Penal Law § 120.25) (citation omitted).

The Seventh Circuit followed *Gray* in *United States v. Smith*, 544 F.3d 781 (7th Cir. 2008) (represented by CJA attorney Jack F. Crawford of Indianapolis, Indiana), an ACCA case. The court analyzed key parts of *Begay* (including the Court's use of reckless tampering with consumer products as an example of an offense that does <u>not</u> meet the *Begay* standard, its description of drunk driving as a "crime of negligence or recklessness," and its statement that drunk driving "differs from a prior record of violent and aggressive crimes committed *intentionally*") to conclude that:

> After *Begay*, the residual clause of the ACCA should be interpreted to encompass only "'purposeful" crimes. Therefore, those crimes with a *mens rea* of negligence or recklessness do not trigger the enhanced penalties mandated by the ACCA. Accordingly, we agree with the Second Circuit that crimes requiring only a *mens rea* of recklessness cannot be considered violent felonies under the residual clause of the ACCA.

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[13] Of course, even "purposeful" predicates are still subject to challenge on the ground that they are non-violent or non-aggressive. *See, e.g.*, Tr., *Chambers v. United States* (06-11206) (Kennedy, J.) (reminding the government that "*Begay* talked about purposeful *violent* conduct, not just purposeful conduct") (emphasis added).

Id. at 786 (*citing Begay* at 1587-88).

The Seventh Circuit has applied this reasoning in a number of cases since *Smith*. *See, e.g., United States v. Gear*, 577 F.3d 810 (7th Cir. 2009) (career offender) (reckless discharge of a firearm is not a proper career offender predicate because "recklessness does not meet the standards established by the Supreme Court in *Begay*") (represented by Defender Richard H. Parsons and AFPD Daniel T. Hansmeier of the Central District of Illinois Federal Public Defender); *United States v. Hampton*, 585 F.3d 1033 (7th Cir. 2009) (district court committed plain error by counting prior conviction for criminal recklessness as ACCA predicate) (represented by CJA attorneys Joel D. Bertocchi and Daniel L. Harris of Chicago, IL); *United States v. High*, 576 F.3d 429, 430-31 (7th Cir. 2009) (prior conviction of second-degree recklessly endangering safety does not satisfy *Begay*); *United States v. Davis*, 2010 WL 271724 (7th Cir. Jan. 24, 2010) (reckless homicide under Wis. Stat. § 940.06 is not a crime of violence because it requires only recklessness) (represented by AFPD Daniel Hansmeier and Defender Richard Parsons of the Central District of Illinois Federal Public Defender); *United States v. McDonald*, 592 F.3d 808 (7th Cir. 2010) (first degree reckless injury under circumstances that show utter disregard for human life in violation of Wis. Stat. § 940.23(1)(a) is not a crime of violence because "recklessness" is insufficient to satisfy the "purposeful" requirement) (represented by Defender Daniel Stiller and AFPD Thomas Wilmouth of the Eastern & Western District of Wisconsin Community Defender);[14] *see also United States v. Hill*, 2010 WL 831411 (7th Cir. Mar. 11, 2010) (recklessly endangering safety under Wis. Stat. § 941.30(2) is not a crime of violence because it does not require purposeful conduct) (represented by CJA attorney Patrick Caffery of Racine, WI).

The Sixth Circuit has also followed suit. *See United States v. Baker*, 559 F.3d 443 (6th Cir. 2009) (career offender guideline) (represented by CJA attorney Charles Patrick Dupree of Chattanooga, TN). In *Baker*, the Sixth Circuit held that a Tennessee felony conviction for reckless endangerment did not qualify as a crime of violence under the career offender guideline even though it required use of a dangerous weapon because "the offense does not clearly involve the type of 'purposeful, violent, and aggressive' conduct as burglary, arson, extortion or the use of explosives. Rather, on its face, the statute criminalizes only reckless conduct." *Id.* at 453 (citing *Begay*, 128 S. Ct. at 1586); *see also United States v. Rogers*, 594 F.3d 517 (6th Cir. 2010) (government does not dispute that reckless endangerment under Tenn. Code Ann. § 39-13-103 is not a crime of violence) (represented by AFPD Mary Jermann-Robinson of the Western District of Tennessee Federal Public Defender (Stephen Shankman, Defender)); *see also United States v. Allen*, 2010 WL 963696 (6th Cir. Mar. 17, 2010) (same) (represented by AFPD Needum Germany of the Western District of Tennessee Federal Public Defender (Stephen Shankman, Defender)).

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[14] Note that 10 days before the decision in *McDonald* was issued, a panel of the Seventh Circuit affirmed a career offender designation based on defendant's prior conviction for criminal recklessness under Ind. Code § 35-42-2-2(b)(1) because of the facts of the case. *See United States v. Clinton*, 591 F.3d 968 (7th Cir. 2010). This analysis is patently wrong, both under *Shepard/Taylor* and under the later decision in *McDonald*, even though *McDonald* does not cite it.

12. Resisting and Obstructing a Police Officer

United States v. Mosley, 575 F.3d 602 (6th Cir. 2009) (career offender guideline) (represented by AFPD Richard Stroba of the Western District of Michigan Federal Public Defender (Ray Kent, Defender)).

The Sixth Circuit held that a prior conviction for resisting and obstructing a police officer did not categorically constitute a crime of violence. The court noted that the Michigan statute at issue contains two categories of offenses – one that defines "obstruction" as an assault, battery or wounding of an officer, and another that defines it as failing to comply with a lawful command. *Id.* at 607. The court held that "[a] knowing failure to comply with a lawful command – say, by refusing to produce information, by ignoring an officer's command not to cross the street or by failing to stay put at an accident scene – is no more aggressive and violent than walking away from custody, drunk driving, or a failure to report to prison." *Id.* (citations omitted). As for the degree of risk, the court held that while "there may be settings where an individual's failure to follow an officer's lawful command poses such risks [as the enumerated offenses pose,] . . . we have no basis in this record – empirical or otherwise – for concluding that the typical violation would create such a danger." *Id.*; *see also United States v. Emery*, 2009 WL 2392948 (6th Cir. Aug. 5, 2009) (same) (represented by AFPDs David L. Kaczor and Paul L. Nelson of the Western District of Michigan Federal Public Defender (Ray Kent, Defender); *United States v. Love*, 2010 WL 489510 (6th Cir. Feb. 10, 2010) (following *Mosley* to hold that a conviction for resisting or obstructing a police officer by knowingly failing to comply with a lawful command under Mich. Comp. Laws Ann. § 750.81(d) (e.g., running away from a police officer) is not a crime of violence under §2K2.1) (represented by AFPD David Kaczor of the Western District of Michigan Federal Public Defender (Ray Kent, Defender)); *United States v. Blomquist*, 356 Fed. Appx. 822 (6th Cir. 2009) (resisting and obstructing an officer under Mich. Code Laws. § 750.479 is not a crime of violence because Michigan courts have held that the statute can be satisfied with passive conduct such as a knowing failure to comply, which is "no more aggressive and violent than walking away from custody or a failure to report to prison") (citations omitted) (represented by CJA attorney Martin Beres of Clinton Township, MI).[15]

13. Sexual Misconduct with a Minor

United States v. Goodpasture, 595 F.3d 670 (7th Cir. 2010) (ACCA case) (represented by AFPD Stephen Williams of the Southern District of Illinois Federal Public Defender (Philip Kavanaugh, Defender)).

The Seventh Circuit recently held that lewd and lascivious acts involving a person under the age of 14 in violation of Cal. Penal Code § 288(a) is not a violent felony under ACCA for three reasons. First, the court noted that the offense can be committed through any lascivious act including kissing or fondling and does not necessarily require violence. Second, the statute does not require a showing of force, fraud, mental or physical harm, or any risk of harm. And third,

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[15] *But see United States v. Almenas*, 553 F.3d 27 (1st Cir. 2009) (resisting arrest qualifies as a crime of violence); *United States v. Hudson*, 557 F.3d 883 (8th Cir. 2009) (resisting arrest by fleeing in such a manner as to create substantial risk of serious physical injury or death to any person under Mo. Rev. Stat. § 575.150.5 is a crime of violence)

the statute does not require that the defendant be older than 16. The court distinguished *United States v. Osborne*, 551 F.3d 718 (7th Cir. 2009) which held that "at least a four-year age difference or use of force or fraud distinguishes 'abusive' contact from the exploratory touching in which many teenagers engage" and found that here, because the statute at issue potentially reached "exploratory touching," it could not satisfy *Begay*.

United States v. Rogers, 2010 WL 342788 (7th Cir. Feb. 1, 2010) (career offender case) (represented by CJA attorney Matthew Soliday of Valparaiso, IN).

The Seventh Circuit has similarly held that sexual misconduct with a minor under Ind. Code § 35-42-4-9 is not a crime of violence. Because the statute sets forth a strict liability offense as demonstrated by California case law, it cannot satisfy *Begay*'s requirement of "purposeful" conduct.

United States v. Harris, __ F.3d __, 2010 WL 2382401 (11th Cir. June 16, 2010) (ACCA case) (represented by AFPD Craig Crawford of the Middle District of Florida Federal Public Defender (Donna Lee Elm, Defender)).

The Eleventh Circuit is the latest appellate court to hold that sexual misconduct with a child does not satisfy the *Begay* test. In *Harris*, the court held that battery of a child under 16 in violation of Fla. Stat. § 800.04(3) is not a violent felony under either subparagraph (i) or (ii) of ACCA. First, the court accepted the government's concession that the statute did not satisfy subparagraph (i)'s definition of "physical force" as interpreted by *Johnson*. Second, the court found the statute did not satisfy subparagraph (ii)'s otherwise clause as interpreted by *Begay* because "the Florida statute, viewed categorically, imposes strict liability and covers . . . a broad range of conduct" that goes beyond that which is similar in kind and degree of risk to the enumerated offenses.

13. Statutory Rape

United States v. Thornton, 554 F.3d 443 (4th Cir. 2009) (ACCA case) (represented by Defender Larry W. Shelton and AFPD Fay Francis Spence of the Western District of Virginia).

In *Thornton*, the Fourth Circuit held that a prior Virginia conviction for "carnal knowledge of a minor" did not qualify as an ACCA predicate because it is not "similar in kind" to the enumerated ACCA predicates. *Thornton*, 554 F.3d at 449. "Although nonforcible adult-minor sexual activity can present grave physical risks to minors, and although states are entitled to criminalize nonforcible adult-minor sexual activity to protect minor victims from these risks, such risks are not sufficiently 'similar in kind as well as in degree of risk posed to the examples' of burglary, arson, extortion and crimes involving explosives." *Id.* While "[t]he enumerated crimes create immediate, serious and foreseeable physical risks that arise concurrently with the commission of the crimes themselves," the risks associated with statutory rape – "primarily STDs and the risks attendant to pregnancy – are not immediate or violent in nature and do not inherently support an inference that an offender will later commit a violent crime." *Id.*

As part of its reasoning, *Thornton* rejected the government's attempt to equate a minor's inability to legally consent to sexual intercourse – that is, the "constructive force" inherent in statutory rape cases – with actual force, noting that Virginia law distinguishes between forcible and carnal knowledge offenses. *Id.* at 448. It also acknowledged that the conduct criminalized by the carnal knowledge statute involved deliberate, purposeful acts, but noted that "[t]he deliberation necessary to engage in adult-minor sexual activity . . . is not sufficient to bring the carnal knowledge offense within the definition of a violent felony. A qualifying offense must also be 'violent' and 'aggressive,' like the enumerated crimes." *Id.* The government failed to cite any cases holding that the inability to give legal consent causes carnal knowledge offenses to be categorized as violent or aggressive, the statute itself did not categorically involve the use of force, and the court refused to infer violence and aggression in all instances of statutory rape. *Id.* at 448-49.

United States v. Dennis, 551 F.3d 986 (10th Cir. 2008) (career offender case) (represented by CJA attorney Thomas B. Jubin of Cheyenne, Wyoming)

In *Dennis*, the Tenth Circuit held that a prior Wyoming conviction for knowingly taking immodest, immoral or indecent liberties with a minor did not categorically constitute a crime of violence under the career offender guideline. *Dennis* noted that the statute is not a sexual assault statute but rather "criminalizes activities that are otherwise permissible between consenting adults when one of the parties is under the age of eighteen years," and thus does not "*necessarily* involve[] conduct that presents a serious potential risk of physical injury to another." *Id.* at 990. The statute itself had been challenged numerous times for its breadth, had been applied in numerous situations not involving a serious potential risk of physical injury to another (e.g., providing and promoting pornographic magazines to a minor, and engaging in consensual sex with a 16 year old), and did not require an age differential between the minor and the defendant. *Id.* at 990-91.

United States v. Christenson, 559 F.3d 1092 (9th Cir. 2009) (ACCA case) (represented by AFPD Christina L. Hunt of the Eastern District of Washington Community Defender (Roger Peven (Executive Director))

The Ninth Circuit became the next circuit to hold that a statutory rape conviction is not categorically a crime of violence under ACCA's residual clause. The court found that "because statutory rape may involve consensual sexual intercourse, it does not necessarily involve either 'violent' or 'aggressive' conduct." *Id.* at 1095. The court remanded the case to the district court to permit it to analyze the offense under the modified categorical approach.

United States v. McDonald, 592 F.3d 808 (7th Cir. 2010) (career offender case) (represented by Defender Daniel Stiller and AFPD Thomas Wilmouth of the Eastern & Western District of Wisconsin Community Defender).

The Seventh Circuit also held that a statutory rape conviction is not categorically a crime of violence under the career offender guideline. The court found that sexual contact or intercourse with a person under the age of 16 in violation of Wis. Stat. § 948.02(2) is a strict

liability crime and does not subcategorize the offense depending on the minor's age and that, therefore, it does not satisfy *Begay*.

United States v. Evans, 2010 WL 1687728 (6th Cir. 2010) (career offender case) (represented by CJA attorney Cary Michael Robbins of Oklahoma City. OK).

The Sixth Circuit has twice, in post-*Begay* cases, questioned the propriety of applying the career offender guideline when one of the predicates was based on conduct amounting to statutory rape that did not also involve an aggravating factor. First, in *Bartee*, the court discussed but avoided directly resolving the defendant's argument that "a conviction involving consensual sexual contact with a minor presents the requisite 'serious potential risk of injury' only when it involves an aggravating factor, such as the minor is less than 13 or 14 years of age or is a minor related to the defendant by blood or affinity." *Bartee*, 529 F.3d at 362. Then, in a later unpublished case, the court explicitly stated that "in order to determine whether the district court was correct to classify a sex offense with a minor as a 'crime of violence,' thus triggering the career offender enhancement, the age of the minor involved is critical." *United States v. Niece*, 2008 WL 4602241, *6 (6th Cir. Oct. 16, 2008). The Sixth Circuit also recently held that Ohio's sexual battery statute, Ohio Rev. Code § 2907.03 is not categorically a crime of violence under the career offender guideline because some subsections of that statute do not involve aggressive and violent behavior. *See United States v. Wynn*, 579 F.3d 567 (6th Cir. 2009) (represented by AFPD Vanessa Faye Malone of the Northern District of Ohio Federal Public Defender (Dennis Terez, Defender)).

Recently, the Sixth Circuit appeared to squarely hold that a conviction for statutory rape under Tenn. Code Ann. § 39-13-506 "satisfies neither prong [of the *Begay* test] under a strict categorical approach based solely on the statutory definition of the offense." Despite this unequivocal holding, the court then remanded the case back to the district court for a determination of whether application of the modified categorical approach is appropriate. Presumably, the district court will follow the law and answer this question in the negative.[16]

Even before *Begay*, courts had begun to struggle with whether it made sense to treat consensual statutory rape as a violent felony under ACCA or a crime of violence under the career offender guideline. *See, e.g., United States v. Meader*, 118 F.3d 876, 884 (1st Cir. 1998) (finding that statutory rape fits under § 4B1.2's "otherwise" clause given that the charging documents listed the "crucial facts" of the age of the girl and the age gap between her and the defendant, while expressing concern that its holding "bypassed a number of troubling and complex issues" such as the standard age below which sexual intercourse typically may be considered to pose a substantial risk of physical injury and what "physical injury" means). Post-*Begay*, everyone should be renewing and preserving these arguments in all ACCA and career offender cases.

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[16] In addition to these cases, the Eleventh Circuit recently held that the offense of sexual battery of a child under 16 in violation of Fla. Stat. § 800.04(3) is not a violent felony under ACCA. *See United States v. Harris*, __ F.3d __, 2010 WL 2382401 (11th Cir. June 16, 2010), discussed at Part C(13), *supra*. Although the statute at issue covers a broad range of conduct, the court referred to it as a "statutory rape" statute several times, and cited *McDonald*, *Thornton*, and *Christensen* as support for its holding. It can thus likely be cited as support in statutory rape cases as well.

14. Threats

United States v. Johnson, Slip Op., 286 Fed. Appx. 155 (5th Cir. July 11, 2008) (unpub.) (ACCA case) (represented by AFPDs Amy R. Blalock and Robert Gerard Arrambide of the Eastern District of Texas Federal Public Defender (G. Patrick Black, Defender)).

In this unpublished decision, the Fifth Circuit held that a statute that makes it a crime to threaten to cause death to another person with the purpose of terrorizing that person does not constitute an ACCA predicate post-*Begay*. The statute at issue, Ark. Code § 5-13-301(a)(1)(A), did not satisfy subparagraph (i) of ACCA's definition of a violent felony based on Fifth Circuit precedent holding that a person can threaten to cause bodily injury without threatening the use of force (e.g., threats to poison or to guide someone into oncoming traffic). It also failed to satisfy subparagraph (ii) because it is a crime against the person and not a property crime. The court based its conclusion that § 924(e)(2)(B)(ii) only reaches property crimes on the statement in *Begay* that "Congress sought to expand the definition of a violent felony to include both crimes against the person (subparagraph (i)) and certain physically risky crimes against property (subparagraph (ii))." *Id.* (citing *Begay*, 128 S. Ct. at 1586) (additional internal punctuation omitted). The Supreme Court, in turn, cited the legislative history of the ACCA, which stated as follows:

> The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony. . . . This will add State and Federal crimes *against property* such as burglary, arson, extortion, use of explosives and *similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person.

H. R. Rep. No. 99-849, p. 3 (1986) (first emphasis in original, second and third emphases added).

15. Vehicular Homicide

United States v. Herrick, 545 F.3d 53, 58 (1st Cir. 2008) (career offender guideline case) (represented by CJA attorney Susan E. Taylor of New Bedford, Massachusetts).

In *Herrick*, the First Circuit held that "vehicular homicide involving criminal negligence does not involve the requisite purposeful, intentional or deliberate conduct" required by *Begay*. *Id.* at 60 (analyzing Wis. Stat. §§ 939.25 & 940.10). The court recognized that "the commentary to USSG § 4B1.2(a) includes manslaughter as a crime of violence without distinguishing between voluntary and involuntary manslaughter, arguably suggesting that the *mens rea* for the crime is not determinative. *Id.* at 60 n.8. Nonetheless, it concluded that, "just as the Supreme Court limited the broad language in the ACCA to crimes involving 'purposeful, violent and aggressive conduct,' so too is it logical to construe the reference to manslaughter as extending only to those crimes involving the requisite *mens rea*." *Id.*

D. <u>Potential applications of *Begay/Chambers*</u>

1. <u>"Powder keg" cases (e.g., escape)</u>

Courts have generally counted escape as a "violent felony" under ACCA or a "crime of violence" under the career offender guideline because of the "powder keg" theory – that is, courts have assumed a sufficient risk exists that the escapee, or his pursuers, will resort to physical violence. *See, e.g., United States v. Winn*, 364 F.3d 7, 12 (1st Cir. 2004) (following "powder keg" rationale to find that escape from custody is categorically a crime of violence under § 4B1.2(a)); *United States v. Jackson*, 301 F.3d 59, 63 (2nd Cir. 2002) (escape qualifies as an ACCA predicate because it "invites pursuit; and the pursuit, confrontation, and recapture of the escapee entail serious risks of physical injury to law enforcement officers and the public"); *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) (escape presents a serious potential risk of physical injury to another under the "powder keg" theory).

Perhaps the most notable part of the Supreme Court's *Chambers* opinion – other than the holding – is the Court's rejection of the "powder keg" theory as its own justification for satisfying ACCA's "otherwise" clause. *See Anglin*, 601 F.3d at 529 ("[p]lainly, after *Chambers* . . ., the powder-keg theory has little, if any, continuing persuasiveness") During oral argument in *Chambers*, Justices Ginsberg, Souter, Kennedy, and Scalia all expressed concerns with the theory,[17] and the opinion reflects the Court's skepticism. First, the Court suggested that ACCA requires a temporal link between the potential risk of violence and commission of the relevant crime. In noting that a failure to return involves inaction, the Court pointed out that someone who failed to return to custody would be unlikely "to call attention to his actions by *simultaneously* engaging in additional violent and unlawful conduct." *Chambers*, 129 S. Ct. at 692 (emphasis added). The Court went on to assess the merits of the theory only because it "assume[d] for argument's sake the relevance of violence that may occur long after an offender fails to report . . . ." *Id.* Setting aside the issue of a temporal link, the Court then required statistical proof that "such an *offender* is *significantly* more likely than others to attack, or physically to resist, an apprehender" before the offense can satisfy ACCA's "otherwise" clause. *Id.* (emphasis added). The statistical proof in *Chambers* – consisting of one Sentencing Commission report and three reported cases – showed "only a small risk of physical violence

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[17] Justice Ginsburg stated that "an arrest for any crime has a certain risk that the arrestee is going to resist" and questioned what about a failure to report was different *See* Tr. of Oral Argument, *Chambers v. United States* (06-11206) at 20 (Nov. 10, 2008), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-11206.pdf. Justice Souter focused on the passive nature of a failure to report and noted that "I don't see that the close logical connections [between failing to report and wanting to continue to avoid custody] convert the passive crime into a higher degree of resisting arrest from any other." *Id.* at 22. Justice Kennedy noted that, although failing to report is a deliberate criminal act, "[y]ou can say the same thing about failure to respond to a traffic ticket." *Id.* And Justice Scalia looked to the defendant's initial sentence and stated, "But it's not common sense that the person who has been convicted of a crime so gentlemanly that they only made him report to prison on the weekends would confront the policeman with violence when he comes. This is not normally what you would think of as a violent type . . . ." *Id.* at 24.

(less than one in several thousand)" and was thus insufficient to satisfy ACCA's standard. *Id.* at 693.

Similarly, in *United States v. Nichols*, 563 F.Supp.2d 631 (S.D. W.Va. 2008) (discussed in Part B(3), *supra.*), the district court found that *Begay* undermined the Fourth Circuit's previous holding in *United States v. Mathias*, 482 F.3d 743, 744 (4th Cir. 2007), that all escapes involve an inherent danger of physical injury to others and that they therefore all fit ACCA's definition of "violent felonies." As the court noted:

> The holding in *Mathias* was based solely on the Circuit Court's finding that the conduct prohibited by the Virginia escape statute "presents a serious potential risk of physical injury," a finding that *Begay* held as alone insufficient to classify a crime as violent. Since the *Mathias* court did not make an additional finding required by *Begay*, namely that escape is "roughly similar" to the listed offenses, the analysis conducted in *Mathias* is now incomplete.

Id. at 635. The court went on to find that escape does not qualify as a crime of violence under *Begay*. *See* Part B(3), *supra*.

You can use the reasoning of *Chambers* and *Nichols* in any case in which the government attempts to expand the "powder keg" theory to offenses other than escape. In *United States v. Henry*, 556 F.Supp.2d 133 (D. Conn. 2008) (represented by CJA attorneys Francis L. O'Reilly of Southport, Connecticut, David J. Wenc of Windsor Locks, Connecticut, and Richard S. Cramer of Hartford, Connecticut), for example, the court rejected the government's argument that violating a protective order requires law enforcement to effectuate an arrest, thereby presenting the same risk of physical injury that exists in escape cases:

> The court finds this argument unpersuasive because the mere fact that an arrest must be effectuated is insufficient to qualify an offense as one which presents a serious potential risk of physical injury to another. Otherwise, virtually all criminal offenses could qualify as "crimes of violence."

Id. at 140-41. These cases should be cited and their rationale explained in any case in which the government argues, without statistical proof, that the requisite "risk of physical injury" arises solely out of the fact that the defendant may seek to avoid being arrested at some later date.

2. Crimes lacking statistical evidence of violence or injury

Another take-home lesson from *Chambers* is that statistics matter. The overall argument reflected a strong reliance on statistics, and provides a good roadmap for the ways in which we should be raising them in the lower courts, at least for those offenses that are not obviously or inherently violent. Many justices – including Chief Justice Roberts and Justices Stevens, Scalia, Kennedy, Souter, Breyer and Ginsburg –questioned Assistant Solicitor General Matthew D. Roberts on the Sentencing Commission's *Report on Federal Escape Offenses in Fiscal Years 2006 and 2007* (Nov. 2008) ("Escape Report"), available at

http://www.ussc.gov/general/escape_FY0607_final.pdf.[18] Justice Kennedy noted that "the potential risk [in ACCA cases] is based on an empirical assessment," and asked "how can we make an empirical assessment without statistics?" *Id.* at 30. And Justice Souter followed up with the assertion that "we've got to have something more than an instinctive belief that something bad might happen." *Id.* at 31. These statements and others from the *Chambers* transcript can be used to encourage your sentencing court to require more than just appeals to common sense, instinctive belief, or pure "imagination" from the government before finding that a crime is "violent" under ACCA or the career offender guideline. *See also id.* at 31 (Kennedy, J.) ("If statistics can inform that [inquiry], why ignore the statistics?").

The opinion, too, is helpful. It labels the Sentencing Commission's Escape Report "conclusive" for purposes of determining whether violence is in fact a serious potential risk in failure to report cases. *See Chambers*, 129 S. Ct. at 692. That report sets forth statistics on whether force, a dangerous weapon, or injury was present in each of five types of escape cases – leaving secure custody, leaving law enforcement custody, leaving nonsecure custody (*i.e.*, walkaway escapes), failing to report, and failing to return – during 2006 and 2007, and reflects the following data:

	Leaving Secure Custody	**Leaving Law Enforcement Custody**	**Leaving Nonsecure Custody ("walkaway" escapes)**	**Failing to Report**	**Failing to Return**
Number of Cases	64 (100%)	13 (100%)	177 (100%)	42 (100%)	118 (100%)
Force	10 (15.6%)	1 (7.7%)	3 (1.7%)	0 (0.0%)	0 (0.0%)
Dangerous Weapon	20 (31.3%)	1 (7.7%)	4 (2.3%)	3 (7.1%)	2 (1.7%)
Injury	7 (10.9%)	2 (15.4%)	3 (1.7%)	0 (0.0%)	0 (0.0%)

See Escape Report at 4-5, Figure 1. This type of data – and similar statistics from the Commission, the FBI, state sentencing commissions, and other state authorities – can be used to demonstrate the lack of any empirical basis for finding a particular crime potentially injurious. For example, combining the categories of "leaving secure custody" and "leaving law enforcement custody" into one "escape" category (as the Supreme Court did in *Chambers*)

[18] *See* Tr. of Oral Argument, *Chambers v. United States* (06-11206) at 29-34 (Nov. 10, 2008), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/06-11206.pdf. According to Justice Breyer, those statistics showed that out of 160 failure to report or return cases, "the number of those cases, whether you looked at the time he had left or whether you looked at the time he was apprehended, in which force was involved is zero. The number of cases in which injury was involved is zero." *Id.* at 32. While Justice Breyer also noted that the offender possessed a dangerous weapon in five of the cases, Justice Scalia pointed out to the government that none of the cases involved use of a weapon: "The problem is you say 'if' he had used a gun. And he didn't use a gun. I mean, to come up with your statistics on the basis of something that didn't happen is not using statistics; it's using imagination." *Id.* at 35.

reflects that 11.7% of those cases involved force and/or injury, and 27.2% had a dangerous weapon present. Compare those statistics to walkaway escapes, which involved force and/or injury in only 1.7% of cases, and had a dangerous weapon present in only 2.3%. Then compare both offense categories to national statistics for burglary, which reflect that 60.9 % of burglaries in 2004 involved a forcible entry, as did 60.8% in 2005.[19] The fact that burglaries involve force in over 60% of cases, whereas force is used in less than 2% in walkaway escape cases and less than 12% in all other escape cases, is clearly relevant to whether escape cases present a risk of injury of the same kind and to the same degree as burglary. Agency statistics like those cited above, and statistics on the percentage of reported cases describing injury or violence in the course of committing the type of offense at issue, can thus provide evidentiary fodder for arguments that the offense is not sufficiently risky to fit within ACCA's "otherwise" clause.

Remember, however, that because a "serious potential risk" is an element of the offense, the burden of proof should always lie with the government. *Accord Chambers*, 129 S. Ct. at 693 (describing the Commission's statistics and relevant case law, and finding for the defense, in part, because "the *Government* provides no other empirical information") (emphasis added); *United States v. Arrington*, 2009 WL 2170990, *3 (D. Minn. July 17, 2009) ("The burden of demonstrating that the career offender provision applies – and, in turn, the burden of demonstrating that [defendant's] underlying convictions were the type of fleeing convictions that satisfy the career offender provision – rests on the prosecution."). The Eleventh Circuit has already picked up on the fact that it is the government's burden to present statistical evidence in support any claim that an offense fits within ACCA's residual clause:

> [S]tatistics about the potential risk of physical injury have taken on a heightened role in recent years. Whatever we may think about injecting statistics into statutory construction, we cannot ignore that the Supreme Court has relied on statistical evidence each time it has revisited the scope of the residual clause in the last three years. Although *Begay* and *Chambers* imposed no rule requiring the government to present statistical evidence on the question of whether a particular crime poses a serious potential risk of physical injury, . . . the Supreme Court has now thrice thrown [such evidence] in the analytical mix.

Harrison, 558 F.3d at 1299; *see also id.* at 1296 (noting government's failure to present statistical evidence that crime of willfully fleeing poses a risk of the same kind and degree as ACCA's enumerated offenses); *Lowery*, 599 F.Supp.2d at 1304 ("*Harrison* makes clear that the government bears the burden to show that the state-law offense poses a serious potential risk of physical injury to another, and that empirical data should be used to the extent possible in helping the court make this conceptually difficult risk assessment.") (citations and internal punctuation omitted); *United States v. Mosley*, 575 F.3d 603 (6th Cir. 2009) (noting that while "there may be settings where an individual's failure to follow an officer's lawful command poses such risks [as the enumerated offenses pose,] . . . we have no basis in this record – empirical or otherwise – for concluding that the typical violation would create such a danger").

[19] *See* F.B.I., Crime in the United States 2005, Table 15 (September 2006) available at http://www.fbi.gov/ucr/05cius/data/table_15.html.

3. Crimes against the person

In *United States v. Johnson*, Slip Op., 286 Fed. Appx. 155 (5th Cir. July 11, 2008) (unpub.), the Fifth Circuit relied on *Begay*, which relied on the legislative history, to find "that § 924(e)(2)(B)(ii) was created to expand the definition of a violent felony to include physically risky crimes against *property*" (emphasis in original). In other words, a crime against the person can be an ACCA predicate *only* if it has as an element the use, attempted use, or threatened use of physical force against the person of another. *See id.*; *see also* 18 USC § 924(e)(2)(B)(i). Subparagraph (ii) is reserved exclusively for *property* crimes involving a risk similar in kind as well as degree to the enumerated offenses. *See also United States v. Mathis*, 963 F.2d 399, 405 (D.C. Cir. 1992) ("It is evident from this definition that Congress created two subcategories of prior criminal conduct: First, there are felonies against the person that have as an element the use or threat of physical force; and, second, there are felonies against property (such as burglary, arson, extortion, etc.) that present a serious potential risk of physical injury.").

Be sure to raise this argument whenever the government asks the court to treat a crime against the person as an ACCA predicate under the statute's otherwise clause (§ 924(e)(2)(B)(ii)).

4. § 2255 motions

The government has conceded that *Begay* and *Chambers* each announced a new substantive rule for purposes of habeas relief, and courts have permitted defendants to file § 2255 habeas petitions based on *Begay* and *Chambers*. *See United States v. Leonard*, Slip. Op, 2009 WL 499357, *4 (N.D. Okla. Feb. 27, 2009) (agreeing with government that "*Begay* announced a new substantive rule, rather than a procedural rule, because *Begay* limits the authority of a court to increase a defendant's punishment for certain types of conduct"); *United States v. Glover*, Slip Op. 2008 WL 2951085, *4 (N.D. Okla. July 28, 2008) (same); *George v. United States*, 2009 WL 1370858, *3 (M.D. Fla. May 14, 2009) (determining that *Chambers* "created a new substantive right in that escape is no longer a 'violent felony' for purposes of §924(e)(2)(B)(i) or (ii), and that such a new right should be applied retroactively");[20] *see also Anderson v. Bodison*, Slip. Op. 2008 WL 5272572 (D. S.C. Dec. 18, 2008) (habeas petition brought under § 2241 based on *Begay* is more properly brought under § 2255); *Sperberg v. Marberry*, 2008 WL

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[20] Habeas petitions have been granted in a number of unpublished decisions as well. *See, e.g., Walden v. United States*, 2009 WL 2163182, *4 (S.D. Fla. July 17, 2009) (vacating sentence upon ground that sentence was imposed in violation of laws of United States under § 2255(a) & (b) because carrying a concealed weapon is no longer ACCA predicate post-*Begay*) (represented by CJA attorney Christian Scott Dunham of Miami, FL); *United States v. Barnette*, 2009 WL 1942192, *4 (D. S.C. July 1, 2009) (appointing counsel to determine whether defendant is now "actually innocent" of being career offender on basis of prior failure to stop for blue light conviction post-*Begay*); *McCarty v. United States*, 2009 WL 1456386, *2 (M.D. Fla. May 22, 2009) (finding that "the new rule articulated in *Begay* and *Archer* is substantive in that it narrows the scope of § 924(e) by interpreting its terms" and granting § 2255 petition because mandatory minimum is now "a punishment that the law cannot impose") (represented by AFPD Dionja L. Dyer of the Middle District of Florida Federal Public Defender (Donna Elm, Defender)); *United States v. McElroy*, 2009 WL 1372908, *3 (N.D. Okla. May 14, 2009) (vacating sentence where prior DUI was used as career offender predicate because DUI is no longer crime of violence post-*Begay*)..

5427727 (W.D. Wisc. Dec. 31, 2008) (permitting § 2241 petition based on *Begay* in light of Seventh Circuit precedent treating claim of fundamental illegality of sentence as claim of actual innocence, as well as fact that petitioner is procedurally barred from bringing § 2255 motion, and transferring case to S.D. of Ind. for venue purposes).[21]

Three circuits have held that *Begay* and *Chambers* established substantive rules that are retroactively applicable on collateral review, and one has gone further to hold that a defendant sentenced as a career offender on the basis of a predicate that no longer qualifies as a crime of violence post-*Begay* is "actually innocent" and therefore entitled to relief under § 2241 . First, in *United States v. Shipp*, 589 F.3d 1084 (10th Cir. 2009), the government conceded that *Chambers* set forth a substantive rule that "prohibits a certain category of punishment for a class of defendants because of their status or offense." *Id.* at 1090. The court then found that the defendant's due process rights were violated as follows:

> Pursuant to the ACCA, Mr. Shipp was sentenced as an armed career criminal to a term of incarceration that exceeds the statutory maximum for the underlying offense of conviction. *Chambers*' construction of the ACCA overrules our prior jurisprudence attributing violence to escape offenses that did not involve the use, attempted use, or threat of the use of physical force against another. It is undisputed that Mr. Shipp's escape conviction, which the Presentence Report describes as merely the "fail[ure] to return as directed," does not qualify as a violent felony under § 924(e). In light of *Chambers*, Mr. Shipp does not constitute an armed career criminal for purposes of the ACCA and thus he received "a punishment that the law cannot impose upon him."

Id. at 1090-91 (quoting *Schriro v. Summerlin*, 542 U.S. 348, 352, (2004)). The court concluded that "[w]here as here, Mr. Shipp was sentenced beyond the statutory maximum for his offense of conviction, his due process rights were violated. 'There can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify collateral relief.' *Id.* at 1091 (quoting *Davis v. United States*, 417 U.S. 333, 346-37 (1974)).

Then, in *Shipp*, the Seventh Circuit held that *Begay* is retroactively applicable on collateral review because "a statutory rule defining the scope of a sentencing enhancement that increases the maximum allowable statutory sentence on the basis of a prior conviction is properly classified as substantive." *See United States v. Welch*, 604 F.3d 408 (7th Cir. 2010). Unfortunately for Mr. Welch, the court ultimately determined that he was not entitled to relief because his prior conviction for intentionally fleeing a police officer in a motor vehicle under 625 Ill. Cons. Stat. § 5/11-204.1(a) remains a violent felony post-*Begay* and *Chambers*, *id.* at *12. Nonetheless, the case stands for the proposition that *Begay*, like *Chambers* and likely *Johnson*, established a new substantive rule that is retroactively applicable.

Most recently, the Eleventh Circuit held not only that *Begay* and circuit case law following *Begay* is retroactively applicable on collateral review, but that a defendant sentenced as a career offender based on what is not a crime of violence post-*Begay* is "actually innocent" of

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[21] Unfortunately, it was a pyrrhic victory for Mr. Glover, as the court refused to extend *Begay*'s holding to his larceny of a person offense. *Glover*, 2008 WL 295105 at *5.

being a career offender and is entitled to relief under § 2241. *United States v. Gilbert* ("*Gilbert II*"), __ F.3d __, 2010 WL 2473560 (11th Cir. June 21, 2010) (represented by AFPDs George Allen Couture, Stephen J. Langs, and Rosemary T. Cakmis of the Middle District of Florida Federal Public Defender (Donna Lee Elm, Defender)). Mr. Gilbert was initially sentenced as a career offender based in part on his prior conviction for carrying a concealed weapon. The Eleventh Circuit affirmed, holding as a matter of first impression that carrying a concealed weapon is a crime of violence under the career offender guideline, *see United States v. Gilbert* ("*Gilbert I*"), 138 F.3d 1371 (11th Cir. 1998), and Mr. Gilbert's pro se § 2255 petition was denied a year later. In 2008, the Supreme Court issued its decision in *Begay*, and shortly thereafter, the Eleventh Circuit abrogated *Gilbert I*, finding that carrying a concealed weapon "does not involve the aggressive, violent conduct that the Supreme Court noted [in *Begay*] is inherent in the enumerated crimes." *See United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008).

In 2009, Mr. Gilbert filed a motion to reopen and amend his original petition, arguing that the district court could treat the motion as one for relief under § 2241, pursuant to the savings clause of § 2255, on the ground that he had been sentenced for a nonexistent offense and was "actually innocent" of being a career offender. The government opposed Mr. Gilbert's motion and the district court reluctantly denied it. On appeal, the Eleventh Circuit eloquently began its analysis as follows:

> The government's position . . . is that despite the error in his sentence, Gilbert is without a legal remedy, his sentence must stand, and he must remain incarcerated. Although made in good faith and based on its understanding of the law, the government's statement at oral argument that Gilbert is entitled to no relief from an illegal sentence cannot be the law. The common law tradition of the "Great Writ" cannot be so moribund, so shackled by the chains of procedural bars and rigid gatekeeping that this court is not authorized to grant relief to one who is "in custody in violation of the Constitution or laws or treaties of the United States." Fiat Justitia, Ruat Coelum [tr. "let right be done, though the heavens should fall"].

Gilbert II, __ F.3d at __, 2010 WL 2473560 (citations omitted).[22] Relying on circuit precedent permitting a successive petition of a sentence based on § 2255's savings clause if the claim is (1) based on a retroactive Supreme Court decision (2) that establishes the petitioner was convicted of a nonexistent offense and (3) circuit law had previously squarely foreclosed the claim, the court reversed the district court. *Id.* (citing *Wofford v. Scott*, 177 F.3d 1236 (11th Cir. 1999)). The government conceded the first and third prongs of the *Wofford* test, and the court found that the second prong was satisfied as well. "For federal sentencing purposes, the act of being a career offender is essentially a separate offense, with separate elements (two felony convictions; for violent felonies) which must be proved, for which separate and additional punishment is provided." *Id.* The court applied *Sawyer v. Whitley*, 505 U.S. 333 (1992), which held that enhancing a non-capital offense to a capital offense based on statutory aggravating factors establishes a separate offense and raises the possibility that a defendant may be "actually innocent" of the capital offense, to find that Mr. Gilbert was "actually innocent" of being a career offender: "Gilbert did not have two prior violent felony convictions when he was adjudicated a career offender. Accordingly, he is innocent of the statutory 'offense' of being a career offender

[22] Pin cites are not yet available for this case.

(having two prior violent felonies) and was sentenced, in part, for a nonexistent offense – being a career offender with only one prior violent felony." *Id.* The court found that this "actual innocence" both satisfied *Wofford*'s interpretation of § 2255's savings clause, and entitled him to relief under § 2241, holding that "Gilbert's sentence enhancement for a nonexistent offense was fundamentally defective and his incarceration for that enhancement is a miscarriage of justice." *Id.*

Counsel should cite *Gilbert II* as support in any case where the defendant was wrongfully sentenced as an armed career criminal or a career offender but may be procedurally precluded from habeas relief. *See also George v. United States*, 2009 WL 1370858, *3 (M.D. Fla. May 14, 2009) (finding pre-*Gilbert II* that the "actual innocence" doctrine "applies within the context of challenging a predicate offense utilized to classify a defendant as a career offender," thereby saving the defendant from what would otherwise have been procedural default).