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- 1. GUNS GUNS GUNS**
  
- 2. CRIMES INVOLVING FIREARMS / AMMUNITION**  
  
**922(g)**  
  
**924(c)**
  
- 3. USSG §2K2.1**
  
- 4. ARMED CAREER CRIMINAL ACT**

## GUNS, GUNS, AND MORE GUNS

### A. Introduction

#### 1. **Firearm** 18 U.S.C. §921(a)(3)

a. any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; the frame or receiver of any such weapon; any firearm muffler or firearm silencer; or any destructive device.

b. Such term does not include an antique firearm.

2. **Antique Firearm** – any firearm manufactured before 1898, ..., and any muzzle loading rifle, muzzle loading shotgun, or muzzle loading pistol, which is designed to use black powder, or a black powder substitute, and which cannot use fixed ammunition. 18 U.S.C. §921(a)(16)

3. **A pistol** means a weapon originally designed, made, or intended to fire a projectile (bullet) from one or more barrels when held in one hand and having a chamber as an integral part of the bore; and a short stock designed to be gripped by one hand at an angle to and extending below the line of the bore. 18 U.S.C. §921(a)(29).

4. **Revolver** means a projectile weapon of the pistol type, having a breechloading chambered cylinder so arranged that the cocking of the hammer or movement of the trigger rotates it and brings the next cartridge in line with the barrel for firing.

5. **Automatic:** Firearms that continually fires with a single pull of the trigger and stops only when the trigger is released or the ammunition runs out.

6. **Semiautomatic:** a firearm that fires a single shot with every pull of the trigger but automatically reloads between shots.

## **B. LONG GUNS**

1. The term “**shotgun**” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire through a smooth bore either a number of ball shot or a single projectile for each single pull of the trigger. 18 U.S.C. §921(a)(5).

2. The term “**short-barreled shotgun**” means a shotgun having one or more barrels less than eighteen inches in length and any weapon made from a shotgun (whether by alteration, modification or otherwise) if such a weapon as modified has an overall length of less than twenty-six inches. 18 U.S.C. §921(a)(6).

3. The term “**rifle**” means a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder and designed or redesigned and made or remade to use the energy of an explosive to fire only a single projectile through a rifled bore for each single pull of the trigger. 18 U.S.C. §921(a)(7).

4. The term “**short-barreled rifle**” means a rifle having one or more barrels less than sixteen inches in length and any weapon made from a rifle (whether by alteration, modification, or otherwise) if such weapon, as modified, has an overall length of less than twenty-six inches. 18 U.S.C. §921(a)(8).

**5. Machine Gun:**

a. a firearm that shoots, is designed to shoot, or can be readily restored to shoot automatically more than one shot by a single function of the trigger.

18 U.S.C. §921(a)(23), 26 U.S.C. §5845(b)

b. Semiautomatic rifle modified by defendant's addition of electrical switch behind original trigger, which allowed one action of pulling the switch to fire multiple shots, was a "machine gun" under federal statute, as required to support defendant's conviction for possession of a machine gun, even if original trigger functioned each time rifle was fired. *United States v. Camp*, 2003, 343 F.3d 743 (5<sup>th</sup> Cir. 2003).

**6. Carbine:** Usually a shorter or lighter version of a rifle.

**C. AMMUNITION, MAGAZINE, ETC.**

**1.** The term "**ammunition**" means ammunition or cartridge cases, primers, bullets, or propellant powder designed for use in any firearm. 18 U.S.C. §921(a)(17)(A).

**2. Armor piercing ammunition:** A projectile or projectile core which may be used in a handgun and which is constructed entirely (excluding the presence of traces of other substances) from one or a combination of tungsten alloys, steel, iron, brass, bronze, beryllium copper, or depleted uranium; or a full jacketed projectile larger than .22 caliber designed and intended for use in a handgun and whose jacket has a weight of more than 25 percent of the total weight of the projectile. 18 U.S.C. § 921(a)(17)(B).

3. **Caliber:** a measure of the bullets “size,” measuring the diameter of the bullet; in shotguns, the round would be measured in gauge.

4. **Magazine:** an enclosed container that stores and feeds ammunition into a firearm for use.

5. **Large capacity magazine.** A “semiautomatic firearm that is capable of accepting a large capacity magazine” means a semiautomatic firearm that has the ability to fire many rounds without reloading because at the time of the offense (A) the firearm had attached to it a magazine or similar device that could accept more than 15 rounds of ammunition; or (B) a magazine or similar device that could accept more than 15 rounds of ammunition was in close proximity to the firearm. This definition does not include a semiautomatic firearm with an attached tubular device capable of operating only with .22 caliber rim fire ammunition USSG §2K2.1, comment. (n.2).

6. **Destructive Device 18 U.S.C. 921(a)(4)(A):** any explosive, incendiary, or poison gas (i) bomb, (ii) grenade, (iii) rocket having a propellant charge of more than four ounces, (iv) missile having an explosive or incendiary charge of more than one-quarter ounce, (v) mine, or (vi) device similar to any of the devices described in the preceding clauses; (B) any type of weapon (other than a shotgun or a shotgun shell which the Attorney General finds is generally recognized as particularly suitable for sporting purposes) by whatever name known which will, or which may be readily converted to, expel a projectile by the action of an explosive or other propellant, and which has any barrel with a bore of more than one-half inch in

diameter; and (C) any combination of parts either designed or intended for use in converting any device into any destructive device described in subparagraph (A) or (B) and from which a destructive device may be readily assembled.

7. **Silencer:** The terms "firearm silencer" and "firearm muffler" mean any device for silencing, muffling, or diminishing the report of a portable firearm, including any combination of parts, designed or redesigned, and intended for use in assembling or fabricating a firearm silencer or firearm muffler, and any part intended only for use in such assembly or fabrication. 18 U.S.C. §921(a)(24)

## 2. CRIMES

**18 U.S.C. §922(G)** - It shall be unlawful for any person (falling into one of 9 prohibition categories) to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

### A. PROHIBITERS

#### 1. Felon

##### a. Conviction

i. **Governed by state law:** “What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.” 18 U.S.C. §921(a)(20)

ii. *United States v. Clarke*, 822 F.3d 1213, 1215 (11th Cir. 2016): The defendant’s prior guilty plea, for which adjudication is withheld, did not constitute a conviction under Florida law, and a conviction for 922(g)(1) cannot stand.

iii. **Expungement:** “Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.” 18 U.S.C. §921(a)(20). What is an ‘expungement’ is also governed by state law.

b. “Crime punishable by imprisonment for a term exceeding one year.” 18 U.S.C. §921(a)(20)

i. Does not include federal / state offenses for antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices.

ii. Does not include any offense classified by State law as a misdemeanor and punishable by a term of imprisonment of two years or less.

2. The term "**fugitive from justice**" means any person who has fled from any State to avoid prosecution for a crime or to avoid giving testimony in any criminal proceeding. 18 U.S.C. §921(a)(15).

a. The government need only prove knowledge of the facts that created the fugitive status, NOT knowledge of the fugitive status existed. *United States v. Ballentine*, 4 F.3d 504 (7<sup>th</sup> Cir. 1993).

b. The government does not need to show that the defendant absented himself from the prosecuting jurisdiction with the intent to avoid prosecution. It is sufficient that the D left the jurisdiction for a collateral reason, and later declined to return to avoid prosecution. *United States v. Spillane*, 913 F.2d 1079 (4<sup>th</sup> Cir. 1990).

3. **Unlawful user of or addicted** to any controlled substance

a. The term “addict” means any individual who habitually uses any narcotic drug so as to endanger the public morals, health safety, or welfare, or who is

so far addicted to the use of narcotic drugs as to have lost the power of self-control with reference to his addiction. 21 U.S.C. 802(1).

b. An unlawful user of any controlled substance, for purposes of statute prohibiting possession of firearm ... is an individual who regularly and unlawfully uses any controlled substance over an extended period of time that is contemporaneous with the possession of a firearm. *United States v. Grover*, 364 F.Supp.2d 1298 (D.Utah 2005).

c. The category of “an unlawful user of or addicted to any controlled substance” was held not vague as applied to a long-term heroin user who, on the date he purchased a firearm, possessed heroin and had track marks on his arms. *United States v. Ocegueda*, 564 F.2d 1363, 1364-5 (9<sup>th</sup> Cir. 1977).

d. There must be some proximity in time between the drug use and weapon possession. The statute prohibits possession of a weapon by one who ‘is’ a user, not one who was a user. *United States v. Reed*, 114 F.3d 1067, 1069 (10<sup>th</sup> Cir. 1997). To prove that one is an ‘unlawful user,’ the government must prove that that defendant took drugs with regularity, over an extended period of time, and contemporaneously with his purchase or possession of a firearm. *United States v. Purdy*, 264 F.3d 809, 812-3 (9<sup>th</sup> Cir. 2001) (conviction upheld where D used drugs before the firearm was seized and testimony indicating his continued drug use.)

e. In ATF’s view, one is an *unlawful* user of marijuana even if State law authorizes the person to use it for medicinal purposes. “Such use remains unlawful under federal law.” ATF Open Letter to All Federal Firearms Licensees,

Sept 21, 2001, ATF form 4473 modified to include warning on Firearms Transaction Record.

4. Adjudicated as a **mental defective** or who has been committed to a mental institution

a. The statute does not define “committed.”

b. The statute does not refer to state law so the question of what constitutes “committed” remains one of the federal law.

5. An **alien**

a. Includes illegal aliens and aliens lawfully admitted under non-immigrant visas, i.e., those aliens not admitted for permanent residence.

b. This provision does not prohibit aliens who lawfully possess a so-called "green card" from possessing guns or ammunition

c. Mens rea as to prohibited status?

i. *United States v. Rehaif*, 2018 WL 1464527 (11<sup>th</sup> Cir. 2018):

The Govt must prove that the D knowingly possessed the firearm and that the D fell into one of the prohibited categories. The government does not have to prove that the D knew of his status as a prohibited person.

ii. Cf: *United States v. Games-Perez*, 667 F.3d 1136, 1142 (10<sup>th</sup> Cir. 2012): Judge Gorsch (now Justice Gorsch) wrote a concurring opinion which, while acknowledging that prior precedent dictated that the mens rea requirement does not apply to the status element, concluded that the plain language of the statute compelled the opposite conclusion. “Prior precedent reads the word “knowingly” as

leapfrogging over the very first § 922(g) element and touching down only at the second. This interpretation defies linguistic sense—and not a little grammatical gravity.” In drawing such a conclusion, then-Judge Gorsuch noted that, “Congress gave us three elements in a particular order. And it makes no sense to read the word ‘knowingly’ as so modest that it might blush in the face of the very first element only to regain its composure and reappear at the second.” He also pointed out that “the Supreme Court has long held that courts should presume a mens rea requirement attaches to each of the statutory elements that criminalize otherwise innocent conduct.”

6. **Discharged** from the Armed Forces under dishonorable conditions

a. Types of discharge vary, according to whether there was a court-martial or administrative removal.

b. Dishonorable discharge, Bad Conduct Discharge, and Officer’s Dismissal affect gun rights.

c. Other or Other than Honorable do not because these are administratively entered discharges.

7. **Renounced U.S. citizenship**

8. Subject to a **domestic violence restraining order**

a. The DVRO must be issued after a hearing of which the person received actual notice, and at which such person had the opportunity to participate.

b. The DVRO restrains the person from harassing, stalking, or threatening an intimate partner of such person or child an intimate partner; and by

its terms explicitly prohibits the use, attempted use, or threatened use of physical force against an intimate partner.

c. Intimate partner means “the spouse of the person, a former spouse of the person, an individual who is the parent of a child of the person, and an individual who cohabitates or has cohabitated with the person.

9. Convicted in any court of a **misdemeanor crime of domestic violence**

a. Statutory definition: 18 U.S.C. §921(a)(33)(A)

i. misdemeanor under Federal, State or Tribal Law

ii. has as an element the use or attempted use of physical force or the threatened use of a deadly weapon

iii. committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim

b. Statutory requirements (due process?) 18 U.S.C. §921(a)(33)(B)

i. D must have been represented by counsel or knowingly and intelligently waived the right to counsel

ii. if D was entitled to a jury trial, D either rec'd jury trial or D knowingly and intelligently waived the right to trial, either by guilty plea or otherwise.

iii. A person shall *not* be considered to have been convicted if the conviction was expunged / set aside or is an offense for which the person was pardoned or had civil rights restored unless the pardon, e expungement, or restoration of civil rights expressly provides that the person may not possess firearms.

c. *United States v. Castleman*, 134 S.Ct. 1405 (2014): Section 922(g)(9)'s “physical force” requirement is satisfied by the degree of force that supports a common-law battery conviction—namely, offensive touching.

d. *United States v. Hayes*, 129 S.Ct 1079 (2009): A domestic relationship need not be a defining element of the predicate offense to support a conviction for 922(g)(9). “A domestic relationship, although it must be established beyond a reasonable doubt in a §922(g)(9) firearms possession prosecution, need not be a defining element of the predicate offense.”

## **B. POSSESSION**

1. Pattern Jury Instruction allows for actual or constructive possession and sole or joint possession.

2. Possession can be actual or constructive, and the government can prove possession through direct or circumstantial evidence. See *United States v. Johnson*, 450 Fed.Appx. 878, 885 (11th Cir. 2012). “Constructive possession exists when a defendant has knowledge of the item possessed coupled with the ability to exert control over it or over the premises ... in which the contraband was concealed.” *Id.* In *United States v. Perez*, 661 F.3d 568, 576 (11th Cir. 2011), the Court held constructive possession of a firearm exists when a defendant . . . has the power or right, and

intention to exercise dominion and control over the firearm.” In other words, if the firearm is accessible and the defendant is in close proximity to drugs or other contraband, the “government need not prove actual possession” in order to satisfy the ‘knowing’ requirement of the firearm’s presence. See *United States v. Wright*, 392 F.3d 1269, 1273 (11th Cir. 2004).

**C.** The term "**INTERSTATE OR FOREIGN COMMERCE**" includes commerce between any place in a State and any place outside of that State, or within any possession of the United States (not including the Canal Zone) or the District of Columbia, but such term does not include commerce between places within the same State but through any place outside of that State. The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States (not including the Canal Zone). 18 U.S.C. §921(1)(2).

1. The jury instruction for this element reads: “The term “interstate or foreign commerce” includes the movement of a firearm from one state to another or between the United States and any foreign country. It's not necessary for the Government to prove that the Defendant knew the firearm had moved from one state to another, only that the firearm did, in fact, move from one state to another.”

2. Potential Challenge: Mr. Client’s conviction should be vacated on the ground that 18 U.S.C. § 922(g) is unconstitutional, facially and as applied, because the statute exceeds Congress’s authority under the Commerce Clause. See U.S. Const. art. I, § 8, cl. 3. Recognizing that this issue is currently foreclosed, Mr. Client respectfully maintains this issue for purposes of further review.

The Supreme Court has identified three broad categories of activities that Congress may regulate pursuant to the Commerce Clause: (i) the use of the channels of interstate commerce; (ii) the instrumentalities of interstate commerce, of the persons or things in interstate commerce, and (iii) as pertinent here, “those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citation omitted). Section 922(g), however, prohibits possession – a non-economic activity – and does not ensure that this activity “substantially affects” interstate commerce. Indeed, the “jurisdictional hook” set forth in § 922(g) – “in or affecting commerce” – suffers from two infirmities: (i) it is not limited to “interstate or foreign commerce,” and (ii) it does not ensure on a case-by-case basis that the activity being regulated (possession) “substantially affects” interstate or foreign commerce. Section 922(g) is therefore facially unconstitutional. *Lopez*, 514 U.S. at 561-68; *United States v. Morrison*, 529 U.S. 598 (2000).

In addition, § 922(g) is unconstitutional as applied to Mr. Client’s purely intrastate possession of a firearm and ammunition. To obtain his conviction, the government relied upon the firearm’s and ammunition’s manufacture outside of Florida, which occurred before Mr. Client’s purely intrastate possession. The government did not proffer any facts, nor did Mr. Client admit to any facts, that established a substantial connection between the proscribed activity (the possession) and interstate or foreign commerce.

Mr. Client acknowledges that his arguments are currently foreclosed. Relying upon *Scarborough v. United States*, 431 U.S. 563 (1977), this Court has said that § 922(g)'s language – “in or affecting commerce” – indicates Congress’s intent “to assert its full Commerce Clause power.” *United States v. Wright*, 607 F.3d 708, 715-16 (11th Cir. 2010) (quoting *United States v. Nichols*, 124 F.3d 1265, 1266 (11th Cir. 1997)). And, this Court has rejected the argument that § 922(g) is unconstitutional in light of *Lopez* and *Morrison*. See, e.g., *United States v. Scott*, 263 F.3d 1270, 1271-74 (11th Cir. 2001). Mr. Client accordingly preserves these arguments for purposes of further review. See *Alderman v. United States*, 562 U.S. 1163 (2011) (Thomas, Scalia, JJ., dissenting from denial of certiorari).

**18 U.S.C. §924(c)**

18 U.S.C. §924(c)(1)

(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime...”

**POTENTIAL PUNISHMENTS**

<b>First Conviction</b>		<b>A term of imprisonment of not less than</b>
(C)(1)(A)(i)	Uses or carries, or possesses in furtherance of COV or DT crime	5 years, consecutive to substantive offense
(C)(1)(A)(ii)	If the firearm is “brandished”	7 years, consecutive to substantive offense
(C)(1)(A)(iii)	If the firearm is “discharged”	10 years, consecutive to substantive offense
(C)(1)(B)(i)	short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon	10 years, consecutive to substantive offense
	machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler	30 years, consecutive to substantive offense
<b>2<sup>nd</sup> or subsequent conviction</b>		25 years, consecutive to substantive offense
	if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler	Mandatory life.

## **I. Crime of Violence**

A. Statutory Definition: For purposes of this subsection the term “crime of violence” means an offense that is a felony and (A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

B. On April 17, 2018, in *Sessions v. Dimaya*, 2018 WL 1800371 (2018), the Supreme Court found constitutionally void-for-vagueness, a similarly worded residual clause in 18 U.S.C. §16(b). In his dissent, Chief Justice Roberts points out “Of special concern, § 16 is replicated in the definition of “crime of violence” applicable to § 924(c), which prohibits using or carrying a firearm “during and in relation to any crime of violence,” or possessing a firearm “in furtherance of any such crime.” §§ 924(c)(1)(A), (c)(3). Though I express no view on whether § 924(c) can be distinguished from the provision we consider here, the Court's holding calls into question convictions under what the Government warns us is an ‘oft-prosecuted offense.’”

C. Hobbs Act Robbery / attempted Hobbs Act Robbery qualify as crimes of violence. *United States v. St. Hubert*, 883 F.3d 1819 (11<sup>th</sup> Cir. 2018).

## **II. Drug Trafficking Crime**

A. Statutory definition: For purposes of this subsection, the term “drug trafficking crime” means any felony punishable under the Controlled Substances Act

(21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

### **III. Special Issues**

#### **A. 5<sup>th</sup> Amendment Requirement**

1. 924(c) is a separate crime, not a sentencing enhancement. Since it is a separate statutory crime, it MUST be pled and proven as a separate charge in the indictment.

2. *United States v. O'Brien*, 130 S.Ct. 2169 (2010): Under statute prohibiting the use or carrying of a firearm in relation to a crime of violence or drug trafficking crime, the fact that firearm was a machinegun was an element of the offense to be proved to the jury beyond a reasonable doubt, rather than a sentencing factor.

3. *United States v. Alleyne*, 133 S.Ct. 2151 (2013): Because mandatory minimum sentences increase the penalty for a crime, any fact that increases the mandatory minimum is an “element” that must be submitted to the jury.

#### **B. “Use” vs. “Carry”**

1. In *Bailey v. United States*, 516 U.S. 137 (1995), the Court addressed whether possessing a firearm kept near the scene of drug trafficking is “use” under § 924(c)(1). The Court looked to the “ordinary or natural” meaning, and decided that mere possession does not amount to “use.” Section 924(c)(1) requires

evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.

2. The "carry" prong of this offense was decided in *Muscarello v. United States*, 118 S. Ct. 1911 (1998), which held that the term carry is not limited to carrying firearms on one's person, but also applies to person who carries firearms in a vehicle. The Court further held that a defendant with a firearm in his car while he drives to a drug deal "carries" the firearm in the vehicle for purposes of the 924(c) enhancement. The carry prong may be successfully alleged when the Defendant drives to a drug deal with a gun in the car, even though the Defendant may leave the car (and the gun) to consummate the drug deal.

B. Possession "in furtherance"

In *United States v. Timmons*, 283 F. 3d 1246 (2002), the police executed a search warrant on the defendant's apartment. The defendant was found and arrested just outside his apartment. Inside, police found a stove top oven in the living room. On top of the oven were two loaded guns. Inside the oven was an empty box of ammo. In a drawer underneath the oven the cops found crack cocaine and \$350. A plastic baggy with pieces of cocaine was found under the couch cushion. Six individually wrapped pieces of cocaine were recovered from a shoe in the defendant's closet. The total amount of drugs seized was 35 grams. The defendant was charged with possession of a gun in furtherance of a drug trafficking offense, under § 924(c). In a case of first impression, the court found that the government must establish that the firearm helped, furthered, promoted, or advanced the drug trafficking. Based on the

facts, the court concluded that Timmons was guilty of possessing the gun in furtherance of the drug activity.

### C. Consecutive Sentences

1. In *Deal v. United States*, 113 S. Ct. 1993 (1993), the Court held that the consecutive enhanced sentences even applied when several § 924(c) counts were charged in a single indictment. Pursuant to *Deal*, a defendant charged with two bank robberies, and with two 924(c) counts for each bank robbery, is facing 25 (5+25=30) years in prison, solely for the 924(c) convictions, which are consecutive to the substantive offense and to each other.

2. In *Abbott v. United States*, 131 S.Ct. 18 (2010), the Court held that a defendant is subject to a mandatory, consecutive sentence for a § 924(c) conviction, and is not spared from that sentence by virtue of receiving a higher mandatory minimum on a different count of conviction. The Court rejected the defendant's argument that the preface language in 924(c) ("except to the extent that a greater minimum mandatory sentence is otherwise provided") meant that an ACCA fifteen year minimum mandatory sentence overrode the 924(c) sentence.

3. In *Dean v. United States*, 137 S.Ct. 1170 (2017), the Court held that Section 924(c) does not prevent a sentencing court from considering a mandatory minimum sentence to be imposed under this provision when calculating an appropriate sentence for the underlying predicate offense. Sentencing courts have long enjoyed discretion in the sort of information they may consider when setting an appropriate sentence, and they continue to do so even as federal laws have required

them to evaluate certain factors when exercising their discretion. Section 3553(a) specifies the factors courts are to consider when imposing a sentence. The § 3553(a) factors are used to set both the length of separate prison terms, § 3582(a), and an aggregate prison term comprising separate sentences for multiple counts of conviction, § 3584(b). As a general matter, these sentencing provisions permit a court imposing a sentence on one count of conviction to consider sentences imposed on other counts.

D. Aiding and Abetting - Knowledge

1. *Rosemond v. United States*, 134 S.Ct. 1240 (2014) - An active participant in a drug transaction has the intent needed to aid and abet a § 924(c) violation when he knows that one of his confederates will carry a gun. In such a case, the accomplice has decided to join in the criminal venture, and share in its benefits, with full awareness of its scope—that the plan calls not just for a drug sale, but for an armed one. In so doing, he has chosen ...to align himself with the illegal scheme in its entirety—including its use of a firearm. And he has determined (again like those other abettors) to do what he can to “make [that scheme] succeed.” *Nye & Nissen*, 336 U.S., at 619, 69 S.Ct. 766. He thus becomes responsible, in the typical way of aiders and abettors, for the conduct of others. He may not have brought the gun to the drug deal himself, but because he took part in that deal knowing a confederate would do so, he intended the commission of a § 924(c) offense—i.e., an armed drug sale.

For all that to be true, though, the § 924(c) defendant's knowledge of a firearm must be advance knowledge—or otherwise said, knowledge that enables him to make

the relevant legal (and indeed, moral) choice. When an accomplice knows beforehand of a confederate's design to carry a gun, he can attempt to alter that plan or, if unsuccessful, withdraw from the enterprise; it is deciding instead to go ahead with his role in the venture that shows his intent to aid an armed offense. But when an accomplice knows nothing of a gun until it appears at the scene, he may already have completed his acts of assistance; or even if not, he may at that late point have no realistic opportunity to quit the crime. And when that is so, the defendant has not shown the requisite intent to assist a crime involving a gun. An unarmed accomplice cannot aid and abet a § 924(c) violation unless he has foreknowledge that his confederate will commit the offense with a firearm.

2. Defendant aided and abetted in carrying firearm, and thus committed offense of aiding and abetting use or carrying of firearm during and in relation to drug trafficking crime, where defendant drove vehicle to scene of drug transaction with codefendant as passenger, knowing that codefendant had firearm, and defendant left vehicle to inspect marijuana under watchful eye of codefendant, thus accepting protection afforded by firearm. *Bazemore v. United States*, 138 F.3d 947 (11<sup>th</sup> Cir. 1998).

E. No mens rea for discharge enhancement: The statutory sentencing enhancement under 18 U.S.C.A. § 924(c)(1)(A)(iii), providing a mandatory minimum sentence if a firearm used or carried during and in relation to any crime of violence or drug-trafficking crime is discharged, required no separate proof of intent, and thus, the enhancement applies if a gun was discharged in the course of a violent or drug-

trafficking crime, whether on purpose or by accident, as the sentencing enhancement accounted for the risk of harm resulting from the manner in which the crime was carried out, for which the defendant was responsible, ruled the Supreme Court in *Dean v. U.S.*, 129 S. Ct. 1849, 173 L. Ed. 2d 785 (2009)

F. “Let’s Make a Deal” or “Leave the gun, take the cannolis”

1. Give the gun, end up with drugs – BAD NEWS: In *Smith v. United States*, 508 U.S. 223, 113 S.Ct. 2050, 124 L.Ed.2d 138 (1993), the Court held that “a criminal who trades his firearm for drugs ‘uses’ it during and in relation to a drug trafficking offense within the meaning of § 924(c)(1).” The Court looked to the ‘ordinary or natural meaning’ of the verb in context, and understood its common range as going beyond employment as a weapon: it is both reasonable and normal to say that petitioner ‘used’ his MAC-10 in his drug trafficking offense by trading it for cocaine.

2. Give the drugs, end up with gun – GOOD NEWS: In *Watson v. United States*, 128 S.Ct. 74 (2007), the Court, again using the “ordinary and natural meaning of the word, held that a person does not “use” a firearm under § 924(c)(1)(A) when he receives it in trade for drugs.

But, wait a second ... in *Watson*, the Court acknowledged the 1998 amendment of § 924(c)(1) which permitted the government to prosecute a defendant for possession “in furtherance of” such a crime. *Id.* at 83. In *Watson*, the issue was over the word “use;” however, the court points out the government’s confidence in prevailing had it prosecuted *Watson* pursuant to the newly amended possession

component of § 924(c)(1). (See *U.S. v. Gurka*, 605 F.3d 40 (1<sup>st</sup> Cir. 2010) - Defendant who received guns in exchange for drugs possessed those guns “in furtherance of” his drug trafficking offense within meaning of statute prohibiting possession of a firearm in furtherance of drug trafficking offense; defendant's possession of the guns was an essential component of the drug sale.)

3. Selling the guns & drugs together: The defendant's sale of a firearm and a quantity of heroin to a confidential informant in the same container, in a single transaction, constituted use of the firearm, for purposes of the defendant's conviction for use of a firearm during and in relation to a drug trafficking crime; defendant openly discussed the presence of the gun with the informant when he negotiated the sale of the gun and heroin together, in a single transaction, and in doing so, he actively employed the gun in relation to the underlying drug trafficking offense. *U.S. v. Claude X*, 648 F.3d 599 (8<sup>th</sup> Cir. 2011).

F. USSG §2K2.4

1. Except if career offender provisions apply, whether or not D is convicted of another offense, the guidelines range is the minimum term of imprisonment required by statute.

2. Interaction of 924(c) & Career Offender: If D is convicted of a violation of 924(c) and is a career offender, see USSG §4B1.1(c)(3).

§3E1.1 Reduction (Acceptance of Responsibility)	Guidelines Range for 924(c) conviction
No reduction	360 to life
2 level reduction	292-365 months
3 level reduction	262-327 months

3. If a sentence under this guideline is imposed in conjunction with a sentence for an underlying offense, do not apply any specific offense characteristic for possession, brandishing, use, or discharge of an explosive or firearm when determining the sentence for the underlying offense. A sentence under this guideline accounts for any explosive or weapon enhancement for the underlying offense of conviction, including any such enhancement that would apply based on conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Do not apply any weapon enhancement in the guideline for the underlying offense, for example, if (A) a co-defendant, as part of the jointly undertaken criminal activity, possessed a firearm different from the one for which the defendant was convicted under 18 U.S.C. § 924(c); or (B) in an ongoing drug trafficking offense, the defendant possessed a firearm other than the one for which the defendant was convicted under 18 U.S.C. § 924(c). However, if a defendant is convicted of two armed bank robberies, but is convicted under 18 U.S.C. § 924(c) in connection with only one of the robberies, a weapon enhancement would apply to the bank robbery which was not the basis for the 18 U.S.C. § 924(c) conviction. USSG §2K2.4, comment (n.4).

### 3. USSG 2K2.1

#### ***STEP 1. CALCULATE THE BOL***

- A. Does “the offense involve”
  - 1. Large Capacity magazine?
  - 2. Special Type of Firearm described in 26 U.S.C. § 5845(a)?
- B. Did the Defendant commit the instant offense after conviction(s)

for:

- 1. “Crime of Violence”
  - a. Definition from Career Offender Section (USSG §4B1.2(a))
  - b. COV includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.
- 2. “Controlled Substance Offense” - definition from Career Offender Section (USSG §4B1.2(a))

#### C. Special Issues

1. ADULT CONVICTIONS: A felony conviction means a prior adult conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed. A conviction for an offense committed at age eighteen years or older is an adult conviction. USSG §2K2.1, comment. (n 1).

2. JUVENILE CONVICTIONS DO NOT COUNT: A conviction for an offense committed prior to age eighteen years is an adult conviction *if* it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted. USSG §2K2.1, comment. (n 1).

3. TIMING: For the purposes of whether the D committed the offense after a prior conviction, only those convictions which receive criminal history points under Chapter 4. Additionally, only count those convictions which count separately under Chapter 4. (i.e, must be scorable criminal history points). USSG §2K2.1, comment. (n 10).

**STEP 2. SPECIFIC OFFENSE CHARACTERISTICS**

A. Number of Firearms

1, Chart of number of guns, increase in offense level

(A)	3 – 7 firearms	+ 2
(B)	8 to 24 firearms	+ 4
(C)	25 to 99 firearms	+ 6
(D)	100 to 199 firearms	+ 8
(E)	200 or more	+10

2. *United States v. Gill*, 864 F.3d 1279 (11<sup>th</sup> Cir. 2017) – “By its terms application note 5 to § 2K2.1 requires only that Gill's possession of each pistol be “unlawful,” not that it be unlawful under federal law. We agree with the Seventh Circuit that a firearm may be counted under § 2K2.1(b)(1) if state law prohibited the defendant from possessing it, even if federal law did not. See *United States v. Jones*, 635 F.3d 909, 919–20 (7<sup>th</sup> Cir. 2011); cf. *United States v. Griffith*, 584 F.3d 1004,

1013 (10th Cir. 2009) (agreeing with four other circuits that conduct can be counted as relevant conduct under the sentencing guidelines if it is criminalized by state law). A firearm that is illegal only under state law does not count for § 922(g) purposes, but it does count for sentencing purposes.”

B. Altered / obliterated serial number – increase by 4 levels

1. Every firearm must have the serial number engraved, cast or stamped on the firearm frame or receiver, and must have the name of the manufacturer, country of origin, model designation, caliber / gauge, and name of importer conspicuously engraved, cast or stamped. For firearms imported / manufactured after 2002, there are rules on the minimum depth / type size for the engraving.

2. This enhancement / SOC applies regardless of whether the D knew or had reason to know that the firearm had an altered / obliterated serial number and the BOL was determined under (a)(7) (that is, offense level 12). However, if the offense involved a stolen firearm or stolen ammunition, apply the +2 enhancement. USSG §2K2.1, comment. (n 8).

C. Stolen Firearm – increase by +2 levels

1. This enhancement / SOC applies regardless of whether the D knew or had reason to believe that the firearm was stolen. USSG §2K2.1, comment (n.8).

2. This enhancement / SOC does not apply if the D is convicted of possession of a stolen firearm (18 U.S.C. §922(i)) and the BOL was

determined under (a)(7) (that is, offense level 12). USSG §2K2.1, comment. (n 8). This is because the base offense level takes into account that the firearm or ammunition was stolen. However, if the offense involved a firearm with an altered or obliterated serial number, apply the +4 increase.

D. Trafficking – This subsection applies, regardless of whether anything of value was exchanged, if

- the D transferred, transported or otherwise disposed of 2 or more firearms or received 2 or more firearms with the intent to transfer, transport or dispose of the firearms; and

- D knew or had reason to know that the conduct would result in the transfer of the firearm to an individual whose possession of the firearm would be unlawful or who intended to use / dispose of the firearms unlawfully.

E. “In Connection With”

i. This SOC applies “if the firearm or ammunition facilitated, or had the potential of facilitating, another felony offense or another offense, respectively.” USSG §2K2.1, comment. (n 14(A)).

ii. Burglary & Drug offenses: This SOC applies when “defendant who, during the course of a burglary, finds and takes a firearm, even if the defendant did not engage in any other conduct with that firearm during the course of the burglary; and (ii) in the case of a drug trafficking offense in which a firearm is found in close proximity to drugs, drug-manufacturing materials, or drug paraphernalia.” In these cases, application of subsections (b)(6)(B) and (c)(1) ... is

warranted because the presence of the firearm has the potential of facilitating another felony offense or another offense, respectively. USSG §2K2.1, comment. (n 14(B)).

iii. *United States v. Carillo-Ayala*, 713 F.3d 82 (11<sup>th</sup> Cir. 2013):

Set up to the case: “Defendant Arturo Carillo–Ayala admits he was a drug dealer and admits he sold firearms, but his ostensible business plan was “Guns and Drugs Sold Separately.” The question before us is whether a drug-dealer who also sells firearms to a drug customer possesses those firearms “in connection with” the charged drug offense. The answer is ‘not necessarily.’” This case contains much quoted language setting a low bar for ‘connection.’ However, close reading may limit it to drug trafficking offenses, not simply drug possession offenses.

iv. *United States v. Wooten*, 253 Fed.Appx 854 (11<sup>th</sup> Cir.

2007): In connection with should be given expansive reading. Guns are the tools of the drug trade.

F. Destructive Device – “A defendant whose offense involves a destructive device receives both the base offense level from the subsection applicable to a firearm listed in 26 U.S.C. § 5845(a) (e.g., subsection (a)(1), (a)(3), (a)(4)(B), or (a)(5)), and the applicable enhancement under subsection (b)(3). Such devices pose a considerably greater risk to the public welfare than other National Firearms Act weapons.” USSG §2K2.1, comment (n. 7).

G. Potential Upward Departure Provisions – USSG §2K2.1, comment (n. 11). An upward departure may be warranted if – number of guns

substantially exceeds 200, the offense involved substantial number of NFA guns (machine guns, destructive devices, non-detectable (Plastic guns), military type assault weapons; an offense involving a lot of armor piercing ammo; or the offense involved a substantial risk of death or bodily injury to multiple individuals.

***STEP 3. POTENTIAL DEPARTURE / VARIANCE CHALLENGES?***

A. Argument on which COV / Drug offenses score under career offender definitions?

1. Section 2K2.1 uses the same definitions as the career offender guidelines. These definitions often only provide a rough measure of a D's past criminal activities and the seriousness of his prior convictions.

2. In August 2016, the Sentencing Commission published a report entitled "Report to the Congress: Career Offender Sentencing Enhancements" in which the Commission undertook a multi-year study of statutory and guideline definitions relating to the nature of a defendant's prior conviction and the impact of such definitions on the relevant statutory and guidelines provisions. The study focused on the Career Offender provision and whether the use of either a crime of violence or controlled substance offense prior conviction was an effective measure of an offender's culpability or likelihood of recidivism. The Commission concluded that the career offender directive is best focused on those offenders who have committed at least one "crime of violence." The Report recommended that Congress amend the directive to reflect this principle by no longer including those who currently qualify as career offenders based solely on drug trafficking offenses. These reforms would

help ensure that federal sentences better account for the severity of the offenders' prior records, protect the public, and avoid undue severity for certain less culpable offenders. (These conclusions are taken from the Executive Summary to the Report, pages 1-2).

B. The past convictions have the effect of both increasing both the BOL and CHC. (overstatement of criminal history?)

C. Large Capacity Magazine – rational exercise of Commission's power?

1. The Guidelines in §2K2.1 were amended to include the definition "semiautomatic firearm capable of accepting a large capacity magazine" in November 2006. (See Amendment 691). Prior to November 2006, the Guidelines provided an increase to the base offense level for possession of a firearm prohibited by 18 U.S.C. §921(a)(30), which was the semiautomatic assault weapon ban that expired on September 13, 2004. Thus, the previous guidelines provided an increase to the offense level for possession of a firearm that was itself illegal. This is similar to the current Guidelines increases for offenses described in 26 U.S.C. §5845(a) (that is, short barrel shotguns, machineguns, silencers, etc). The increase to the offense level for a prohibited person possessing an illegal firearm seems like a logical calculation by the Commission. However, the Guideline amendment in 2006 made possession of a lawful firearm or magazine subject to the same increase. This increase makes less sense given that the firearm at issue is not itself illegal.

2. Prevalence of large capacity magazines: In 2006, it was less likely that a firearm would have a 'large capacity magazine.' In the past, if a firearm owner wanted to possess a 'large capacity magazine' he or she might be required to purchase a more expensive firearm or a special magazine. However, many firearms marketed today have large capacity magazines. It is less rare for this enhancement to apply and less likely to reflect the culpability of an offender.

D. Fleeting possession / lesser harm

#### 4. ARMED CAREER CRIMINAL ACT / 18 U.S.C. §924(E)

18 U.S.C. §924(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

##### I. Generally

- A. Increases the statutory penalty from a *maximum* of 10 years imprisonment to a *minimum mandatory* term of 15 years imprisonment. Since there is no statutory maximum described in the statute, the maximum is life imprisonment. *United States v. Brame*, 997 F.2d 1426, 1428 (11<sup>th</sup> Cir. 1993). The statute also increases the maximum term of supervised release from 3 years to 5 years.
- B. All three prior qualifying convictions must have been committed and final by the time the defendant possessed the gun in the instant case. *United States v. Richardson*, 166 F.3d 1360 (11<sup>th</sup> Cir. 1999).
- C. There is no time limit for prior offenses. Unlike criminal history scoring (USSG § 4A1.1) and career offender provisions (USSG § 4B1.1), priors never age out. *United States v. Green*, 904 F.2d 654 (11<sup>th</sup> Cir. 1990); USSG § 4B1.4, comment 1.

##### II. Categorical Approach and Modified Categorical Approach

- A. *United States v. Taylor*, 495 U.S. 575, 602 (1990): “The only plausible interpretation of § 942(e)(2)(B)(ii) is that, like the rest of the enhancement statute, it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.”
- B. *Shepard v. United States*, 544 U.S. 13, 15 (2005): When presented with the issue of whether the sentencing court may also look to police reports or complaint application in addition to *Taylor* documents to determine whether prior offense constituted ‘generic’ burglary, the Court held that “a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any

explicit findings of fact by the trial judge to which the defendant assented.”

- C. *Mathis v. United States*, 136 S.Ct. 2243 (2016): A prior conviction does not qualify as the generic form of burglary, arson, or extortion, as predicate violent felony offenses supporting 15-year mandatory minimum sentence under Armed Career Criminal Act (ACCA), if an element of the crime of conviction is broader than an element of the generic offense because the crime of conviction enumerates various alternative factual means of satisfying a single element.

### III. Serious Drug Offenses

- A. *Citron v. US Attorney General*, 882 F.3d 1380 (11<sup>th</sup> Cir. 2018): A plain reading of the statute, aided by the weight of Florida authority, indicates that Florida Statutes § 893.135(1)(c)1 created a single drug trafficking offense that could be committed by alternative means. Because the jury did not need to agree on the particular method of commission to convict, the statute was indivisible. An indivisible and overbroad statute is categorically not an aggravated felony. See also *Francisco v US Attorney General*, 884 F.3d 1120 (11<sup>th</sup> Cir. 2018)
- B. Always check the state law in the jurisdiction where the defendant was convicted to see if the maximum is over 10 years imprisonment.
- C. The maximum term of imprisonment prescribed by law, to determine whether a prior offense qualified as a SDO under the ACCA, is determined referring to applicable recidivist enhancements for the prior offense. *United States v. Rodriquez*, 128 S.Ct 1783 (2008).
- D. Sometimes, a prior conviction labeled by the State as a ‘misdemeanor’ still counts as a felony conviction if the maximum penalty is more than one year in prison. *Burgess v. United States*, 128 S.Ct 1572 (2008).
- E. For Florida offenses, must be at least a 2<sup>nd</sup> degree felony to qualify. Sale of cannabis and sale of a substance in lieu of a controlled substance do not count.

### IV. Violent Felonies

- A. **18 U.S.C. § 924(e)(2)(B)**: the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife,

or destructive device that would be punishable by imprisonment for such term if committed by an adult, that –

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

**B. Elements Clause:**

1. *Johnson v. United States*, 130 S.Ct. 1265 (2010), the Court held that a conviction under Florida’s battery statute does not qualify as a violent felony.

a. The Court is bound by the Florida Supreme Court’s interpretation of state law, including its determination of the elements of the Florida Statute. Under Florida law, a battery can be committed by any intentional physical contact, no matter how slight. The most nominal contact, such as a tap on the shoulder without consent establishes a battery. *Id.* at 1269.

b. Since the ACCA does not define ‘physical force,’ the Court gave the phrase its ordinary meaning. *Id.* at 1270.

i. After considering dictionary definitions and prior precedent, the Court held that “We think it clear that in the context of a statutory definition of “*violent felony*,” the phrase “physical force” means *violent force* - that is, force capable of causing physical pain or injury to another person.” *Id.* at 1271.

ii [T]he term “physical force” itself normally connotes force strong enough to constitute “power”- and all the more so when it is contained in the definition of “violent felony.” *Id.* at 1272.

2. **Robbery:** On April 2, 2018, the Supreme Court granted certiorari in *Stokeling v. United States*, arising in the Southern District, which will address whether a Florida conviction for robbery qualifies as a “violent felony” under the elements clause of the Armed Career Criminal Act. The question presented is “Is a state robbery offense that includes ‘as an element’ the common law requirement of overcoming ‘victim resistance’ a violent felony ....if the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance?” *Stokeling* will be the first case to “physical force” clause *Curtis Johnson*.

Although *Stokeling* addresses only Florida robbery, the Court’s decision may affect several other predicate offenses. For example, the en banc Eleventh Circuit

held felony battery under Fla. Stat. § 784.041 qualifies under the elements clause. The Court held that although felony battery may be committed with a slight touch, it is a touch that is “capable of causing physical pain or injury.” A favorable decision in *Stokeling* may call this decision (and several others) into doubt.

Right after the p/cert was granted in *Stokeling*, the Eleventh Circuit issued *United States v. Lee*, 2018 WL 1573347 (11<sup>th</sup> Cir. April 2, 2018), holding that prior Florida robbery convictions constituted violent felonies under the ACCA elements clause. Judge Jordan filed a concurring opinion explaining that “when we wrongly decided *Down*, and then *Lockley*, that Florida robbery is categorically a violent felony under the elements clause of the ACCA and the career offender provision of the Sentencing Guidelines, we dug ourselves a hole. We have since made that that hole a trench by adhering to those decisions without analyzing Florida law. Hopefully one day we will take a fresh look at the issue.”

### 3. Miscellaneous Offenses

a. **AGGRAVATED ASSAULT - FLORIDA CONVICTION:** “Deshazor's argument that aggravated assault under Fla. Stat. § 784.021 is not a violent felony is foreclosed by our prior precedent. In *Turner v. Warden Coleman FCI*, 709 F.3d 1328, 1337–38 (11th Cir. 2013), we held that Fla. Stat. § 784.021 qualifies as a violent felony under the ACCA's elements clause. *Turner* is binding in this circuit “unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this Court sitting en banc.” *United States v. Deshazor*, 2018 WL 944768 (11th Cir. February 20, 2018) (internal citations omitted).

b. **RESISTING WITH VIOLENCE:** “Deshazor's argument that resisting an officer with violence under Fla. Stat. § 843.01 is not a violent felony is also foreclosed by prior precedent. We previously held that Fla. Stat. § 843.01 qualifies as a violent felony under the ACCA's elements clause.” *United States v. Deshazor*, 2018 WL 944768 (11th Cir. February 20, 2018) ((internal citations omitted).

c. **SEXUAL BATTERY:** “A conviction for sexual battery with a deadly weapon under Fla. Stat. § 794.011(3) is a conviction for a violent felony under the ACCA's elements clause.” *United States v. Deshazor*, 2018 WL 944768 (11th Cir. February 20, 2018).

d. **FLA CONVICTION FOR FELONY DOMESTIC BATTERY BY STRANGULATION** is a violent felony. *United States v. Dixon*, 874 F.3d 678 (11<sup>th</sup> Cir. 2017).

e. **FLA FELONY BATTERY (FS 784.041)** is a crime of violence. *United States v. Vail-Bailon*, 868 F.3d 1263 (11<sup>th</sup> Cir. 2017).

### C. **Burglary**

1. In *United States v. Taylor*, 495 U.S. 575, 599 (1990), the Court created a generic definition of burglary for the ACCA: any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.
2. *United States v. Esprit*, 841 F.3d 1235 (11<sup>th</sup> Cir. 2016): “We hold that a conviction for burglary under Florida law cannot serve as a predicate “violent felony” under ACCA because the Florida burglary statute is not divisible, and that means that we cannot use the modified categorical approach.”

### D. **No more Residual Clause!!**

1. *Johnson v. United States*, 135 S.Ct. 2551, 2563 (2015): “We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled. Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.”

2. *Welch v. United States*, 136 S.Ct. 1257 (2016): The Supreme Court its *Johnson* decision, which held that the definition of prior “violent felony” in the residual clause of the ACCA was unconstitutionally vague under due process principles, announced a substantive rule that applied retroactively on collateral review.

### V. **Dangers**

- A. Requires that the three previous convictions are “... committed on occasions different from one another ...” However, this does not mean there has to be three separate cases, sentences or judgments for the underlying predicates to count. The 11<sup>th</sup> Circuit determined that “the ‘successful’ completion of one crime plus a subsequent conscious decision to commit another crime makes that second crime distinct from the first for the purposes of the ACCA.” *United States v. Pope*, 132 F.3d 684, 692 (11<sup>th</sup> Cir.1998), *United States v. Spears*, 443 F.3d 1358, 1360 (11<sup>th</sup> Cir. 2006).

Are *Shepard* documents necessary to prove that the prior offenses were committed on occasions different from one another? In *United States v*

*Sneed*, 600 F.3d 1326 (11<sup>th</sup> Cir. 2010), the court held that the sentencing court “may not use police reports to determine whether predicate offenses were committed on occasions different from another.”

- B. Under some circumstances, juvenile offenses count as violent felonies (“... or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult...” 18 U.S.C. § 924(e)(2)(B)). See also *United States v. Wilks*, 464 F.3d 1240 (11<sup>th</sup> Cir. 2006) (“Our conclusion that youthful offender sentences can qualify as predicate offense for sentence enhancement purposes remains valid .... It is one thing to prohibit capital punishment for those under the age of 18, but an entirely different thing to prohibit consideration of prior youthful offender offenses when sentencing criminals who continue their illegal activity into adulthood.”)
- C. Applies even if the defendant possessed ammunition alone, not a firearm.
- D. No way to collaterally challenge constitutional validity of prior convictions in the federal sentencing proceedings. In *Custis v. United States*, 511 U.S. 485 (1994), the Supreme Court held that a defendant in a federal sentencing proceeding cannot collaterally attack the validity of prior state conviction (except uncounseled convictions) under the Armed Career Criminal Act of 1984.

**VI. Sentencing Guidelines (USSG § 4B1.4) – has the impact of setting both a base offense level (to 33 or 34) and increases the CHC to either IV or VI.**

**VII. *Object, Object, Object to the PSR***

“It is the law of this circuit that a failure to object to allegations of fact in a PSI admits those facts for sentencing purposes.” *United States v. Wade*, 458 F.3d 1273, 1277 (11<sup>th</sup> Cir. 2006). “It is also established law that the failure to object to a district court's factual findings precludes the argument that there was error in them.” *Id.*

“A sentencing court's findings of fact may be based on undisputed statements in the PSI. Where a defendant objects to the factual basis of his sentence, the government has the burden of establishing the disputed fact. However, challenges to the facts contained in the PSI must be asserted with specificity and clarity. Otherwise, the objection is waived.” *United States v. Bennett*, 472 F.3d 825, 832 (11<sup>th</sup> Cir 2006).

Object to:

1. The facts themselves (at least say that 'the defendant does not admit the facts purporting to represent the circumstances of the prior conviction and demands strict proof'). (Practice Note: Know thy judge and PO to consider how far you can go without raising the possibility of losing acceptance of responsibility.)

2. The source of the facts (require the government produce and the court rely on only the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information).

3. The conclusion that the prior qualifies as a predicate offense.