

**ARMED CAREER CRIMINAL ACT AND THE CAREER
OFFENDER PROVISION OF THE SENTENCING GUIDELINES**

June 2020

ARMED CAREER CRIMINAL ACT

I. “In the case of a person who violates section 922(g) of this title and has three previous convictions . . . 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 . . .”

18.S.C. § 924(e)(1).

A. No time limit for predicate offenses. No requirement that predicate offense included any particular sentence.

B. Violent Felony 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 as 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 use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and (C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.” 18 U.S.C. 924(e)(2)(B)

a. *Curtis Johnson v. United States*, 559 U.S. 133 (2010) defined “physical force” as “violent force – that is, force capable of causing physical pain or injury to another person.”

1. *Stokeling v. United States*, 139 S. Ct. 544 (2019), foreclosed arguments based on *Curtis Johnson’s* definition of “physical force.”

b. Offenses involving reckless conduct, including Florida’s aggravated assault statute, do not qualify as violent felonies.

See Leocal v. Ashcroft, 543 U.S. 1 (2004); *United States v. Palomino-Garcia*, 606 F.3d 1317 (11th Cir. 2010); *United States v. Robert Young*, 4:13cr22-RH (N.D. Fla.) ECF No. 84, entered

June 1, 2018. Issue is before the Supreme Court in *United States v. Borden*, 19-5410.

- c. Florida’s Battery on a Law Enforcement Officer (Fla. Stat. § 784.07), Aggravated Battery on a Pregnant Victim (Fla. Stat. § 784.045), and Battery on a Person Being Detained (Fla. Stat. § 784.082).
 - 1. *See United States v. Gandy*, 917 F.3d 1333 (11th Cir. 2019).
- C. Enumerated Offenses Clause: “is a burglary, arson, extortion . . .”
 - a. Is the offense a generic one? *Taylor v. United States*, 495 U.S. 575 (1990).
 - 1. Florida’s burglary statute is non-generic and cannot qualify as a violent felony. *United States v. Esprit*, 841 F.3d 1235, 1240-1241 (11th Cir. 2016).
- D. Residual Clause. *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015).

II. Serious Drug Offense

- A. “[T]he term “serious drug offense” means . . . an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law.” 18 U.S.C. § 924(e)(2)(A).
 - a. *Shular v. United States*, 140 S. Ct. 779 (2020): A court need only and determine whether the state offense requires the conduct listed in the ACCA—distribution, manufacturing, etc.
 - 1. Arguably the ACCA, then, requires the listed conduct, not inchoate offenses like Florida’s sale of a controlled substance, which includes attempts. *See Milazzo v. State*, 377 So.2d 1161, 1162 (Fla. 1979) ((by statute, both the actual transfer and the attempted transfer are sufficient to constitute the act of “delivery;” therefore, “there can be no such offense as attempted delivery of cocaine.”)
 - 2. Florida’s trafficking statute, which allows for a conviction based on possession of larger quantities also falls short.

III. “[O]n occasions different from one another . . .”

- A. *See United States v. McCloud*, 818 F.3d 591, 595 (11th Cir. 2016)

“A crime is successive when the defendant has a meaningful opportunity to desist . . . activity before committing the second offense and the crimes reflect distinct aggressions.”)

B. Court must rely on *Shepard* documents. *Id.*

CAREER OFFENDER

I. “A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.” USSG § 4B1.1.

II. Not mandatory

A. In fiscal year 2019, only 22.8 percent of those who qualified for career offender sentencing were sentenced within the career offender range. Quick Facts – Career Offenders (April 2020).¹

B. Judge Hinkle: “[M]ost defendants who are career offenders under the Guidelines Manual receive – and should receive – below-guideline sentences.” *United States v. Gospidon*, No. 4:06cr21 (N.D. Fla. 2019) ECF No. 149 at 4, Aug. 22, 2019.

C. “Drug trafficking only career offenders are not meaningfully different from other federal drug trafficking offenders and should not categorically be subject to the significant increase in penalties required by the career offender directive.” *United States Sentencing Commission, Career Offender Sentencing Enhancements* (2016) at 3.

D. In *Career Offender Sentencing Enhancements*, the Commission also concluded that the “normal operation of Chapter Four’s criminal history provisions adequately accounts for the likelihood

¹ Available at: <https://www.ussc.gov/research/quick-facts/career-offenders>.

It takes some math to reach the percentage. According to the information, 50.6% of career offenders were “sentenced under the Guidelines Manual.” Of those, 44.7% were “sentenced within the guideline range.” $50.6 \times .447 = 22.75$.

of recidivism and future criminal behavior of those offenders who are currently deemed to be career offenders, but who have not committed an instant or prior offense that is a ‘crime of violence.’” The Commission’s recommendation to Congress was to “amend the career offender directive at 2 U.S.C. § 994(h) . . . by requiring that an offender have committed a felony ‘crime of violence’ either as an instant offense or as one of the required predicate convictions.” *Id.* at 44.

III. Offenses have to qualify under the criminal history rules:

A. There is a time limit. USSG §4A1.2(e).

B. Remember, you only count one offense if the offenses are resolved at the same time and there is no intervening arrest. USSG §4A1.2(a)(2).

IV. Crime of Violence: “The term ‘crime of violence’ means any offense under federal or state law, punishable for a term exceeding one year, that – (1) Has an element the use, attempted use, or threatened use of physical force against the person of another, or (2) Is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material defined in 18 U.S.C. §841(c).” USSG § 4B1.2(a).

A. Analysis for the elements clause and the enumerated clause same as the ACCA.

V) Controlled Substance Offense: “The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.” USSG § 4B1.2(b)

A. Same test as the ACCA: *United States v. Bates*, __ F.3d __, 2020 WL 2761051 (11th Cir. May 26, 2020).

a. Maybe not the end of the story.

1. Wording of the Guidelines differs from the wording of the ACCA. Guidelines have one section for federal offenses, another for state, suggesting the requirements are different. ACCA also defines serious drug offense as one “involving” manufacture, etc, while the Guidelines speak in terms of an “offense . . . that prohibits” manufacture, etc. Inference is that, contrary to *Shular*, courts must first determine if the offense is a generic one.
2. Even assuming *Shular* also applies to the Guidelines, remember that Florida’s drug offense includes attempted sale or distribution, something not listed in USSG § 4B1.2(b).
 - aa. Commentary, however, states: “Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.” USSG § 4B1.2, comment. (n. 1). So, the argument has to be that the commentary conflicts with the plain language of the guideline and that the guideline is, therefore, controlling. See *Stinson v. United States*, 508 U.S. 36, 38 (1993); *United States v. Hill*, 783 F.3d 842, 844-845 (11th Cir. 2015).