

DEFINING THE STRIKE ZONE—AN ANALYSIS OF THE CLASSIFICATION OF PRIOR CONVICTIONS UNDER THE FEDERAL “THREE-STRIKES AND YOU’RE OUT” SCHEME

*What man was ever content with one crime?*¹

INTRODUCTION

On September 13, 1994, President Clinton fulfilled a promise made during his February 1994 State of the Union address by signing the Violent Crime Control and Law Enforcement Act of 1994 (the “Act”).² A political cornerstone of the Act provides for mandatory life imprisonment for persons convicted of a third violent felony.³ This provision mandates the long-term removal from society of the nation’s most dangerous repeat offenders.⁴ Congress enacted the mandatory life imprisonment scheme (the “three-strikes law” or “three-strikes statute”) against a national backdrop of anti-crime fervor that kindled the

¹ Juvenal, *Satires*, in THE QUOTABLE LAWYER 68 (David Shrager & Elizabeth Frost eds., 1986).

² Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796; William Claiborne, *State Legislators Rethink “3 Strikes” Laws as Costs Begin to Hit Home*, WASH. POST, Aug. 7, 1994, at A18; Ana Puga, *Crime Specialists Fault 3 Strike Rule—They Dismiss Life Terms for Violent Repeat Offenders as Mostly Empty Rhetoric*, BOSTON GLOBE, Jan. 27, 1994, at 14.

³ 18 U.S.C.A. § 3559(c) (West Supp. 1995). The relevant provision provides:

Notwithstanding any other provision of law, a person who is convicted in a court of the United States of a serious violent felony shall be sentenced to life imprisonment if—

(A) the person has been convicted (and those convictions have become final) on separate prior occasions in a court of the United States or of a State of—

(i) 2 or more serious violent felonies; or

(ii) one or more serious violent felonies and one or more serious drug offenses; and

(B) each serious violent felony or serious drug offense used as a basis for sentencing under this subsection, other than the first, was committed after the defendant’s conviction of the preceding serious violent felony or serious drug offense.

Id.

⁴ HOUSE COMM. ON THE JUDICIARY, MANDATORY LIFE IMPRISONMENT FOR PERSONS CONVICTED OF A THIRD FELONY, H.R. REP. NO. 463, 103d Cong., 2d Sess. 3-4 (1994).

consideration of similar provisions by more than sixteen state legislatures.⁵

While the three-strikes law is the latest vogue in the popular anti-crime political rhetoric, recidivist laws existed in the American colonies as early as 1692.⁶ Modern recidivist statutes implement a policy of selective incapacitation, seeking to identify and then remove from society for long periods of incarceration those criminals most likely to become repeat offenders.⁷ Selective incapacitation's general premise is that imprisonment does not rehabilitate this core group of career criminals.⁸ Lengthy prison terms imposed under recidivist statutes serve to remove this selective group from society and prevent them from committing more crime.⁹ Nationally publicized gruesome crimes perpetrated by repeat offenders and general media coverage of violent crime statistics seem to have driven the public opinion polls, placing criminal violence as a top priority among voters.¹⁰ Public concern over

⁵ Stephen Braun & Judy Pasternak, *A Nation with Peril on Its Mind; Crime Has Become the Top Concern of Many People. Much of the Anxiety Is Fueled by a Perception of Violence, Not the Statistics*, L.A. TIMES, Feb. 13, 1994, at A1; Richard Lacayo, *Lock 'Em Up! . . . With Outraged Americans Saying That Crime is Their No. 1 Concern, Politicians are Again Talking Tough. But are They Talking Sense?*, TIME, Feb. 7, 1994, at 50.

⁶ Note, *Selective Incapacitation: Reducing Crime Through Predictions of Recidivism*, 96 HARV. L. REV. 511, 511 n.1 (1982). The Massachusetts Bay Colony enforced enhanced sentences for repeat robbers and burglars as early as 1692. *Id.* The Virginia House of Burgesses in 1705 passed a provision aimed at thwarting the persistent problem of hog stealing by mandating harsher sentences for each subsequent conviction. *Id.* Recidivist is defined as "a habitual criminal; a criminal repeater." BLACK'S LAW DICTIONARY 1269 (6th ed. 1990). Habitual offenders, repeat offenders, recidivists, career criminals and "three-time losers" are all synonymous terms used to describe the class of criminals these laws seek to punish. James E. Hooper, *Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act*, 89 MICH. L. REV. 1951, 1951 n.2 (1991). Today, every state in the nation authorizes increased punishment for repeat offenders. Alex Glashausser, Note, *The Treatment of Foreign Country Convictions as Predicates for Sentence Enhancement Under Recidivist Statutes*, 44 DUKE L.J. 134, 134 (1994).

⁷ Hooper, *supra* note 6, at 1953; Note, *supra* note 6, at 512. The selective incapacitation theory works from the premise that certain individuals are impervious to the rehabilitation efforts of the criminal justice system. Hooper, *supra* note 6, at 1953. Studies show that a core group of unresponsive criminals likely will be responsible for an inordinate proportion of the crimes committed in society. *Id.* at 1951 n.3. The landmark recidivist study, conducted by Wolfgang, Figlio and Sellin, examined the criminal records of 10,000 young males born in Philadelphia in 1945, showing that of the 10,214 crimes committed by the group, 51.9% of the crimes were committed by 627 males of the total group examined (18% of total group). Note, *supra* note 6, at 514 n.20 (citing M. WOLFGANG ET AL., *DELINQUENCY IN A BIRTH COHORT* 88 (1972)).

⁸ Hooper, *supra* note 6, at 1953.

⁹ *Id.* at 1953-54; Note, *supra* note 6, at 512. Although relevant to the general issue of the effectiveness of mandatory life statutes, this Note does not discuss whether past criminal history provides a reliable predictor of recidivism. See Note, *supra* note 6 for a discussion of the ability to predict recidivism.

¹⁰ Braun & Pasternak, *supra* note 5, at A1. Braun and Pasternak noted that although the violent crime rate actually dropped 3% during first six months of 1994, more than 43% of people surveyed in January 1994 placed crime issues at the top of the nation's most important problems.

crime made the three-strikes law, amenable to the sound bite "three-strikes and you're out," especially popular among legislators.¹¹

Political conservatives latched onto the public sentiment and called for an inclusive three-strikes law that would seek to combat the problem of violent crime on a national level.¹² Civil libertarians and others strongly denounced any attempt by the federal government to jump on the three-strikes bandwagon.¹³ The opponents maintained that the deterrent effects of such a law would be minimal compared to the increased costs of providing long-term care to nonviolent geriatric prisoners.¹⁴ Additionally, opponents claimed that the likely disproportionate effect of the law on African-Americans, Latinos and Native-Americans would only worsen the racially imbalanced sentencing procedures of the federal courts.¹⁵

Congress chose a mid-ground approach by meting out harsh punishment only to those offenders whose criminal history included prior convictions classified as "serious drug offenses" or "serious violent felonies."¹⁶ Additionally, Congress sought to appease other concerns by making enforcement voluntary for Native-American tribal govern-

Id. This figure rose from 21% who placed crime as the most important problem in a June 1993 poll. *Id.*; see also Edwin Meese III, *Three Strikes Laws Punish and Protect*, 7 FED. SENTENCING REP. 58, 58 (1994) (murders of teenager Polly Klaas in California, Michael Jordan's father James in North Carolina and others by repeat violent offenders triggered massive reaction among law-abiding citizens).

¹¹ See Braun & Pasternak, *supra* note 5, at A1. The popularity of these provisions garnered support from both ends of the political spectrum. Pierre Thomas, *Violent Strikes a Chord Coast to Coast "3-Time Loser" Laws Find Diverse Support*, WASH. POST, Jan. 24, 1994, at A1 (stating both New York Governor Mario M. Cuomo, a Democrat, and California Governor Pete Wilson, a Republican, supported three-strikes measures). As of March 1995, 15 states had enacted some type of three-strikes sentence enhancement scheme, and nearly every state provides for increased sentences for multiple felony convictions. Robert Heglin, *A Flurry of Recidivist Legislation Means: "Three Strikes and You're Out"*, 20 J. LEGIS. 213, 215-16 (1994); Hooper, *supra* note 6, at 1952.

¹² 140 CONG. REC. H2432-33 (daily ed. Apr. 19, 1994) [hereinafter Packard Statement] (statement by Rep. Packard condemning Democratic version of three-strikes bill as weak). The initial Senate three-strikes provisions, passed in November 1993, are indicative of the wide scope of the three-strikes law envisioned by some advocates. See H.R. 3355, 103d Cong., 1st Sess. §§ 2408, 5111 (1993) (allowing drug convictions to count as all three strikes and including crimes against property as qualifying crimes); Heglin, *supra* note 11, at 229-30.

¹³ H.R. REP. NO. 463, *supra* note 4, at 5-6 (listing opponents testifying at hearings on H.R. 3981); *Crime Prevention and Criminal Justice Reform Act: Hearings on H.R. 3315 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong., 2d Sess. (1994) (statement of Jesse Jackson, President, National Rainbow Coalition), available in Westlaw, USTESTIMONY database, File No. 1994 WL 222636 [hereinafter *Jackson Statement*]; see also Marc Mauer, "Three Strikes and You're Out" Politics, *Crime Control . . . And Baseball?*, CRIM. JUST., Fall 1994, at 30.

¹⁴ See H.R. REP. NO. 463, *supra* note 4, at 5, 6; Puga, *supra* note 2, at 14.

¹⁵ See *Jackson Statement*, *supra* note 13; Puga, *supra* note 2, at 14; see also U.S. SENTENCING COMM., ANALYSIS OF THE VIOLENT CRIME CONTROL AND LAW ENFORCEMENT ACT OF 1993 - H.R. 3355 12 (1994) [hereinafter SENTENCING COMMISSION REPORT]; Mauer, *supra* note 13, at 63.

¹⁶ See H.R. REP. NO. 463, *supra* note 4, at 3-4 ("[The] 'Three-strikes and You're Out,' [bill]

ments, allowing for parole of prisoners over seventy years old and permitting only one of the first two strikes to be a drug offense.¹⁷ Moreover, the Act provided that in limited circumstances defendants could prevent the sentencing court from counting an otherwise qualified prior conviction.¹⁸

The three-strikes law serves as a sentence enhancement provision for those recidivist criminals with qualifying prior criminal histories who stand convicted of a serious violent felony in a federal court.¹⁹ A qualifying criminal history includes either two prior serious violent felony convictions or one prior serious violent felony conviction and one serious drug conviction.²⁰ Prior state and federal convictions may qualify as strikes for purposes of sentence enhancement.²¹ Finally, each serious violent felony or serious drug offense used as a basis for sentence enhancement, other than the first, must have been committed after the preceding strike's conviction date.²²

The three-strikes law provides an extensive definition section that establishes which prior felonies qualify as "serious drug offense" strikes and "serious violent felony" strikes.²³ The law specifically enumerates qualifying "serious drug offenses" as federal convictions of specified sections of the Controlled Substances Act or the Controlled Substances Import and Export Act.²⁴ State drug offenses may also qualify as strikes when, if the offense had been prosecuted in a federal court, it would have been punishable under specified sections of the Controlled Substances Act or the Controlled Substances Import and Export Act.²⁵

is designed to take the nation's most dangerous recidivist criminals off the streets and imprison them for life.").

¹⁷ See 18 U.S.C.A. §§ 3559(c)(1)(a), (c)(6), 3582 (West Supp. 1995).

¹⁸ *Id.* § 3559(c)(3).

¹⁹ *Id.* § 3559(c); H.R. REP. NO. 463, *supra* note 4, at 3-4.

²⁰ 18 U.S.C.A. § 3559(c)(1).

²¹ *Id.* § 3559(c)(1)(A).

²² *Id.* § 3559(c)(1)(B). Stated another way, the date of the first strike's conviction must be before the date of the conduct that results in the second strike's conviction. *Id.* This requirement deals with a problem that has arisen for courts counting convictions under the Armed Career Criminal Act. See Hooper, *supra* note 6, at 1967-68 (noting three different methods employed by courts in counting convictions for sentence enhancement under the ACCA).

²³ *Id.* § 3559(c)(2)(F), (H).

²⁴ *Id.* § 3559(c)(2)(H). The relevant portion of the statute states: "[t]he term 'serious drug offense' means . . . an offense that is punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A))." *Id.*

²⁵ *Id.* The statute sets out in relevant part:

For purposes of this subsection . . . the term "serious drug offense" means . . . an offense under State law that, had the offense been prosecuted in a court of the

The three-strikes sentencing scheme employs a dual-category structure to define prior offenses that count as "serious violent felony" strikes.²⁶ The categories of qualifying prior offenses include both enumerated and nonenumerated crimes.²⁷ Interpreting one of the two existing federal recidivist provisions employing a similar dual-category structure, the United States Supreme Court, in its 1990 *Taylor v. United States* decision, held that sentencing courts analyzing prior convictions under the similarly structured "violent felony" definition of the Armed Career Criminal Act (the "ACCA") must follow a formal categorical approach.²⁸ This approach limits sentencing courts' inquiry to the statutory definition of the prior offense and the fact of conviction.²⁹ It prohibits any inquiry into the particular facts underlying the prior conviction.³⁰ Similarly, courts interpreting the "crime of violence" definition in the Career Offender recidivist provision of the United States Sentencing Guidelines (the "Career Offender provision") also have adopted the formal categorical approach set down in *Taylor*.³¹ The language and definitional structure related to classifying prior convictions for sentence enhancement in the ACCA, Career Offender provision and the three-strikes law are almost identical.³² Thus, courts interpreting the new three-strikes provision will likely adopt the *Taylor* categorical approach as well when attempting to classify prior offenses as enumerated strikes.³³

In contrast to the ACCA and the Career Offender provisions, however, the three-strikes statute provides defendants a limited collateral challenge to the use of otherwise qualifying nonenumerated strikes and prior robbery or arson convictions.³⁴ The statute does not

United States, would have been punishable under section 401(b)(1)(A) or 408 of the Controlled Substances Act (21 U.S.C. 841(b)(1)(A), 848) or section 1010(b)(1)(A) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)(1)(A)).

Id.

²⁶ H.R. REP. NO. 463, *supra* note 4, at 8.

²⁷ *Id.*

²⁸ See *United States v. Taylor*, 495 U.S. 575, 602 (1990).

²⁹ *Id.*

³⁰ *Id.* at 600, 602.

³¹ See, e.g., *United States v. Winter*, 22 F.3d 15, 18 n.3 (1st Cir. 1994) (concluding that *Taylor* methodology was persuasive in interpreting similar Career Offender crime of violence definition); *United States v. McAllister*, 927 F.2d 136, 139 (3d Cir.) (following *Taylor* methodology in Career Offender context), *cert. denied*, 112 S. Ct. 111 (1991).

³² Compare 18 U.S.C. § 924(e) (1988) and UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, § 4B1.1-2 (Nov. 1994) [hereinafter USSG] with 18 U.S.C.A. § 3559(c).

³³ See *infra* notes 136-43 and accompanying text.

³⁴ Compare 18 U.S.C.A. § 3559(c)(3) with 18 U.S.C. § 924(e) and USSG § 4B1.2.

allow a general challenge to the validity of prior convictions.³⁵ Rather, criminals can preclude the use of a prior conviction by proving the absence of three specific factual circumstances from the conduct underlying the prior conviction.³⁶ Absence of these circumstances indicates that the actual conduct surrounding the prior offense did not pose a significant enough threat of harm toward another to merit qualification as a serious violent felony.³⁷ Even though the collateral attack provision seems to be on its face a fair way to ensure that only truly violent prior convictions are used for enhancement, its application could prove problematic.³⁸

The United States Sentencing Commission estimated that between 284 and 689 prisoners will be sentenced each year under a federal three-strikes scheme.³⁹ Significant federal litigation will likely develop over its interpretation and application.⁴⁰ Additionally, as part of the Violent Crime Control and Law Enforcement Act of 1994, federal funding of state prisons and state participation in regional prisons were linked to states establishing laws similar to the federal three-strikes provision.⁴¹ Thus, the possibility exists that state legislatures will model their own three-strikes provisions after that of the federal government, increasing the need for a clear understanding of the federal three-strikes law.

This Note seeks to predict the likely methodology that courts will employ when counting prior convictions under the new three-strikes statute based upon how courts do so under existing federal recidivist schemes.⁴² It then will analyze the collateral attack provision of the three-strikes statute, discussing potential problems with its application.⁴³ Finally, this Note will propose amendments to the collateral

³⁵ See 18 U.S.C.A. § 3559(c)(3).

³⁶ *Id.*

³⁷ See *id.*

³⁸ See *infra* notes 219–44 and accompanying text.

³⁹ SENTENCING COMMISSION REPORT, *supra* note 15, at 18, 19. These numbers were calculated based upon analysis of the two three-strikes provisions proposed by the Senate in the Fall of 1993. *Id.* The enacted three-strikes law differs from these proposed provisions. Thus, it is difficult to determine whether the number of affected criminals will increase or decrease. A March 17, 1995, newspaper article reported that as of that date only seven criminals had been arrested and targeted to receive the mandatory life sentence imposed by the three-strikes laws. Sam Vincent Meddis, *Federal Three-Strikes Law Getting Its First Test In Iowa*, USA TODAY, Mar. 17, 1995, at 12A.

⁴⁰ H.R. REP. NO. 463, *supra* note 4, at 11 (Congressional Budget Office estimate); cf. SENTENCING COMMISSION REPORT, *supra* note 15, at 13.

⁴¹ See Violent Crime Control and Law Enforcement Act of 1994, P.L. 103–332, §§ 20101–02, 108 Stat. 1796, 1815–16.

⁴² See *infra* notes 50–218 and accompanying text.

⁴³ See *infra* notes 219–44 and accompanying text.

attack scheme aimed at providing the same protections without the inherent problems.⁴⁴

Part I describes the operation of the existing federal recidivist statutes.⁴⁵ Part II discusses the development of the categorical approach by the United States Supreme Court.⁴⁶ Part III predicts how courts are likely to interpret the "serious violent felony" definition in the three-strikes law by conducting a survey of circuit court decisions on similar sentencing provisions.⁴⁷ Part IV discusses the general availability and specific operation of a defendant's collateral attack of prior convictions and provides several criticisms, finding the collateral attack scheme a flawed and inefficient system.⁴⁸ Part V provides an alternative to the collateral attack scheme and calls on Congress to address several potential problems that exist in the statute as drafted.⁴⁹

I. EXISTING VIOLENT FELONY RECIDIVIST SENTENCE ENHANCEMENT STATUTES: THE ACCA & CAREER OFFENDER PROVISIONS

Two existing federal recidivist sentencing schemes, the Armed Career Criminal Act and the Career Offender provision of the United States Sentencing Guidelines, are similar in scope and operation by requiring enhanced prison sentences for criminals with prior violent felony convictions.⁵⁰ Both the ACCA and Career Offender provision define "violent felony" using legally analogous language and structure.⁵¹ Moreover, courts uniformly apply the methodology developed

⁴⁴ See *infra* notes 245-73 and accompanying text.

⁴⁵ See *infra* notes 50-72 and accompanying text.

⁴⁶ See *infra* notes 73-135 and accompanying text.

⁴⁷ See *infra* notes 136-218 and accompanying text.

⁴⁸ See *infra* notes 219-44 and accompanying text.

⁴⁹ See *infra* notes 245-73 and accompanying text.

⁵⁰ Compare 18 U.S.C. § 924(e) (Armed Career Criminal Act) with USSG § 4B1.1 (Career Offender provision).

⁵¹ 18 U.S.C. § 924(e); USSG § 4B1.2(1). The Armed Career Criminal Act is codified at 18 U.S.C. § 924(e) and sets out in relevant part:

[T]he 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.

18 U.S.C. § 924(e)(2)(B). The Career Offender provision defines crime of violence as:

[A]ny offense under federal or state law punishable by imprisonment for a term exceeding one year that—

in the interpretation of the ACCA when analyzing prior offenses under the Career Offender provision.⁵²

A. Types of Qualifying Violent Felonies Under the ACCA

Congress designed the ACCA to increase federal law enforcement system participation in the effort to curb the illegal acts of armed, habitual criminals.⁵³ The ACCA imposes an enhanced prison sentence for recidivist criminals convicted in a federal court for the unlawful possession of a firearm.⁵⁴ The law mandates a mandatory prison sentence of fifteen years without parole for such criminals with at least three prior convictions for violent felonies or serious drug offenses.⁵⁵

The ACCA defines qualifying violent felonies through a dual-category structure.⁵⁶ Enumerated crimes—burglary, arson and extortion, for example—comprise the first category of prior offenses that qualify as violent felonies.⁵⁷ “Nonenumerated crimes” make up the second

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

USSG § 4B1.2.

⁵² *United States v. Winter*, 22 F.3d 15, 18 n.3 (1st Cir. 1994) (authority interpreting ACCA is persuasive in interpreting the Career Offender provision); *United States v. Fiore*, 983 F.2d 1, 3 (1st Cir. 1992) (when classifying prior convictions in Career Offender context, *Taylor* “is the beacon by which we must steer”), *cert. denied*, 113 S. Ct. 1830 (1993); *United States v. McAllister*, 927 F.2d 136, 139 (3d Cir.) (applying *Taylor* in Career Offender analysis), *cert. denied*, 112 S. Ct. 111 (1991).

⁵³ H.R. REP. NO. 1073, 98th Cong., 2nd Sess. 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3661.

⁵⁴ 18 U.S.C. § 924(e). The relevant portion is set out below:

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 not more than \$25,000 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).

Id. Section 922(g) criminalizes possession of a firearm by any person convicted of a crime punishable by imprisonment for more than one year. 18 U.S.C. § 922(g)(1) (Supp. V 1993).

⁵⁵ 18 U.S.C. § 924(e). The ACCA really could be characterized as a “four-strikes and you’re out” enhancement scheme. *See id.* The principal sponsors of the ACCA intended the law to be used by local prosecutors as a leveraging tool when dealing with repeat offenders. Hooper, *supra* note 6, at 1959–60. The basic premise was that repeat offenders would rather plead guilty to state charges than face federal prosecution for unlawful firearm possession under the ACCA, which mandated a 15-year minimum mandatory prison term. *Id.* at 1960.

⁵⁶ *See* 18 U.S.C. § 924(e)(B). *See infra* note 137 for the full text of the definition section.

⁵⁷ 18 U.S.C. § 924(e)(2)(B). Prior convictions that have the same elements as the enumerated

category of qualifying prior convictions.⁵⁸ Two sub-categories of nonenumerated crimes qualify as violent felonies.⁵⁹ Nonenumerated-elemental crimes require as an element of proof the use, attempted use, or threatened use of physical force against the person of another and qualify as violent felonies.⁶⁰ Finally, nonenumerated-inherent crimes, which by their nature involve conduct that inherently poses a substantial risk of physical injury to another, also qualify as violent felonies under the ACCA.⁶¹

B. *The Career Offender Provisions of the United States Sentencing Guidelines*

The United States Sentencing Guidelines (the "Guidelines") control the sentencing phase of more than ninety percent of all federal felony and misdemeanor criminal convictions.⁶² The Guidelines use a simple-looking numerical grid system with entry points based on a defendant's "criminal history" on one axis and "offense levels" on the other.⁶³ The defendant's offense level is based upon the statutory conviction.⁶⁴ The Guidelines assign each federal criminal offense a

crimes, burglary, arson or extortions, qualify automatically as violent felonies. See *Taylor*, 495 U.S. at 599; *United States v. Cunningham*, 911 F.2d 361, 363 (9th Cir. 1990) (Oregon burglary conviction with elements virtually identical to those of generic burglary is "violent felony"), *cert. denied*, 498 U.S. 1103 (1991).

⁵⁸ See 18 U.S.C. § 924(e)(2)(B). This Note uses terms "enumerated" and "nonenumerated," which come from the House Report describing the federal three-strikes provision, to provide a structure for the ACCA. See H.R. REP. NO. 463, *supra* note 4, at 8. The Note adds the "elemental" and "inherent" suffixes to nonenumerated for ease of use when referring to the two sub-categories of nonenumerated crimes.

⁵⁹ See 18 U.S.C. § 924(e)(2)(B).

⁶⁰ 18 U.S.C. § 924(e)(2)(B)(i); see also *United States v. Cook*, 26 F.3d 507, 509 (4th Cir.) (holding obstruction of justice required element of threatened harm toward another to count for sentence enhancement), *cert. denied*, 115 S. Ct. 373 (1994); *United States v. Lujan*, 9 F.3d 890, 891-92 (10th Cir. 1993) (prior convictions for manslaughter and robbery clearly had element of force toward another); *United States v. Preston*, 910 F.2d 81, 86, 87 (3d Cir. 1990) (conspiracy to commit robbery qualifies because of element of attempted use of physical force toward another), *cert. denied*, 498 U.S. 1103 (1991).

⁶¹ See *United States v. O'Brien*, 972 F.2d 47, 53 (3d Cir. 1992) (breaking and entering qualifies as ACCA violent felony due to possibility of violent confrontation), *cert. denied*, 114 S. Ct. 210 (1993).

⁶² USSG Ch. I, Pt. A(5).

⁶³ Elizabeth T. Lear, *Double Jeopardy, The Federal Sentencing Guidelines, and the Subsequent Prosecution Dilemma*, 60 BROOK. L. REV. 725, 729 (1994). This very basic introduction in no way does justice to the complex, even labyrinthine, computations necessary to determine a defendant's sentencing range. See PRACTICE UNDER THE FEDERAL SENTENCING GUIDELINES (Phyllis Skloot Bomberger & David J. Gottlieb eds., 3d ed. 1993 & Supp. 1994) for a detailed discussion of the issue.

⁶⁴ Lear, *supra* note 63, at 731.

"base offense level" and then adjust the "base offense level" either up or down for other factors, such as the defendant's role in the offense or acceptance of responsibility.⁶⁵ Courts calculate the defendant's criminal history by analyzing the number, type and date of the criminal's prior convictions.⁶⁶ These two numbers are then plotted on the grid to determine the appropriate sentencing range in months.⁶⁷

The Career Offender provision establishes the methodology used to calculate the criminal history score for those defendants with at least two previous convictions for crimes of violence and/or drug trafficking offenses.⁶⁸ The Career Offender provision mandates a prison sentence range at or near the statutory maximum for the current offense when a qualified defendant stands convicted in a federal court of a crime of violence or a controlled substance offense.⁶⁹ The language and structure of the Career Offender's crime of violence definition mimics that of the ACCA almost to the word.⁷⁰ Thus, similar to the ACCA's violent felony definition, the crime of violence definition has two categories—enumerated and nonenumerated crimes.⁷¹ Although some differences do exist, the crime of violence and violent felony definitions operate in basically the same fashion.⁷²

II. THE CATEGORICAL APPROACH TO CLASSIFICATION OF PRIOR CONVICTIONS: *TAYLOR V. UNITED STATES*

A principle issue in the qualification of prior offenses is the manner and the extent of judicial inquiry into the prior convictions.⁷³ The overwhelming majority of felony prosecutions take place at the state level.⁷⁴ States do not use a uniform criminal offense classification system.⁷⁵ The labels that state criminal statutes attach to offenses, such

⁶⁵ See *id.*

⁶⁶ See Hooper, *supra* note 6, at 1955 n.15.

⁶⁷ *Id.*

⁶⁸ USSG § 4B1.1. See *infra* note 137 for the full definition of the crime of violence. The Career Offender provision defines controlled substance offense as any violation under state or federal law for drug trafficking. USSG § 4B1.2(2).

⁶⁹ SENTENCING COMMISSION REPORT, *supra* note 15, at 5.

⁷⁰ See *infra* note 137 for the relevant text of both statutory sections. See also UNITED STATES SENTENCING COMM., MOST FREQUENTLY ASKED QUESTIONS ABOUT THE SENTENCING GUIDELINES, Quest. No. 95 (7th ed. 1994) [hereinafter M.F.A.Q.].

⁷¹ See USSG § 4B1.2(1); see also *supra* notes 56–61 and accompanying text.

⁷² See M.F.A.Q., *supra* note 71, at Quest. No. 93.

⁷³ See *United States v. Taylor*, 495 U.S. 575, 600 (1990).

⁷⁴ See Packard Statement, *supra* note 12, at H2403 (stating that 95% of violent crimes fall under state or local laws).

⁷⁵ *Taylor*, 495 U.S. at 580.

as second-degree burglary or conspiracy to commit burglary, do not provide insight into whether the offense qualifies a violent felony under the ACCA or Career Offender provision.⁷⁶ Federal courts using prior state convictions for sentence enhancement purposes need to look beyond the state's label on the offense to determine whether it qualifies as a violent felony.⁷⁷ Thus, sentencing courts attempting to qualify a prior conviction must either look into the conduct underlying the offense or limit their inquiry to the offense's statutory definition.⁷⁸

A. A Categorical Approach: *Taylor v. United States*

In 1990, in *Taylor v. United States*, the United States Supreme Court unanimously held that sentencing courts must employ a formal categorical approach when classifying prior convictions as violent felonies for sentence enhancement purposes under the ACCA.⁷⁹ The Court stated that this approach limited the scope of a sentencing court's inquiry to the fact of conviction and the statutory definition of the prior crime.⁸⁰ The defendant in *Taylor* contested the use of two second-degree burglary convictions from Missouri for sentence enhancement under the ACCA.⁸¹ He claimed that neither offense actually involved conduct likely to pose a substantial threat of harm to another.⁸² Defendant Taylor reasoned, therefore, that the sentencing court could not count the offenses as "burglaries" for sentence enhancement purposes under the ACCA.⁸³ The Court rejected Taylor's contention and held that sentencing courts were not to consider the conduct underlying

⁷⁶ See *id.* at 590; *United States v. Fiore*, 983 F.2d 1, 3 (1st Cir 1992), *cert. denied*, 113 S. Ct. 1830 (1993).

⁷⁷ *Taylor*, 495 U.S. at 592. This Note focuses on the problems associated with using state convictions for federal sentence enhancement. Presumably the same problems hold true when using prior federal convictions for sentence enhancement purposes, but there the definitions and elements of proof are more easily determined by a federal sentencing court.

⁷⁸ *Id.*

⁷⁹ *Id.* at 602. Although Justice Scalia joined with the Court's holding, he did not join section II of the Court's opinion, in which the majority conducted a detailed analysis of the legislative history of the ACCA. *Id.* at 603 (Scalia, J., dissenting). Rather, Justice Scalia penned a concurring opinion to this part, stating that he saw no reason for such a detailed analysis of the legislative history after the Court decided Congress mandated a modern generic definition for burglary. *Id.*

⁸⁰ *Id.* at 602.

⁸¹ *Id.* at 579.

⁸² *Taylor*, 474 U.S. at 579.

⁸³ *Id.* The Court reasoned that Taylor sought to remove his burglary convictions from the reach of the statute by wrongly suggesting that, by placing the "otherwise" phrase after "burglary," Congress intended to include only an especially dangerous subclass of qualifying burglaries. *Id.* at 596-98. The Court reasoned that neither legislative history nor the plain language of the statute supported such a limited definition. *Id.* at 596-97.

previous convictions, but rather were to focus their inquiry on the statutory elements of the prior offenses, and in a narrow range of cases could look to the charging papers and jury instructions.⁸⁴

In *Taylor*, defendant Arthur Taylor pled guilty to unlawful possession of a firearm by a felon in violation of a federal statute.⁸⁵ Taylor had four prior convictions: robbery, assault, and two second-degree burglary convictions from Missouri.⁸⁶ Based on this, the government sought a fifteen-year minimum mandatory prison term under the sentence enhancement provision of the ACCA.⁸⁷ Although Taylor conceded that his prior robbery and assault convictions qualified as violent felonies, he contested the classification of his Missouri second-degree burglary convictions as such.⁸⁸ Taylor contended that neither burglary actually involved conduct likely to pose a substantial risk of physical harm to another, and thus they should not count for sentence enhancement purposes under the ACCA.⁸⁹ The district court disagreed and imposed the fifteen-year minimum mandatory sentence.⁹⁰

The United States Court of Appeals for the Eighth Circuit affirmed the district court's sentence.⁹¹ The court reasoned that burglary as used within the ACCA's definition of "violent felony" meant any offense labeled burglary by a state's criminal laws.⁹² The Eighth Circuit held, therefore, that the district court did not err in finding that Taylor's two Missouri second-degree burglary convictions qualified as violent felonies for sentence enhancement purposes.⁹³ Taylor appealed to the Supreme Court.⁹⁴

The Supreme Court upheld the Eighth Circuit's affirmation but disagreed with its reasoning, holding that sentencing courts should

⁸⁴ *Id.* at 602.

⁸⁵ *Id.* at 578. Taylor pled guilty to a violation of 18 U.S.C. § 922(g), which criminalizes the possession of a firearm by an individual with a prior state or federal felony conviction. *Id.* Taylor's guilty plea was conditioned upon his retention of the right to challenge the classification of the two Missouri burglary convictions as qualifying "violent felonies." *Id.* at 579.

⁸⁶ *Taylor*, 495 U.S. at 578.

⁸⁷ *Id.* at 579.

⁸⁸ *Id.*

⁸⁹ *Id.* During the time of Taylor's burglary convictions, Missouri had seven different statutes under which an individual could be charged with second degree burglary. *Id.* at 578 n.1. Each of the seven statutes criminalized unlawful entry into a structure, but differed as to the type of structure and the method of entry. *Id.*

⁹⁰ *Taylor*, 495 U.S. at 579.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.* The Court stated that it granted certiorari to resolve a conflict among the courts of appeals concerning the definition of burglary within the ACCA. *Id.*

conduct a categorical inquiry into the statutory definition of a prior offense to determine if it qualifies as a violent felony.⁹⁵ Initially, the Supreme Court determined the meaning of the term burglary as used within the ACCA.⁹⁶ The Court investigated the legislative history of the ACCA and concluded that Congress intended the term burglary to have a uniform, modern definition, independent of the labels used by various state criminal codes.⁹⁷ The Court determined that a prior felony conviction qualifies as a generic burglary, and thus an enumerated violent felony under the ACCA, where that prior offense contains three elements: (1) unlawful or unprivileged entry into, or remaining in, (2) a building or structure, (3) with intent to commit a crime.⁹⁸ Thus, if the criminal's past conviction involved an offense that contained the three elements set out above, regardless of its label, the offense qualified as a violent felony for sentence enhancement purposes.⁹⁹

The Court then examined the situation of variance between the statutory definition of the prior offense and the generic definition of burglary.¹⁰⁰ The Court opined that in some circumstances the prior offense would arise under a state's statutory definition that provided a more stringent definition of burglary than the generic definition Congress intended.¹⁰¹ The Court stated that these situations posed no problem of qualifying the prior conviction for use in sentence enhancement, because simple proof of conviction indicated that the prior fact finder found all of the necessary generic elements to reach the guilty verdict.¹⁰² The Court also noted that where the state statute contained only minor changes in terminology, the prior offense still would qualify if the state statute corresponded in substance to the generic definition.¹⁰³

Next, the Court addressed the situation of significant difference between the statutory definition of a prior offense and the generic definition of the enumerated violent felony.¹⁰⁴ In dealing with this

⁹⁵ *Taylor*, 495 U.S. at 590, 602.

⁹⁶ *Id.* at 590.

⁹⁷ *Id.* at 581-91, 592, 598.

⁹⁸ *Id.* at 599.

⁹⁹ *Id.*

¹⁰⁰ *Taylor*, 495 U.S. at 599.

¹⁰¹ *Id.* The Court gave the example of a burglary statute that requires a showing of intent to engage in conduct that poses a serious risk of harm to another, in addition to the three generic elements mentioned previously. *See id.*

¹⁰² *Id.* at 599.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 599-600. The Court provided two examples. *Id.* at 599. In the first example, one of

circumstance, the Court chose to address the more general question of whether a sentencing court could consider the conduct underlying a prior conviction, a factual approach, or must limit itself to look only to the statutory definition of a prior offense, a formal categorical approach.¹⁰⁵ The Court noted that the courts of appeals uniformly interpreted the ACCA as mandating a formal categorical approach and found their reasoning persuasive.¹⁰⁶ The Court considered the plain language of the statute, the lack of legislative history regarding the elaborate fact-finding process it deemed necessary for a factual approach, and the practical effects of instituting a factual approach to analyzing prior convictions.¹⁰⁷ The Court reasoned these three factors supported the contention that Congress intended a categorical approach.¹⁰⁸

The Supreme Court discussed several specific practical problems that could arise from applying the factual approach.¹⁰⁹ The Court termed the practical administrative difficulties and potential unfairness in carrying out a factual approach "daunting."¹¹⁰ Such an approach requires a detailed analysis of the entire course of conduct surrounding a prior criminal offense, including both charged and non-charged wrongdoing, which in some cases will require a mini-trial of the previous circumstances.¹¹¹

The Court stated that when the government asserted that the defendant's actual conduct fit the generic definition of burglary, the court would have to make a finding as to the nature of the conduct

the requirements of the generic burglary definition was eliminated, such as requiring the breaking to be unlawful. *Id.* In the second example, the prior conviction's statutory definition covered a wider range of illegal conduct than that of the generic definition, such as criminalizing breaking and entering an automobile, boat or railroad car. *Id.*

¹⁰⁵ *Taylor*, 495 U.S. at 600.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 600-02.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 601-02.

¹¹⁰ *Taylor*, 495 U.S. at 601.

¹¹¹ *See id.* at 600. In this Note the term "charged conduct" refers to those actions by the defendant, included in the indictment or information, that directly led to the prior conviction. "Uncharged conduct" refers to all actions by the defendant while committing the crime that are not specifically charged in the indictment. For instance, assume that the defendant was previously convicted for criminal trespass. The elements of the crime include the unlawful entry or unlawful remaining within a commercial building. Assume further that the state burglary statute includes the elements of trespass but also requires an intent to commit a crime. The defendant's indictment charged him with criminal trespass. The police report from the incident indicates that the defendant was carrying a pry bar and attempting to open a cash register, but the government decided not to prosecute the defendant based on his attempt to open the cash register. In this example, the defendant's illegal entry into a commercial building comprises the charged conduct

itself.¹¹² The Court reasoned that this would require sentencing courts to make factual findings neither completed nor required at the original trial.¹¹³ Additionally, the Court noted that the prosecution's proof at trial could constitute the only evidence capable of proving that the defendant's conduct fulfilled the generic elements.¹¹⁴

The Court then questioned whether sentencing courts should limit the government to presenting trial transcripts or should allow witness testimony as to the underlying conduct of the prior offense.¹¹⁵ Similarly, the Court questioned whether the defendant would then be allowed to counter with additional witnesses, arguing that the alleged underlying conduct either did not happen or did not conform to the elements of the generic enumerated crime definition.¹¹⁶ In essence, the Court concluded that conducting a factual approach would require what amounted to a new trial of the conduct surrounding the prior conviction and implied that this would be a waste of judicial resources.¹¹⁷

Moreover, the Court suggested that a circumstance could arise in which such a post factum inquiry could be constitutionally unsound.¹¹⁸ The Court hypothesized that a sentencing court could conclude that the defendant's prior conduct constituted a violation of the enumerated crime of burglary, although the jury in the prior offense did not have to reach that same conclusion.¹¹⁹ The Court questioned whether a defendant could challenge this later finding as abridging his or her

because it was the conduct used to obtain the conviction. The attempt to open the cash register with the pry bar is the uncharged conduct because it was not required information for the trespass conviction.

¹¹² *Id.* at 601.

¹¹³ *Id.* As an example, assume that the prior conviction was for criminal trespass and required the fact finder only to determine that the defendant unlawfully entered a structure. Thus, intent to commit a crime was not an essential element of proof for the simple trespass conviction. When later attempting to use the prior conviction for sentence enhancement, however, the government could present evidence that the prosecutor's theory of the case included an intent to commit crime. A sentencing court could make a finding that the defendant intended to commit a crime.

¹¹⁴ *Id.* This could occur when the defendant did not put on a case during the prior proceeding, but instead relied upon a belief that the prosecution had failed to meet its burden of proof.

¹¹⁵ *Taylor*, 495 U.S. at 601.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* For example, assume that the defendant's prior conviction arose under a state statutory definition that did not require intent to commit a crime. Using the example from *supra* note 113, assume the defendant was convicted of trespass, which required a jury only to find unlawful entry into a building. Under the factual approach, the government could then theoretically prove that the defendant did indeed have intent to commit a crime, by introducing evidence showing that the defendant was trying to open a cash register with a pry bar. If the prosecutor proved

right to a jury trial.¹²⁰ Furthermore, the Court stated that when a defendant plea bargains and pleads guilty to a crime less serious than the offense originally charged, often no record of the underlying facts is generated.¹²¹ The Court opined that even if the government could prove the necessary facts in a plea bargained case, using the conviction for sentence enhancement seemed unfair where the defendant pled guilty to a lesser, non-burglary crime.¹²²

The Court held, therefore, that the ACCA requires sentencing courts to utilize a formal categorical approach, rejecting consideration of any underlying conduct.¹²³ The Court reasoned that the categorical approach may allow sentencing courts to look beyond mere statutory definitions, however, when they cannot determine which factual elements comprised the prior offense.¹²⁴ The Court posited that sentencing courts conducting extended categorical analyses could consider the charging papers and jury instructions to determine whether the jury was actually required to find all of the requisite elements for a qualifying violent felony.¹²⁵

In applying its holding to the facts of the case, the Court found that the second-degree burglary statutes in effect in Missouri at the

criminal intent in the prior offense by a preponderance of the evidence, the judge could make a finding that such intent was present. *See Lear, supra* note 63, at 733 ("Sentencing facts need only be proven by a preponderance of the evidence."). The government thus can transform the defendant's prior trespass conviction into a generic burglary conviction for purposes of sentence enhancement.

¹²⁰ *Taylor*, 495 U.S. at 601.

¹²¹ *Id.* Using the example from *supra* note 119, assume that the original indictment was for generic burglary—unlawful entry of a building with intent to commit a crime. Further assume that the defendant pled guilty to the lesser charge of trespass—unlawful entry of a building. No record related to the defendant's intent to commit a crime was likely to have been generated.

¹²² *Id.* at 601–02. Building on the example from *supra* note 121, this would mean using the facts of the underlying prior convictions to use the defendant's trespass conviction as a qualifying enumerated burglary conviction.

¹²³ *Id.* at 602.

¹²⁴ *Id.* Ambiguity arises in two circumstances. *Id.* at 599. In some cases the statute under which the defendant was convicted contains alternative elements for conviction. *Id.* Thus, a jury could convict based on finding either elements A, B and C or elements A, B, and D. *See id.* In other cases, the defendant's conviction record will not indicate which specific statute the conviction arose under, but rather will state a generic title that refers to several similar statutes or subsections. *See id.*

¹²⁵ *Taylor*, 495 U.S. at 602. Thus, if the statutory definition of a crime as enumerated by the ACCA required A, B and C, and the statutory definition of the prior offense required A, B and C or D, then a simple statutory comparison would not reveal whether the jury had to find all of the requisite elements—the jury could have convicted based on finding A, B and D. *See id.* Looking at the charging papers and jury instructions from the prior conviction may be helpful in determining whether the prior conviction was based on a finding of A, B and C, which would then qualify, or based on a finding of A, B and D, which would not qualify. *See id.*

time of Taylor's conviction varied from the generic burglary definition implied by the ACCA.¹²⁶ The Court stated that Taylor could have been convicted under any of seven burglary statutes, which covered the illegal breaking and entering of various places including tents and boats.¹²⁷ The Court stated that the appellate record did not indicate under which specific second-degree burglary statute Taylor's conviction resulted.¹²⁸ The Court reasoned, therefore, that the jury could have convicted Taylor without finding that he entered a structure as required by the generic definition.¹²⁹ Thus, a simple categorical analysis could not reveal whether a jury found Taylor had entered a structure.¹³⁰ The Court, therefore, remanded the case for further proceedings, directing the lower court to conduct a modified categorical inquiry consistent with its holding.¹³¹

In summary, the *Taylor* court held that sentencing courts classifying prior convictions as qualifying violent felonies normally must limit the scope of their inquiry to the fact of conviction and the statutory definition of the prior offense.¹³² The Court also noted that in certain circumstances, however, sentencing courts may apply a modified categorical approach.¹³³ Courts may look beyond the mere fact of conviction and the statutory definition when necessary to prove that the defendant's conviction actually falls within the ACCA's violent felony definition.¹³⁴ Applying the modified categorical approach, a sentencing court may look to the charging papers and jury instructions to determine the elements of the defendant's prior offense, but still may not consider the facts underlying the prior conviction.¹³⁵

III. CLASSIFICATION OF PRIOR FELONY CONVICTIONS UNDER THE "THREE-STRIKES" PROVISION BY COMPARISON TO THE DEVELOPMENT OF THE *TAYLOR* CATEGORICAL APPROACH

The three-strikes sentencing scheme employs a dual-category structure to define prior offenses that count as "serious violent felony"

¹²⁶ *Id.*

¹²⁷ *Id.* at 599-600.

¹²⁸ *Id.* at 602.

¹²⁹ *See id.*

¹³⁰ *Taylor*, 495 U.S. at 602.

¹³¹ *Id.* See *infra* notes 178-82 and accompanying text for a discussion of the decision on remand.

¹³² *Taylor*, 495 U.S. at 602.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

strikes.¹³⁶ The structure and language used by the three-strikes provision bear a significant resemblance to both the ACCA's "violent felony" and the Career Offender provision's "crime of violence" definitions.¹³⁷ Structurally, all three recidivist statutes provide for the qualification of both enumerated and non-enumerated prior violent felonies.¹³⁸ Al-

¹³⁶ H.R. REP. NO. 463, *supra* note 4, at 8.

¹³⁷ Compare 18 U.S.C.A. § 3559(c)(2)(F) with 18 U.S.C. § 924(e)(2)(B) and USSC § 4B1.2(1). 18 U.S.C.A. § 3559(c)(2)(F) is set out below:

[T]he term "serious violent felony" means a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; or attempt, conspiracy, or solicitation to commit any of the above offenses; and any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.

18 U.S.C.A. § 3559(c)(2)(F). The ACCA's violent felony definition is set out below:

[T]he 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 has as an element the use, attempted use, or threatened use of physical force against the person of another; or is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The Career Offender's crime of violence definition is set out below:

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

USSC § 4B1.2(1). Additionally, an interpretive note to the Career Offender provision from the U.S. Sentencing Commission states:

"Crime of violence" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included where (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. Under this section, the conduct of which the defendant was convicted is the focus of inquiry.

USSC § 4B1.2, comment (n.2).

¹³⁸ Compare 18 U.S.C.A. § 3559(c)(2)(F) with 18 U.S.C. § 924(e)(2)(B) and USSC § 4B1.2(1). See *supra* note 137 for the text of all three statutes.

though the three-strikes law lists qualifying enumerated violent felonies with more detail than the ACCA and Career Offender provision, all three statutes use almost identical language to define qualifying non-enumerated crimes.¹³⁹

In all likelihood, Congress drafted the three-strikes serious violent felony definition with full cognizance of how courts had previously interpreted the similarly worded and structured ACCA violent felony definition.¹⁴⁰ When Congress enacted the three-strikes law, it knew that courts had interpreted the Career Offender provision's crime of violence definition based on case law analyzing the ACCA's similar violent felony definition because the two definitions were similarly structured and worded.¹⁴¹ Thus, by drafting the three-strikes serious violent felony definition using wording and structure essentially identical to that of the ACCA violent felony definition, Congress intended courts to interpret the three-strikes law serious violent felony definition employing the case law and analysis from the ACCA's violent felony context.¹⁴²

¹³⁹ See *supra* note 137 for full text of all three statutory definitions.

¹⁴⁰ Cf. *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028, 1036 (1992). In *Franklin*, a Title IX private right of action case, the United States Supreme Court assumed that Congress was aware that existing federal court decisions had interpreted a certain statute to mean "x". See *id.* Congress did not alter the statute when amending certain sub-sections subsequent to these decisions. *Id.* The Court, using traditional methods of statutory analysis, thus concluded that Congress intended that courts continue to interpret the law to mean "x". See *id.*

¹⁴¹ See, e.g., *United States v. Winter*, 22 F.3d 15, 18 n.3 (1st Cir. 1994) (concluding that *Taylor* methodology was persuasive in interpreting similar Career Offender crime of violence definition); *United States v. McAllister*, 927 F.2d 136, 139 (3d Cir.) (following *Taylor* methodology in Career Offender context), *cert. denied*, 112 S. Ct. 111 (1991). Traditional methods of statutory analysis provide that when Congress enacts a clause using language similar to an existing provision that courts have interpreted one way, Congress intends the new clause to be interpreted the same as the old clause. Cf. *Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1194 (1st Cir. 1994). In *Cambridgeport*, the United States Court of Appeals for the First Circuit implied congressional intent favoring an interpretation of an Occupational Safety and Health Act ("OSHA") provision based upon how courts had interpreted a similarly worded Labor-Management Reporting and Disclosure Act ("LMRA") provision. The court reasoned that Congress knew how courts interpreted LMRA when it enacted OSHA, and thus courts should interpret the similar language in OSHA as it had been interpreted in LMRA. *Id.*

¹⁴² Cf. *Franklin*, 112 S. Ct. at 1036; *Cambridgeport*, 26 F.3d at 1194. Additionally, the legislative history of the language finally enacted by Congress supports the conclusion that Congress intended the three-strikes law to be interpreted in the same manner as the ACCA. See SENTENCING COMMISSION REPORT, *supra* note 15, at 12-13. The initial Senate proposal, passed in the fall of 1993, contained two separate three-strikes laws, each of which defined qualifying violent felonies differently. H.R. 3355, 103d Cong., 1st Sess. §§ 2408, 5111 (1993). The United States Sentencing Commission criticized the Senate versions for not using the violent felony definition found in the ACCA, stating that the ACCA's definition was well established in the case law and thus precluded further litigation over its meaning. SENTENCING COMMISSION REPORT, *supra* note 15, at 13. From the language of the three-strikes provision eventually enacted into law, it appears that Congress followed the Sentencing Commission's recommendations and changed the language of the three-strikes law to take advantage of the existing ACCA and Career Offender case law.

Thus, courts are likely to utilize the *Taylor* Court's formal categorical approach when classifying prior convictions as serious violent felonies for sentence enhancement purposes.¹⁴³

The three-strikes law reduces the qualifying crimes to two categories—enumerated and nonenumerated crimes.¹⁴⁴ The first category, enumerated serious violent felonies, contains specific offenses whose elements are either set out within the law or explicitly established by reference to existing federal criminal statutes.¹⁴⁵ The second category of qualifying prior offenses, nonenumerated serious violent felonies, contains those crimes punishable by at least ten years of imprisonment that fit into either of two sub-categories—nonenumerated-elemental and nonenumerated-inherent.¹⁴⁶ To qualify as a nonenumerated-elemental violent felony, a prior offense must have included an element of actual, attempted or threatened physical violence against another.¹⁴⁷ Prior convictions qualify as nonenumerated-inherent violent felonies when the prohibited conduct inherently poses a substantial risk of physical force against another.¹⁴⁸

A government prosecutor seeking sentence enhancement under the three-strikes law must file an information prior to trial stating which convictions he or she intends to use for sentence enhancement purposes.¹⁴⁹ No such notification process exists in either the ACCA or

See *supra* note 137 for a comparison of the texts of the ACCA, Career Offender and three-strikes laws.

¹⁴³ See *supra* notes 136–42 and accompanying text.

¹⁴⁴ H.R. REP. NO. 463, *supra* note 4, at 8.

¹⁴⁵ 18 U.S.C.A. § 3559(c)(2)(F)(i). The relevant portion is set out below:

[T]he term "serious violent felony" means a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; or attempt, conspiracy, or solicitation to commit any of the above offenses.

Id.

¹⁴⁶ See 18 U.S.C.A. § 3559(c)(2)(F)(ii).

¹⁴⁷ See *id.* The relevant portion provides that "any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another . . ." *Id.*

¹⁴⁸ See *id.* The relevant portion provides that "any other offense punishable by a maximum term of imprisonment of 10 years or more that . . . by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense." *Id.*

¹⁴⁹ 18 U.S.C.A. § 3559(c)(4). The law states that "[t]he provisions of section 411(a) of the

the Career Offender provision.¹⁵⁰ The three-strikes law directs that the information conform to rules laid out in sub-section 851(a) of the Controlled Substances Act.¹⁵¹ After the government proves the factual existence of the prior convictions listed in the information, the sentencing court likely will determine their qualification as a matter of law.¹⁵²

A. *Enumerated Serious Violent Felonies*

Sentencing courts will use a multi-part analysis when classifying prior offenses as enumerated serious violent felonies.¹⁵³ First, the prosecution must provide proof of conviction for each offense the government desires the court to consider as an enumerated serious violent felony.¹⁵⁴ Then, the sentencing court must compare the statutory definition of the prior offense to the definition of the enumerated serious violent felony.¹⁵⁵

The sentencing court's primary concern is ensuring that each element of the three-strikes law enumerated serious violent felony was a required finding in the prior conviction.¹⁵⁶ Substantial correspon-

Controlled Substances Act (21 U.S.C. § 851(a)) shall apply to the imposition of sentence under this subsection." *Id.* See *infra* note 151 for the relevant text of 21 U.S.C. § 851(a).

¹⁵⁰ See 18 U.S.C. § 924(e); USSG § 4B1.1-2.

¹⁵¹ 18 U.S.C.A. § 3559(c)(4). The relevant sub-section of the Controlled Substances Act sets out:

No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

21 U.S.C. § 851(a)(1) (1988).

¹⁵² *Cf.* *United States v. Winter*, 22 F.3d 15, 18 (1st Cir. 1994) (Career Offender case in which court held that qualification of prior offense was purely a legal question); *United States v. Davis*, 16 F.3d 212, 214 (7th Cir.) (ACCA case in which court held that classification of prior conviction was issue of law), *cert. denied*, 115 S. Ct. 354 (1994).

¹⁵³ See *United States v. Taylor*, 495 U.S. 575, 602 (1990); *United States v. O'Neal*, 937 F.2d 1369, 1373 (9th Cir. 1990).

¹⁵⁴ See *O'Neal*, 937 F.2d at 1371 n.2 (defendant had five prior state convictions that government sought to use for enhancement).

¹⁵⁵ See *Taylor*, 495 U.S. at 602; *United States v. Taylor*, 932 F.2d 703, 707-08 (8th Cir.) [hereinafter *Taylor II*] (affirming decision on remand from 495 U.S. 575), *cert. denied*, 502 U.S. 882 (1991).

¹⁵⁶ See *Taylor*, 495 U.S. at 599; *United States v. Lujan*, 9 F.3d 890, 892 (10th Cir. 1993).

dence between the elements of the prior offense with those of the enumerated serious violent felony fulfills this burden.¹⁵⁷ Additionally, a more stringent statutory definition, requiring the enumerated crime's elements plus others, assures a sentencing court that all of the requisite elements were found.¹⁵⁸

The three-strikes law lists fourteen specific crimes, ranging from arson to murder, that qualify as serious violent felony strikes.¹⁵⁹ The statute establishes the required elements of proof for each of the enumerated crimes either by referring to an existing federal criminal statute or by expressly defining the required elements of proof.¹⁶⁰ The three-strikes law's list of enumerated serious violent felonies differs from the ACCA and Career Offender provision's both by including more crimes, and more significantly, by expressly setting out the required elements of each enumerated offense.¹⁶¹ In doing so, Congress has made it more likely that courts will attempt to classify prior offenses as enumerated serious violent felonies, because courts will not have to waste judicial resources independently determining the elements of each enumerated crime.¹⁶²

The United States Court of Appeals for the Ninth Circuit's decision in *United States v. Sweeten* provides an excellent example of how

¹⁵⁷ See *Taylor*, 495 U.S. at 599; see also *United States v. Cunningham*, 911 F.2d 361, 363 (9th Cir. 1990), cert. denied, 498 U.S. 1103 (1991).

¹⁵⁸ *Taylor*, 495 U.S. at 599. For example, assume that a prior conviction for aggravated burglary required that the defendant be armed with a deadly weapon. See *id.* at 596. This requirement was in addition to the three elements necessary for the crime to qualify as the generic enumerated burglary, i.e., unlawful entry of a building with the intent to commit a crime. *Id.* at 597. Therefore, the prior conviction certainly qualifies as burglary for sentence enhancement purposes. *Id.*

¹⁵⁹ 18 U.S.C.A. § 3559(c)(2)(F); see *supra* note 145.

¹⁶⁰ 18 U.S.C.A. § 3559(c)(2)(F)(i). For instance, the statute lists murder as defined in 18 U.S.C. § 1111 (1988) as a qualifying serious violent felony. *Id.* The statute defines arson as "an offense that has as its elements maliciously damaging or destroying any building, inhabited structure, vehicle, vessel, or real property by means of fire or an explosive." 18 U.S.C.A. § 3559(c)(2)(B).

¹⁶¹ Compare 18 U.S.C.A. § 3559(c)(2)(F)(i) with 18 U.S.C. § 924(e) and USSG § 4B1.2. Both the ACCA and the Career Offender provision only list burglary, arson and the use of explosives as enumerated crimes. 18 U.S.C. § 924(e)(2)(B)(ii); USSG § 4B1.2(1). The application notes following USSG § 4B1.2 also state that "[c]rime of violence includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling." USSG § 4B1.2, comment (n.2). These lists of enumerated crimes, however, merely represent generic labels for various crimes without providing the specific elements necessary for each crime. Thus, sentencing courts hoping to classify prior offenses as one of the enumerated crimes first faced the task of determining the specific elements of the enumerated crime. See *Taylor*, 495 U.S. at 592.

¹⁶² In *Taylor*, it took the Supreme Court 18 pages of detailed legislative history analysis to determine the elements of the burglary as defined by the ACCA. *Id.* at 581-99. Justice Scalia termed such an exercise unnecessary. *Taylor*, 495 U.S. at 603 (Scalia, J., dissenting).

courts attempting to classify prior offenses as enumerated serious violent felonies likely will proceed.¹⁶³ In *Sweeten*, the government contested the district court's disqualification of a prior Texas burglary conviction for ACCA sentence enhancement.¹⁶⁴ The district court reasoned that the Texas burglary conviction did not qualify because the statutory definition of the crime included the illegal entry of vehicles.¹⁶⁵ The district court concluded, therefore, that a conviction could have resulted without the jury having found the requisite ACCA generic burglary element of illegal entry of a building or structure.¹⁶⁶

The Ninth Circuit noted, however, that the term "vehicles" as used in the Texas burglary statute included only those vehicles whose primary purpose was to serve as a dwelling, as distinguished from automobiles as used by the Supreme Court in *Taylor*.¹⁶⁷ The court analogized the burglary of a vehicle adapted to provide overnight accommodations to that of a building or house, noting that it would be more difficult for a burglar to enter unnoticed.¹⁶⁸ The likely confrontation that made burglary of a building an inherently violent felony would just as likely occur during a burglary of a mobile home.¹⁶⁹ The Ninth Circuit concluded that Texas's definition of burglary of a habitation fell within the generic definition of burglary as laid out by the Supreme Court in *Taylor*, and thus the prior conviction qualified as an enumerated violent felony under the ACCA.¹⁷⁰

In some cases, however, the sentencing court is unable to make a determination based solely on proof of conviction and an analysis of the prior offense's statutory definition.¹⁷¹ The sentencing court may not be able to determine under which subsection of a statute a previous conviction arose.¹⁷² Additionally, the prior offense's statutory definition may cover a wider range of activity than the enumerated serious violent felony.¹⁷³ Therefore, a conviction may have resulted without the fact

¹⁶³ See 933 F.2d 765, 771 (9th Cir. 1991).

¹⁶⁴ *Id.* at 768.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 770.

¹⁶⁸ *Sweeten*, 933 F.2d at 771.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* The court went on to state emphatically that its determination of the qualification of the prior conviction did not rest upon Texas state law or Fifth Circuit law, but rather upon Ninth Circuit law dealing with how the ACCA was to be interpreted within the Ninth Circuit. *Sweeten*, 939 F.2d at 771 n.1.

¹⁷¹ *United States v. Lujan*, 9 F.3d 890, 892 (10th Cir. 1993); *United States v. Taylor*, 932 F.2d 703, 707-08 (8th Cir.), *cert. denied*, 502 U.S. 582 (1991).

¹⁷² *United States v. Taylor*, 495 U.S. 575, 599 (1990); *Lujan*, 9 F.3d at 892.

¹⁷³ *Lujan*, 9 F.3d at 892.

finder having been required to find all of the elements necessary for an enumerated strike.¹⁷⁴

The Supreme Court in *Taylor* indicated that in such circumstances sentencing courts must look to the charging papers and jury instructions.¹⁷⁵ Most courts have not pedantically enforced this language, which would require the prosecution to always produce jury instructions along with the indictment.¹⁷⁶ Rather, courts generally relax the jury instruction requirement where another document demonstrates that the fact finder established the truthfulness of the allegations in the indictment.¹⁷⁷

Thus, sentencing courts classifying prior convictions as enumerated serious violent crimes likely will follow the analysis of the United States Court of Appeals for the Eighth Circuit's decision on remand, *Taylor II*.¹⁷⁸ The Supreme Court remanded the case to determine whether Taylor's prior Missouri burglary convictions arose under a version of the statute such that they could be classified as generic enumerated burglaries according to the ACCA.¹⁷⁹ Both charging papers from the Missouri convictions included language charging Taylor with breaking and entering a dwelling house and building.¹⁸⁰ The court reasoned that this language indicated that Taylor's convictions arose under the version of the Missouri burglary statute criminalizing unlawful entry of a building or structure, and not those versions making such entry of boats and rail cars illegal.¹⁸¹ The Eighth Circuit concluded that Taylor's prior convictions did contain the requisite elements of burglary and thus were violent felonies for purposes of sentence enhancement under the ACCA.¹⁸²

¹⁷⁴ *Taylor*, 495 U.S. at 602.

¹⁷⁵ *Id.*

¹⁷⁶ See, e.g., *Lujan*, 9 F.3d at 892 (holding sentencing court can consider indictment and verdict form without jury instructions); *United States v. Parker*, 5 F.3d 1322, 1327 (9th Cir. 1993) (holding sentencing court can consider any document that unequivocally demonstrates jury found all necessary elements); *United States v. Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992) (Breyer, C.J.) (holding sentencing judges can consider uncontested pre-sentencing report to supplement information in indictment).

¹⁷⁷ See *Lujan*, 9 F.3d at 892; *Parker*, 5 F.3d at 1327.

¹⁷⁸ See 932 F.2d 703, 707-08 (8th Cir.), *cert. denied*, 502 U.S. 882 (1991).

¹⁷⁹ *United States v. Taylor*, 495 U.S. 575, 602 (1990).

¹⁸⁰ *Taylor II*, 932 F.2d at 707.

¹⁸¹ See *id.* at 709.

¹⁸² *Id.*; see also *United States v. O'Neal*, 937 F.2d 1369, 1374 (9th Cir. 1990) (indictment language used to classify two California burglary convictions as enumerated violent felonies under ACCA).

B. *Nonenumerated Serious Violent Felonies*

The second category of qualifying prior offenses, nonenumerated strikes, are those crimes punishable by at least ten years of imprisonment that fit into either of two sub-categories: nonenumerated-elemental and nonenumerated-inherent.¹⁸³ To qualify as a nonenumerated-elemental strike, a prior offense must have included an element of actual, attempted or threatened physical violence against another.¹⁸⁴ Prior convictions qualify as "nonenumerated-inherent strikes" if their commission inherently posed a substantial risk of physical force against another.¹⁸⁵

1. Nonenumerated-Elemental Serious Violent Felonies

Courts likely will follow the categorical approach previously described in part III when classifying a prior conviction as a nonenumerated-elemental strike.¹⁸⁶ Rather than the multi-element matching required in the enumerated category, however, a sentencing court must find only that the prior conviction required an element of actual, attempted or threatened use of physical force against another.¹⁸⁷ Thus, a categorical statutory comparison under this sub-category is simpler than that of the enumerated crime category; certain crimes qualify almost automatically.¹⁸⁸ Sentencing courts still will need to look beyond the prior conviction's statutory definition when it is ambiguous as to whether the violence element was required to sustain the prior conviction.¹⁸⁹

Courts needing to go beyond simple statutory comparison face a potential issue arising in ACCA case law regarding the types of docu-

¹⁸³ See 18 U.S.C.A. § 3559(c)(2)(F)(ii).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See *United States v. Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992); *United States v. Mathis*, 963 F.2d 399, 405 (D.C. Cir. 1992); *United States v. Preston*, 910 F.2d 81, 84 (3d Cir. 1990), *cert. denied*, 498 U.S. 1103 (1991). The Ninth Circuit has not directly decided the issue, but has stated in dicta that its interpretation of *Taylor* indicates that the modified categorical approach, allowing inquiry beyond statutory definition, may not be used other than to classify crimes as burglary. See *United States v. Parker*, 5 F.3d 1322, 1326 n.3 (9th Cir. 1993).

¹⁸⁷ See *United States v. Cook*, 26 F.3d 507, 509 (10th Cir.), *cert. denied*, 115 S. Ct. 373 (1994); *Preston*, 910 F.2d at 86.

¹⁸⁸ *United States v. Lujan*, 9 F.3d 890, 891-92 (10th Cir. 1993) (finding prior manslaughter convictions readily qualify as a nonenumerated-elemental violent felony under the ACCA).

¹⁸⁹ See *Cook*, 26 F.3d at 509. See *supra* note 124 for other examples of when such ambiguity could arise.

ments courts may use in such an inquiry.¹⁹⁰ Several courts of appeals have suggested that sentencing courts may consider all judicially noticeable documentation or other relevant documentation.¹⁹¹ In 1992, in *United States v. Harris*, then Chief Judge Stephen Breyer, writing for the United States Court of Appeals for the First Circuit, noted that a sentencing court may consider information from an unchallenged presentence report ("PSR")¹⁹² when determining whether a prior crime qualifies as a violent felony under the ACCA.¹⁹³ The court stated that in such circumstances it is reasonable to consult the PSR, not to determine the violent or non-violent nature of the conduct, but to determine whether the conduct may indicate what offense the government and defendant thought was at issue.¹⁹⁴ The First Circuit concluded that sentencing courts could then use this information to determine which specific statutory offense served as the basis for the prior conviction.¹⁹⁵

¹⁹⁰ Compare *Parker*, 5 F.3d at 1327 (requiring documents that unequivocally demonstrate that the jury's findings support the contention that all requisite elements were found) with *Harris*, 964 F.2d at 1236-37 (allowing consideration of an unchallenged presentence report to determine the definition of the prior offense).

¹⁹¹ Carlton F. Gunn, *So Many Crimes, So Little Time: The Categorical Approach to the Characterization of a Prior Conviction Under the Armed Career Criminal Act*, 7 FED. SENTENCING REP. 66, 67-68 & n.8 (1994) (citing *United States v. Maness*, 23 F.3d 1006, 1009 (6th Cir. 1994) (allowing consideration of transcript of guilty plea); *Harris*, 964 F.2d at 1236 (allowing consideration of presentence report); *United States v. Sweeten*, 933 F.2d 765, 771 (9th Cir. 1991) (allowing consideration of judicially noticeable documentation only)).

¹⁹² The United States Sentencing Guidelines mandate that the federal probation department complete a presentencing report on each individual convicted of a federal crime. USSC § 6A1.1; see FED. R. CRIM. P. 32(c). The reports contain general information about the defendant, including prior criminal history and other circumstances deemed helpful to a court in determining the sentence of the defendant. FED. R. CRIM. P. 32(c)(2)(A). These reports often contain factual information regarding the current offense, as well as background material on circumstances surrounding prior criminal offenses. See *Harris*, 964 F.2d at 1236-37.

¹⁹³ *Id.* at 1236. In *Harris*, the federal government sought to use a Massachusetts assault and battery conviction for sentence enhancement under the ACCA. *Id.* at 1235. The Massachusetts assault and battery statute prohibited both violent and non-violent behavior. *Id.* at 1235. The defendant pled guilty to the prior assault and battery charge, and no jury instructions existed to provide independent verification of which version the defendant pled. *Id.* at 1236. The court stated that "case files" referred to by the PSR noted that the defendant was armed with a knife when the assault and battery took place. *Id.* at 1236-37. The First Circuit reasoned that the fact the defendant had a knife when arrested indicated that the conviction arose under the violent subsection of the assault and battery statute. *Id.* at 1237.

¹⁹⁴ *Id.* at 1236. The court noted in dicta, however, that it is proper in certain circumstances for a sentencing court to consider the underlying facts of a prior conviction. *Id.* The court provided the specific example of an indictment that used boilerplate language to charge a generic crime to which the defendant pled guilty, leaving no jury instructions and thus making it impossible to determine which variation of a crime was actually charged. *Id.*

¹⁹⁵ *Id.* The Ninth Circuit, in the dicta of a recent unpublished opinion, endorsed the First

One commentator criticized the dicta in *Harris*, which allowed for expanded use of PSR's, as directly controverting the Supreme Court's avoidance of "mini trials" under the categorical approach.¹⁹⁶ On its face, the *Harris* court's interpretation seems inconsistent with the with formal categorical approach.¹⁹⁷ One can argue, however, that courts use the facts of the prior conviction obtained from the PSR only to clarify the elemental definition of the prior offense and not to assess the violent nature of the underlying conduct.¹⁹⁸ It remains unclear how courts interpreting the three-strikes law will proceed when faced with situations similar to those found in *Harris*.

2. Nonenumerated-Inherent Serious Violent Felonies

Courts classifying prior offenses as nonenumerated-inherent serious violent felonies likely will implement the categorical approach discussed above in part III.B.1.¹⁹⁹ Courts first will determine the statutory definition of the prior offenses.²⁰⁰ Then sentencing courts likely will make a "common-sense" decision as to whether the statutory conduct posed a substantial risk of injury to another.²⁰¹ Determining whether the elements of a prior offense are inherently violent will be a matter of law, and thus will form one of the only areas of judicial discretion built into the three-strikes law.²⁰²

Courts analyzing prior nonenumerated-inherent offenses in the ACCA context have addressed an interesting issue regarding the types of sources courts should use in ascertaining the elemental definition of a prior offense.²⁰³ Courts applying the categorical approach in the three-strikes context probably will have to confront the same issue. In *United States v. Becker*, the United States Court of Appeals for the Ninth Circuit held that a sentencing court could rely upon a judicially imposed element, not found in the state's statutory definition, to qualify

Circuit's approach that allows sentencing courts to consider information in PSR's. See *United States v. Hensley*, No. 94-30148, 1995 WL 37326, at *4 (9th Cir. Jan. 30, 1995).

¹⁹⁶ *Gunn*, *supra* note 191, at 67.

¹⁹⁷ *Id.*

¹⁹⁸ See *United States v. Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992).

¹⁹⁹ See *United States v. Taylor*, 495 U.S. 575, 602 (1990); *United States v. Davis*, 16 F.3d 212, 217-18 (7th Cir.), *cert. denied*, 115 S. Ct. 354 (1994); *United States v. Custis*, 988 F.2d 1355, 1363 (4th Cir. 1993), *aff'd*, 114 S. Ct. 1732 (1994).

²⁰⁰ See *United States v. Thomas*, 2 F.3d 79, 80 (4th Cir. 1993), *cert. denied*, 114 S. Ct. 1194 (1994); *United States v. Payne*, 966 F.3d 4, 5 (1st Cir. 1992).

²⁰¹ *Custis*, 988 F.2d at 1363.

²⁰² See *id.*

²⁰³ *United States v. Parker*, 5 F.3d 1322, 1325 (9th Cir. 1993); *United States v. Becker*, 919 F.2d 568, 571 n.5 (9th Cir. 1990), *cert. denied*, 499 U.S. 911 (1991).

a prior conviction as a crime of violence under the Career Offender provision.²⁰⁴ In *Becker*, the defendant appealed the use of a prior California first-degree burglary conviction for enhancement purposes under the Career Offender provision.²⁰⁵ The Ninth Circuit stated that the California Supreme Court imposed an additional "unlawful entry" requirement for a conviction of first-degree burglary.²⁰⁶ The statutory definition of the crime did not include this requirement.²⁰⁷ The court then reasoned that the conduct prohibited by the full inferred definition, illegal entry of a residence with intent to commit a felony, inherently posed a substantial risk of harm toward another.²⁰⁸ The Ninth Circuit concluded, therefore, that the California first-degree burglary conviction qualified as a nonenumerated-inherent violent felony.²⁰⁹ Thus, sentencing courts applying the three-strikes law probably will also consider relevant state court interpretations of state criminal statutory definitions when qualifying prior convictions.²¹⁰

C. Three-Strikes Categorical Approach Summary

Courts interpreting the three-strikes law likely will apply the *Taylor* categorical approach as developed in the ACCA and Career Offender contexts.²¹¹ After the government proves the existence of the prior convictions listed in its pretrial information, sentencing courts will determine the statutory definition of the prior offense.²¹² Courts will look to both the language of the statute as enacted by the legislature and any judicially imposed elements.²¹³ Sentencing courts likely will employ a modified categorical inquiry to resolve any ambiguities that exist with respect to what specific elements comprised the prior conviction.²¹⁴ Courts using a modified categorical approach will consider charging papers, jury instructions, verdict forms and possibly other

²⁰⁴ *Becker*, 919 F.2d at 571 n.5.

²⁰⁵ *Id.* at 569.

²⁰⁶ *Id.* at 571 n.5.

²⁰⁷ *Id.*

²⁰⁸ *Id.* at 573.

²⁰⁹ *Becker*, 919 F.2d at 573.

²¹⁰ *See id.*

²¹¹ *See supra* notes 136-43 and accompanying text.

²¹² *Cf.* *United States v. Taylor*, 495 U.S. 575, 602 (1990).

²¹³ *See* *United States v. Parker*, 5 F.3d 1322, 1325 (9th Cir. 1993) (language of statute); *Becker*, 919 F.2d at 571 n.5. (judicially imposed elements).

²¹⁴ *Cf.* *United States v. Taylor*, 932 F.2d 703, 707-08 (8th Cir.), *cert. denied*, 502 U.S. 882 (1991).

court documents to determine what specific elements the fact finder had to find in order to convict the defendant of the prior crime.²¹⁵

After determining the prior offense's elemental definition, sentencing courts will attempt to categorize it as a qualifying enumerated or nonenumerated serious violent felony.²¹⁶ The qualification of the prior offenses depends upon on the match between the prior crimes' elemental definitions and those of the enumerated crimes and the nonenumerated crimes.²¹⁷ Under the ACCA and the Career Offender provision, classification of a prior crime as a violent felony is the stopping point for sentencing courts' inquiries. Under the three-strikes law, however, sentencing courts must go one step further and consider a defendant's collateral challenge to the use of certain prior convictions.²¹⁸

IV. DEFENDANT'S RIGHT TO COLLATERAL REVIEW DURING CLASSIFICATION OF PRIOR OFFENSES AS SERIOUS VIOLENT FELONIES

The defendant's express right to preclude the use of a limited class of otherwise qualified prior convictions through a collateral review process forms one of the unique features of the new three-strikes law.²¹⁹ Neither the ACCA nor the Career Offender provision provides for a defendant's affirmative challenges to the inclusion of a prior offense for sentence enhancement.²²⁰ Robbery, arson and prior offenses falling into the nonenumerated category are the only types of convictions that

²¹⁵ See *supra* notes 171-77, 185-93 and accompanying text.

²¹⁶ See *supra* notes 153-210 and accompanying text.

²¹⁷ See *id.*

²¹⁸ 18 U.S.C.A. § 3559(c)(3).

²¹⁹ 18 U.S.C.A. § 3559(c)(3).

²²⁰ See 18 U.S.C. § 924(e); USSG § 4B1.1-2. In 1994, in *Custis v. United States*, 114 S. Ct. 1732, 1738-39 (1994), the United States Supreme Court held that defendants may seek collateral review of a prior conviction only when claiming that the conviction was obtained in complete violation of the defendants' right to counsel. The defendant had sought to preclude a prior conviction from counting under the ACCA because of alleged ineffective assistance of counsel in violation of his Sixth Amendment right. *Id.* at 1734. The Court rejected the defendant's contention and held that the only avenue of direct collateral attack on ACCA prior convictions was via a claim of failure to be appointed counsel. *Id.* at 1738. Circuit courts have widely held that this decision controls in the Career Offender context. See, e.g., *United States v. Thomas*, 42 F.3d 823, 824 (3d Cir. 1994) (applying *Custis* in Career Offender context); *United States v. Killion*, 30 F.3d 844, 846 (7th Cir. 1994) (same). The three-strikes law allows collateral attacks on prior convictions on three narrow factual issues. 18 U.S.C. § 3559(c)(3). Sentencing courts applying the three-strikes law will likely follow the *Custis* rationale and not allow collateral attacks beyond the three defined narrow issues. Cf. *Custis*, 114 S. Ct. at 173; *Thomas*, 42 F.3d at 824.

defendants may collaterally challenge.²²¹ To preclude the use of a robbery or nonenumerated conviction, the defendants must prove three facts by clear and convincing evidence, collectively termed the "non-violent elements."²²² First, defendants seeking to prevent the use of otherwise qualified nonenumerated crimes or robbery must prove that no firearm or other dangerous weapon was used in the offense.²²³ Second, defendants must demonstrate that the prior offense did not involve any threat of use of a firearm or other dangerous weapon.²²⁴ Finally, defendants must prove that the offense did not result in death or serious bodily harm.²²⁵ The collateral review provision mandates the factual approach directly rejected by the Supreme Court in *Taylor*.²²⁶

In light of the harsh penalty imposed by the three-strikes law, a collateral review provision makes sense. The collateral review process provides for a degree of judicial discretion not found in either the ACCA or the Career Offender provision.²²⁷ Through this provision, Congress likely sought to grant judges increased discretion to prevent the three-strikes law from ensnaring non-violent felons in life sen-

²²¹ See 18 U.S.C.A. § 3559(c)(3).

²²² *Id.* The relevant portion of the statute is set out below:

Nonqualifying felonies, [include] [r]obbery, an attempt, conspiracy, or solicitation to commit robbery; or an offense described in paragraph (2)(F)(ii) shall not serve as a basis for sentencing under this subsection if the defendant establishes by clear and convincing evidence that—

(i) no firearm or other dangerous weapon was used in the offense and no threat of use of a firearm or other dangerous weapon was involved in the offense; and
(ii) the offense did not result in death or serious bodily injury (as defined in section 1365) to any person.

18 U.S.C.A. § 3559(c)(3)(A). The three-strikes law also allows defendants to prevent the use of prior arson convictions where the defendant can establish by clear and convincing evidence that the offense posed no threat to human life and the defendant reasonably believed the offense posed no threat to human life. 18 U.S.C.A. § 3559(c)(3)(B).

In 1993, in *Parke v. Raley*, 113 S. Ct. 517, 519–24 (1993), the United States Supreme Court reviewed the constitutionality of a defendant collateral review provision in a Kentucky persistent felony offender statute. The Kentucky recidivist statute, like the federal three-strikes law, allows the defendant to challenge the use of prior convictions and places the burden of proof on the defendant. See *id.* The Court held that this burden shifting scheme was well within constitutional bounds. *Id.* at 517.

²²³ 18 U.S.C.A. § 3559(c)(3)(A)(i). The three-strikes law does not specifically define the terms dangerous weapon or firearm.

²²⁴ 18 U.S.C.A. § 3559(c)(3)(A)(i).

²²⁵ 18 U.S.C.A. § 3559(c)(2)(A)(ii). Serious bodily injury is defined in 18 U.S.C. § 1365 and includes "bodily injury which involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of the function of a bodily member, organ or mental faculty." 18 U.S.C. § 1365 (g)(3) (1988).

²²⁶ See *United States v. Taylor*, 495 U.S. 575, 602 (1990).

²²⁷ See *United States v. Custis*, 114 S. Ct. 1732, 1739 (1994) (no general collateral attack allowance found in ACCA); *United States v. Thomas*, 42 F.3d 823, 824 (3d Cir. 1994) (applying

tences.²²⁸ The initial Senate three-strike proposals, which bear little resemblance to the adopted House version, did not contain collateral review provisions.²²⁹ No legislative history exists explaining why the House of Representatives employed a collateral review provision. The floor debate accompanying a House amendment to the collateral review subsection indicates that Congress generally desired to sharply focus the three-strikes law to remove those individuals who repeatedly threatened their fellow citizens.²³⁰ Therefore, Congress presumably enacted the collateral review provision as one method of focusing the application of mandatory life sentences.²³¹

A. Criticism of the Collateral Attack Scheme

Though allowing for collateral review of prior convictions makes good sense in general, two significant problems exist with the three-strikes collateral review provisions as drafted. First, defendants attempting to preclude the use of nonenumerated offenses may face severe evidentiary problems in meeting the clear and convincing burden of

Custis in Career Offender context). See *supra* note 220 for a full discussion of the lack of review under the ACCA and Career Offender program. By allowing collateral review based on the conduct underlying the prior offenses, Congress granted sentencing courts the discretion to focus their sentencing power on those truly recidivist offenders.

²²⁸ One of the principal judicial complaints about similar mandatory sentence provisions is the lack of judicial discretion to provide individualized sentencing, forcing similar sentences for dissimilar criminal activity. *United States v. Angiulo*, 852 F. Supp. 54, 60 (D. Mass. 1994) (quoting Jose A. Cabranes, *Incoherent Sentencing Guidelines*, WALL ST. J., Aug. 28, 1992, at A11).

²²⁹ H.R. 3355, 103d Cong., 1st Sess., §§ 2408, 5111 (1993).

²³⁰ 140 CONG. REC. H2432 (daily ed. Apr. 19, 1994) (statement by Rep. Hoyer).

²³¹ It is possible to construct a scenario where, absent a collateral review provision, a defendant with a relatively non-violent criminal history could receive life imprisonment. For example, assume John Doe was arrested in 1995 for trying to pick the pocket of a tourist in Yosemite National Park. Because the offense occurred on federal territory, Doe was charged and convicted of robbery in violation of 18 U.S.C. § 2111.

Doe has two prior convictions. The first was a 1986 California conviction for possession of a controlled substance with intent to distribute, to wit, 50 or more grams of crack cocaine. Doe was sentenced to two years imprisonment and five years probation. He served six months jail time and then went on probation. This offense would qualify as a serious drug felony under the three-strikes law, because if prosecuted in federal court it could have resulted in a conviction under 21 U.S.C. § 841(b)(1)(A). See 18 U.S.C.A. § 3559(c)(2)(H)(ii).

Assume Doe was arrested in Nevada for breaking and entering a commercial warehouse at night while on probation for the California drug offense. Doe was charged and convicted of this crime in 1989, and because he was on probation at the time of the offense, Doe was subject to a possible 15-year prison sentence. Assume that Doe received a six-month jail sentence, served one month and was released. This crime would likely qualify as a nonenumerated-inherent crime because of the perceived likelihood of confrontation from a night-time breaking and entering. See *United States v. Davis*, 16 F.3d 212, 215 (7th Cir.) (holding that breaking and entering conviction involved risk of substantial bodily harm because of possible confrontation when someone interrupts intruder), *cert. denied*, 116 S. Ct. 354 (1994). Thus, without a chance to prove

proof. This could render the protection offered by the collateral review provision moot. Secondly, Congress's failure to delineate a procedural framework for the collateral review process will compound these evidentiary problems. These problems could lead to disparate sentencing schemes among the circuit courts of appeal, directly controverting Congress's goal of uniformity in sentencing for defendants with similar criminal records.²³²

1. Collateral Review Elements Not at Issue During Prior Offenses

Defendants likely will face significant evidentiary problems when attempting to prove the three non-violent elements necessary to preclude the use of a prior conviction. As stated above, a defendant must prove by clear and convincing evidence that the prior offense both did not involve the use or threatened use of a firearm or other dangerous weapon, and did not result in death or serious bodily harm.²³³ The problem arises when at least one of the three non-violent elements was not an essential element of proof or otherwise at issue in the prior conviction. Defendants attempting to meet the clear and convincing burden of proof during the three-strikes sentencing phase would be forced to seek out witnesses and extrinsic evidence to support an assertion that was not subject to the adversarial process in the prior proceeding.

Meeting this burden of proof likely will prove most difficult for those defendants with older convictions because they are less likely to have access to the evidence necessary to prove their factual assertions. This controverts the general sentencing principle that time should dilute, not magnify, older convictions.²³⁴ For example, in the ACCA

that the conduct surrounding the breaking and entering conviction neither involved the use or attempted use of a firearm or other dangerous weapon, nor resulted in serious bodily harm, a sentencing court would have to impose mandatory life imprisonment. Such a result seems unfair and is the type of inequity that the collateral review provision seeks to prevent.

²³² See 28 U.S.C. § 991(f) (1988) (setting out guiding principles for the United States Sentencing Commission).

²³³ 18 U.S.C.A. § 3559(c)(3).

²³⁴ See *United States v. Parker*, 5 F.3d 1322, 1328 (9th Cir. 1993). A statute of limitations, like that found in § 411 of the Controlled Substances Act, limiting collateral challenges to only those convictions less than five years in age, is inappropriate in this context. See 21 U.S.C. § 851(e). Unlike § 411, the three-strikes collateral review process allows defendants to strike only at the validity of specific factual assertions, not the convictions themselves. *Id.* Sufficient motivation should have existed to cause a defendant independently to appeal infirm convictions; putting a five-year cap on expansion thus prevents frivolous attacks on prior convictions. See 21 U.S.C. § 851(c). But the specific factual assertions associated with the three-strikes collateral review were not even considered at a prior conviction, so there is insufficient motivation independently to challenge their existence.

context attempted burglary and attempted breaking and entering are common types of crimes that courts qualify as a nonenumerated violent felonies.²³⁵ The use of a gun or injury to another are not required elements of proof in these prior convictions, making it unlikely that any witnesses or related extrinsic evidence was ever introduced at the prior proceeding. This is especially true where the prior conviction occurred by a guilty plea that generated no trial record. Thus, a defendant trying to meet his or her affirmative burden of proof must locate new witnesses and evidence related to an incident that may have happened many years in the past. Although the Supreme Court has upheld this type of burden shifting, it seems unfair to make a factual circumstance that was never subject to the crucible of the adversarial process the deciding factor in the determination of a sentence of life imprisonment.²³⁶

2. No Collateral Review Process Delineated

The lack of a delineated procedural framework for conducting collateral review of prior convictions almost certainly will cause sentencing disparity when the provision is applied. The Supreme Court in *Taylor* considered and rejected the factual approach, noting several distinct problems that would result from the elaborate fact finding process required.²³⁷ The Court declined to place the burden of delineating such a process on sentencing courts, implying that the burden

²³⁵ See, e.g., *United States v. Thomas*, 2 F.3d 79, 80 (4th Cir. 1993) (counting attempted burglary as violent felony under ACCA because of inherent risk of confrontation), *cert. denied*, 114 S. Ct. 1194 (1994); *United States v. O'Brien*, 972 F.2d 47, 53 (3d Cir. 1992) (holding attempted breaking and entering did not have violence element a nonenumerated-inherent violent felony must have under ACCA), *cert. denied*, 114 S. Ct. 210 (1993).

²³⁶ See *Parke v. Raley*, 113 S. Ct. 517, 525 (1992). It is a well decided tenet of sentencing law that courts may consider all relevant non-charged conduct when making sentencing decisions, even acquitted conduct. E.g., *McMillan v. Pennsylvania*, 477 U.S. 79, 92 (1986) (holding sentencing court may consider uncharged conduct proven by preponderance of evidence); *Williams v. New York*, 337 U.S. 241, 247 (1949) (holding ability of sentencing court to obtain pertinent information not limited by rules of evidence).

The earlier uncharged conduct may receive the attention of the adversarial system in the three-strikes sentencing process. This discussion, however, will likely suffer due to poor quality and lack of evidence available at the later proceeding. Several good law review articles have addressed the inequities posed by the consideration of uncharged conduct in sentencing. E.g., *Lear*, *supra* note 63, at 744-45; Kevin R. Reitz, *Sentencing Facts: Travesties of Real-Offense Sentencing*, 45 STAN. L. REV. 523 (1993) (providing a fresh alternative to the sentencing system as it exists today); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980). The Supreme Court in *Taylor* identified a potential constitutional infirmity in the use of prior uncharged conduct. *United States v. Taylor*, 495 U.S. 575, 601 (1990).

²³⁷ *Taylor*, 495 U.S. at 601-02.

more rightly belonged to Congress.²³⁸ Neither the language of the three strikes law nor its legislative history provides any guidance as to how sentencing courts should implement this factual inquiry. Thus, sentencing courts must determine independently how they will proceed. Without an established review procedure it will be difficult to guarantee that each defendant will be able to exercise his or her rights granted by the law.

A number of questions arise as to the manner in which the court will gather information necessary for its decision to preclude the use of a prior conviction. Defendants seeking to exclude the use of a prior conviction must prove several factual assertions.²³⁹ Whether sentencing courts will conduct full evidentiary hearings in every case or rather grant hearings only to those defendants whose claims pass some threshold burden of proof remains unclear. Moreover, what type of evidence courts will allow the defendant to present also remains unclear. Courts also will face the question of whether to rely solely on the presentence report and the parties' written statements and affidavits or to allow the defendant to present witnesses and extrinsic evidence. Additionally, courts must determine what evidence the government will be allowed to present to rebut the defendant's assertions. The complexity of these questions means that many possible solutions exist. Without guidance from Congress, the different circuits are likely to develop their own judicially mandated procedures that will inevitably vary from one another, causing unwanted sentencing disparity.²⁴⁰

If Congress does not act to provide further guidance, sentencing courts are likely to turn to one of two places for an example of a method of structuring a collateral review. Some courts may apply the informal Guidelines procedure currently used to resolve disputed factors in presentencing investigations.²⁴¹ Alternatively, because the three-strikes statute requires the government to meet the notification requirements of section 411(a) of the Controlled Substances Act, some courts may adopt the other provisions of section 411.²⁴² Specifically, section 411 in full provides a procedural framework for sentencing

²³⁸ See *id.*

²³⁹ 18 U.S.C.A. § 3559(c)(3).

²⁴⁰ One of the guiding principles of sentencing law is reduction of unwarranted sentence disparities. 28 U.S.C. § 991(b)(1)(B) (1988).

²⁴¹ See THOMAS W. HUTCHINSON & DAVID YELLEN, *FEDERAL SENTENCING LAW & PRACTICE* § 6A1.3 (1989 & Supp. 1991) for a discussion of the development of a more formal procedure for resolution of PSR disputes.

²⁴² 18 U.S.C.A. § 3559(c)(4). The relative portions of § 851 are set out below:

If the Person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the infor-

courts establishing the existence of prior convictions used to increase the prison sentence of defendants convicted of serious drug felonies.²⁴³ This second choice seems the more prudent course to follow because the procedure is more established and thus provides a more structured approach than the Guidelines' disputed factors analysis.²⁴⁴ Following section 411's more settled procedure creates less room for interpretation by the courts, thus decreasing the likelihood of disparity in sentencing based on procedural differences among the circuits.

V. LEGISLATIVE PROPOSALS

In general, the federal three-strikes law effectively isolates the hard-core class of violent repeat offenders—the intended focus of the law's powers.²⁴⁵ Congress must consider, however, enacting additional legislation delineating a procedural framework for the law's collateral review process. This will prevent the sentencing disparity that will arise as each circuit independently determines how it will implement the collateral review process. Additionally, Congress should pass separate legislation requiring that all courts, state and federal, make and report four key findings after every felony criminal conviction for their inclusion in the National Felony Classification System, a criminal history data base. Subsequent sentencing courts easily could access this data base rather than wasting judicial resources associated with recreating the specifics of a prior offense.

A. *Three-Strikes Procedural Framework*

Congress must establish a procedural framework for the collateral challenge provision of the three-strikes law. The collateral review provision mandates a factual inquiry into the conduct surrounding a prior

mation. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. . . . The hearing shall be before the court without a jury and either party may introduce evidence. . . . At the request of either party, the court shall enter findings of fact and conclusions of law. A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response.

21 U.S.C. § 851(c) (1988).

²⁴³ 21 U.S.C. § 851.

²⁴⁴ See generally *United States v. Burrows*, 36 F.3d 875, 886 (9th Cir. 1994).

²⁴⁵ H.R. REP. NO. 463, *supra* note 4, at 3.

conviction.²⁴⁶ A number of questions exist as to the manner in which sentencing courts will gather the information necessary to their decision.²⁴⁷ As stated above, the complexity of these questions will almost certainly result in sentencing disparity as courts conduct the collateral review process in a wide variety of manners. Thus, the process available to a defendant collaterally attacking a prior conviction in a three-strikes sentencing situation will depend on the venue in which the case resides.²⁴⁸ This is neither desirable nor necessary. Congress should enact a uniform procedural framework guaranteeing defendants equal access to a full collateral review process.

The procedure established in section 411 of the Controlled Substance Act provides a good starting point.²⁴⁹ The three-strikes law already requires the government to file a pre-trial information in conformance with section 411(a), listing the prior convictions the government intends to use for sentence enhancement.²⁵⁰ Drawing further from section 411, Congress should require the defendant to file a written response to the government's pre-trial information.²⁵¹ Specifically, defendants should summarize the form and substance of all evidence they will present in support of the factual assertions necessary to preclude a prior conviction's usage: whether the prior offense involved the use, or threatened use, of a firearm or other dangerous weapon, and whether the prior offense resulted in death or serious bodily injury.²⁵² This written response will allow courts to determine the necessity of a full evidentiary hearing. Congress should grant courts discretion to deny an evidentiary hearing if the defendant's written response does not allege any factual support of each of the three assertions necessary to preclude a prior conviction. This gatekeeping power will prevent needless automatic delays in sentencing caused by defendants' frivolous challenges to prior convictions, ensuring a more efficient use of judicial resources.²⁵³ When a court finds that the defendant has alleged a factual basis to support each of the three required

²⁴⁶ See *supra* notes 219-44 and accompanying text.

²⁴⁷ See *supra* notes 239-44, and accompanying text.

²⁴⁸ For instance, one court may cite judicial economy concerns and allow defendants only to submit written statements, while another may allow defendants to present witnesses and extrinsic evidence to prove the same point.

²⁴⁹ 21 U.S.C. § 851(c).

²⁵⁰ 18 U.S.C.A. § 3559(c)(4). Section 851 contains the procedure to establish prior convictions for sentence enhancement within the Controlled Substances Act. 21 U.S.C. § 851(c).

²⁵¹ See 21 U.S.C. § 851(c). See *supra* note 242 for the relevant text of § 851(c).

²⁵² See 18 U.S.C.A. § 3559(c)(3)(A).

²⁵³ This form of discretion is lacking within the § 851 context. 21 U.S.C. § 851. But a similar feature prevents frivolous challenges by stating that defendants may only challenge convictions

assertions, the court must hold an extra-jury evidentiary hearing.²⁵⁴ The defendant should be allowed to present witnesses and evidence to support his or her claims and must meet a clear and convincing burden of proof.²⁵⁵ The government should be allowed to present evidence in rebuttal of the defendant's claims.

Sentencing courts will face the difficult task of determining what evidence is sufficient to prove each of the three factual assertions. When dealing with older convictions, for example twenty or more years old, it is conceivable that the only evidence available to support the three assertions will be the defendant's own testimony. This is especially likely when the prior conviction resulted from a guilty plea and not a trial. It is unclear how courts should proceed in such situations. It may come down to a question of whether a court will accept the word of a thrice-convicted felon as enough grounds to preclude life imprisonment.

In summary, Congress should enact a procedural framework for the three-strikes collateral review process in which the defendant must submit a written response to the government's information. The response must summarize the form and substance of the facts the defendant will present in support of the three factual assertions necessary to preclude the use of a prior conviction: that the prior offense did not involve the use, or threatened use, of a firearm or other dangerous weapon and did not result in death or serious bodily injury. Courts should grant an evidentiary hearing if the defendant has alleged a factual basis for each necessary assertion. Such a hearing should include the presentation of witness and other evidence, both by defendant in support of his or her assertions and by the government in rebuttal of the defendant's claims.

B. *Looking Toward the Future*

Analysis of the three-strikes law and other federal recidivist laws indicate that no simple answers exist when determining whether a criminal's past conviction record warrants life imprisonment.²⁵⁶ It is a

less than five-years old. 21 U.S.C. § 851(e). As discussed above, a five-year statute of limitations would be inappropriate in the three-strikes context. *See supra* note 234.

²⁵⁴ *See* 21 U.S.C. § 851(c)(1).

²⁵⁵ The clear and convincing standard is explicitly established in the three-strikes law. 18 U.S.C.A. § 3559(c)(3).

²⁵⁶ *See supra* notes 232-44 and accompanying text describing the complexities associated with conducting a categorical inquiry into past convictions.

question that more and more federal and state courts will confront as they interpret and apply their own three-strikes laws.²⁵⁷ The effectiveness of these recidivist sentencing schemes depends in large part on a court's ability to decipher a defendant's prior criminal history. Courts often must expend substantial judicial resources while attempting to classify a prior offense for sentence enhancement purposes.²⁵⁸ The whole process could be simplified if whenever a court convicted a defendant it produced a clear and concise record, taking into consideration that the conviction may have meaning beyond the instant proceedings.²⁵⁹ Congress recognized that violent felony recidivism was a problem of national scope when it enacted the federal three-strikes law.²⁶⁰ Congress should take the additional step and enact new legislation making it easier for both federal and state courts to identify and severely punish those criminals with violent recidivist criminal histories.

Congress should require all federal and state courts to conduct a hearing and to make four specific findings after every felony criminal conviction.²⁶¹ Congress should then require that sentencing courts input these findings into a dedicated data base called the National Felony Classification System that other courts could easily access in

²⁵⁷ See Heglin, *supra* note 11, at 215-16; Thomas, *supra* note 11, at A01.

²⁵⁸ Virtually all states have enacted some statutory scheme that provides for enhanced sentences for defendants with prior felony convictions. See Richard A. Galt, *The Use of Out-of-State Convictions for Enhancing Sentences of Repeat Offenders*, 57 ALB. L. REV. 1133, 1133 (1994). The overwhelming majority of those states use a *Taylor*-type categorical approach when considering out-of-state convictions. See *id.* at 1134.

²⁵⁹ There is nothing that can be done regarding convictions that exist as of today. The real benefit of the legislation proposed by this section is that a determination is made by the court handling the matter immediately after adjudicating the defendant guilty when all relevant facts are easily accessible to both the defendant and the government. Thus, courts must continue to use the categorical approach when dealing with existing convictions as the best available alternative. But the basic thrust of the proposed legislation is that there is no need to accept the status quo when a more effective alternative is within easy reach.

²⁶⁰ See H.R. REP. NO. 463, *supra* note 4, at 3.

²⁶¹ A definitional section applicable to the ACCA context provides a workable definition for "felony criminal conviction":

[C]rime punishable for a term . . . [of imprisonment] exceeding one year [that] does not include -

any federal or state offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or any state offense classified by the laws of the state as a misdemeanor and punishable by a term of imprisonment of two years or less.

18 U.S.C. § 921(a)(20) (1988). This definition ensures that only serious felony convictions receive the uniform classification. The scope of the definition is useful because most states provide for increased sentences based not only on the commission of violent felonies, but also on the existence of any conforming prior felony conviction. See Galt, *supra* note 258, at 1133.

subsequent proceedings.²⁶² Initially, for each count that results in a criminal felony conviction, Congress should mandate that the sentencing court list the offense's required elements of proof.²⁶³ In addition, Congress should direct the sentencing court to make three factual findings related to the underlying conduct of the prior offense (the "violence attributes").²⁶⁴ First, the sentencing court should determine whether the prior offense involved the use of a dangerous weapon or firearm.²⁶⁵ Second, the sentencing court should find whether the offense involved the threatened use of a firearm or dangerous weapon. Third, the sentencing court should indicate whether the crime resulted in death or serious bodily harm.²⁶⁶

Most federal and state courts attempting to use prior convictions as predicates for subsequent sentence enhancement limit their inquiry

²⁶² Federalist concerns likely would prevent Congress from making state compliance with the legislation mandatory. Sufficient precedent exists, however, to link compliance to a state's acceptance of some type of discretionary funding. For instance, the 1994 Violent Crime Control and Law Enforcement Act linked federal funding of local prisons to states enacting "truth in sentencing laws." See Violent Crime Control and Law Enforcement Act of 1994, P.L. 103-322 §§ 20101-02, 108 Stat. 1796, 1815-16. Receipt of prison funding was based on a state's enacting laws that both require all convicted felons to serve 85% of their imposed prison sentences, and require state courts to modify their sentencing procedures to allow victims and their families to testify at sentencing hearings. *Id.* It is arguable that the requirements of the National Felony Classification System are less intrusive than the "truth in sentencing laws." See *id.*

The infrastructure and technology for the National Felony Classification System exist today. The FBI maintains the National Crime Information Center (the "NCIC"), a national criminal history data base, but it contains only the dates and labels of offenses, not the type of information needed to classify a prior offense as a predicate for sentence enhancement. See 28 C.F.R. § 20.20 (1994). Congress could make courts report their required findings as a subset of the NCIC information, thus limiting the data base's start-up expenses.

²⁶³ Reference to an existing statute would be allowed only if it provides a clear indication of the specific elements.

²⁶⁴ Consideration of the underlying factual conduct of a prior offense for sentence enhancement seems to run contrary to the Supreme Court's holding in *Taylor*. *United States v. Taylor*, 495 U.S. 575, 600-01 (1990). But the *Taylor* Court rejected such consideration, not because the information was not relevant, but because of the practical difficulties associated with a subsequent determination of such conduct. *Id.* at 601. In fact, modern concepts of individualized sentencing have made it necessary for sentencing courts to have as much information about the defendant and his past conduct as possible. *United States v. Williams*, 337 U.S. 241, 247 (1949).

Congress already has indicated through the three-strikes law collateral review provision that violent attributes are indicative of whether the prior offense qualified as a serious violent felony. See 18 U.S.C.A. § 3559(c)(3). It seems a reasonable assumption that if any of the violent attributes—use of a firearm or other dangerous weapon, threatened use of a firearm or other dangerous weapon, or the death or serious bodily harm of another—accompanied the prior offense, the offense was violent. See *id.*

²⁶⁵ Unlike the federal three-strikes provision, Congress should define "use," "firearm," "dangerous weapon" and all other terms within the statute.

²⁶⁶ Serious bodily harm would be defined by reference to 18 U.S.C. § 1365 (1988).

to the elements of the prior offense.²⁶⁷ Analogous case law from the ACCA and Career Offender context indicates that even a simple categorical inquiry to define the elements of the prior offense can place a drain on judicial resources.²⁶⁸ Ambiguity regarding the elemental definition of a prior offense may arise in many ways. A prior offense may contain several subsections, only one of which qualifies as a predicate, or the prior conviction may be for a generic offense with several different versions, not all of which qualify as a predicate.²⁶⁹ When such ambiguity arises, subsequent sentencing courts must wade through the indictment, jury instructions, verdict forms and other types of "judicially noticeable documentation" to eliminate the ambiguity.²⁷⁰ Thus, providing courts easy access to the essential elements of the prior offense reduces the administrative burden on later courts. Additionally, this ensures that ambiguity over a prior violent felony conviction's statutory definition never leads to a conviction's rejection as a predicate offense. This goal is accomplished by requiring the court in the best position to make the determination of violence, the original sentencing court, simply to list and record the essential elements for each count for which the fact finder establishes the defendant's guilt.

Additionally, a direct benefit arises from providing easy access to a prior offense's underlying conduct, specifically, enabling a later sentencing court to determine the existence of any attributes of violence. Putting this information in the hands of later courts allows them to focus further on those individuals most deserving of increased punishment. Based on fairness and judicial economy concerns, federal courts rejected a factual inquiry into the conduct underlying prior offenses for qualification as sentence enhancement predicates.²⁷¹ But those rationales disappear when the original court provides the forum in

²⁶⁷ See *supra* notes 211–18 and accompanying text; see also Galt, *supra* note 258, at 1134, 1136–37 (stating that most state courts determine whether the elements of the prior out-of-state conviction would have resulted in an in-state conviction of requisite severity).

²⁶⁸ See *United States v. Taylor*, 495 U.S. 575, 602 (1990) (ACCA case—remand required to make further determination of elements of prior conviction); *United States v. Harris*, 964 F.2d 1234, 1236 (1st Cir. 1992) (ACCA case—courts wade through indictment, jury instructions, plea agreement transcript, presentence report and other judicially noticeable documentation); *United States v. Becker*, 919 F.2d 568, 574 (9th Cir. 1990) (Career Offender case—court must consider both legislatively and judicially imposed elements), *cert. denied*, 499 U.S. 911 (1991). This is especially true when the prior conviction was the result of a plea agreement, such that no trial record or jury instructions exist. See *Taylor*, 495 U.S. at 601–02. The categorical approach itself is a compromise based on judicial economy. See *id.* at 601.

²⁶⁹ See *Taylor*, 495 U.S. at 601. This is especially true when the prior conviction was the result of a guilty plea that does not generate any trial record for objective review. *Id.*

²⁷⁰ See *supra* notes 211–15 and accompanying text.

²⁷¹ See *supra* notes 79–135 and accompanying text.

which the underlying conduct is established. Subsequent sentencing courts never have indicated that the underlying facts of a prior conviction would not assist their crafting of the later sentence. Rather, courts have been concerned with the inequities associated with a subsequent proceeding to determine prior facts.²⁷² The crucible of the adversarial process, applied immediately after the determination of guilt, will ensure accurate findings based on sufficient evidence to support or deny each of the violence attributes.

The new legislation should establish a procedural framework that mandates a separate hearing after the fact finder establishes the defendant's guilt to determine the existence of the three violent attributes. The government should be required to prove the existence of each violent attribute not required for the defendant's conviction by a preponderance of the evidence.²⁷³ Both the government and the defendant should have the opportunity to present evidence, thus ensuring the full benefit of the adversarial process by parties with equal access to the necessary facts. It is hardly debatable that if the prior offense involved any of the three violent attributes, then it was a violent offense. Thus, subsequent sentencing courts will be able to rely upon these findings to determine whether the prior offense was actually violent and focus on increased punishment of truly violent criminals.

Requiring courts to make the four findings after every conviction would also serve a subsidiary deterrent purpose. Courts can use the hearing process to drive home the message that subsequent convictions will result in harsher punishment. Defendants will be on notice that society is no longer willing to let them continue to repeatedly commit serious felonies without serious consequences. Thus, Congress should enact the National Felony Classification System because it will significantly improve the ability of the criminal justice system to effectively deal with repeat offenders.

VI. CONCLUSION

The federal three-strikes provision is a recidivist statute aimed at putting society's most dangerous criminals in prison for long-term incarceration. Courts interpreting the statute's serious violent felony definition are likely to employ the categorical approach developed by

²⁷² *Taylor*, 495 U.S. at 601.

²⁷³ *Lear*, *supra* note 63, at 733 ("Sentencing facts need only be proven by a preponderance of the evidence.").

courts interpreting the similar ACCA and Career Offender provisions. Unlike existing federal violent felony recidivist statutes, the three-strikes law provides for a defendant's limited collateral attack against the inclusion of otherwise qualified prior convictions. Congress should address collateral review provision inadequacies by providing a procedural framework for defendant challenges. Additionally, Congress should enact a National Felony Classification System that would provide state and federal courts greater efficiency and accuracy when using prior convictions for subsequent sentence enhancement.

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