CASE LIST
Sentencing Issues in Reentry Cases

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Introduction

It is important to note two things when reviewing the decisions which follow. First, the Sentencing Commission has amended Section 2L1.2 several times, each time altering the enhancement levels triggered by various prior convictions. For example, under the 2000 version of Section 2L1.2, a misdemeanor assault under Texas state law for which a defendant received a one-year jail sentence qualified as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F) and a sixteen-level enhancement pursuant to § 2L1.2. However, under the 2003 version the guidelines, only an eight-level increase would apply, although the conviction would still be an aggravated felony under § 1101(a)(43). This list includes cases applying both the 16-level enhancement and the 8-level enhancement. The definition applicable to the 8-level enhancement for having a prior aggravated felony crime of violence is broader than that for imposing the 16-level increase.

Second, there has been some confusion, mainly in the past, in the cases concerning how to apply the categorical approach. However, following *Shepard v. United States*, 544 U.S. 13 (2005), some of the confusion has been resolved in our favor. Do not hesitate to make categorical approach-based objections even in the face of contrary cases which appear to be on point. A proper analysis of the prior conviction under the categorical approach may require a different result, and your Circuit may end up deciding as much on appeal or the issue could be ripe for a petition for certiorari. Facially similar state statutes may include differ in crucial ways. Therefore, it is recommended that you use the decisions below only as a starting point in analyzing which enhancement applies.

Additionally, this list is not exhaustive and focuses on appellate decisions. Please check all citations to ensure accuracy. Some cases appear in multiple categories.

Categorical Approach Applies to the Guidelines.

United States v. Aguilar-Ortiz, 450 F.3d 1271, 1273 (11th Cir. 2006): A categorical approach "generally" applies to determining whether a prior conviction is a qualifying offense for enhancement purposes under U.S.S.G. § 2L1.2(b)(1)(A).

United States v. Llanos-Agostadero, 486 F.3d 1194, 1196-97 (11th Cir. 2007): Generally, in determining whether a prior conviction is a qualifying offense for enhancement purposes, "categorical" approach is used: "that is, we look no further than the fact of conviction and the statutory definition of the prior offense." However, modified categorical approach applies where the judgment of conviction and the statute are ambiguous and the district court cannot determine whether the prior conviction qualifies. Under the modified categorical analysis, the district court may look to the facts underlying the state conviction to determine whether it qualifies. In so doing, the district court is generally limited to "relying only on the charging document[s], written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."

United States v. Santiesteban-Hernandez, 469 F.3d 376, 378 (5th Cir.2006): "Even if a prior offense is designated as "robbery" in a state penal code, it may not qualify as a robbery under Section 2L1.2.**"**

United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993). Applying the categorical approach to the guidelines in interpreting whether a prior conviction is a crime of violence under Armed Career Criminal Act, as defined under § 4B1.2. Holding that the sentencing court must only look to statutory definition, not underlying facts, to make determination whether the prior conviction is a crime of violence.

United States v. Vargas-Duran, 356 F.3d 598 (5th Cir. 2004) (en banc). **Texas crime of intoxication assault** under Tex. Penal Code § 49.07 is not a "crime of violence" as defined under U.S.S.G. §2L1.2(b)(1)(A)(ii) (Nov. 1, 2001). Looks to fact of conviction and statutory definition of offense to determine that statute does not require "use of force," as the term "use" of force requires an intentional availment of force. Although Texas statute requires, as an element, that the defendant "cause serious bodily injury to another," the Guideline's requirement of an element of "use, attempted use, or threatened use of physical force against the person of another" is absent from the Texas statute.

United States v. Reyes-Solano, 543 F.3d 474 (8th Cir. 2008): Convictions under **Mississippi law for misdemeanor assault** did not qualify as crimes of violence justifying enhancement where the record failed to include the elements of the offenses.

United States v. Martinez-Hernandez, 422 F.3d 1084 (10th Cir. 2005). Court recognizing that the categorical approach used by the Supreme Court in *Shepard* would seem to apply to guideline enhancements as well as statutory enhancements. Court rejecting government's request to expand the range of documents (i.e., police reports parroted in the presentence report that Defendant's weapon of choice was a sawed-off shotgun) to consider under the categorical approach. Government failed to produce official judicial records to support enhancement.

United States v. Pimental-Flores, 339 F.3d 959 (9th Cir. 2003). District court's reliance on factual description in PSR to conclude that defendant's prior conviction for "assault in violation of a court order" was a COV was plain error.

Firearms

United State v. Duarte-Aldana, 2010 WL 411106 (9th Cir. 2010) (unpublished): prior conviction under **Oregon** for felon-in-possession qualified as an aggravated felony under modified categorical approach.

United States v. Martinez-Hernandez, 422 F.3d 1084 (10th Cir. 2005): Defendant's prior **California conviction for possession of a weapon** was *not* a "firearms offense," within meaning of Sentencing Guidelines provision for 16-level sentence enhancement.

United States v. Diaz-Diaz, 327 F.3d 410 (10th Cir. 2003). Not plain error for district court to enhance reentry defendant's sentence based on prior **Texas conviction for possession of short-barrel firearm** (note that this case involved older versions of the guideline).

United States v. Vasquez-Garcia, 449 F.3d 870 (8th Cir. 2006). Where defendant had pled guilty in California state court to **possession of a short barrel rifle**, under Cal. Penal Code § 12020(a), based on state court information, enhancement under § 2L1.2 properly imposed even though defendant contended, based on police reports, that he actually possessed a pistol.

United States v. Lopez-Garcia, 565 F.3d 1306 (11th Cir. 2009): Georgia state **firearms** conviction- Ga.Code Ann § 16-11-106(b)- constituted a violation of federal law 18 U.S.C. § 924C and meets the definition of "firearms offense" under U.S.S.G. § 2L1.2.

Drug Trafficking and Simple Possession.

The circuit split over whether the prior offense must have been punishable as a felony under the Controlled Substances Act (in which case simple possession offenses with no intent to distribute would not be included; *see* 21 U.S.C. §844) or whether the prior simply need have been a felony under either state or federal law and additionally punishable under the CSA as any level of offense was settled in *Lopez v. Gonzales*, 549 U.S. 47 (2006), in which the Supreme Court held that, although South Dakota treated alien's conviction for aiding and abetting another person's possession of cocaine as equivalent of possessing the drug, and thus a felony under that state's law, the offense was misdemeanor under Controlled Substances Act, and thus not an "aggravated felony" under Immigration and Naturalization Act (INA), as would disqualify alien from discretionary cancellation of removal. Thus, generally, simple possession offenses will not qualify as aggravated felonies or drug trafficking crimes. However, the Court noted some possession crimes will qualify, stating: "Those state possession crimes that correspond to felony violations of one of the three statutes enumerated in § 924(c)(2), such as possession of cocaine base and recidivist possession, see 21 U.S.C. § 844(a), clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2)[.]" 127 S.Ct. at 630 n.6. *See United States v. Cepeda-Rios below citing pre-Lopez case United States v. Sanchez-Villalobos applying federal recidivist statute*. One should contrast those cases with a Second Circuit ruling refusing to employ the federal recidivist statute to a subsequent state felony simple possession conviction. *United States v. Ayon-Robles*, 557 F.3d 110 (2nd Cir. 2009).

United States v. Amaya-Portillo, 423 F.3d 427 (4th Cir. 2005): Defendant's **Maryland** conviction for **cocaine possession** did not constitute a felony conviction under the Controlled Substances Act, and thus, it was not an aggravated felony subjecting defendant to an eight-level increase; although offense carried a maximum sentence of four years' imprisonment, offense was characterized as a misdemeanor under Maryland law.

United States v. Phillips, 413 F.3d 1288 (11th Cir. 2005): Defendant's prior state conviction (specific state and statute not identified) for **attempted criminal sale of a controlled substance** was a "drug trafficking offense," which could be used to enhance his sentence for illegal reentry after deportation.

United States v. Aguilar-Ortiz, 450 F.3d 1271 (11th Cir. 2006): Applying modified categorical approach, prior Florida conviction for **solicitation to deliver cocaine**, Fla. Stat. § 777.04(2), was not a drug-trafficking offense warranting 12-level increase under U.S.S.G. § 2L1.2 where defendant solicited a personal-use amount of drugs.

United States v. Madera-Madera, 333 F.3d 1228 (11th Cir. 2003): prior Georgia conviction for **trafficking** under O.C.G.A. § 16-13-31 where the trafficking charge could be based on the possession of 28 or more grams of methamphetamine qualified as a "drug trafficking conviction" for purposes of § 2L1.2.

United States v. Cabrera-Ruiz, 132 Fed.Appx. 288 (11th Cir. 2005): Florida third-degree felony conviction for **delivery of cannabis** was a drug-trafficking crime.

United States v. Orihuela, 320 F.3d 1302 (11th Cir. 2003): **Telephone facilitation** conviction in violation of 21 U.S.C.A. § 843(b) can constitute "drug trafficking offense" where underlying drug offense is a felony and the sentence imposed was more than 13 months.

Cheuk Fung S-Yong v. Holder, 578 F.3d 1169 (9th Cir. 2009): California penal codes § 11379 **sale or transportation of controlled substance** and § 11378 **possession of a controlled substance for sale** are not categorically "drug trafficking offenses" in violation of the CSA and therefore not aggravated felonies. Government was unable to produce reliable evidence that the controlled substance involved in prior convictions is the same drug as regulated under the CSA. The court found that both California drug statutes regulate a broader amount of drugs than the federal statutes.

United States v. Juarez-Corona, 140 Fed. Appx. 228 (11th Cir. 2005): Prior conviction for violating **California Health and Safety Code section 11351**, which criminalizes the "possess[ion] for sale or purchase[ ] for purposes of sale" of controlled substances was a drug-trafficking offense; district court properly considered indictment, plea agreement, plea hearing transcript, and judgment.

United States v. Orozco-Vega, 172 Fed. Appx. 776 (9th Cir. 2006): Defendant's prior conviction for **possession of marijuana for sale**, pursuant to California Health & Safety Code § 11359, qualifies categorically as a drug trafficking offense for purposes of USSG § 2L1.2(b)(1)(B).

United States v. Navidad-Marcos, 367 F.3d 903 (9th Cir. 2004). Under categorical approach, **California conviction** for importing, selling, furnishing, administering, or giving away certain controlled substances, or offering to do so, was not "**drug trafficking** offense" warranting 16-level enhancement under § 2L1.2, because it criminalized a variety of conduct, including more than "manufacture, import, export, distribution, or dispensing of a controlled substance," or possession with intent to do same; under modified categorical approach, California abstract of judgment was insufficient to prove that defendant was convicted of sale and transportation of methamphetamine.

United States v. Zubia-Torres, 550 F.3d 1202 (10th Cir. 2008): not plain error to assess 16-level enhancement for prior **Nevada methamphetamine conviction** even though conviction could be for simple possession; in absence of objection by defendant, probation did not need to produce documents to prove the prior was for drug trafficking.

United States v. Figueroa-Ocampo, 494 F.3d 1211 (9th Cir. 2007). **Felony simple drug possession** under **Calif. Health & Safety Code § 11350(a)** was not an aggravated felony.

United States v. Santana-Illan, 2009 WL 5103592 (10th Cir. 2009): **California conviction for marijuana possession** and **Georgia conviction for cocaine possession** were not aggravated felonies; district court erred by concluding Georgia conviction could have been prosecuted as a felony under the federal Controlled Substances Act and therefore was an aggravated felony where Georgia conviction was not prosecuted as a recidivist crime. *See also Alsol v. Mikasey*, 548 F.3d 207, 219 (2d Cir.2008) (holding second simple possession conviction was not an aggravated felony because it was not prosecuted as recidivist possession); *United States v. Ayon-Robles*, 557 F.3d 110 (2d Cir. 2009); *Rashid v. Mukasey*, 531 F.3d 438, 442-48 (6th Cir. 2008) (same); *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006) (same); *Steele v. Blackman*, 236 F.3d 130, 137-38 (3d Cir. 2001) (same); *but see United States v. Cepeda-Rios*, 530 F.3d 333, 335-36 (5th Cir. 2008) (holding second simple possession conviction qualifies as an aggravated felony regardless of whether it was actually prosecuted as recidivist possession), and *United States v. Pacheco-Diaz*, 513 F.3d 776, 778-79 (7th Cir. 2008) (same). The Supreme Court has granted certiorari on this issue. *Carachuri-Rosendo v. Holder*, 130 S.Ct. 10102 (Dec. 14, 2009).

United States v. Cepeda-Rios, 530 F.3d 333 (5th Cir. 2008). Defendant's prior **California felony** conviction for **sale of tar heroin** under section **Ca. Health & Safety Code § 11352** is an aggravated felony. Even if the § 11352 conviction alone did not qualify as an aggravated felony, it could have been charged as a felony if it had

been brought under federal recidivist provision because defendant had prior conviction for possession of a controlled substance. *See* 21 U.S.C. § 844(a).

United States v. Sanchez-Villalobos, 412 F.3d 572 (5th Cir. 2005). Pre-*Lopez* case that is still good 5th Cir. law where prior defendant had two prior state convictions for **possession of controlled substance** thus making defendant eligible for the federal **recidivist** enhancement because the second conviction could have been punished under § 844(a) as a felony under federal law.

Carachuri-Rosendo v. Holder, 570 F.3d 263 (5th Cir.2009). Applying *Lopez* defendant's **second state misdemeanor possession drug offense**- after the conviction for a prior misdemeanor possession offense is final-could have been punished as a felony under the CSA and therefore is a "drug trafficking crime," an aggravated felony.

United States v. Pacheco-Diaz, 513 F.3d 776 (7th Cir. 2008). Where defendant had **two state convictions for simple possession of marijuana**, and a second marijuana possession conviction would be a federal felony under 21 U.S.C. § 844(a), he was a controlled-substance felon under 8 U.S.C. § 1101(a)(43) and was properly enhanced for the prior aggravated felony under § 2L1.2(b)(1)(C).

United States v. Ayon-Robles, 557 F.3d 110 (2nd Cir. 2009). Court rejected the application of the federal recidivist enhancement because defendant had **two prior felonies for simple possession of controlled substances** neither of which was prosecuted as under a state recidivist statute.

United States v. Herrera-Roldan, 414 F.3d 1238 (10th Cir. 2005). Texas felony conviction for **possession of large amounts of marijuana** is not a drug trafficking offense meriting a twelve-level offense under the guidelines but is an aggravated felony meriting an eight-level enhancement.

United States v. Castro-Rocha, 323 F.3d 846 (10th Cir. 2003). A state felony conviction for **possession of a controlled substance** is an "aggravated felony" within the meaning of U.S.S.G. § 2L1.2(b)(1)(C) authorizing eight-level sentencing enhancement, *but see Lopez, supra and Martinez-Macias below.*

United States v. Millan-Torres, 139 Fed.Appx. 105 (10th Cir. 2005): Defendant's California **conviction for selling cocaine**, in violation of Cal. Health & Safety Code § 11352, was a "drug trafficking offense," for purposes of the 16-level enhancement for a prior felony drug-trafficking conviction.

United States v. Martinez-Macias, 472 F.3d 1216 (10th Cir. 2007): Kansas conviction for **possession of cocaine** not an aggravated felony, applying Supreme Court holding in *Lopez v. Gonzales*, 127 S.Ct. 625 (2006).

United States v. Mendoza-Guardiola, 184 Fed.Appx. 791 (10th Cir. 2006): Applying modified categorical approach to determine that defendant's prior **racketeering** conviction under **18 U.S.C. § 1852** was a drug trafficking offense and affirming 12-level increase.

United States v. Torres-Romero, 537 F.3d 1155 (10th Cir. 2008): Recognized that **Colorado conviction under West's C.R.S.A. § 18-18-105** reached a broad range of conduct including trafficking and simple possession, but applying modified categorical approach, defendant had admitted to elements of trafficking in prior guilty plea colloquy.

United States v. Zuniga-Guerrero, 460 F.3d 733 (6th Cir. 2006): Defendant's prior conviction for unlawful use of a **communication facility to facilitate controlled substance offense** was a "drug trafficking offense" within the meaning of U.S.S.G. § 2L1.2.

United States v. Henao-Melo, 591 F.3d 798 (5th Cir. 2009): A conviction in violation of 21 U.S.C. § 843(b) for use of a telephone to facilitate the commission of a narcotics offense is a "drug trafficking offense," for purposes of USSG § 2L1.2,, only if the underlying offense facilitated was a drug trafficking offense, limiting *United States v. Pillado-Chaparro*, 543 F.3d 202 (5th Cir. 2008).

United States v. Arizaga-Acosta, 436 F.3d 506 (5th Cir. 2006): reentry defendant's prior conviction for **possession of a listed chemical with intent to manufacture a controlled substance** did not qualify as a "drug-trafficking offense."

United States v. Martinez-Rodriguez, 472 F.3d 1087 (9th Cir. 2007): Defendant's prior California convictions for **possession of marijuana for sale** were "drug trafficking offenses".

United States v. Garcia-Arellano, 522 F.3d 477 (5th Cir. 2008): applying modified categorical approach, prior Texas **conviction for delivery of a controlled substance** was a drug trafficking offense, warranting 12-level enhancement.

United States v. Ramirez, 2009 WL 4722237 (S.D.N.Y. 2009) (unpublished): Conviction for criminal sale of a controlled substance in the second degree in violation of **New York Penal Law § 220.41** was a drug trafficking offense.

United States v. Maroquin-Bran, 587 F.3d 214 (4th Cir. 2009): remand for resentencing where it was not clear that defendant's prior **California conviction for transporting marijuana** was for a drug-trafficking crime.

Crime of Violence under Statute and Guidelines.

United States v. Villegas-Hernandez, 468 F.3d 874 (5th Cir. 2006): defendant's prior Texas **assault** conviction under Texas Penal Code § 22.01(a), which provides: "A person commits an offense if the person: (1) intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse", was not a crime of violence; see also *United States v. Flores-Pizana*, 233 Fed.Appx. 358 (5th Cir. 2007).

United States v. Treto-Banuelos, 165 Fed. Appx. 668 (10th Cir. 2006): Prior Kansas conviction for **felony criminal threat**, K.S.A. 21-3419(a)(1, 2) (1996), was a crime of violence supporting 16-level enhancement.

United States v. Licon-Nunez, 230 Fed.Appx. 448 (5th Cir. 2007): New Mexico conviction for **aggravated assault by use of a deadly weapon** was a crime of violence under reentry guideline.

United States v. Estrada-Eliverio, 583 F.3d 669 (9th Cir. 2009): California conviction for **assault with a deadly weapon** (§ 245(a)(1)) was categorically a crime violence warranting a 16-level increase under the GL. See also *United States v. Grajeda*, 581 F.3d 1186 (9th Cir. 2009) decided on the same day with identical holding.

United States v. Cordova, 269 F.3d 895 (11th Cir. 2008): Reentry defendant's Iowa conviction for **assault on a peace officer** was a crime of violence.

United States v. Zuniga-Soto, 527 F.3d 1110 (10th Cir. 2008): Prior Texas conviction for **assaulting a public servant** under V.T.C.A. Penal Code § 22.01(a)(1), (b)(1) was not a crime of violence because it could be based on reckless conduct and thus "use ... of physical force" was not an element of conviction.

United States v. Guillen-Alvarez, 489 F.3d 197 (5th Cir. 2007): Texas conviction for **aggravated assault** was a crime of violence for sentencing purposes; see also *United States v. Delgado-Salazar*, 252 Fed.Appx. 596 (5th Cir. 2007).

United States v. Ramirez, 557 F.3d 200 (5th Cir. 2009): New Jersey conviction for **aggravated assault** was a crime of violence warranting a 16-level increase under guideline section 2L1.2.

United States v. Esparza-Herrera, 557 F.3d 1019 (9th Cir. 2009): Arizona offense of **aggravated assault,** A.R.S. § 13-1204(A)(11), did not correspond to the generic definition of "aggravated assault" that is enumerated as a crime of violence in U.S.S.G. § 2L1.2 and therefore does not warrant a 16-level enhancement.

United States v. Mungia-Portillo, 484 F.3d 813 (5th Cir. 2007): Tennessee conviction for **reckless aggravated assault** qualified as the enumerated offense of "aggravated assault" under the reentry guideline, considering the generic contemporary definition of "aggravated assault".

United States v. Rojas-Gutierrez, 510 F.3d 545 (5th Cir. 2007): prior California state court conviction of **assault with intent to commit certain enumerated felonies**, including mayhem, rape, sodomy and oral copulation, was for a "crime of violence" supporting 16-level increase.

United States v. Bolanos-Hernandez, 492 F.3d 1140 (9th Cir. 2007): prior California conviction for **assault with intent to commit rape** qualified as a crime of violence.

United States v. Carballo-Arguelles, 267 Fed.Appx. 416 (6th Cir. 2008): prior conviction for **assault with intent to murder** was for crime of violence warranting 16-level increase.

United States v. Grant-Martinez, 511 F.Supp.2d 738 (W.D. Texas 2007): Massachusetts conviction for **assault and battery** was not a crime of violence, but **assault and battery by means of a dangerous weapon** was a crime of violence warranting 16-level increase.

United States v. Earle, 488 F.3d 537 (1st Cir. 2007): prior conviction under Massachusetts law for **assault and battery with a dangerous weapon** constituted a conviction for a crime of violence.

United States v. Dominguez, 479 F.3d 345, 347-49 (5th Cir. 2007): a conviction under Fla. Stat. Ann. § 784.045(1)(a) 1 and 2 (**assault and battery**) is a crime of violence.

Canada v. Gonzales, 448 F.3d 560 (2d Cir. 2006): Connecticut conviction under C.G.S.A. § 53a-167c(a)(1) for **assault of a police officer** constituted a crime of violence aggravated felony because offense included intentional conduct.

Fernandez-Ruiz v. Gonzales, 466 F.3d 1121 (9th Cir. 2006): **misdemeanor domestic violence assault** of which alien was convicted did not qualify as "crime of domestic violence" warranting removal; and neither recklessness nor gross negligence supports finding of "crime of violence" under "use of physical force" definition; overruled *United States v. Ceron-Sanchez*, 222 F.3d 1169, and *Park v. INS*, 252 F.3d 1018.

United States v. Solorio-Nunez, 287 Fed.Appx. 13 (9th Cir. 2008) (slip copy): Court properly enhanced reentry defendant's sentence for prior conviction for **Willful Infliction of Corporal Injury to a Cohabitant** under California Penal Code § 273.5, a "wobbler" statute.

United States v. Magdaleno-Sanchez, 169 Fed.Appx. 830 (5th Cir. 2006): prior Washington conviction for **assault-in-the-second-degree** conviction was a "crime of violence" for purposes of 16-level sentence enhancement.

United States v. Sanchez-Torres, 136 Fed.Appx. 644 (5th Cir. 2005): Washington convictions for **assault in the fourth degree** not crimes of violence under U.S.S.G. § 2L1.2(b)(1)(E) because a "Washington state prosecutor may secure a conviction for fourth degree assault by proving that there was an intentional touching that [was] either 'harmful' or 'offensive'."

United States v. Favela-Masuca, 247 Fed.Appx. 464 (5th Cir. 2007): Iowa conviction for **misdemeanor serious domestic abuse assault** was not a crime of violence under 18 U.S.C. § 16 and therefore not an aggravated felony.

United States v. Rodriguez-Enriquez, 518 F.3d 1191 (10th Cir. 2008): defendant's prior Colorado conviction for **assault two (drugging victim)** was not a "crime of violence" under reentry guideline.

Chrzanoski v. Ashcroft, 327 F.3d 188 (2d Cir. 2003): Connecticut conviction under C.G.S.A. § 53a-61(a)(1) for **third-degree assault** did not constitute a crime of violence because offense lacked intent element; required only "intentional causation of injury".

Singh v. Gonzales, 432 F.3d 533 (3d Cir. 2006): Pennsylvania **simple assault** conviction was a crime of violence that rendered alien removable for committing aggravated felony; but Pennsylvania **reckless endangerment** conviction was not a crime of violence (note that this case involves two misdemeanor offenses but Mr. Singh had received the maximum sentence of one year for the offenses, thus it is an example of a misdemeanor being treated as a felony for immigration purposes).

Popal v. Gonzales, 416 F.3d 249 (3d Cir. 2005): **Simple assault (reckless)** in violation of 18 Pa. Cons. Stat. Ann. § 2701, is not an aggravated felony crime of violence since a *mens rea* of recklessness is insufficient to qualify as a crime of violence.

United States v. Cordoza-Estrada, 385 F.3d 56 (1st Cir. 2004). **Simple assault** conviction under New Hampshire law where defendant was sentenced to 12 months imprisonment with ten months suspended basis for 8-level enhancement for having a prior aggravated felony conviction even though NH law designated the offense a misdemeanor.

United States v. Nason, 269 F.3d 10 (1st Cir. 2001): Maine general purpose **assault** statute necessarily involves, as an element, use of force even though **offensive** touching was sufficient to violate statute.

United States v. Torres-Diaz, 438 F.3d 529 (5th Cir. 2006): Evidence supported finding that defendant's prior Connecticut conviction for **second degree assault** was for crime of violence; where statute listed multiple alternative methods of committing crime, sentencing court could look to charging instrument for limited purpose of deciding which method was at issue in prior prosecution.

Prakash v. Holder, 579 F.3d 1033 (9th Cir. 2009). California conviction for **solicitation to commit assault by means of force likely to produce great bodily injury** constitutes a crime of violence under 8 U.S.C. 1101(a)(43)(F). In the context of an illegal reentry case, it is likely under the above reasoning that this conviction would warrant a sixteen level increase under the guidelines.

United States v. Perez-Vargas, 414 F.3d 1282 (10th Cir. 2005). Colorado misdemeanor conviction for **3rd degree assault** is not categorically a crime of violence for sentencing purposes under the guidelines § 2L1.2(b)(1)(A). PSR found to be insufficient to prove prior conviction is a crime of violence in light of Defendant's objection to that conviction.

United States v. Xocholij-Carrillo, 263 Fed.Appx. 216 (3d Cir. 2008): New York conviction for **first-degree assault** was crime of violence warranting 16-level enhancement.

United States v. Cano-Esparza, 243 Fed.Appx. 15 (5th Cir. 2007): prior Texas state **felony assault** conviction was not a crime of violence warranting 16-level enhancement; use of force was not an element.

United States v. Machado-Delgado, 272 Fed.Appx. 685 (10th Cir. 2008): Without applying categorical approach and without analyzing the elements of the Arizona statute, **Ariz. Rev. Stat. § 13-1204**, court concludes that it is a crime of violence warranting 16-level enhancement; however, defendant admitted in brief **assaulting a police officer by resisting arrest.**

Garcia v. Gonzales, 455 F.3d 465 (4th Cir. 2006): alien's New York state law conviction for **reckless assault in the second degree** was not an aggravated felony and by extension not a crime of violence.

United States v. Diaz-Argueta, 447 F.3d 1167 (9th Cir. 2006): state conviction for **assault with a firearm** qualified for 16-level enhancement under U.S.S.G. § 2L1.2 even though, because term of imprisonment was less than one year, offense was not an aggravated felony.

United States v. Heron-Salinas, 566 F.3d 898 (9th Cir. 2009): California statute- Cal.Penal Code § 245(a)(1)- **assault with a firearm** is categorically a crime of violence and an aggravated felony for immigration purposes.

United States v. Guerrero-Robledo, 565 F.3d 940 (5th Cir. 2009): South Carolina conviction for **assault and battery of a high and aggravated nature (ABHAN)** qualified as a crime of violence for sentencing purposes.

United States v. Sanchez-Torres, 136 Fed.Appx. 644 (5th Cir. 2005): misdemeanor Washington convictions for **assault** in the fourth degree were not crimes of violence under U.S.S.G. § 2L1.2(b)(1)(E) because could involve "harmful" or "offensive" contact.

United States v. Martinez-Mata, 393 F.3d 625 (5th Cir. 2004): Texas crime of **retaliation** not a crime of violence for purposes of reentry guideline; statute prohibits committing or threatening to commit "harm," defined as "anything reasonably regarded as loss, disadvantage, or injury, including harm to another person in whose welfare the person affected is interested," and does not include element of use of force.

United States v. Hays, 526 F.3d 674 (10th Cir. 2008): not a reentry case, but Court applied categorical approach in holding that **Wyoming battery statute,** West's Wyo.Stat.Ann. § 6-2-501(b), prohibiting "unlawfully touching another in a rude, insolent, or angry manner" did not require physical force and thus was not a crime of domestic violence that could support a federal conviction for possession of a firearm by a prohibited person.

United States v. Treto-Martinez, 421 F.3d 1156 (10th Cir. 2005): Defendant's prior Kansas conviction for **aggravated battery against a law enforcement officer** was a crime of violence.

United States v. Tejada-Calderon, 234 Fed.Appx. 211 (5th Cir. 2007): prior Indiana felony **battery** conviction was a crime of violence, warranting assessment of a 16-level increase.

United States v. Herrera, 2008 WL 2698644 (10th Cir. 2008) (unpub'd): **California battery** conviction not a crime of violence; reversed under plain error review.

United States v. Smith, 171 F.3d 617 (8th Cir. 1999): Iowa conviction for committing an act intended to cause **pain, injury, or offensive or insulting physical contact** was a crime of violence.

United States v. Martinez-Sanchez, 278 Fed.Appx. 676 (7th Cir. 2008): Illinois **aggravated battery** conviction not categorically a crime of violence; however, under modified categorical approach, defendant's prior conviction was a crime of violence.

United States v. Llanos-Agostadero, 486 F.3d 1194 (11th Cir. 2007): Florida conviction for **aggravated battery on a pregnant woman,** West's F.S.A. §§ 784.03(1)(a), 784.045(1)(b). The Court's analysis is flawed. Battery under Florida law can be committed either by intentionally touching or striking another person *or* by intentionally causing bodily harm to another. The Court does not distinguish between the two. Other circuits have found such statutes to not qualify as categorical crimes of violence because causation of injury does not necessarily require the intentional use of force. *See e.g. Chrzanoski v. Ashcroft,* 327 F.3d 188 (2d Cir. 2003); *United States v. Perez-Vargas*, 414 F.3d 1282 (10th Cir. 2005); *United States v. Calderon-Pena*, 383 F.3d 254 (5th Cir. 2004); *United States v. Barraza-Ramos*, 550 F.3d 1246 (10th Cir. 2008).

United States v. Barraza-Ramos, 550 F.3d 1246 (10th Cir. 2008): prior Florida conviction for **aggravated battery on a pregnant woman,** West's F.S.A. §§ 784.03(1)(a), 784.045(1)(b) is not categorically a felony crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii) because court documents under modified categorical approach did not demonstrate which part of the battery statute was violated.

United States v. Ortiz, 565 F.3d 400 (7th Cir. 2009): Wisconsin **battery conviction as a habitual offender** statute- Wis. Stat. § 939.62- (which makes a Class A misdemeanor a felony offense) was a crime of violence for purposes of U.S.S.G. § 2L1.2.

Flores v. Ashcroft, 350 F.3d 666 (7th Cir. 2003): Indiana **battery** offense that prohibits "rude, insolent, or angry" touching not a crime of violence.

United States v. Venegas-Ornelas, 348 F.3d 1273 (10th Cir. 2003). On the heels of the Court's decision in *Lucio-Lucio*, the Court, following the Fifth Circuit's reasoning in *Delgado-Enriquez*, a pre-*Chapa-Garza* case (Fives finding DWI is not an aggravated felony) holds that a prior CO. conviction of **first degree criminal trespass** of a dwelling qualifies as a "crime of violence" under 18 U.S.C. § 16(b), and hence is a "aggravated felony" for purposes of enhancing defendant's sentence under U.S.S.G. § 2L1.2. We believe that the holding in *Delgado-Enriquez* is in question based on subsequent Fifth Circuit cases applying the categorical approach. Further, the 10th Cir. in an unpublished decision found that prior CO. conviction of **first degree criminal trespass** is not a COV under 2L1.2 but is an aggravated felony under 18 U.S.C. § 16(b) warranting an 8 level increase. See *United States v. Ortuno-Caballero*, 187 Fed.Appx. 814 (10th Cir. 2006).

United States v. Cornelio-Pena, 435 F.3d 1279 (10th Cir. 2006): **solicitation to commit burglary of a dwelling** was crime of violence for purposes of reentry sentencing guideline.

United States v. Marquez, 258 Fed.Appx. 184 (10th Cir. 2007): prior Texas conviction for **attempted burglary of a habitation** was not an aggravated felony.

United States v. Cruz-Alonzo, 2010 WL 114198 (5th Cir. 2010) (unpublished): not plain error for district court to assess 16-level enhancement based on defendant's prior **Utah** for burglary of a dwelling.

United States v. Rivera-Oros, 590 F.3d 1123 (10th Cir. 2009): **Arizona conviction for second-degree felony burglary** is a crime of violence.

United States v. Gonzalez-Terrazas, 516 F.3d 357 (5th Cir. 2008): prior California conviction for **residential burglary** did not qualify as "burglary of a dwelling" and was not a "crime of violence" for purpose of 16-level sentencing enhancement.

United States v. Aguila-Montes de Oca, 553 F.3d 1229 (9th Cir. 2009): prior California conviction for **residential burglary** did not qualify as "burglary of a dwelling" and was not a "crime of violence" for purpose of 16-level enhancement. Case stands for the rule, if a state conviction does not include the elements of the "generic" crime in the Taylor categorical analysis a court *can't move on* to the modified categorical analysis.

United States v. Castillo-Morales, 507 F.3d 873 (5th Cir. 2007): applying modified categorical approach prior Florida **second-degree burglary** conviction was for "burglary of a dwelling" within meaning of guideline's definition for crime of violence.

United States v. Gomez-Guerra, 485 F.3d 301 (5th Cir. 2007): Florida **burglary conviction** was not a crime of violence supporting 16-level enhancement.

United States v. Carbajal-Diaz, 508 F.3d 804 (5th Cir. 2007): applying modified categorical approach, prior Missouri conviction for **burglary** qualified as a crime of violence under reentry guideline.

United States v. Murillo-Lopez, 444 F.3d 337, 344-45 (5th Cir. 2006): prior **California conviction for burglary** is the equivalent to the enumerated crime of violence offense of burglary of a dwelling, **but see** *United States v. Ortega-Gonzaga*, 490 F.3d 393 (5th Cir. 2007) (distinguishing *Murillo-Lopez*).

United States v. Ortega-Gonzaga, 490 F.3d 393 (5th Cir. 2007): prior California conviction for **burglary** did not qualify as "burglary of a dwelling" for purposes of 16-level enhancement.

United States v. Castillo-Medina, 251 Fed.Appx. 301 (5th Cir. 2007): prior Texas conviction of **burglary of a habitation** constituted "crime of violence" for sentencing purposes.

United States v. Herrera-Montes, 490 F.3d 390 (5th Cir. 2007): Tennessee conviction for **aggravated burglary** not a crime of violence for purposes of 16-level increase under reentry guideline.

United States v. Ortuno-Caballero, 187 Fed.Appx. 814 (10th Cir. 2006): reentry defendant's prior state court conviction for **Colorado attempted first degree criminal trespass of a dwelling** did not qualify as "crime of violence" for purposes of the 16-level enhancement under U.S.S.G. § 2L1.2 (note, however, under *Venegas-Ornelas*, *infra*, the offense likely qualifies as an aggravated felony and the 8-level increase).

United States v. Reina-Rodriguez, 468 F.3d 1147 (9th Cir. 2006): defendant's prior Utah offense of **burglary in the second degree** was not categorically a crime of violence for purpose of determining if 16-level sentencing increase applied.

United States v. Garcia-Mendez, 420 F.3d 454 (5th Cir.2005): Defendant's prior Texas conviction for **burglary of a habitation** was a prior conviction for a crime of violence under § 2L1.2(b)(1)(A)(ii) because it was equivalent to the enumerated offense of burglary of a dwelling.

United States v. Ocon-Estrada, 237 Fed.Appx. 369 (10th Cir. 2007) (prior Texas **burglary** conviction was a crime of violence warranting 16-level increase where prior conviction involved burglary of a dwelling)

United States v. Cornelio-Pena, 435 F.3d 1279 (10th Cir. 2006). Defendant's Arizona felony conviction for **solicitation to commit burglary of a dwelling** was a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A) warranting a 16-level enhancement.

Sareang Ye v. I.N.S., 214 F.3d 1128, 1133 (9th Cir. 2000): California conviction for **car burglary** not inherently violent in nature and not a crime of violence.

United States v. Alfaro-Gramajo, 2008 WL 331176 (11th Cir. 2008) (slip copy): Texas conviction for **burglary of a vehicle**, V.T.C.A. Penal Code § 30.04, qualified as, alternatively, attempted theft and crime of violence aggravated felony.

United States v. Rodriguez-Rodriguez, 323 F.3d 317 (5th Cir. 2003). Defendant's prior Texas felony convictions for **burglary of a building** and **unauthorized use of a motor vehicle** were not "crimes of violence" under U.S.S.G. § 2L1.2(b)(1)(A)(ii) (Nov. 1, 2001) (note that the versions of the statutes at issue are older); see *United States v. Galvan-Rodriguez*, 169 F.3d 217 (5th Cir. 1999).

United States v. Galvan-Rodriguez, 169 F.3d 217 (5th Cir. 1999): **Texas crime of unauthorized use of a motor vehicle** was a crime of violence under 18 U.S.C. § 16(b) and therefore an aggravated felony. *See e.g., United States v. Armendariz,* 571 F.3d 490 (5th Cir. 2009)(cert. granted and Supreme Court remands for consideration in light of *Begay v. United States,* - - - U.S.- - -, 128 S.Ct. 1581 (2008) and *Chambers v. United States* ,--- U.S.---, 129 S.Ct. 687, (2009) whether TX conviction of **unauthorized use of a motor vehicle** is an aggravated felony.

United States v. Sanchez-Garcia, 501 F.3d 1208 (10th Cir. 2007): Arizona's **Unlawful Use of a Means of Transportation** (UUMT) is not an aggravated felony (USSG § 2L1.2(b)(1)(C)) **crime of violence** (COV) under 18 U.S.C. § 16(b). The parties agreed that the UUMT does not have as an element the use, attempted use, or threatened use of force and that, therefore, the issue was whether it fell within § 16(b) as involving a "substantial risk that physical force against the person or property of another may be used in the course of committing the offense."

United States v. Hernandez-Castellanos, 287 F.3d 876 (9th Cir. 2002): Arizona offense of **felony endangerment** AZ. Stat. § 13-1201 was not categorically an aggravated felony for purposes of reentry guideline.

United States v. Gomez-Hernandez, 300 F.3d 974 (8th Cir. 2002): Iowa conviction for **going armed with intent** was a crime of violence warranting 16-level enhancement.

United States v. Lopez-Torres, 443 F.3d 1182 (9th Cir. 2006): The defendant's prior California conviction for **shooting at an occupied motor vehicle** was categorically a crime of violence.

United States v. Cortez-Arias, 403 F.3d 1111 (9th Cir. 2005): Prior California conviction of **shooting at inhabited dwelling** qualified as "crime of violence," warranting 16-level increase in offense level.

United States v. Alfaro, 408 F.3d 204 (5th Cir. 2005): Virginia conviction for **shooting into an occupied dwelling** was not a crime of violence for purposes of enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(ii).

United States v. Jaimes-Jaimes, 406 F.3d 845 (7th Cir. 2005): Prior conviction under Wisconsin law for **discharging a firearm into a vehicle or building** was not a conviction for a "crime of violence" warranting sentencing enhancement under U.S.S.G. § 2L1.2.

Quezada-Luna v. Gonzales, 439 F.3d 403 (7th Cir. 2006): offense of **aggravated discharge of a firearm** under Illinois law was an aggravated felony crime of violence.

United States v. Saenz-Mendoza, 287 F.3d 1011 (10th Cir. 2002). Defendant's state court **misdemeanor conviction of child abuse**, for which he received a sentence of one year, qualified as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(F), notwithstanding the fact that it was not a felony; Congress could, and did, choose to include some misdemeanor offenses within the definition of "aggravated felony," and it is the definition, not the label, that controls.

United States v. Contreras-Salas, 387 F.3d 1095 (9th Cir. 2004): Nevada conviction for **Child Abuse and/or Neglect Causing Substantial Bodily Harm** was not crime of violence.

United States v. Lopez-Patino, 391 F.3d 1034 (9th Cir. 2004): Under categorical approach, prior Arizona conviction for **child abuse** did not qualify as a crime of violence under U.S.S.G. § 2L1.2 because a person could "cause a child" physical injury without use of force.

United States v. Wilson, 392 F.3d 1243 (11th Cir. 2004): Florida conviction for **aggravated child abuse**, which included a physical-force element, was a crime of violence under the reentry guideline.

United States v. Gracia-Cantu, 302 F.3d 308 (5th Cir. 2002). The offense of **injury to a child under Texas** law is not a "crime of violence" under 8 U.S.C. § 1101(a)(43)(F) and hence is not an "aggravated felony" for purposes of 8 U.S.C. § 1326(b)(2) or U.S.S.G. § 2L1.2. **(Note that Texas injury to a child statute is divisible and depending on the subsection listed in the indictment it could constitute a crime of violence).**

United States v. Calderon-Peña, 383 F.3d 254 (5th Cir. 2004): reentry defendant's prior Texas conviction of **child endangerment**, for knowingly engaging in conduct that placed child younger than 15 years of age in imminent danger of bodily injury, did not have as element "the use, attempted use, or threatened use of physical force against the person of another," and did not qualify as "crime of violence" for sentence enhancement purposes.

United States v. Vasquez-Torres, 134 Fed.Appx. 648 (5th Cir. 2005): Defendant's prior Texas conviction for **injury to a child** was not for a crime of violence for purposes of sentence enhancement.

United States v. Hernandez-Rodriguez, 388 F.3d 779 (10th Cir. 2004). Utah's **misdemeanor conviction of attempted riot** using the modified categorical approach was an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), notwithstanding the fact that it was not a felony. Court resists government's request to consider the "incorporated police report" which establishes that Defendant "got into a fight" but is not part of the charging paper and judgment of conviction.

United States v. Landeros-Gonzales, 262 F.3d 424 (5th Cir. 2001). The offense of **criminal mischief under Texas** law is not a "crime of violence" under 18 U.S.C. § 16, and hence is not an "aggravated felony" under 8 U.S.C. §§ 1101(a)(43)(F) and 1326(b)(2), or US.S.G. §2L1.2b)(1)(A).

United States v. Landeros-Arreola, 260 F.3d 407 (5th Cir. 2001). Defendant's **prior conviction for "menacing" under Colorado law** did not count as an "aggravated felony" where, although the original sentence was four years imprisonment, the sentence was subsequently reduced on reconsideration of sentence (after defendant's successful completion of a "boot camp") to 18 months probation; the probation sentence was not merely a suspension of the prior prison sentence, but was an entirely new sentence.

United States v. Drummond, 240 F.3d 1333 (11th Cir. 2001): **NY conviction for menacing** qualified as an crime of violence for purposes of 16-level enhancement.

United States v. Perez-Veleta, 541 F.Supp.2d 1173 (D.N.M. 2008): defendant's prior Colorado conviction for **menacing** did not warrant imposition of 16-level sentencing enhancement.

United States v. Trejo-Palacios, 418 F.Supp.2d 915 (S.D.Tex. 2006): Defendant's prior Tennessee conviction for **facilitation of aggravated robbery** was not for crime of violence because it did not require intent to commit underlying offense, but merely knowing assistance of someone else who intended to commit it; however, it did qualify as an "aggravated felony" justifying 8-level increase.

United States v. Rivera-Ramos, 578 F.3d 1111 (9th Cir. 2009). New York **attempted robbery** conviction is a crime of violence under U.S.S.G. § 2L1.2. Court found that attempt coextensive with the common law definition.

United States v. Malacara, 224 Fed.Appx. 439 (5th Cir. 2007): no plain error in enhancing defendant's sentence 16 levels based on prior **Texas aggravated robbery conviction**.

United States v. Lopez-Gonzalez, 492 F.Supp.2d 687 (W.D.Texas 2007): Illinois **robbery** conviction was for a crime of violence for sentencing purposes.

United States v. Castillo-Zuniga, 270 Fed.Appx. 342 (5th Cir. 2008): California **robbery** conviction was a crime of violence.

U.S. v. Garcia-Caraveo, 586 F.3d 1230 (10th Cir. 2009): California robbery conviction was categorically a crime of violence under U.S.S.G. § 2L1.2 warranting a 16-level increase.

United States v. Servin-Acosta, 534 F.3d 1362 (10th Cir. 2008): Government conceded that California **second-degree robbery** was broader than generic robbery and failed to prove that defendant's prior conviction was for generic robbery so as merit a 16-level enhancement. *See U.S. v. Garcia-Caraveo*, ---- F.3d ----, 2009 WL 3585162 (10th Cir. 2009)(holding that California robbery conviction is categorically a crime of violence under GL).

United States v. Obando-Landa, 179 Fed. Appx. 477 (10th Cir. 2006): Prior New York conviction for **attempted third-degree robbery**, McKinney's Penal Law § 160.05, was a felony crime of violence supporting 16-level enhancement.

United States v. Obando-Landa, 179 Fed.Appx. 477 (10th Cir. 2006): NY conviction for **attempted third degree robbery** was a crime of violence; 16-level increase in offense level upheld.

United States v. Saavedra-Velazquez, 578 F.3d 1103 (9th Cir. 2009): California **attempted robbery** under penal code § 211 was a crime of violence warranting a 16-level increase. The definition of an "attempt" to commit a crime, under California law, was coextensive with the federal definition of "attempt".

United States v. Tellez-Martinez, 517 F.3d 813 (5th Cir. 2008): California **robbery** warranted 16-level increase; court analyzed whether prior conviction qualified as the enumerated offense of "robbery" "as understood in its ordinary, contemporary, [and] common' meaning" (internal quotation marks not included).

United States v. Becerril-Lopez, 528 F.3d 1133 (9th Cir. 2008): California **robbery** conviction (West's Ann. Cal. Penal Code § 211) was crime of violence , warranting 16-level increase; the statute defined robbery as the felonious taking of property in the possession of another from his person or immediate presence, and against his will, by means of force or fear, so that it was broader than the offense generic robbery, but any conduct outside the generic definition encompassed the definition of generic extortion, also a crime of violence.

United States v. Flores-Hernandez, 250 Fed.Appx. 85 (5th Cir. 2007): Florida conviction for **"strong arm robbery"** was a crime of violence.

United States v. Trejo-Palacios, 418 F.Supp.2d 915 (S.D. Tex. 2006): defendant's prior Tennessee **conviction for facilitation of aggravated robbery** was not for crime of violence meriting 16-level increase, because conviction did not require intent to commit underlying offense, but merely knowing assistance of someone else who intended to commit it; however, court held the offense was an aggravated felony and arguably used the wrong definition.

Bejarano-Urrutia v. Gonzales, 413 F.3d 444 (4th Cir. 2005): Virginia conviction for **involuntary manslaughter** not a crime of violence and thus not an aggravated felony.

United States v. Gomez-Leon, 545 F.3d 777 (9th Cir. 2009): California conviction for **vehicular manslaughter while intoxicated without gross negligence**, Cal.Penal Code § 192(c)(3), was not a crime of violence for purposes of sentencing enhancement.

But see United States v. Duran-Hernandez, 261 Fed.Appx. 567 (4th Cir. 2008): prior Virginia **involuntary manslaughter** conviction was a crime of violence warranting 16-level enhancement; court relied solely on the enumerated list in the guideline.

United States v. Gutierrez-Salinas, 257 Fed.Appx. 804 (5th Cir. 2007): Oklahoma conviction for **first degree manslaughter** was not for crime of violence and therefore 16-level enhancement was not warranted; offense was DWI-related.

Vargas-Sarmiento v. U.S. Dept. of Justice, 448 F.3d 159 (2d Cir. 2006): New York **first-degree manslaughter** conviction under N.Y. Penal Law § 125.20(1) and (2) was a crime of violence under 18 U.S.C. § 16(b); petitioner had stabbed victim.

United States v. Ramos-Guerrero, 254 Fed.Appx. 305 (5th Cir. 2007): remand required to determine whether Nebraska conviction for **manslaughter** was a crime of violence under reentry guideline.

United States v. Bonilla, 524 F.3d 647 (5th Cir. 2008): NY **second-degree manslaughter** conviction (N.Y. McKinney's Penal Law § 125.15) was not categorically a crime of violence.

United States v. Maldonado-Lopez, 517 F.3d 1207 (10th Cir. 2008): Colorado **harassment** statute, West's C.R.S.A. § 18-9-111(1)(a), was sufficiently broad to encompass both violent and nonviolent crimes, since it could involve conduct such as spitting on the victim, which was not violent, and thus was not categorically a crime of violence.

United States v. Esquivel-Arellano, 208 Fed.Appx. 758 (11th Cir. 2006): **Georgia aggravated stalking** conviction, Ga. Code Ann. § 16-5-91, not categorically a crime of violence that would support a 16-level enhancement under U.S.S.G. § 2L1.2

Szucz-Toldy v. Gonzales, 400 F.3d 978 (7th Cir. 2005): Illinois conviction for **harassment by telephone** not a crime of violence; statute criminalized making a telephone call with intent to abuse, threaten, or harass and did not require any words or threats to actually be spoken

Singh v. Ashcroft, 386 F.3d 1228, (9th Cir. 2004): Oregon crime of "**harassment**" that prohibited "offensive touching" not a crime of violence under 18 U.S.C. 16(a).

United States v. Gonzalez-Perez, 472 F.3d 1158 (9th Cir. 2007): prior conviction under Florida's **false imprisonment** statute does not constitute a "crime of violence" under U.S.S.G. § 2L1.2(b)(1)(A)(ii). *But see Flores-Navarro, below.*

United States v. Flores-Navarro, 267 Fed.Appx. 830 (11th Cir. 2008): Applying modified categorical approach, Florida **false imprisonment** conviction was for a crime of violence; charges made it clear that defendant's false imprisonment conviction had as an element the use of force.

United States v. De Jesus Ventura, 565 F.3d 870 (DC Cir. 2009): Virginia's **felonious abduction statute**, VA. Code § 18.2-47, does not categorically conform to the generic crime of kidnapping and is not a crime of violence for sentencing purposes.

United States v. Ruiz-Rodriguez, 494 F.3d 1273 (10th Cir. 2007): Defendant's prior conviction under Nebraska law for first-degree **false imprisonment** was not categorically a crime of violence for sentencing purposes.

United States v. Hernandez-Hernandez, 431 F.3d 1212 (9th Cir. 2005): California **false imprisonment** not categorically a crime of violence; however, applying modified categorical approach, defendant's prior conviction was a crime of violence.

Delgado-Hernandez v. Holder, 582 F.3d 930 (9th Cir. 2009): California **kidnapping** conviction under Cal. Penal Code § 207(a) is categorically an aggravated felony under 1101(a)(43)(F) referencing 18 U.S.C. § 16(b).

United States v. Moreno-Florean, 542 F.3d 445 (5th Cir. 2008): California **kidnapping** conviction under Cal. Penal Code § 207(a) is not categorically a crime of violence under § 2L1.2(b)(1)(A)(ii).

Dickson v. Ashcroft, 346 F.3d 44 (2d Cir. 2003): New York first-degree **unlawful imprisonment** (N.Y. McKinney's Penal Law §§ 135.00(1)(a), (b), 135.10) is a divisible statute, and only a conviction of the section involving an adult victim is clearly a crime of violence.

United States v. Franco-Fernandez, 511 F.3d 768 (7th Cir. 2008) (Illinois offense of **child abduction by putative father** was not a crime of violence for purposes of 16-level increase under U.S.S.G. § 2L1.2 nor was it an aggravated felony).

United States v. Martinez-Jimenez, 294 F.3d 921 (7th Cir. 2002): Convictions for **attempting to lure a child into a motor vehicle for an unlawful purpose** contrary to the Illinois Child Abduction statute, 720 ILCS 5/10-5(10), was a crime of violence supporting 8-level enhancement under reentry guideline.

United States v. Cervantes-Blanco, 504 F.3d 576 (5th Cir. 2007): Colorado conviction for **attempted second-degree kidnapping** did not qualify as enumerated offense of "kidnapping" and 16-level increase was not warranted.

United States v. Campos-Fuerte, 357 F.3d 956 (9th Cir. 2004), amended on other grounds, 366 F.3d 691 (9th Cir. 2004): conviction under Cal. Veh. Code § 2800.2 (**flight from police officer** in willful and wanton disregard for safety) was a crime of violence and aggravated felony under 8 U.S.C. § 1101(a)(43) and 18 U.S.C. § 16(b), warranting an 8-level enhancement under U.S.S.G. § 2L1.2.

United States v. Perez-Tapia, 241 Fed.Appx. 416 (9th Cir. 2007): California **arson** conviction was a crime of violence under guideline.

Sex Offenses and Crime of Violence.

United States v. Raya-Romero, 157 Fed.Appx. 703 (5th Cir. 2005): Record did not support district court's crime of violence finding where Defendant's prior convictions were for **"oral copulation, victim unconscious" and "sexual penetration, victim unconscious"** under Cal. Penal Code §§ 288a(f) and 289(d), each of which can be committed in one of four ways.

United States v. Munoz-Ortenza, 563 F.3d 112 (5th Cir. 2009): Prior California conviction for **oral copulation of a minor**, Cal.Penal Code § 288a(b)(1), did not correspond to the generic definition of "sexual abuse of a minor" that is enumerated as a "crime of violence" in Guidelines § 2L1.2.

Vargas v. Dept. of Homeland Security, 451 F.3d 1105 (10th Cir. 2006): Under modified categorical approach, Colorado conviction for **contributing to the delinquency of a minor by inducing the minor to engage in unlawful sexual contact**, West's C.R.S.A. § 18-6-701, was an aggravated felony conviction rendering alien deportable.

United States v. Chacon, 533 F.3d 250 (4th Cir. 2008): Court held that (1) a convictions under Maryland law for (1) **second-degree rape** by engaging in vaginal intercourse with another by force or threat of force was a conviction for a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)(ii); (2) **statutory rape** was a conviction for a crime of violence; and (3) **second-degree rape** by engaging in vaginal intercourse with another who was mentally defective, mentally incapacitated, or physically helpless was a conviction for a crime of violence. The Court concluded that the crimes fell within the scope of "forcible sex offense" even though the offenses lacked any element of use of force.

United States v. Gaytan, 226 Fed.Appx. 519 (6th Cir. 2007): Michigan conviction for **second-degree criminal sexual conduct** for having touched breast of 12-year-old girl was "crime of violence" that justified 16-level enhancement.

United States v. Castillo-Suarez, 215 Fed. Appx. 361 (5th Cir. 2007): **molestation** conviction under Massachusetts law was a crime of violence under U.S.S.G. § 2L1.2 because it qualified as "sexual abuse of a minor."

United States v. Diaz-Ibarra, 522 F.3d 343 (4th Cir. 2008): prior Georgia conviction for felony **attempted child molestation** contrary to Ga. Code Ann. § 16-6-4 qualified as a crime of violence for purposes of 16-level enhancement.

United States v. Serna-Gomez, 184 Fed.Appx. 768 (10th Cir. 2006): defendant's prior Illinois conviction for **aggravated sexual abuse** was a "crime of violence" for sentencing purposes.

United States v. Beltran-Munguia, 489 F.3d 1042 (9th Cir. 2007) : Prior Oregon conviction for **sexual abuse in the second degree** was not a crime of violence warranting 16-level enhancement because statute does not include element of use, attempted use or threatened use of physical force.

United States v. Medina-Villa,--- F.3d—, 2009 WL 1758742(9th Cir. 2009): Prior California conviction for **lewd and lascivious acts on a child under fourteen,** Cal.Penal Code 288(a), corresponds to the generic definition of "sexual abuse of a minor" which is enumerated as a crime of violence under U.S.S.G. § 2L1.2.

United States v. Izaguirre-Flores, 405 F.3d 270 (5th Cir. 2005): Defendant's North Carolina offense of taking **indecent liberties with a child** was "sexual abuse of a minor," for purposes of § 2L1.2.

United States v. Padilla-Reyes, 247 F.3d 1158 (11th Cir. 2001): Prior conviction under **West's F.S.A. § 800.04** that criminalizes a broad variety of acts, not all of which require victim contact, against children under age 16 qualified as "sexual abuse of a minor" and defining the phrase as "a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification."

United States v. Gomez-Hernandez, 300 F.3d 974 (8th Cir. 2002): **unlawful sexual intercourse with a minor** in violation of California Penal Code § 261.5(d) (prohibiting intercourse by a person aged 21 or older with someone aged 16 or younger) was a crime of violence under reentry guideline.

United States v. Pereira-Salmeron, 337 F.3d 1148 (9th Cir. 2003): Prior felony conviction under Virginia law, for **carnal knowledge of a child between 13 and 15** years of age, was a crime of violence for purposes of reentry guideline.

United States v. Lopez-Montanez, 421 F.3d 926 (9th Cir. 2005): California **sexual battery conviction** was not a categorical "crime of violence," for purpose of U.S.S.G. § 2L1.2 because statute encompassed illegal touching that did not involve use of force, and statute's requirement that victim be unlawfully restrained was not limited to physical restraint, but could be accomplished by words alone; modified categorical approach could be applied to determine that defendant was actually convicted of conduct that was a crime of violence. *But see Lisbey v. Gonzales*, 420 F.3d 930 (9th Cir. 2005): California sexual battery conviction was a crime of violence under 8 U.S.C. § 1101(a)(43) because Cal. Penal Code § 243.4(a) had a "substantial risk of use of force" and was an aggravated felony under 18 USC § 16(b).

United States v. Lechuga, 279 Fed.Appx. 183 (3d Cir. 2008): California conviction for **sexual battery** was for felony crime of violence, justifying 16-level sentence enhancement.

United States v. Viezcas-Soto, 562 F.3d 903 (8th Cir. 2009): it was plain error to impose 16-level enhancement for prior crime of violence where defendant's **California unlawful sexual intercourse conviction** (statutory rape)was under a wobbler statute and government failed to prove it was a felony conviction.

United States v. Meraz-Enriquez, 442 F.3d 331 (5th Cir. 2006): Defendant's Kansas conviction for **attempted aggravated sexual battery** was one that could be committed by methods that did not require use of force, and so it did not qualify as a "crime of violence" under U.S.S.G. § 2L1.2.

United States v. Munguia-Sanchez, 365 F.3d 877 (10th Cir. 2004). Defendant's Colorado conviction for **sexual assault of a minor** was a "crime of violence" under U.S.S.G. § 2L1.2(b)(1)(A)(2003).

Xiong v. I.N.S., 173 F.3d 601 (7th Cir. 1999): Wisconsin conviction for **sexual assault on a child** was not a crime of violence; offense conduct was consensual sex between 18-year-old defendant and 15-year-old girlfriend.

Lara-Ruiz v. I.N.S., 241 F.3d 934 (7th Cir. 2001): **Illinois sexual assault** was a sexual abuse of a minor aggravated felony offense; victim was aged four years.

United States v. Rivera-Perez, 322 F.3d 350 (5th Cir. 2003). Defendant's prior conviction for **attempted indecency with a child** was a "felony" for purposes of U.S.S.G. § 2L1.2(b)(1)(A), notwithstanding the fact that it had been sentenced as a misdemeanor pursuant to the provisions of Tex. Penal Code § 12.44(a), because by the terms of the criminal statute defendant was potentially exposed to more than one year of imprisonment and because Texas state law itself recognizes that felonies sentenced as misdemeanors under § 12.44(a) retain their character as felonies; see also *United States v. Lopez-Cortez*, 269 Fed.Appx. 360 (5th Cir. 2008).

United States v. De La Cruz-Garcia, 590 F.3d 1157 (10th Cir. 2010): Colorado **attempted sexual abuse of a minor** is categorically a crime of violence.

United States v. Najera-Najera, 519 F.3d 509 (5th Cir. 2008): prior Texas offense of **indecency with a child** was sexual abuse of a minor under the guideline.

United States v. Ramos-Sanchez, 483 F.3d 400 (5th Cir. 2007): Kansas conviction for **indecent solicitation of a child** involving soliciting or enticing a minor to perform an illegal sex act was "sexual abuse of a minor" and thus a "crime of violence" for purposes of reentry guideline.

United States v. Balderas-Rubio, No. 06-41153 (5th Cir. Sept. 5, 2007) (King, Garza, Benavides): **Indecency with a child** under Okla. Stat. Tit. 21, § 1123(a)(4) is "sexual abuse of minor."

United States v. Sarmiento-Funes, 374 F.3d 336 (5th Cir. 2004). Prior Missouri **sexual assault felony conviction** was not a **"crime of violence"** within the meaning of U.S.S.G. § 2L1.2 cmt. n.1(B)(ii)(2002).

United States v. Lopez-DeLeon, 513 F.3d 472 (5th Cir. 2008): prior California conviction for **sexual intercourse with minor** was "crime of violence," given records that established equivalency to **statutory rape** in that victim was under age 14.

Estrada-Espinoza v. Mukasey, 546 F.3d 1147 (9th Cir. 2008)(en banc): California **statutory rape** statute did not correspond to generic definition of "sexual abuse of a minor" and was not categorically a crime of violence.

United States v. Medina-Villa,--- F.3d --- , 2009 WL 1758742 (9th Cir. 2009): California conviction for **lewd and lascivious acts with minor under age 14** was a 16-level crime of violence because it qualified as sexual abuse of a minor.

United States v. Munoz-Ortenza, 563 F.3d 112 (5th Cir. 2009): California statute of **oral copulation of a minor** did not categorically qualify as sexual abuse of a minor under the application notes to USSG § 2L1.2; the court noted in note 7 that the record was silent on the age of the victim.

United States v. Lopez-Solis, 447 F.3d 1201 (6th Cir. 2006): **Statutory rape** in violation of Tennessee law was not predicate "crime of violence," under guideline providing for 16-level sentencing increase for defendant convicted of illegal reentry.

United States v. Gomez-Gomez, 547 F.3d 242 (5th Cir. 2008): Prior California **rape**, Cal.Penal Code § 261(a)(2), conviction did correspond to the generic definition of "forcible sex offense" that is enumerated as a crime of violence for sentencing purposes pursuant to Guidelines § 2L1.2.

United States v. Alvarez-Gutierrez, 394 F.3d 1241 (9th Cir. 2005): reentry defendant's prior Nevada conviction for **statutory sexual seduction** constituted a conviction for sexual abuse of a minor, and, though not a traditional felony in that it was not punishable by more than one year, was an aggravated felony for sentencing guideline purposes.

Gonzalez v. Ashcroft, 369 F.Supp.2d 442 (S.D.N.Y. 2005): New York conviction for **use of a child in a sexual performance** was not equivalent of federal pornography or sexual abuse offenses, both of which required scienter, and thus did not constitute aggravated felony.

United States v. Rodriguez-Guzman, 506 F.3d 738 (9th Cir. 2007): holding that "**statutory rape**, is a per se crime of violence under § 2L1.2(b)(1)(A)(ii) of the Guidelines. However, [the California statute], which sets the age of consent at eighteen, is overbroad. The generic federal definition of statutory rape, reflecting the age of consent established by the overwhelming body of authority, requires that the victim be under sixteen years of age." Remanded for resentencing.

Valencia v. Gonzales, 439 F.3d 1046 (9th Cir. 2006): California offense of which alien was convicted, felony **unlawful sexual intercourse with person under 18** who was more than three years his junior, did not qualify as "crime of violence," and thus was not an "aggravated felony" that subjected him to removal.

Estrada-Espinoza v.Mukasey, 546 F.3d 1147 (9th Cir. 2008)(en banc): Prior California conviction for **statutory rape** contary to Cal. Penal Code § 261.5(c) did not conform to the generic definition of "sexual abuse of a minor" and therefore not categorically a crime of violence.

United States v. Romero-Hernandez, 505 F.3d 1082 (10th Cir. 2007): Colorado misdemeanor (but punishable by more than one year imprisonment) **unlawful sexual contact**, West's C.R.S.A. § 18-3-404(1), was a "forcible sex offense" and therefore a "crime of violence" warranting 16-level increase.

United States v. Gonzalez-Jaquez, 566 F.3d 1250 (10th Cir. 2009): California conviction of **sexual battery**, Cal.Penal Code § 243.4, was a crime of violence for guideline purposes.

United States v. Rosas-Pulido, 526 F.3d 829 (5th Cir. 2008): Minnesota conviction for **fourth degree criminal sexual conduct**, contrary to Minn. Stat. Ann. § 609.345, was not for a crime of violence.

United States v. Velazquez-Overa, 100 F.3d 418 (5th Cir. 1996): offense of **indecency with a child by sexual contact** constituted a "crime of violence" as it applied only to child victims under the age of 17 and inherently involved a substantial risk that physical force would be used.

United States v. Alas-Castro, 184 F.3d 812 (8th Cir. 1999): Nebraska conviction for **sexual assault of a child** is a crime of violence.

Ramsey v. I.N.S., 55 F.3d 580 (11th Cir. 1995): Florida offense of **attempted lewd assault on a child under the age of 16** is a crime of violence even though the offense might be accomplished without use of physical force.

United States v. Ortiz-Delgado, 451 F.3d 752 (11th Cir. 2006): California conviction for **lewd acts upon a child** qualified as "sexual abuse of a minor" for purposes of reentry guideline enhancement.

United States v. Contreras-Murillo, 270 Fed.Appx. 693 (9th Cir. 2008): Reentry defendant's prior conviction for **lewd and lascivious acts with a child under 14**, contrary to West's Ann.Cal.Penal Code § 288, was a crime of violence warranting a 16-level upward adjustment.

United States v. Perez-Aguilar, 2008 WL 2367399 (9th Cir. 2008) (slip copy): District court committed plain error in enhancing reentry defendant's offense level by 16; conviction for **sodomy with another person who is under 18 years of age** contrary to Cal.Penal Code. § 286(b)(1) does not categorically qualify as statutory rape because the age of consent under California law is 18 and the term minor in the context of the statutory rape law means a person under age 16.

United States v. Garcia-Juarez, 421 F.3d 655 (8th Cir. 2005): **Lascivious acts with a child** under Iowa law was a crime of violence.

United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993): Utah conviction for **attempted sexual abuse of a child** was a crime of violence even if actual physical force was not used.

Weapons and Crime of Violence.

United States v. Rivas-Palacios, 244 F.3d 396 (5th Cir. 2001). The Texas crime of unlawful **possession of a short-barreled shotgun** is a "crime of violence" under 18 U.S.C. § 16 and hence is also an "aggravated felony" for purposes of 8 U.S.C. § 1101(a)(43)(F) or U.S.S.G. § 2L1.2(b) (2000 version). (In dicta, Court indicated that the unlawful possession of any unregistered firearm would constitute a "crime of violence" under 18 U.S.C. § 16 and hence an "aggravated felony.") **This decision has been cited by subsequent panel decisions as failing to follow the *Chapa-Garza* framework and therefore lacks precedential value. *See United States v. Diaz-Diaz* and *United States v. Hernandez-Neave* described below.**

United States v. Diaz-Diaz, 327 F.3d 410 (5th Cir. 2003). Court appeared to agree that defendant's conviction for **possession of a short-barrel firearm** under Tex. Penal Code § 46.05 was not a "crime of violence" under 8 U.S.C. §§ 1101(a)(43)(F) and 1326 or the U.S.S.G. § 2L1.2 (2000); however, because it was not clear that the

same sixteen-level enhancement could not still be imposed as a firearms offense under 8 U.S.C. §1101(a)(43)(E)(iii), there was no plain error in assessing the 16-level enhancement for an "aggravated felony."

United States v. Hernandez-Neave, 291 F.3d 296 (5th Cir. 2001). The felony offense of **carrying a firearm** onto premises which are licensed or permitted to sell alcoholic beverages is not a "crime of violence" under 18 U.S.C. § 16 and hence not an "aggravated felony" for purposes of 8 U.S.C. § 1101(a)(43)(F) or U.S.S.G. § 2L1.2. (Court suggested that while this decision seemingly conflicted with an earlier decision in *Rivas-Palacios*, *Rivas-Palacios* conflicted with the earlier panel decision in *Chapa-Garza*; therefore *Chapa-Garza*, and not *Rivas-Palacios*, should be followed.)

United States v. Gamez, 577 F.3d 394 (2nd Cir. 2009). New York Penal Code § 265.03, **unlawful possession of a firearm**, is not a crime of violence under § 2L1.2.

United States v. Medina-Anicacio, 325 F.3d 638 (5th Cir. 2003). Defendant's California felony conviction for **possession of a deadly weapon** (concealed dagger) was not a "crime of violence," and hence not an "aggravated felony," under 8 U.S.C. §§ 1101(a)(43)(F) and 1326 or § 2L1.2 (2000).

United States v. Sandoval-Barajas, 206 F.3d 853 (9th Cir. 2000): conviction for **possession of firearm by non-citizen** was not "aggravated felony," and reentry defendant was not subject to 16-level enhancement because conviction was not described in federal statute setting forth crime of possession of firearm by illegal alien; federal statute applied to some aliens while Washington statute applied to all aliens.

Henry v. Bureau of Immigration and Customs Enforcement, 493 F.3d 303 (3d Cir. 2007): **Second-degree criminal possession of a weapon** under NY law qualified as an aggravated felony crime of violence; statute required possession of the weapon with intent to use it against another.

United States v. Lopez-Garcia, 565 F.3d 1306 (11th Cir. 2009): **Possession of a firearm during the commission of a crime** under Georgia law, Ga.Code Ann. § 16-11-106(b)(4) constituted a "firearms offense" with the meaning of U.S.S.G. § 2L1.2 and warranted a 16-level increase.

DUI and Crime of Violence.

Leocal v. Ashcroft, 543 U.S. 1 (2004): alien's conviction for **driving under the influence of alcohol (DUI)** and causing serious bodily injury in an accident, in violation of Florida law, was not a "crime of violence," and therefore, was not an "aggravated felony" warranting deportation.

United States v. Portela, 469 F.3d 496 (6th Cir. 2006): Florida conviction for **reckless vehicular assault** was not "crime of violence" warranting enhancement of sentence.

United States v. Lucio-Lucio, 347 F.3d 1202 (10th Cir. 2003). **DWI** is not a "crime of violence" under 18 U.S.C. § 16 and hence is not an "aggravated felony" for purposes of 8 U.S.C. § 1101(a)(43)(F) or U.S.S.G. § 2L1.2(b)(1)(A).

United States v. Torres-Ruiz, 387 F.3d 1179 (10th Cir. 2004): The definition of "crime of violence" for purposes of U.S.S.G. § 2L1.2 incorporates an intent requirement that cannot be satisfied by negligent conduct; California conviction of **felony driving while intoxicated** was not a COV.

United States v. Vargas-Duran, 356 F.3d 598 (5th Cir. 2004)(en banc). Decision rendered after en banc hearing, vacating prior decision, determined that the **Texas crime of intoxication assault** under Tex. Penal Code § 49.07 is not a "crime of violence" as defined under U.S.S.G. §2L1.2(b)(1)(A)(ii) (Nov. 1, 2001). The term "use" of force in this Guideline requires an intentional availment of force; even though Texas statute requires, as an element, that the defendant "cause serious bodily injury to another," the Guideline's requirement of an element

of "use, attempted use, or threatened use of physical force against the person of another" is absent from the Texas statute. The prior Texas crime of intoxication assault did not qualify as "crime of violence," for sentence enhancement purposes.

Oyebanji v. Gonzales, 418 F.3d 260 (3d Cir. 2005): New Jersey conviction for **vehicular homicide** not a crime of violence and hence not an aggravated felony.

Francis v. Reno, 269 F.3d 162 (3d Cir. 2001): **homicide by vehicle** under Pennsylvania law not an aggravated felony.

United States v. Hernandez-Castellanos, 287 F.3d 876 (9th Cir. 2002): Arizona offense of **felony endangerment** AZ. Stat. § 13-1201 was not categorically an aggravated felony for purposes of reentry guideline.

United States v. Chapa-Garza, 243 F.3d 921 (5th Cir. 2001). The crime of driving while intoxicated (**DWI**) is not a "crime of violence" under 18 U.S.C. § 16 and hence is not an "aggravated felony" for purposes of 8 U.S.C. § 1101(a)(43)(F) or U.S.S.G. § 2L1.2(b)(1)(A).

United States v. Trejo-Galvan, 304 F.3d 406 (5th Cir. 2002). Defendant's **misdemeanor DWI** convictons were not "crimes against the person" for purposes of the enhanced penalties of 8 U.S.C. § 1326(b)(1); a "crime against the person" is an offense that, by its nature, involves a substantial risk that the offender will intentionally employ or threaten to employ physical force against another.

United States v. Gutierrez-Salinas, 257 Fed.Appx. 804 (5th Cir. 2007) (Oklahoma conviction for **first degree manslaughter** was not for crime of violence and therefore 16-level enhancement was not warranted; defendant caused offense while driving intoxicated; offense also was not generic manslaughter).

United States v. Gomez-Leon, 545 F.3d 777 (9th Cir. 2008): California conviction for **vehicular manslaughter while intoxicated without gross negligence** was not "crime of violence" for purposes of sentence enhancement under 2L1.2.

Fraud and Definition of Aggravated Felony, the birth of the "circumstance-specific" approach.

Nijhawan v. Holder, 129 U.S. 2294 (2009): Court distinguishes between statutes that require a categorical approach or modified categorical approach and statutes that require a "circumstance-specific" approach which allows the finder of fact to look beyond the types of evidence it could consider under the modified categorical approach. Here, the defendant committed **fraud**. The statute of conviction did not have as an element the amount of loss. The Court considered whether the aggravated felony definition "an offense that ... involves fraud or deceit *in which the loss to the victim or victims exceeds $10,000*." (quoting 8 U.S.C. § 1101(a)(43)(M)(I)). The Court concluded the categorical approach was not appropriate; consideration of this aggravated felony definition required a "circumstance-specific" approach. Under this approach it was permissible for the adjudicator to rely upon sentencing-related material to determine the amount of loss.

Hamilton v. Holder, 584 F.3d 1284 (10th Cir. 2009): Using a "circumstance-specific" approach the judge found that presentence investigation report (PSR)supported a finding that defendant's conviction for **conspiracy to commit mail fraud** was an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(I).

Tian v. Holder, 576 F.3d 890 (2009): Prior conviction for **unauthorized access to computer** in violation of 18 U.S.C. § 1030(a)(4) qualifies as an aggravated felony because the loss to victim exceeded $10,000. At sentencing, the defendant agreed that the investigative loss to the victim exceeded $10,000.

Imposition of Sentence and Definition of Conviction.

United States v. Ruiz-Gea, 340 F.3d 1181 (10th Cir. 2003). For purposes of determining whether defendant had a drug trafficking offense with a "sentence imposed" of greater than 13 months, so as to qualify for a sixteen-level enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(i), it was proper for district court to consider not only the original probation sentence but also the sentence imposed upon revocation of probation (two years' imprisonment); because the revocation sentence exceeded thirteen months, the enhancement was properly applied.

United States v. Alfaro-Antonio, 83 Fed.Appx. 269 (10th Cir. 2003). Defendant's prior felony conviction for **attempted forcible sex abuse** was not an "aggravated felony" under 8 U.S.C. §§ 1101(a)(43) because sentence imposed was less than one year. (Note that *Alfaro-Antonio* was determined under the 2000 guidelines which required the prior conviction be classified as an aggravate felony to impose a 16-level increase. Under the current guidelines, it is likely a sixteen-level increase would be imposed under U.S.S.G. § 2L1.2 although the prior conviction is not an aggravated felony. *See United States v. Arguijo-Lucio*, 71 Fed. Appx. 441 (5th Cir. 2003) (Defendant's prior felony robbery conviction was not "aggravated felony" under statute; however, finding no error imposing a sixteen-level increase under § 2L1.2)).

United States v. Gonzalez-Coronado, 419 F.3d 1090 (10th Cir. 2005). The Kansas felony conviction for **attempted aggravated assault** was not an aggravated felony for sentencing purposes because Defendant received a sentence of **straight probation**, however, it was a crime of violence under § 2L1.2, which does have a sentence requirement, warranting a 16-level enhancement. Court rejected Defendant's argument that a two year statutory maximum applies because prior conviction was insufficient to meet 8 U.S.C. § 1001(a)(43)'s statutory definition of an aggravated felony as charged by government. Court found that Defendant never objected to whether prior was a felony conviction and government does not need to be specific between §1326(b)(2) or 1326 (b)(1).

*United States v. Zamudio***,** 314 F.3d 517 (10th Cir. 2002). Defendant's **plea in abeyance** for **distribution of marijuana** was an aggravated felony under 8 U.S.C. § 1326(b)(2) and § 2L1.2.

Cruz-Garza v. Ashcroft, 396 F.3d 1125 (10th Cir. 2005). Court reversed and vacated BIA decision upholding ruling that alien's prior **Attempted Theft** felony conviction that was later vacated and replaced by Attempt Theft, a class B misdemeanor, by the state court. Court found that INS failed to prove by clear and convincing evidence, that alien's state court conviction was such as to make him subject to removal. The issue turns on whether alien's prior was reduced from a felony to a misdemeanor for rehabilitative reasons or for procedural ones. *Cf. Renteria-Gonzalez v. INS*, 322 F.3d 804 (5th Cir. 2002) (categorically allowing removal regardless of whether the predicate conviction has been vacated on grounds relating to procedural and substantive flaws).

United States v. Sanchez-Mota, 319 F.3d 1 (1st Cir. 2002): Defendant's sentence for illegally reentering the United States after removal could not be increased under U.S.S.G. § 2L1.2(b)(1)(C) where the defendant's **removal occurred before his aggravated felony conviction**; resentencing ordered because the original sentence exceeded the two-year maximum allowed under 8 U.S.C. § 1326(a).

United States v. Rojas-Luna, 522 F.3d 502 (5th Cir. 2008): Government must prove that the removal was subsequent to the aggravated felony conviction; it was plain error for the district court to rely on an unsupported statement in the PSR that defendant was removed in 2006, following a conviction in 2003, and enhance his sentence beyond the two-year maximum of § 1326(a).

United States v. Simo-Lopez, 471 F.3d 249 (1st Cir. 2006): Fact that defendant received only a six-month sentence for prior battery conviction was persuasive evidence that his conviction was for a misdemeanor aggravated battery conviction, rather than for the originally-charged felony aggravated battery, where at the time of the prior conviction, Puerto Rico was a "**fixed sentence jurisdiction**."

United States v. Anderson, 328 F.3d 1326 (11th Cir. 2003): "Conviction" includes a **nolo contendere plea with adjudication withheld**, as long as some punishment, penalty, or restraint on liberty is imposed; applying Florida law.

United States v. Cisneros-Cabrera, 110 F.3d 746 (10th Cir. 1997): Defendant was subject to enhancement for illegally reentering United States after deportation following aggravated felony conviction, though state court invalidated conviction after defendant's reentry. *See also United States v. Luna-Diaz*, 222 F.3d 1 (1st Cir. 2000).

United States v. Banda-Zamora, 178 F.3d 728 (5th Cir. 1999): Holding a sentence of **straight probation** for prior conviction, where there is no imposition and suspension of sentence, is not an "aggravated felony" for purposes of sentencing guideline because there was no imposition of sentence.

United States v. Landeros-Arreola, 260 F.3d 407 (5th Cir. 2001). Defendant's **prior conviction for "menacing" under Colorado law** did not count as an "aggravated felony" where, although the original sentence was four years imprisonment, the sentence was subsequently reduced on reconsideration of sentence (after defendant's successful completion of a "boot camp") to 18 months probation; the probation sentence was not merely a suspension of the prior prison sentence, but was an entirely new sentence.

United States v. Viezcas-Soto, 562 F.3d 903 (8th Cir. 2009): it was plain error to impose 16-level enhancement for prior crime of violence where defendant's **California unlawful sexual intercourse conviction** (statutory rape) was under a wobbler statute and government failed to prove it was a felony conviction.