CRIMINAL LAW—THE MEANING OF VIOLENCE: AN INTERPRETIVE ANALYSIS ON WHETHER A PRIOR CONVICTION FOR CARRYING A CONCEALED WEAPON IS A "CRIME OF VIOLENCE" UNDER THE UNITED STATES SENTENCING GUIDELINES

Neal Eriksen

Follow this and additional works at: http://digitalcommons.law.wne.edu/lawreview

Recommended Citation
CRIMINAL LAW—THE MEANING OF VIOLENCE: AN INTERPRETIVE ANALYSIS ON WHETHER A PRIOR CONVICTION FOR CARRYING A CONCEALED WEAPON IS A "CRIME OF VIOLENCE" UNDER THE UNITED STATES SENTENCING GUIDELINES

INTRODUCTION

In United States v. Price, the defendant Price pleaded guilty to the crime of being a felon in possession of a firearm in violation of federal law.1 During sentencing, the court considered Price's prior Florida conviction of carrying a concealed weapon a "crime of violence" under the United States Sentencing Guidelines (Guidelines).2 This resulted in an enhancement of Price's sentence, from twelve to eighteen months,3 to a thirty-month sentence.4 On appeal, Price argued that his prior conviction for carrying a concealed weapon under Florida law was improperly characterized as a crime of violence, and thus, his sentence was incorrect.5 Relying on its own precedent, the Court of Appeals for the Eleventh Circuit affirmed the trial judge's sentence.6 Therefore, the judge's determination that Price's prior conviction of carrying a concealed weapon was a crime of violence directly and substantially impacted the sentence that Price received. Currently the courts of appeals disagree as to whether a prior conviction for carrying a concealed weapon is a crime of violence under the Guidelines.7 This split among the federal courts of appeals concerning the proper classification (vio-

---

1. United States v. Price, 132 F. App’x 341 (11th Cir. 2005). Price was convicted under 18 U.S.C. §§ 922 (g)(1) and 924(a)(2). Id.
2. Id. at 342.
3. See U.S. Sentencing Guidelines Manual, § 5A, at 377 (2005). Price's base level would have been set at fourteen pursuant to section 2K2.1(a)(6), which provides for a base level of fourteen if the defendant was a "prohibited person at the time the defendant committed the instant offense." Id. § 2K2.1(a)(6). “[A] prohibited person [is] any person described in 18 U.S.C. § 922(g) . . . .” Id. § 2K2.1, cmt., n.3. Price would have likewise received a reduction of three points for “accept[ing] responsibility,” setting his final base level offense at eleven. See id. §§ 3E1.1(a)-(b).
4. Price received a three-level reduction as a result of accepting responsibility pursuant to the U.S. Sentencing Guidelines Manual, supra note 3, §§ 3E1.1(a)-(b), therefore his sentencing base level offense was seventeen. Price, 132 F. App’x at 342.
5. Price, 132 F. App’x at 341.
6. Id. at 343.
7. See infra Part I.F.
lent or non-violent) of a concealed weapons conviction has created a disparity in our federal criminal justice system.  

This Note is written with the purpose of resolving the disparity between the circuit courts’ interpretations of the crime of violence provision under the Guidelines and whether a prior conviction for carrying a concealed weapon is included within its scope. Part I will discuss the origin and operation of the Guidelines. This Part will also analyze the crime of carrying a concealed weapon by comparing the various state laws governing the crime. Furthermore, this Part will examine the current case law, analyzing the split among the circuit courts over the issue of whether a prior conviction for carrying a concealed weapon is a crime of violence.

In Part II, this Note will argue several points that aid in obtaining the proper scope of the crime of violence provision, and will ultimately find that it does not include the crime of carrying a concealed weapon. First, under a common canon of statutory interpretation, the crime of carrying a concealed weapon is excluded from the scope of the crime of violence provision. Also, while the courts of appeals have diverged in their conclusions on this issue, they have all taken the same insufficient approach in the analysis of the provision. Therefore, this Note will set forth a new approach to analyzing the crime of violence provision—an objective categorical approach. By applying this approach, Part II will provide further reasoning and support as to why the crime of carrying a concealed weapon is not a crime of violence.

I. BACKGROUND


Historically, the United States has implemented various systems of criminal punishment. While the roles of the three branches of government have been in a constant evolution with respect to sentencing, they have always mirrored, in some form, the general theory of “separation of powers.” No one branch has ever had

8. Id.

9. While the Eighth and Eleventh Circuits arrived at differing conclusions about whether a concealed weapons conviction is a “crime of violence,” both did so by a “subjective” evaluation of the risk created by the conduct. For further discussion, see infra Part II.B.

10. The United States sought to apply the theory of separation of powers to criminal sentencing. By separating powers among the branches of the government, with each branch having equal power and separate duties, separation of power ensures a
overriding authority, or rather, exercised overriding authority in the area of sentencing with the exception of the executive branch, which has the power of the presidential pardon. Instead, criminal punishment has been the result of the interaction between the three branches of government. This idea of cooperation between the branches in sentencing can be traced back even further than the creation of the federal courts. For example, the 1789 Act to regulate the Collection of Duties provided that if a person swears or affirms falsely, he or she shall be punished by fine or imprisonment, "in the discretion of the court before whom the conviction shall be had, so as the fine shall not exceed one thousand dollars, and the term of imprisonment shall not exceed twelve months." This Act depicts the three-branch sentencing structure found in the federal criminal system—that the court has discretionary powers to prescribe a particular sentence, as long as that sentence is within the range provided by Congress, with the presidential pardon existing in the background.

The sharing of power between the branches in the area of sentencing evolved further with the creation of the parole system. In 1910, Congress established the first parole system whereby a commission would be established in every prison, and would have the system of checks and balances that best serves a democratic form of government. The notion of separating the powers to achieve this is best represented by the Federalist No. 51, which declared that

[...] to what expedient, then, shall we finally resort, for maintaining in practice the necessary partition of power among the several departments, as laid down in the Constitution? The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.

THE FEDERALIST No. 51 (James Madison).

11. U.S. CONST. art. II, § 2, cl. 1 (declaring that "[t]he President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States").

12. Compare An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States, ch. 5, § 35, 1 Stat. 29, 46-47 (1789) (setting a broad range for sentencing and leaving the court with discretion to impose the proper sentence within that range) (signed into law on July 31, 1789), with Judiciary Act of 1789, 1 Stat. 73 (passed two months later on September 24, 1789, which established the federal courts).

13. An Act to regulate the Collection of the Duties imposed by law on the tonnage of ships or vessels, and on goods, wares and merchandises imported into the United States, ch. 5, § 35, 1 Stat. 29, 46-47 (1789).

14. Only the Legislature and Judiciary appear explicitly in the statute, however, the constitutional provision of the presidential pardon is always present.

authority to release certain prisoners who the commission believed were rehabilitated and would "live and remain at liberty without violating the laws."\textsuperscript{16} Under the parole system, immediate discretion was divided not only between Congress and the courts, but also an independent parole board. A defendant's sentence became indeterminate, and he should be incarcerated "until he or she had reformed."\textsuperscript{17} The authority was divided between judges and the parole board. Judges retained the authority to suspend a defendant's sentence,\textsuperscript{18} while the parole board could release a defendant after one-third of his sentence had been served.\textsuperscript{19}

After decades of a "parole" sentencing structure that was largely based on judicial discretion, the political atmosphere concerning the punishment of criminals changed in the 1980s.\textsuperscript{20} Indeterminate sentencing was producing unsatisfactory results in the minds of members of Congress.\textsuperscript{21} As a result, in 1984, President Reagan signed the Comprehensive Crime Control Act,\textsuperscript{22} which contained several criminal law reforms including the Sentencing Reform Act.\textsuperscript{23} The Sentencing Reform Act established the Sentencing Commission that was charged with creating the Guidelines\textsuperscript{24} to correct the problems with the existing federal sentencing system. The roles of the three branches had changed once again and the authority of the judiciary in sentencing was reduced in order to accomplish the goals of Congress.

\textsuperscript{17} Nagel, supra note 15, at 894.
\textsuperscript{18} Kate Stith & José A. Cabranes, Fear of Judging: Sentencing Guidelines in the Federal Courts 19 (1998). The Supreme Court in Ex parte United States, 242 U.S. 27, 51-52 (1916), held that federal courts could not suspend a sentence if the legislature provided a statutory minimum sentence for the crime. Judicial power to suspend a sentence was reinstated when Congress enacted the Probation Act of 1925, ch. 521, § 1, 43 Stat. 1259, 1259.
\textsuperscript{19} An Act To parole United States prisoners, ch. 387, § 1, 36 Stat. at 819 (codified at 18 U.S.C. §§ 4202-4208 (repealed 1984)).
\textsuperscript{20} Stith & Cabranes, supra note 18, at 29-35.
\textsuperscript{21} See id. at 43-48.
\textsuperscript{24} 28 U.S.C. § 994.
The Sentencing Commission was created to establish a successful system of punishment that operates with the express purpose of efficiently, fairly, and realistically punishing a particular crime. Instead of establishing a singular and primary purpose of punishment to which all sentences must conform in principle, and allowing latitude for judicial discretion to impose the correct sentence, the Guidelines provide an objective valuation of crime and an objective measure for punishment. Furthermore, the Guidelines purport to pursue all four of the purposes and principles of punishment—deterrence, incapacitation, retribution, and rehabilitation. The Guidelines also effectively reduce the sharing of the responsibility of criminal punishment between the branches by instituting a uniform, mechanical system of punishment. Thus, judicial discretion in criminal sentencing has been diminished, essentially changing the balance among the branches.


26. U.S. SENTENCING GUIDELINES MANUAL, supra note 3, § 1A1.1, editorial note, at 2, (declaring that “Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity”); see also STITH & CABRANES, supra note 18, at 104 (quoting a letter from the Honorable Stephen S. Trott, Associate Attorney General, on behalf of the U.S. Department of Justice to Hon. William Wilkins, Jr., Chairman of the U.S. Sentencing Commission dated April 7, 1987, that read, in part, “Simply stated, unwarranted disparity caused by broad judicial discretion is the ill that the Sentencing Reform Act seeks to cure”).

27. See generally STITH & CABRANES, supra note 18, at 38-39 (discussing Senator Edward Kennedy, who proposed versions of Sentence Reform bills beginning in the 1970s, because he viewed ‘sentencing in the federal courts as ‘a disgrace,’ ‘a national scandal,’ a ‘glaring flaw,’ in ‘utter disarray,’ ‘hopelessly inconsistent,’ ‘arbitrary,’ and ‘desperately in need of reform’”).

28. U.S. SENTENCING GUIDELINES MANUAL, supra note 3, § 1A1.1, editorial note, at 2 (declaring that the “guidelines . . . will further the basic purposes of criminal punishment, i.e., deterring crime, incapacitating the offender, providing just punishment [retributive punishment], and rehabilitating the offender”). “Deterrent punishment” is defined as “[p]unishment intended to deter the offender and others from committing crimes and to make an example of the offender so that like-minded people are warned of the consequences of crime.” BLACK’S LAW DICTIONARY 1270 (8th ed. 2004). “Incapacitation” is defined as the “action of disabling . . . .” Id. at 775. “Retributive punishment” is defined as “[p]unishment intended to satisfy the community’s retaliatory sense of indignation that is provoked by injustice.” Id. at 1270. “Rehabilitation” is defined as “[t]he process of seeking to improve a criminal’s character and outlook so that he or she can function in society without committing other crimes.” Id. at 1311.

29. The term “mechanical” refers, in particular, to the Sentencing Table, where sentences are calculated according to a numerical standard. See infra text accompanying notes 35-37.

30. See STITH & CABRANES, supra note 18, at 4-5 (noting that the Guidelines permit the judge to “depart” from the sentence prescribed by the Guidelines in only two narrow circumstances).
B. The Sentencing Guidelines

Congress vested the Sentencing Commission with the power to create a sentencing system that provide[s] certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and [to] reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.31

Congress directed the Commission to focus on two broad factors when imposing a sentence: (1) the current offense and the characteristics of the defendant32 and (2) the need for the punishment.33 The Sentencing Commission, therefore, attempted to create an objective system of determining punishment, and this culminated in the formation of the Sentencing Table. As a result, the interplay between the branches of government profoundly changed with both the abandonment of the parole system and the institution of a system of punishment that requires sentencing based on a "mechanical" calculation by the judge according to the Sentencing Table rather than on the judge's discretion.34

The Sentencing Table is a 258-box grid that has six criminal history categories on the top margin and forty-three offense levels on the left margin.35 The Guidelines operate by assigning point values to the two sub-factors to be considered in sentencing—the current offense and the characteristics of the defendant. The current offense can be enhanced by adding points that are largely derivative of the circumstances of the crime committed. For example, if a defendant was convicted of robbery, section 2B3.1 declares that the base offense level (left margin) is set at twenty.36 However, this

33. Id. § 3553(a)(2).
34. Id. § 3551. Prisoners, however, may earn "good time" credits and be released from prison, under supervision. See U.S. SENTENCING GUIDELINES MANUAL, supra note 3, §§ 5D1.1, 5D1.2. See generally STITH & CABRANES, supra note 18, at 63.
35. U.S. SENTENCING GUIDELINES MANUAL, supra note 3, § 5A, at 377; see infra Appendix B.
level may be increased if a firearm was discharged during the commission of the robbery.\textsuperscript{37}

The Guidelines also provide a point valuation for the criminal history of the defendant. Responding to the direction of Congress to provide a system that accounts for the characteristics of the defendant, the Guidelines provide enhanced punishment for repeat offenders. The Guidelines comment that

\begin{quote}
[a] defendant with a record of prior criminal behavior is more culpable than a first offender . . . . General deterrence of criminal conduct dictates . . . that repeated criminal behavior will aggravate the need for punishment . . . . Repeated criminal behavior is an indicator of a limited likelihood of successful rehabilitation.\textsuperscript{38}
\end{quote}

This results in more severe punishment for those defendants who have a lengthy criminal past.\textsuperscript{39} The severity of the sentence is determined by increasing the "criminal history category" of the defendant.

In addition to adding points to the "base level" of the current offense, prior convictions result in points that are aggregated to determine the criminal history category, which is represented by the top margin of the Sentencing Table.\textsuperscript{40} The number of points a defendant receives toward his criminal history category depends on the length of the prior sentence; the circumstances surrounding those convictions, including whether the criminal act was committed while on probation, parole, supervised release, imprisonment, work release, or escape status; and the timeliness of the current crime in relation to the prior convictions.\textsuperscript{41} By matching the appropriate criminal history category (column) with the current offense level (row), the court is given the precise range for the sentence to

\begin{thebibliography}{9}
\item \textsuperscript{37} \textit{Id.} \textsection 2B3.1(b)(2)(A).
\item \textsuperscript{38} \textit{Id.} \textsection 4A1.1, introductory cmt.
\item \textsuperscript{39} While the commentary to the Guidelines explains that repeat offenders will have a sentence imposed with respect to the four principles of punishment, the increased length of punishment for repeat offenders leads to the logical conclusion that incapacitation was the primary driving force behind the criminal history structure. \textit{See STITH \& CABRANES, supra note 18, at 55; see also Erik G. Luna, \textit{Foreword, Three Strikes in a Nutshell}, 20 T. Jefferson L. REV. 1, 7-8 (1998). In discussing California's three strikes law, Erik Luna describes that increased punishment for recidivist offenders incorporates two principles of punishment, incapacitation and deterrence. \textit{Id.} For additional similar comments, see R. Daniel O'Connor, Note, \textit{Defining the Strike Zone—An Analysis of the Classification of Prior Convictions Under the Federal "Three-Strikes and You're Out" Scheme}, 36 B.C. L. REV. 847, 848 (1995).
\item \textsuperscript{40} U.S. \textsc{Sentencing Guidelines Manual, supra note 3, \textsection 4A1.1.}
\item \textsuperscript{41} \textit{Id.} \textsection 4A1.1(d).
\end{thebibliography}
be imposed.\textsuperscript{42} Thus, to "avoid sentencing disparity 'among defendants with similar records who have been found guilty of similar criminal conduct,'"\textsuperscript{43} the Sentencing Table provides an empirical measure that normalizes sentences across the country. Repeat offenders with a history of multiple violent crimes will receive longer sentences under the enhancement provisions described above, while repeat offenders with a history of non-violent crimes receive lower sentences.\textsuperscript{44}

In addition to section 4A1.1, under which the defendant's criminal history determines the criminal history category,\textsuperscript{45} part B of chapter 4 of the Guidelines provides that in some circumstances, a defendant's criminal history will increase both the criminal history category and the base offense level. This effectively increases the sentence to a much higher incarceration period than if only the base level or the criminal history category were increased. Section 4B1.1 provides an enhancement for "career offenders."\textsuperscript{46} This section provides:

\begin{quote}
A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.\textsuperscript{47}
\end{quote}

Similar to the "career offender provision," which applies to defendants who fall within the definition of section 4B1.1 and commit any crime punishable for more than a year, the Guidelines also contain crime-specific multiple-offender enhancement provisions. Section 4B1.4 provides enhancement for "career offenders" whose current offense is being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g). Even prior to the creation of the Guidelines, Congress had previously provided a specialized enhancement for multiple offenders who were convicted under 18 U.S.C. § 922(g), as part

\textsuperscript{42} See infra Appendix B.
\textsuperscript{43} SITTH & CABRANES, supra note 18, at 71 (quoting 28 U.S.C. § 991(b)(1)(B) (2000)).
\textsuperscript{44} For example, see supra text accompanying notes 1-6. If Price's prior conviction for carrying a concealed weapon was considered a non-violent crime, he would have received a sentencing range of 12-18 months, as opposed to it being considered a violent crime where the sentencing range is 30-37 months.
\textsuperscript{45} See supra text accompanying notes 40-42.
\textsuperscript{46} U.S. SENTENCING GUIDELINES MANUAL, supra note 3, § 4B1.1(b).
\textsuperscript{47} Id. § 4B1.1(a).
of the Armed Career Criminal Act (ACCA). Therefore, section 4B1.4, the "armed career criminal" provision in the Guidelines, incorporates the ACCA.

The ACCA provides sentencing enhancement for an individual who is facing a current conviction of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), and who has three previous convictions for violent felonies. In such a scenario, that individual faces a minimum term of imprisonment of fifteen years. The Guidelines, through section 4B1.4, provide sentencing for "armed career criminals" under the ACCA, ensuring that the sentence imposed is at least the fifteen years as stated in ACCA and possibly longer depending on further circumstances of the crime. While the ACCA requires a determination of whether a prior conviction was for a "violent felony" and the Guidelines require a determination of whether the prior convictions were "crimes of violence," they have been interpreted by the courts to encompass the same crimes, and both are interpreted to have the same meaning.


49. U.S. SENTENCING GUIDELINES MANUAL, supra note 3, § 4B1.4 cmt. background ("This section implements 18 U.S.C. § 924(e) [Armed Career Criminal Act].").


51. U.S. SENTENCING GUIDELINES MANUAL, supra note 3, §§ 4B1.4(b), (c). Subsection (b)(3)(B) provides that the base offense level is set at 33, and subsection (c)(3) provides that the lowest possible criminal history category is Category IV. This will result in a minimum sentence of 188 months or 15 and one-half years. Subsections (b) and (c) both provide for an increase in the base offense level and an increase in the criminal history category if certain circumstances are present. It is not necessary for this Note to delve into all the possible factual scenarios that may result in a given case. For further information, see id.


53. Although the commentary accompanying § 4B1.4 declares that the "definitions of 'violent felony' and 'serious drug offense' in 18 U.S.C. § 924(e)(2) (2000) are not identical to the definitions of 'crime of violence' and 'controlled substance offense' used in § 4B1.1," at least in the context of violent felony and crime of violence, the differences are minor. U.S. SENTENCING GUIDELINES MANUAL, supra note 3, § 4B1.4, cmt. n.1. Compare 18 U.S.C. § 924(e)(2)(B) (emphasis added) (defining "violent felony" as any crime punishable for a term exceeding one year . . . 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 the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"), with U.S. SENTENCING GUIDELINES MANUAL, supra note 3, § 4B1.2(a) (emphasis added) ("The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use or threatened use of physical force against the person of another, or (2) 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")
Therefore, whether a prior conviction is considered a crime of violence has a direct impact on both the criminal history category and the base offense level of a defendant facing sentencing under sections 4B1.1 and 4B1.4.

C. The “Advisory” Guidelines—Post Booker v. United States

The sentencing dynamic changed again with a constitutional challenge of the Guidelines in 2005, in Booker v. United States.54 The Supreme Court found that, in certain cases, the Guidelines operated unconstitutionally.55 The Court held that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”56 The Court’s holding rested upon Sixth Amendment57 grounds, that the “interest in fairness and reliability protected by the right to a jury trial . . . has always outweighed the interest in concluding trials swiftly.”58 The Court further held that if the Guidelines were not mandatory and binding on judges, “the selection of particular sentences in response to differing sets of facts . . . would not implicate the Sixth Amendment.”59 To accomplish the goal of rendering the Guidelines advisory instead of mandatory, the Court excised two sections of the Guidelines,60 18 U.S.C. § 3553(b)(1)61 and 18 U.S.C. § 3742(e).62

another.”). See also United States v. Gilbert, 138 F.3d 1371, 1372 (11th Cir. 1998) (holding the definitions of “violent felony” and “crime of violence” as identical and that the interpretation of one can be used for the other); O’Connor, supra note 39, at 851.

55. The constitutional concern arose when a defendant’s sentence was increased due to the application of the Guidelines’ provisions, above the statutory maximum for the crime for which the jury issued its verdict. Id. at 244.
56. Id.
57. U.S. CONST. amend. VI. The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.” Id.
58. Booker, 543 U.S. at 244.
59. Id. at 233.
60. Id. at 259-61.
61. 18 U.S.C. § 3553(b)(1) (2000) (“The court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described . . . .”).
By rendering the Guidelines merely advisory, the Court diminished the power of the Guidelines. However, the Guidelines' importance has not been diminished. While courts are not strictly "bound by the federal guidelines, [they] must continue to consult the provisions of the federal guidelines and consider them in sentencing."63 This consideration "necessarily requires the sentencing court to calculate the Guidelines sentencing range in the same manner as before Booker."64 Following the calculation of a sentence according to the Guidelines, the court may "impose a more severe or more lenient sentence as long as the sentence is reasonable."65 Therefore, the Booker decision has little impact on the importance of determining the applicability, scope, and interpretation of the provisions of the Guidelines.

D. Ascertaining the Scope of the Crime of Violence Provision

While the Guidelines have reduced the influence and discretion of the judiciary in the area of sentencing, judges still retain an important interpretive role. The provisions in the Guidelines are sometimes broad, ambiguous, or unclear, so judges must determine which provisions are applicable, and their proper scope. As illustrated in the Introduction above, the determination that a prior conviction of carrying a concealed weapon was a crime of violence could nearly double the sentence received.66

1. The Plain Language of the Crime of Violence Provision

The crime of violence provision has been a fertile source for judicial analysis. The crime of violence provision has two main clauses and attempts to provide an inclusive illustration of the crimes intended by the drafters to be within the scope of the enhancement provision. In order for any crime to be considered a crime of violence, it must be one to which the defendant could have been punished by imprisonment for a term exceeding one year,67

---

63. United States v. Davila-Rodriguez, 166 F. App'x 399, 402 (11th Cir. 2006); see also United States v. Crawford, 407 F.3d 1174, 1178 (11th Cir. 2005).
64. Crawford, 407 F.3d at 1178-79 (quoting United States v. Shelton, 400 F.3d 1325, 1332 n.9 (11th Cir. 2005)).
65. Id. at 1179.
66. See supra note 4 and accompanying text.
67. U.S. SENTENCING GUIDELINES MANUAL, supra note 3, § 4B1.2(a); see also id. § 4A1.1 cmt. background. The defendant need not have served more than a year; rather, the availability of a term of imprisonment exceeding a year must have existed. The purpose for this is that the Commission recognized that "[t]here are jurisdictional variations in offense definitions, sentencing structures, and manner of sentence pro-
and it must also fit within one of the two clauses of the statute. The first clause requires that in order for a prior conviction to be a crime of violence it must “[have] as an element the use, attempted use, or threatened use of physical force against the person of another.”68 The second clause includes a conviction that “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.”69 In short, the crime of violence provision separates the included offenses into two subcategories; (1) physical force crimes and (2) non-physical-force crimes that create a serious risk of physical injury to another.

2. The Commentary Accompanying the Guidelines Provision

In addition to the language of the provision, the Sentencing Commission included commentary (Commentary) to the Guidelines designed to “provide[] concrete guidance” as to how to apply the provisions, and thus, the Commentary accompanying the crime of violence provision is helpful in determining its scope.70 The Supreme Court in Stinson v. United States established the binding force of the Commentary to the Guidelines.71 Stinson pleaded guilty to robbery of a bank in Florida.72 The district court sentenced Stinson as a career criminal under § 4B1.2 of the Guidelines as a result of two prior convictions, which the court determined were predicate offenses within the scope of the crime of violence provision.73 Among Stinson's prior convictions was one for unlawful possession of a firearm by a felon in violation of 18 U.S.C. § 922(g).74 Stinson appealed his sentence, claiming that the district court improperly interpreted his firearm possession conviction as a crime of violence.75 The Court of Appeals for the Eleventh Circuit

---

68. Id. § 4B1.2(a)(1).
69. Id. § 4B1.2(a)(2).
71. Id. at 37-38.
72. Id. at 38.
73. Id.
74. Id.
75. Id. at 39.
held, however, that the possession of a firearm by a felon “was, as a categorical matter, a crime of violence.”

Following the Eleventh Circuit’s denial of Stinson’s appeal, the Sentencing Commission amended the Commentary to the crime of violence provision. The amendment provided that a “crime of violence” does not include the offense of unlawful possession of a firearm by a felon. Stinson filed a second appeal in the Eleventh Circuit seeking retroactive application of the Commentary. The Eleventh Circuit denied Stinson’s second appeal for a rehearing on the issue, holding that the Commentary to the Guidelines is not binding on the courts. The Supreme Court, however, disagreed with the Eleventh Circuit’s characterization of the Commentary, and held that the Commentary is binding on the courts provided that it “does not violate the Constitution or a federal statute [and that] it must be given ‘controlling weight unless it is plainly erroneous or inconsistent with the regulation.’” Furthermore, the Court noted that the Commentary “represent[s] the most accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual.” Thus, the Commentary accompanying the Guidelines is binding authority on the courts.

The Commentary accompanying the crime of violence provision separates “crimes of violence” from non-violent crimes by establishing inclusive lists of crimes. “Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling.” The crime of violence provision ex-

76. *Id.*
77. *Id.*
79. United States v. Stinson, 957 F.2d 813 (11th Cir. 1992), vacated, Stinson v. United States, 508 U.S. 36 (1993). The court noted that “[a]lthough commentary should generally be regarded as persuasive, it is not binding.” *Id.* at 815. Furthermore, they were doubtful of the Sentencing Commissions’ power through amendment to nullify the precedent of the circuit courts. *Id.*
80. *Id.* at 815.
82. *Id.*
plicitly illustrates only one excluded crime in the Commentary—the crime of unlawful possession of a firearm by a felon.84

Therefore, the Commentary provides a non-exhaustive list of crimes to be included or excluded under the crime of violence provision, and while such a list may be helpful, it is incomplete.85 Thus, it does not provide absolute guidance to the courts in determining whether to include offenses that are not enumerated in the statute or in the Commentary.

3. The Legislative History of the Crime of Violence Provision of the Armed Career Criminal Act

Further guidance into the scope of the crime of violence provision can be found in the legislative history of the ACCA. The ACCA is a “crime specific” enhancement provision that operates identically to, and is interpreted to coincide with, the general crime of violence enhancement provision of the Guidelines.86 The ACCA began as an enhancement for convicted felons who “receive[ ], possess[ ], or transport[ ] . . . a firearm” if the defendant had been previously convicted of three felonies of robbery or burglary.87 In 1986, this provision was recodified as 18 U.S.C. § 924(e)88 and amended again by replacing the term “any felony” with “any crime punishable by a term of imprisonment exceeding one year.”89 Section 924(e) was further amended less than six months later, expanding the predicate offenses by replacing “robbery or burglary” with any “violent felony or serious drug offense.”90

Following further debate, Congress proposed two versions of the ACCA in order to establish a consensus over the definition of a crime of violence. The first, proposed by Senator Specter in the Senate and Representative Wyden in the House, defined “crime of violence” as “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or prop-

84. Id.
85. Cf. id. (“Other offenses are included as ‘crimes of violence’ if (A) that offense has as an element the use . . . of physical force against the person of another, or (B) the conduct set forth . . . presented a serious potential risk of physical injury to another.”).
86. See supra note 53 and accompanying text.
88. Firearms Owners’ Protection Act, § 104.
89. Id.
erty of another,' or any felony 'that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.'

The second bill narrowly defined "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person . . . of another." The compromise of both of these bills is the current definition used in § 924(e). What is significant is that the House Report concerning this compromise further described that debate centered on the concern of including "violent felonies . . . against property."

Following this legislative history, the Supreme Court in *Taylor v. United States* had to determine what type of burglaries the provision intended to include in the second clause, which explicitly refers to burglary. The Court declared that, in creating the ACCA, "Congress focused its efforts on career offenders—those who commit a large number of fairly serious crimes as their means of livelihood." The Court further observed that the predicate offenses were not limited to crimes actually involving violence, as contained in the first clause, but they also extended to some property crimes, including burglary, "because of [those crimes'] inherent potential for harm to persons."

Therefore the legislative history of the crime of violence provision of the ACCA provides a solid foundation for ascertaining the provision's scope. First, the history indicates that the provision includes all offenses that have as an element, a violent act. Second, the drafters intended to include certain property crimes which may not result in actual physical violence, but include conduct that increases the risk of violence to such a degree that they should be treated as violent crimes.

91. *Id.* at 583 (citing S. 2312, 99th Cong. (1986) and H.R. 4639, 99th Cong. (1986)).
92. *Id.* (citing H.R. 4768, 99th Cong. (1986)).
93. *See supra* note 53.
98. *Id.* at 588.
99. A violent act in this respect is represented by the use, attempted use, or threatened use of physical force.

Determining the scope of the crime of violence provision is not limited to a plain language analysis coupled with the intent of the drafters. In addition to these tools of statutory construction, it is also necessary to determine the permissible inquiry of the court into the past crime. In *Taylor v. United States*, the Supreme Court held that a trial court must take a formal categorical approach to a prior conviction and cannot look into the facts surrounding the conviction to determine if it is a crime of violence.\(^{100}\) A formal categorical approach limits the sentencing court's inquiry to include only the conviction documents together with the statutory definition of the crime. The alternative approach, a fact-finding based approach that allows a sentencing court to look into the particular facts of the prior conviction, was held by the Court to be improper on two grounds.\(^{101}\)

First, the Court held that the text itself supports a categorical approach, and not a fact-finding based approach. The Guidelines use terms that are broad and detached from a specific factual circumstance. Section 924(e) "refers to 'a person who . . . has three convictions' for—not a person who has committed—three previous violent felonies," suggesting that the focus is on a detached review of the conviction record and not the particular actions of the defendant.\(^{102}\) Furthermore, the provision applies to "any crime" that "has [violence] as an element," which is significantly broader than if the provision used the phrase, "any crime, that in a particular case" involved violence.\(^{103}\)

Second, the legislative history illustrates that Congress intended a categorical approach, namely that if a court was supposed to "engage in an elaborate fact finding process regarding the defendant's prior offenses, surely this would have been mentioned somewhere in the legislative history."\(^{104}\) The Court also noted that a fact-finding based approach could lead to a possible violation of the defendant's Sixth Amendment right to a trial by jury.\(^{105}\)

100. *Taylor*, 495 U.S. at 600-02.
101. *Id.*
102. *Id.* at 600-01 (quoting 18 U.S.C. § 924(e)) (omission in original).
103. *Id.* at 600.
104. *Id.* at 601.
105. *Id.*
Therefore, in determining whether a prior conviction is included within the crime of violence provision, a court may only look at the statutory definitions of the crime of which the defendant was convicted. Additionally, a court must only determine whether the conduct, expressed through the elements of the crime, presents a "serious risk of physical injury to another." For example, exigent factors, such as intent to injure, cannot be used as a basis for determining whether the defendant's conduct presented a serious risk of injury, unless the intent was an element of the crime for which the defendant was found guilty.

A formal categorical approach, in limiting the permissible areas of inquiry for a sentencing court, attempts to normalize sentencing among the federal courts. Since a sentencing court must look at the generic definition of a crime through the elements of conduct, differences between state laws are reduced to common elements of conduct.

E. Carrying a Concealed Weapon

In order to determine whether any crime should fall within the scope of the crime of violence provision, it is necessary to understand the elements of the crime and the pertinent and informative aspects of that crime. This section will provide an analysis of the crime of carrying a concealed weapon. It will first explore the prohibited conduct by illustrating the generic common elements of the crime. Next, it will provide a comparative analysis between the different state laws, illustrating that the prohibition of carrying a concealed weapon differs vastly among the states. Finally, this section will look at the circumstances in which it is permissible to carry a concealed weapon.

1. State Law Analysis of the Prohibited Conduct

The crime of unlawfully carrying a concealed weapon is primarily governed by state law and is based upon the principle of gen-

---

106. See id. at 602.
107. See id. (citation omitted) (holding that a court must only look at "the fact of conviction and the statutory definition of the prior offense. This categorical approach . . . may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements . . . .").
108. See id. at 590-92.
109. There are federal laws that prohibit carrying a concealed weapon in specific circumstances. For example, 49 U.S.C. § 46505(b)(1) (2000) prohibits a person who, "when on, or attempting to get on, an aircraft in, or intended for operation in, air transportation or intrastate air transportation, has on or about the individual or the property
eral deterrence. Its aim is not to curb a direct wrong against another person or a person’s property, but rather, to deter someone from having the instrument to commit a wrong against a person in the future. It is essentially a preventative crime. In State v. Chippey, the court explained one rationale for criminalizing the act of carrying a concealed weapon. The charge to the jury explained that:

Every statute has some purpose and meaning. The object of this statute is to prevent the carrying of concealed deadly weapons about the person; because, persons becoming suddenly angered and having such a weapon in their pocket, would be likely to use it, which in their sober moments they would not have done, and which could not have been done had not the weapon been upon their person.

There are three general elements of the crime of carrying a concealed weapon. First, the person must knowingly possess a firearm. Second, the firearm must be concealed. The term “concealment” is broad and opens the door to a wide range of factual

of the individual a concealed dangerous weapon that is or would be accessible to the individual in flight.” See also 18 U.S.C. § 922(q)(2)(A) (2000), which makes it “unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce at a place that the individual knows, or has reasonable cause to believe, is a school zone.” 18 U.S.C. § 922(q)(2)(A) (2000). This Note, however, focuses on state law for several reasons. First, the federal statutes, as the ones above indicate, share the same elements as the state crimes, and thus would not affect the analysis of this Note. Second, the power of the federal government to regulate firearms possession is limited. See United States v. Lopez, 514 U.S. 549 (1995), superseded by statute on other grounds, Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, § 101(f), 110 Stat. 3009 (1996). In determining whether Congress has the authority to criminalize possession of a firearm on school property, the Lopez Court noted that “[s]tates possess primary authority for defining and enforcing the criminal law.” Id. at n.3 (quoting Brecht v. Abrahamson, 507 U.S. 619, 635 (1993)). The Court held that Congress may only regulate such possession within the constricted powers of the Commerce Clause. Lopez, 514 U.S. at 565-66; U.S. Const. art. I, § 8, cl. 3. Since this regulatory power is limited, the case law pertinent to this Note is absent. On the other hand, the issue of this Note has arisen out of state law convictions, and thus, this Note focuses only on state laws.

110. See supra note 28 (definition of deterrence).
112. State v. Chippey, 33 A. 438, 438 (Del. 1892).
113. Id.
114. See, e.g., MO. ANN. STAT. § 571.030(1) (West, Westlaw through 2006 legislation).
115. Id.
determinations, but the simplest explanation is that the weapon be “hidden from common observation.”116 The third factor is that the weapon must be “readily accessible” for use, distinguishing the crime of carrying a concealed weapon from mere possession of a firearm.117 Although not explicit in the text of concealed weapons statutes, the courts have generally inferred this requirement when interpreting the requirement that the weapon must be “on or about” the person.118 In State v. Blazovitch, the court interpreted the phrase “about” to include carrying a weapon in a bag or satchel as being within the spirit of the law, which was to prevent a person from unlawfully having access to a weapon.119 The importance of the manner of concealment, i.e., whether the weapon is “on” the person or “about,” has also been broadened to include having the weapon “in such proximity to the person as to be convenient of access and within immediate physical reach” even in an automobile.120

While these three elements are common to most state laws, they are not universal, and there can be striking differences between the states in the punishable conduct with regard to the possession or carrying of a weapon. For example, some states do not require that a weapon be concealed in order to violate a “carrying” law.121 In fact, Massachusetts, which has one the most stringent

118. Bolling, 537 N.E.2d at 1102-03; Nebbitt, 713 S.W.2d at 50; Erickson, 362 N.W.2d at 532; Bailey, 442 So. 2d at 386; Lanzetti, 97 Pa. Super. at 128.
120. Hampton v. Commonwealth, 78 S.W.2d 748, 749-50 (Ky. 1934).
penalties, does not require concealment\textsuperscript{122} or even that the firearm be loaded to be a violation.\textsuperscript{123}

The penalties for carrying a concealed weapon in violation of the law also differ dramatically among the states. Below is a table that illustrates the maximum penalties for all fifty states and the District of Columbia.

**Maximum Imprisonment Term\textsuperscript{124}**

**Lawful to Carry a Concealed Weapon:**
- Alaska, Vermont

**30 Days:**
- North Carolina, Oklahoma

**90 Days:**
- South Carolina, Washington

**6 Months:**
- Alabama, Arizona, Idaho, Louisiana, Mississippi, Montana, New Mexico, Ohio, Oregon, Wyoming

**One Year:**
- Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Indiana, Kansas, Kentucky, Maine, Minnesota, Nebraska, Nevada, New Hampshire, North Dakota, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin

**Exceeding One Year:**
- Connecticut, Delaware, Florida, Illinois, Iowa, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Pennsylvania, Rhode Island

By comparing the laws of the fifty states and the District of Columbia, several observations can be made. First, there is a wide

\textsuperscript{122} Mass. Gen. Laws ch. 269, § 10.
\textsuperscript{123} Id. If State v. Chippey provides an accurate reasoning for restricting the carrying of a concealed weapon, the law in Massachusetts seems to be an anomaly. In Chippey, the reasoning of the prohibition was premised upon carrying a deadly weapon and using it against another when angered. See supra notes 112-113 and accompanying text. In Massachusetts, apparently, a person is prohibited from carrying even a non-deadly (i.e., unloaded) firearm. It makes this author wonder exactly what the reasoning in Massachusetts is for their restriction of unloaded firearms.

\textsuperscript{124} See infra Appendix A, notes 197-202, for citations to the applicable state laws that provided the information for this table.
range of penalties for carrying a concealed weapon, from no penalty\textsuperscript{125} in Alaska and Vermont to the possibility of a ten-year sentence in Rhode Island.\textsuperscript{126} Second, and most important, not all state statutes could invoke a crime of violence analysis for a subsequent conviction in federal court. This is because the Guidelines require that in order for a prior conviction to be considered a crime of violence it must be a crime for which the person could have served more than one year in prison.\textsuperscript{127} Of the fifty states and the District of Columbia, only thirteen have laws under which carrying a concealed weapon could be considered a "crime of violence" under the Guidelines: Connecticut, Delaware, Florida, Illinois, Iowa, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Pennsylvania, and Rhode Island.\textsuperscript{128} In the other thirty-eight states and the District of Columbia, a conviction for carrying a concealed weapon could never be considered a crime of violence for enhancement purposes of a later crime in federal court.\textsuperscript{129}

\textsuperscript{125} While Alaska and Vermont do not criminalize the general conduct of carrying a concealed weapon, they do provide some restrictions. See Alaska Stat. § 11.61.220 (West, Westlaw through 2006 legislation), which provides that any person over the age of 21 can carry a concealed weapon, except that they cannot carry a weapon into a courthouse, schoolyard, bar, or domestic violence shelter. Vermont's pertinent statute allows anyone to carry a concealed weapon so long as he does not do so with "the intent or avowed purpose of injuring a fellow man," and does not do so "within any state institution or upon the grounds or lands owned or leased for the use of such institution, without the approval of the warden or superintendent of the institution." VT. STAT. ANN. tit. 13, § 4003 (West, Westlaw through 2006 legislation).

\textsuperscript{126} R.I. GEN. LAWS § 11-47-8(a) (West, Westlaw through 2006 legislation).

\textsuperscript{127} U.S. SENTENCING GUIDELINES MANUAL, supra note 3, § 4B1.2(a) (requiring that the crime must be "punishable by imprisonment for a term exceeding one year").


\textsuperscript{129} This raises an interesting dilemma in that persons convicted in the thirteen states listed could face enhancement, while persons convicted in the remaining thirty-eight jurisdictions could not. It would seem then, that it may be impossible to normalize sentencing across the country, which will be discussed further in this Note. See infra
2. Authorized Conduct: States Permit Carrying a Concealed Weapon Through a Permitting Process

In addition to the striking differences in how states punish the crime, carrying a concealed weapon is not categorically prohibited. As described above, Alaska and Vermont do not prohibit the act at all, and the thirteen states that have laws that could fall under the crime of violence provision actually allow certain persons to carry a concealed weapon. Carrying of a concealed weapon is permissible if a person goes through a permitting process. While these thirteen states have unique and specific requirements, there are common requirements among all states in determining the eligibility of a person to carry a concealed weapon.

First, the person must be of minimum legal age, usually eighteen or twenty-one. Second, a criminal history background check is required because prior criminal convictions may be a basis for denial, depending on the type of crime committed. The third common requirement is that the person must complete a certified

Part II. Aside from any arguments that may stem from this particular conundrum, which will not be entertained in this Note, it does illustrate that the crime of carrying a concealed weapon does not have universal application.

130. ALASKA STAT. § 11.61.220; VT. STAT. ANN. tit. 13, § 4003.

131. That is, these states have laws which punish the crime by imprisonment exceeding one year as required by the crime of violence provision.

132. See infra text accompanying notes 133-137.

133. See CONN. GEN. STAT. ANN. § 29-28(b)(10); DEL. CODE ANN. tit. 11, § 1441(a)(1) (West, Westlaw through 2006 legislation) (“of full age”); FLA. STAT. ANN. § 790.06(2)(b) (West, Westlaw through 2006 legislation); 430 ILL. COMP. STAT. ANN. 65/4(a)(2)(i) (West, Westlaw through 2006 legislation); IOWA CODE ANN. § 724.8(1) (West, Westlaw through 2006 legislation) (eighteen years of age); MASS. GEN. LAWS ch. 140, § 122 (“not a minor”); MICH. COMP. LAWS ANN. § 28.422(3)(b) (West, Westlaw through 2006 legislation); MO. ANN. STAT. § 571.090(1)(1) (West, Westlaw through 2006 legislation); N.J. STAT. ANN. § 2C:58-3(c) (West, Westlaw through 2006 legislation); N.Y. PENAL LAW § 400.00(1)(a) (West, Westlaw through 2006 legislation); R.1. GEN. LAWS § 11-47-11(a) (West, Westlaw through 2006 legislation).

134. See CONN. GEN. STAT. ANN. § 29-28(b)(2); DEL. CODE ANN. tit. 11, § 1441(a)(1) (West, Westlaw through 2006 legislation); FLA. STAT. ANN. § 790.06(2)(d) (West, Westlaw through 2006 legislation); 430 ILL. COMP. STAT. ANN. 65/4(a)(2)(ii) (West, Westlaw through 2006 legislation); IOWA CODE ANN. § 724.8(2) (West, Westlaw through 2006 legislation); MASS. GEN. LAWS ch. 140, § 131P(a); MICH. COMP. LAWS ANN. §§ 28.422(3)(d)-(e) (West, Westlaw through 2006 legislation); MO. ANN. STAT. § 571.090(1)(2) (West, Westlaw through 2006 legislation); N.Y. PENAL LAW § 400.00(1)(c) (West, Westlaw through 2006 legislation); R.1. GEN. LAWS §§ 6109(c)(i)(iii)-(iv) (West, Westlaw through 2006 legislation); R.I. GEN. LAWS § 11-47-11(a) (West, Westlaw through 2006 legislation).
firearms handling course. Additionally, the permitting process of some states may require a determination of whether the person is of "good moral character" or whether the issuing authority has "probable cause to believe that the applicant would be a threat to himself or herself or to other individuals." While the general purpose of prohibiting a person from carrying a concealed weapon, as artfully stated in State v. Chippey, is that a person may present a risk to others with a weapon in hand because people can be suddenly angered, and thus, act violently, the states have drawn a line determining that the danger lies within the characteristics of the person carrying the weapons and not the mere act of carrying. Therefore, the states have uniformly developed a system that allows "safe" persons to carry a concealed weapon, and prevents "unsafe" persons from doing the same.

F. An Analysis of Case Law Concerning the Interpretation of Weapons Possession/Carrying Crimes Under the Crime of Violence Provision

The courts of appeals are split over the issue of whether a prior state conviction of carrying a concealed weapon is a crime of violence under the Guidelines. The primary issue of dispute between the courts is whether carrying a concealed weapon "presents a serious potential risk of physical injury to another." In 1991, in United States v. Whitfield, the Court of Appeals for the Eighth Circuit held that the defendant's prior concealed weapons conviction was not within the scope of the "otherwise clause." The court did, however, note that "[a]lthough carrying an illegal weapon may involve a continuing risk to others, the harm is not so immediate as to ‘present[ ] a serious potential risk of physical injury to another,’" as required by 18 U.S.C.

136. See Del. Code Ann. tit. 11, § 1441(a); N.Y. Penal Law § 400.00(1)(b); 18 Pa. Cons. Stat. Ann. § 6109(d)(3) (requiring that the sheriff "shall investigate whether the applicant's character and reputation are such that the applicant will not be likely to act in a manner dangerous to public safety").
140. United States v. Whitfield, 907 F.2d 798, 800 (8th Cir. 1990); see infra note 155 and accompanying text.
§ 924(e)(2)(B)(ii). Recently, in the 2002 case of United States v. Crawley, a district court in the Tenth Circuit reviewed the issue of whether the defendant's prior Missouri conviction for carrying a concealed weapon was a crime of violence under the Guidelines. The court, persuaded by the reasoning in Whitfield, concluded that carrying a concealed weapon is not a crime of violence. Most notably, the court also commented that the actual location of the firearm, whether on the person or readily accessible by its proximate location to the person, makes no difference in the analysis of whether the conviction is a crime of violence or not. Instead, the court held:

That the weapon is found on the person rather than on the floorboard or seat of a vehicle is not enough in itself to say the risk of physical injury created by a firearm's presence is now serious. The court is not satisfied that the imminence or likelihood of violence associated with a person carrying a weapon is appreciably different from that presented when the weapon is simply otherwise readily available to a person.

Therefore, in both the Eighth and Tenth Circuits, the courts have concluded that the risk involved in carrying a concealed weapon does not rise to the level required by the crime of violence provision.

The Eleventh Circuit, however, has consistently held that carrying a concealed weapon is a crime of violence because the risk created by the conduct reaches the level required by the provision. Since being overruled in Stinson v. United States, which resulted in the crime of being a felon in possession of a firearm being excluded from the crime of violence provision, the Eleventh Circuit

141. Whitfield, 907 F.2d at 800.
143. Id. at 1253.
144. Id. at 1256.
145. To satisfy the element of having a weapon "on or about" the person, the firearm could be located on the person, in a bag, or in a car, see supra text accompanying notes 118-120.
146. Crawley, 213 F. Supp. 2d at 1256-57. Although not an argument raised in this Note, the court's comments anticipate further arguments on the issue, that the risk created by the conduct may change in particular circumstances. Ultimately, however, this would be a failing argument since the court is restricted to a formal categorical approach and cannot inquire into the specific conduct of a defendant, unless that conduct is expressed in the elements of the crime. See supra text accompanying notes 100-108.
147. Crawley, 213 F. Supp. 2d at 1256.
148. See supra text accompanying notes 81-84.
has attempted to provide support for including the crime of carrying a concealed weapon as a crime of violence by drawing a distinction from unlawful possession by a felon.

Beginning with United States v. Hall,149 and continuing to United States v. Price,150 the Eleventh Circuit has remained consistent in its decisions.151 In Hall, the Eleventh Circuit accepted the government's argument on appeal that carrying a concealed weapon is an "active conduct crime" and that the danger extends beyond "mere possession" because "the person has taken the extra step of having the weapon immediately accessible for use on another."152

Thus, the courts of appeals have diverged over the interpretation of whether carrying a concealed weapon is a "crime of violence." The case law described above illustrates that this issue has been reduced to a simple analysis and judgment of the risk created by the conduct. Because evaluating risk is invariably a subjective endeavor, the conflicting conclusions of these courts should not come as a surprise. It is this subjectivity that is at the heart of the argument set forth in Part II below.

II. ANALYSIS

This Note argues that a prior conviction for carrying a concealed weapon is not a crime of violence under the enhancement provisions in the United States Sentencing Guidelines. First, by utilizing the canon of statutory interpretation, ejusdem generis, the crime of carrying a concealed weapon is excluded from the scope of the provision since it is dissimilar to the enumerated crimes in the provision. Second, assuming that the first argument fails to persuade the courts, this Note provides an alternate reason why the crime is not within the scope of the provision. The second argument focuses on the insufficiency of the current approach to analyzing the crime of violence provision taken by the courts, and introduces a proper approach, which yields only one conclusion, that carrying a concealed weapon is not a "crime of violence."

149. United States v. Hall, 77 F.3d 398 (11th Cir. 1996).
151. See Hall, 77 F.3d at 401; United States v. Gilbert, 138 F.3d 1371, 1372 (11th Cir. 1998) (holding that carrying a concealed weapon is a crime of violence, relying on the holding in Hall, 77 F.3d at 401); see also Price, 132 F. App'x at 343 (holding the same by referring to Hall, 77 F.3d at 401, Gilbert, 138 F.3d at 1372, and United States v. Adams, 316 F.3d 1196 (11th Cir. 2003)).
152. Hall, 77 F.3d at 401.
A. The Crime of Carrying a Concealed Weapon Is Dissimilar to the Enumerated Crimes of the Crime of Violence Provision

Carrying a concealed weapon is not within the scope of the crime of violence provision since it is dissimilar, in nature and characteristics, to the enumerated crimes in the provision. A crime of violence is defined as:

[A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) 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.\textsuperscript{153}

Since carrying a concealed weapon is not one of the enumerated crimes listed within this definition,\textsuperscript{154} its inclusion must necessarily fall in the provision of “otherwise involves conduct that presents a serious potential risk of physical injury to another” (hereinafter the “otherwise clause”).\textsuperscript{155} The “otherwise clause,” however, is not an independent and separate clause in the provision, but rather, is tied directly to the entire second clause, which explicitly enumerates includable offenses such as burglary, arson, and extortion.\textsuperscript{156}

\textit{Ejusdem generis} is a canon of interpretation declaring that a “general term” must be interpreted “to reflect the class of objects reflected in more specific terms accompanying it.”\textsuperscript{157} In \textit{Circuit City Stores, Inc. v. Adams},\textsuperscript{158} which provides an illustration of the canon \textit{ejusdem generis} and its application, the Supreme Court invoked the canon while interpreting a broad, general statutory term.\textsuperscript{159} In \textit{Circuit City}, the plaintiff Adams brought suit alleging discrimination,

\begin{itemize}
  \item 153. U.S. SENTENCING GUIDELINES MANUAL, \textit{supra} note 3, § 4B1.2 (emphasis added).
  \item 154. Simply, it does not have as an element “the use, attempted use, or threatened use of physical force,” nor is it a “burglary . . . , arson, or extortion, [nor] involves use of explosives.” \textit{See id.}
  \item 159. \textit{Id.} at 114.
\end{itemize}
and sought to avoid the arbitration provision in his employment application through an exemption in the Federal Arbitration Act.\textsuperscript{160} At issue was the scope of the exemptions to the Federal Arbitration Act,\textsuperscript{161} which provides for the exclusion "from the Act's coverage 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.'"\textsuperscript{162} Adams argued that the arbitration provision on his employment application with Circuit City was not binding since it was a "contract of employment" and he was a worker engaged in interstate commerce. The Court of Appeals for the Ninth Circuit agreed and held that the arbitration provision, as part of an employment contract, was excluded from the FAA.\textsuperscript{163}

The Supreme Court, however, reversed the Ninth Circuit by invoking \textit{ejusdem generis}. The Court held that this general term which seemingly includes all contracts of employment involving workers in commerce cannot be read so broadly as to render the preceding explicit reference to "seamen" and "railroad employees" pointless. Ultimately, they held that \textit{ejusdem generis} requires that "the residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it."\textsuperscript{164} Therefore, the statute should be confined to "transportation workers."\textsuperscript{165}

The "otherwise clause" is a similar general term, since on its face it lacks specificity and serves as a means for including non-enumerated crimes, following a series of enumerated crimes. Therefore, under the canon of \textit{ejusdem generis}, the "otherwise clause" must be interpreted to include offenses similar in nature and characteristics to the enumerated crimes.

The common thread among these enumerated crimes is that they all require an affirmative act that produces a primary harm to another. Burglary requires the entering or remaining inside a building of another—essentially the damage of another's property through the invasion of his building.\textsuperscript{166} Arson requires the starting

\begin{itemize}
  \item \textsuperscript{160} \textit{Id.} at 109-11.
  \item \textsuperscript{161} \textsuperscript{9 \textit{U.S.C.}} § 1 (2000).
  \item \textsuperscript{162} \textit{Circuit City Stores, Inc.}, 532 U.S. at 109 (quoting \textit{9 \textit{U.S.C.}} § 1).
  \item \textsuperscript{163} \textit{Circuit City Stores, Inc. v. Adams}, 194 F.3d 1070, 1071-72 (9th Cir. 1999) (citing \textit{Craft v. Campbell Soup Co.}, 17 F.3d 1083, 1094 (9th Cir. 1999)).
  \item \textsuperscript{164} \textit{Circuit City Stores, Inc.}, 532 U.S. at 115.
  \item \textsuperscript{165} \textit{Id.} at 109.
  \item \textsuperscript{166} Burglary is defined under the prior version of the ACCA as "entering or remaining surreptitiously within a building that is property of another with the intent to
of a fire causing the destruction of a building of another. Extortion requires any act of either force or coercion to compel another to act. All of these enumerated crimes have statutory elements that include an overt act that produces a primary harm to another, and thus, *ejusdem generis* requires that the "otherwise clause" incorporates crimes that have these essential elements: (1) an overt act that (2) produces a primary harm against another.

The canon of *ejusdem generis*, however, is not applicable when it would cause a result conflicting with the intent of Congress. Restricting the "otherwise clause" to crimes that share these two elements is not to invoke judicial veto over a piece of legislation, but rather, it attempts to further the intent of the drafters of the legislation. The requirement of a primary harm to another is supported by the intent and purpose of the provision, as expressed through the legislative history of the ACCA. The legislative history of the ACCA shows that Congress intended to include physically violent crimes in the first clause, but also intended to include property crimes. These crimes do not actually result in physical violence, but still create the potential risk of such injury. Essentially, the drafters did not want people to escape responsibility for the inherent violence of their actions because of the mere

---

167. *A person is guilty of arson under the Model Penal Code § 220.1 "if he starts a fire or causes an explosion with the purpose of: (a) destroying a building or occupied structure of another." Model Penal Code § 220.1.

168. Extortion is defined as "[t]he act or practice of obtaining something or compelling some action by illegal means, as by force or coercion." *BLACK'S LAW DICTIONARY*, supra note 28, at 623.

169. See *Norfolk & Western Ry. Co. v. Am. Train Dispatchers' Ass'n*, 499 U.S. 117, 128-29 (1991) (holding that *ejusdem generis* "does not control . . . when the whole context dictates a different conclusion"); see also *Gooch v. United States*, 297 U.S. 124, 128 (1936) ("The rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty. Ordinarily, it limits general terms which follow specific ones to matters similar to those specified; but it may not be used to defeat the obvious purpose of legislation. And, while penal statutes are narrowly construed, this does not require rejection of that sense of the words which best harmonizes with the context and the end in view.").

170. *ESKRIDGE, FRICKEY, & GARRETT*, supra note 157, at 254 (noting that *ejusdem generis* "capture[s] our intuitions about legislators' linguistic decisions, namely, that people use lists to link similar concepts and to illustrate coherent patterns").


172. *Id.*
chance that no one was injured. More simply put, an arsonist should not escape the legal consequences of the violent nature of setting a building ablaze merely because he lucked out in that no one was in the building at the time. By considering crimes that never actually resulted in physical harm to be the same, in degree of culpability, as those that do result in physical harm, the drafters had to make some limitations to avoid creating a rule so broad that it would encompass most criminal acts. If there were no limitations to the provision, almost all crimes could present a serious potential risk of injury to another, depending on the particular facts of a given case.

For example, the crime of driving without a license could present a serious risk of physical injury to another since the licensing process ensures that people know how to drive safely. Therefore, without a license a court may presume that the driver lacks this knowledge of safe operation of a vehicle, and conclude that the person's unsafe driving presents a serious risk of physical injury to another. Such broadening of the crime of violence provision would inevitably conclude that most crimes could be included, which would, in effect, change the provision from a violent criminal history enhancement to a "general" criminal history enhancement. This would present a clear problem of redundancy in the Guidelines since a "general" criminal history enhancement is already provided for under section 4A1.1.

Essentially, the intent of the drafters was to treat certain property crimes that create a serious potential risk of physical violence, but that do not actually result in physical violence, in a similar manner as if the physical violence came to fruition. Applying this analysis to the crime of carrying a concealed weapon, the only conclusion is that carrying a concealed weapon is not within the scope of the crime of violence provision. To be convicted of carrying a concealed weapon, a person must have a weapon "on or about his person," the weapon must be "hidden from common observation,"

173. Taylor v. United States, 495 U.S. 575, 597 (1990) (finding that "Congress thought that certain general categories of property crimes—namely burglary, arson, extortion, and the use of explosives—so often presented a risk of injury to persons . . . that they should be included in the enhancement statute even though, considered solely in terms of their statutory elements, they do not necessarily involve the use or threat of force against a person").

174. See U.S. SENTENCING GUIDELINES MANUAL, supra note 3, § 4A1.1; see also supra text accompanying notes 41-44.

175. See Taylor, 495 U.S. at 597.
and be "readily accessible" for use. The crime does not require physical injury to another or damage to another's property. In fact, since the crime requires "concealment," bystanders do not even know that a person is carrying such a weapon, and thus, they have not actually been affected—they are completely oblivious to the crime. Therefore, under the canon of interpretation _ejusdem generis_, the crime of carrying a concealed weapon is excluded from the crime of violence provision since it is dissimilar to the enumerated crimes in the provision by lacking an overt act that produces a primary harm to another.

In addition to an enumerated list of includable offenses within the crime of violence provision, the Commentary to the Guidelines provides for the exclusion of the crime of being a felon in possession of a firearm. While the courts are in disagreement as to whether the crime of carrying a concealed weapon is similar to unlawful possession of a firearm by a felon, the logic behind exclusion of the crime of unlawful possession of a firearm by a felon provides guidance. As Judge Posner stated in _United States v. Lane_, a felon is "no doubt more likely to make an illegal use of a firearm than a non-felon," but there is no evidence that the risk of such use is "substantial." Judge Posner illustrated that ex-felons "have the same motives as lawful possessors of firearms to possess a firearm—self-defense, hunting, gun collecting, and target practice." While the use of a firearm may lead to a crime of violence, Judge Posner opined that "[a] crime that increases the likelihood of a crime of violence need not itself be a crime of violence." While the Eleventh Circuit held that carrying a concealed weapon is different from the crime of being a felon in possession due to the fact that the weapon must be readily accessible, the difference is immaterial and insignificant to the analysis. The crucial factor is that includable crimes must have an overt act that produces a primary harm to another. Neither the crime of carrying a concealed

---

176. See _supra_ text accompanying notes 116-117.
177. Note the exception of the Massachusetts statute, which does not require concealment. _Mass. Gen. Laws_ ch. 269, § 10 (West, Westlaw through 2006 legislation); see _supra_ text accompanying note 122.
178. See _supra_ Part I.F (discussing the split among the courts in finding similarities and differences between the two crimes).
179. _United States v. Lane_, 252 F.3d 905 (7th Cir. 2001).
180. _Id._ at 906.
181. _Id._
182. _Id._ at 907.
183. See _United States v. Hall_, 77 F.3d 398, 401-02 (11th Cir. 1996).
weapon, nor being a felon in unlawful possession of a firearm have, as an element, an overt act that produces a primary harm to another. Judge Posner was pointing to the logical disconnect between what may happen and what has happened, that while possession of a firearm may lead to violence, no violence has actually occurred. Both crimes, carrying a concealed weapon and unlawful possession by a felon, share this same trait; the opportunity for violence is available, but no overt act with a primary harm has been inflicted upon another. Therefore, while carrying a concealed weapon is not identical in all aspects, namely the "readily accessible" requirement to the explicitly excluded offense of unlawful possession of a firearm by a felon, it does share the necessary characteristic of lacking an overt act that results in a primary harm to another. Since neither crime has the determinate characteristic of an overt act that results in primary harm to another, they are similar. Therefore, the canon of *ejusdem generis* provides support for excluding carrying a concealed weapon from the crime of violence provision, by grouping it with the excluded crime of unlawful possession of a firearm by a felon.

B. *Carrying a Concealed Weapon is not Conduct that by its Nature, Presents a Serious Risk of Physical Injury to Another*

1. Insufficiency of Current Approach by the Courts of Appeals

In addition to exclusion under *ejusdem generis*, carrying a concealed weapon is beyond the scope of the language of the crime of violence provision. The "otherwise clause" is limited to crimes which contain conduct that by its nature presents a serious potential risk of physical injury to another. This section will argue that under a proper approach, an objective categorical approach, the

184. See *supra* text accompanying notes 114-118 (elements of carrying a concealed weapon). The crime of unlawful possession of a firearm by a felon restricts any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.


crime of carrying a concealed weapon does not include conduct that by its nature presents a serious risk of physical injury to another.

The circuits are split regarding the inclusion of the crime of carrying a concealed weapon in the crime of violence provision, essentially due to the approach the courts utilize in answering the question. Assuming that a court could interpret carrying a concealed weapon as a crime that fits within the general category of crimes included in the provision, a sentencing court must further determine whether the conduct of carrying a concealed weapon presents a “serious potential risk of physical injury to another.”

The discrepancy between the Eighth and Eleventh Circuits results from the subjective determination of whether the crime of carrying a concealed weapon presents enough “potential risk” of “serious physical injury” to fall within the scope of the provision. Since the Guidelines were created to correct disparity of sentencing, any interpretation, including a subjective categorical approach, of a provision of the Guidelines that opens the possibility of disparity among the courts must necessarily fail. Sentencing criminals in accordance with an objective standard was a fundamental purpose and principle of the Guidelines. The Sentencing Commission created an objective valuation standard in sentencing, where a defendant’s sentence is merely calculated by adding up the point values the Guidelines assign to a particular circumstance of consideration instead of leaving a large amount of room for judicial interpretation. This general approach strongly suggests that the Guidelines were created to efficiently employ a mechanical valuation system and remove any broad, ambiguous language that would allow subjective determinations. In addressing the proper approach to the Guidelines, the Supreme Court in Taylor v. United States attempted to restrict subjective determinations by implementing the formal categorical approach.

The formal categorical approach of Taylor restricts the sentencing court’s analysis to the generic definition of a crime, and rests upon the notion that the language and intent behind the crime of violence provision was to normalize the application of the provision across the country. In Taylor, the inclusion of “burglary” was at issue, and although explicitly included in the provision, the crime of burglary, a state law crime, is defined in a variety of ways by the states. For example, Michigan “has no offense formally labeled

186. Id. § 4B1.2(a)(2).
burglary,” but rather classifies the conduct in “grades of ‘breaking and entering.’” Therefore, a sentencing court in Michigan may look only at Michigan law in determining whether the defendant’s prior conviction for “breaking and entering” is within the scope of the crime of violence provision. In so doing, it is possible to conclude that it is not within the scope of the provision since it is not labeled “burglary.” To resolve this problem, the Supreme Court held that the language and the intent of the drafters in drafting the provision was that the focus should be on the “conduct” of the crime, no matter how a particular state labels such conduct in its criminal code.

The holding in Taylor, however, is insufficient in addressing the issue of whether carrying a concealed weapon is a crime of violence, since the Taylor court dealt with an enumerated crime. Ascertainin g the proper definition is conclusive in cases in which an enumerated offense of the provision is at issue since the sole question, as in Taylor, is whether the defendant committed a crime listed in the provision. The “otherwise clause” requires a secondary analysis after determining the generic definition of the prior offense committed by the defendant: whether the conduct of the offense “presents a serious risk of potential physical injury to another.” Applying the same rationale to this clause of the provision, as the Supreme Court did in Taylor to ascertain the definition of the crime, the issue is resolved—expand an objective standard to the determination of whether the conduct presents a serious potential risk of physical injury to another.

2. An Objective Categorical Approach to Analyzing the Crime of Violence Provision

An objective categorical approach to defining the crime of carrying a concealed weapon incorporates not only the crime’s general statutory elements, but also its generic characteristics, including how the states punish and how they have evaluated the risk created by the conduct. Under an objective categorical approach, the

---

188. Id. (quoting MICH. COMP. LAWS § 750.110 (1979)).
189. Id. at 592 (“We think that ‘burglary’ in § 924(e) must have some uniform definition independent of the labels employed by the various States’ criminal codes.”).
190. See also United States v. Custis, 988 F.2d 1355, 1363 (4th Cir. 1993). The Fourth Circuit held that in applying the categorical approach of Taylor, “courts must necessarily make common-sense judgments about whether a given offense prescribes generic conduct with the potential for serious physical injury to another.” Id. (emphasis added). Both the common sense approach and the objective categorical approach, proposed in this Note, attempt to accomplish the same objective—to establish a method for
crime of carrying a concealed weapon is excluded since the states have illustrated that it is not the conduct of the crime, but rather, characteristics of the defendant that make the crime present a serious potential risk of physical injury to another.

All states allow people to carry a concealed weapon. In fact, both Vermont and Alaska have no affirmative requirements for its citizens to be able to carry a concealed weapon. The other states allow people to carry a concealed weapon provided that they apply for and receive a permit from the state to do so. The permitting exception (as well as Vermont and Alaska) illustrates two important issues in determining whether the crime of carrying a concealed weapon is included in the crime of violence provision: (1) it clarifies and defines the conduct, and (2) it is an excellent measure of how the states weigh the risk of that conduct.

As Part I.E indicates, the general purpose of criminalizing carrying a concealed weapon is that people can be suddenly angered, and if an angered person has a hidden weapon, they may be able to employ it with unfair surprise against another. Superficially, this seems to fit exactly within the definition of a crime of violence—carrying a concealed weapon has the potential risk of physical injury to another. However, since States allow certain people (those with permits) to carry a concealed weapon, one cannot logically conclude that the states are giving people the opportunity to put others at a potential risk of injury. The States are emphatically declaring that it is not the conduct that creates the risk, but rather, the person that creates the risk. The permitting process is an official determination by the state that the person is a risk or is not a risk. If a person is granted a permit, he is not a risk, and by carrying a concealed weapon his conduct, likewise, does not present such risk of injury to another. In contrast, if a person is denied a permit, the state has determined that he is a risk, and thus, by carrying a concealed weapon, he is creating a risk of injury to another.

analysis that provides a consistent interpretation of the crime of violence provision among the federal courts.

191. Only thirteen states are at issue in this Note since the provision provides a term of imprisonment restriction, which applies only to thirteen states. See supra text accompanying notes 127-128.


193. The assertion that the State has made a formal determination that a person is a risk (i.e., he was denied a permit for carrying a concealed weapon and thus by carrying he is creating a risk to another) does not undermine the analysis of the provision in this Note. To the contrary, it directly supports one of the principles upon which
Since the crime of violence provision requires the *conduct* to be the risk creating factor, carrying a concealed weapon is not within the scope of the provision. Furthermore, since being convicted of the crime of carrying a concealed weapon necessarily requires absence of a permit, for a court to determine that it is a crime of violence it must presume that absence of a permit is conclusive evidence that the person is one that the state has determined is a risk.

C. *Absence of a Permit to Carry a Concealed Cannot Be Conclusive Evidence that Such Person is a Risk*

Lacking a permit to carry a concealed weapon cannot be conclusive evidence in deciding that the person is a risk, for such determination makes an illogical leap that will fail in actual application by including persons who are not a risk.

A hypothetical is necessary to illustrate this point. Suppose defendant *A* applies for a permit on January 1, 2006, because she is in fear of her life and safety from an abusive husband. The permitting process takes time to complete. Since *A* is in immediate danger, she cannot wait, and thus begins carrying a concealed weapon on January 1, 2006. Defendant *A* is pulled over on a typical traffic stop for speeding, and while searching for her driver’s license, the police officer sees the handle of a pistol in her purse. Because defendant *A* lacks a permit, the police officer arrests her for carrying a concealed weapon.

Was defendant *A*, by carrying a concealed weapon, creating a serious risk of physical injury to another? As previously stated, the determination of being a risk under state law stems from the permitting process. However, unlike a situation in which a person was granted a permit (determined by the state not to be a risk) or denied a permit (determined by the state to be a risk), defendant *A* is in a gray area—she has had no formal official determination of risk by the state.

The ultimate answer as to whether defendant *A* was a risk, and thereby her conduct was a risk, lies in whether she could have obtained a permit at the time she was arrested for the crime. If she would have been denied a permit, the State would view her as a

---

this argument rests, that any *risk* in carrying a concealed weapon is determined not by the act, but by the actor. Since the provision requires an analysis of the conduct, such conclusion that the actor creates the risk clearly takes this crime out of the intended scope of the provision.
risk, and by carrying a concealed weapon her conduct would have created a risk of harm. On the other hand the opposite is also true; if defendant A would have been able to receive a permit, by her nature she was not a risk when she was carrying the concealed weapon, and thus, her conduct is not a risk either.\textsuperscript{194}

In order to properly conclude that carrying a concealed weapon presents a serious potential risk of injury to another, the court must determine the particular characteristic of the defendant—namely whether the defendant could have obtained a permit. This would be a fact-finding based approach to interpreting the crime of violence provision, and would be able to resolve any discrepancies. However, the Supreme Court has emphatically refused to allow such an approach on two grounds; first, a fact-finding based approach is not authorized by the Guidelines, and second, the defendant’s Sixth Amendment right to a jury trial also precludes the judge from making factual determinations that were not submitted to the jury.\textsuperscript{195} Instead, courts are limited to a categorical approach and must only look at the elements of the crime.\textsuperscript{196} Since the crime of carrying a concealed weapon makes no mention of whether the defendant was within the class of “risky persons” (unable to obtain a permit), under the proper approach to the Guidelines—the objective categorical approach—a court could never conclude that the act of carrying a concealed weapon is a crime of violence.

**Conclusion**

While the structure of criminal sentencing has evolved and changed during the life of our nation, criminal law and sentencing has been and always will remain the prerogative of the people. Criminal law is society’s collective manner of governing ourselves, for there is no greater expression of our will than that which dictates permissible and impermissible conduct. Furthermore, crimi-
nal sentencing is a measure of what laws we deem most important, and what conduct we deem most urgent to punish, deter, and rehabilitate. As it stands today, the structure of criminal sentencing is uncertain with the introduction of the *Booker* holding, rendering the Guidelines advisory. However, since courts still must consult the Guidelines in determining the proper sentencing range, the interpretation of the particular sections of the Guidelines remains important. Because of this, any interpretation of a clause in the Guidelines must be true to the Guidelines in both language and purpose.

It is for these reasons that the crime of carrying a concealed weapon is excluded from the scope of a crime of violence on multiple grounds. First, the crime is dissimilar in character to those enumerated crimes in the statute and the commentary, and thus the canon of statutory interpretation, *ejusdem generis*, excludes it from the provision. Additionally, the crime of carrying a concealed weapon is also excluded from the provision after applying the proper approach to the provision. By expanding the holding in *Taylor*, a formal categorical approach, to adequately handle cases of crimes that are not enumerated, a sentencing court is left with an objective categorical approach. This approach forces a sentencing court to take a generic, objective view toward the risk evaluation process, in addition to the established generic approach to the definition of the crime as suggested by the *Taylor* Court. By objectively adopting the risk evaluation that the states have already made, a sentencing court is provided clear guidance; the conduct of carrying a concealed weapon, by its nature, does not present a serious potential risk of physical injury to another, and therefore is not a “crime of violence.”

*Neal Eriksen*
APPENDIX A
MAXIMUM IMPRISONMENT TERMS FOR
CARRYING A CONCEALED WEAPON

Lawful to Carry a Concealed Weapon:197

Alaska, Vermont

30 Days:198

North Carolina, Oklahoma

90 Days:199

South Carolina, Washington

6 Months:200

Alabama, Arizona, Idaho, Louisiana, Mississippi, Montana, New Mexico, Ohio, Oregon, Wyoming

One year:201

Arkansas, California, Colorado, District of Columbia, Georgia, Hawaii, Indiana, Kansas, Kentucky, Maine, Minnesota, Nebraska,

197. ALASKA STAT. § 11.61.220 (West, Westlaw through 2006 legislation); VT. STAT. ANN. tit. 13, § 4003 (West, Westlaw through 2005 legislation).
198. OKLA. STAT. ANN. tit. 21, §§ 1272 (prohibition), 1276 (punishment) (West, Westlaw through 2006 legislation); N.C. GEN. STAT. ANN. §§ 14-269 (prohibition), 15A-1340.23(c) (punishment) (West, Westlaw through 2006 legislation).
199. S.C CODE ANN. § 16-23-460 (West, Westlaw through 2006 legislation); WASH. REV. CODE ANN. §§ 9.41.050 (prohibition), 9.92.030 (punishment) (West, Westlaw through 2007 legislation);
201. ARK. CODE ANN. §§ 5-73-120 (prohibition), 5-4-401(b)(1) (punishment) (West, Westlaw through 2006 legislation); CAL. PENAL CODE § 12025 (West, Westlaw through 2007 legislation); COLO. REV. STAT. ANN. §§ 18-12-105 (prohibition), 18-1.3-501 (punishment) (West, Westlaw through 2006 legislation); D.C. CODE §§ 22-4504 (prohibition), 22-4515 (punishment) (West, Westlaw through 2007 legislation); GA. CODE ANN. §§ 16-11-126 (prohibition), 17-10-3 (punishment) (West, Westlaw through 2006 legislation); HAW. REV. STAT. §§ 134-51 (prohibition), 701-107 (punishment)
Nevada, New Hampshire, North Dakota, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin

Exceeding One Year

Connecticut, Delaware, Florida, Illinois, Iowa, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New York, Pennsylvania, Rhode Island


202. CONN. GEN. STAT. § 53-206(a) (West, Westlaw through 2006 legislation); DEL. CODE ANN. tit. 11, §§ 1442 (prohibition), 4205(b)(7) (punishment) (West, Westlaw through 2007 legislation); FLA. STAT. ANN. §§ 790.01(1)-(3) (prohibition), 775.082 (punishment) (West, Westlaw through 2006 legislation); 720 ILL. COMP. Stat. ANN. 5/24-1.6(a), (d) (prohibition), 730 ILL. COMP. STAT. ANN. 5/5-8-1(a)(7) (punishment) (West, Westlaw through 2006 legislation); IOWA CODE ANN. §§ 724.4(1) (prohibition), 903.2(2) (punishment) (West, Westlaw through 2006 legislation); MD. CODE ANN., CRIM. LAW § 4-101 (West, Westlaw through 2006 legislation); MASS. GEN. LAWS ch. 269, § 10 (West, Westlaw through 2006 legislation); MICH. COMP. LAWS ANN. §§ 750.227(2)-(3) (West, Westlaw through 2006 legislation); MO. ANN. STAT. §§ 571.030(1)(5) (prohibition), 558.011(1)(4) (punishment) (West, Westlaw through 2006 legislation); N.J. STAT. ANN. §§ 2C:39-5(b) (prohibition), 2C:43-6(a)(3) (punishment) (West, Westlaw through 2006 legislation); N.Y. PENAL LAW §§ 265.02(6) (prohibition), 70.00(2)(d) (punishment) (West, Westlaw through 2007 legislation); 18 PA. CONS. STAT. ANN. §§ 6106(a)(1) (prohibition), 1103(3), 1104(1) (punishment) (West, Westlaw through 2006 legislation); R.I. GEN. LAWS § 11-47-8(a) (West, Westlaw through 2006 legislation).
## Appendix B

### Sentencing Table

**Criminal History Category (Criminal History Points)**

<table>
<thead>
<tr>
<th>Offense Level</th>
<th>I (0 or 1)</th>
<th>II (2 or 3)</th>
<th>III (4, 5, 6)</th>
<th>IV (7, 8, 9)</th>
<th>V (10, 11, 12)</th>
<th>VI (13 or more)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zone A</td>
<td>1</td>
<td>0-6</td>
<td>0-6</td>
<td>0-6</td>
<td>0-6</td>
<td>0-6</td>
</tr>
<tr>
<td></td>
<td>2</td>
<td>0-6</td>
<td>0-6</td>
<td>0-6</td>
<td>0-6</td>
<td>2-8</td>
</tr>
<tr>
<td></td>
<td>3</td>
<td>0-6</td>
<td>0-6</td>
<td>0-6</td>
<td>2-8</td>
<td>4-10</td>
</tr>
<tr>
<td></td>
<td>4</td>
<td>0-6</td>
<td>0-6</td>
<td>2-8</td>
<td>4-10</td>
<td>6-12</td>
</tr>
<tr>
<td></td>
<td>5</td>
<td>0-6</td>
<td>1-7</td>
<td>4-10</td>
<td>6-12</td>
<td>9-15</td>
</tr>
<tr>
<td></td>
<td>6</td>
<td>0-6</td>
<td>2-8</td>
<td>4-10</td>
<td>10-16</td>
<td>15-21</td>
</tr>
<tr>
<td></td>
<td>7</td>
<td>0-6</td>
<td>2-8</td>
<td>8-14</td>
<td>10-16</td>
<td>18-24</td>
</tr>
<tr>
<td></td>
<td>8</td>
<td>0-6</td>
<td>4-10</td>
<td>10-16</td>
<td>18-24</td>
<td>18-24</td>
</tr>
<tr>
<td>Zone B</td>
<td>9</td>
<td>4-10</td>
<td>8-14</td>
<td>12-18</td>
<td>18-24</td>
<td>21-27</td>
</tr>
<tr>
<td></td>
<td>10</td>
<td>6-12</td>
<td>8-14</td>
<td>12-18</td>
<td>18-24</td>
<td>21-27</td>
</tr>
<tr>
<td>Zone C</td>
<td>11</td>
<td>8-14</td>
<td>12-18</td>
<td>18-24</td>
<td>24-30</td>
<td>27-33</td>
</tr>
<tr>
<td></td>
<td>12</td>
<td>10-16</td>
<td>12-18</td>
<td>24-30</td>
<td>27-33</td>
<td>30-37</td>
</tr>
<tr>
<td>Zone D</td>
<td>13</td>
<td>12-18</td>
<td>15-21</td>
<td>24-30</td>
<td>30-37</td>
<td>33-41</td>
</tr>
<tr>
<td></td>
<td>14</td>
<td>15-21</td>
<td>18-24</td>
<td>27-33</td>
<td>33-41</td>
<td>37-46</td>
</tr>
<tr>
<td></td>
<td>15</td>
<td>18-24</td>
<td>21-27</td>
<td>30-37</td>
<td>37-46</td>
<td>41-51</td>
</tr>
<tr>
<td></td>
<td>16</td>
<td>21-27</td>
<td>24-30</td>
<td>33-41</td>
<td>41-51</td>
<td>46-57</td>
</tr>
<tr>
<td></td>
<td>17</td>
<td>24-30</td>
<td>27-33</td>
<td>37-46</td>
<td>46-57</td>
<td>51-63</td>
</tr>
<tr>
<td></td>
<td>18</td>
<td>27-33</td>
<td>30-37</td>
<td>41-51</td>
<td>51-63</td>
<td>57-71</td>
</tr>
<tr>
<td></td>
<td>19</td>
<td>30-37</td>
<td>33-41</td>
<td>46-57</td>
<td>57-71</td>
<td>63-78</td>
</tr>
<tr>
<td></td>
<td>20</td>
<td>33-41</td>
<td>37-46</td>
<td>51-63</td>
<td>63-78</td>
<td>70-87</td>
</tr>
<tr>
<td></td>
<td>21</td>
<td>37-46</td>
<td>41-51</td>
<td>57-71</td>
<td>70-87</td>
<td>77-96</td>
</tr>
<tr>
<td></td>
<td>22</td>
<td>41-51</td>
<td>46-57</td>
<td>63-78</td>
<td>77-96</td>
<td>84-105</td>
</tr>
<tr>
<td></td>
<td>23</td>
<td>46-57</td>
<td>51-63</td>
<td>70-87</td>
<td>84-105</td>
<td>92-115</td>
</tr>
<tr>
<td></td>
<td>24</td>
<td>51-63</td>
<td>57-71</td>
<td>77-96</td>
<td>92-115</td>
<td>100-125</td>
</tr>
<tr>
<td></td>
<td>25</td>
<td>57-71</td>
<td>63-78</td>
<td>84-105</td>
<td>100-125</td>
<td>110-137</td>
</tr>
<tr>
<td></td>
<td>26</td>
<td>63-78</td>
<td>70-87</td>
<td>92-115</td>
<td>110-137</td>
<td>120-150</td>
</tr>
<tr>
<td></td>
<td>27</td>
<td>70-87</td>
<td>78-97</td>
<td>100-125</td>
<td>120-150</td>
<td>130-162</td>
</tr>
<tr>
<td></td>
<td>28</td>
<td>78-97</td>
<td>87-108</td>
<td>110-137</td>
<td>130-162</td>
<td>140-175</td>
</tr>
<tr>
<td></td>
<td>29</td>
<td>87-108</td>
<td>97-121</td>
<td>120-150</td>
<td>140-175</td>
<td>151-188</td>
</tr>
<tr>
<td></td>
<td>30</td>
<td>97-121</td>
<td>108-135</td>
<td>140-175</td>
<td>151-188</td>
<td>168-210</td>
</tr>
<tr>
<td></td>
<td>31</td>
<td>108-135</td>
<td>121-151</td>
<td>151-188</td>
<td>168-210</td>
<td>188-235</td>
</tr>
<tr>
<td></td>
<td>32</td>
<td>121-151</td>
<td>135-168</td>
<td>168-210</td>
<td>188-235</td>
<td>210-262</td>
</tr>
<tr>
<td></td>
<td>33</td>
<td>135-168</td>
<td>151-188</td>
<td>188-235</td>
<td>210-262</td>
<td>235-293</td>
</tr>
<tr>
<td></td>
<td>34</td>
<td>151-188</td>
<td>168-210</td>
<td>210-262</td>
<td>235-293</td>
<td>262-327</td>
</tr>
<tr>
<td></td>
<td>35</td>
<td>168-210</td>
<td>188-235</td>
<td>235-293</td>
<td>262-327</td>
<td>292-365</td>
</tr>
<tr>
<td></td>
<td>36</td>
<td>188-235</td>
<td>210-262</td>
<td>262-327</td>
<td>292-365</td>
<td>324-405</td>
</tr>
<tr>
<td></td>
<td>37</td>
<td>210-262</td>
<td>235-293</td>
<td>292-365</td>
<td>324-405</td>
<td>360-life</td>
</tr>
<tr>
<td></td>
<td>38</td>
<td>235-293</td>
<td>262-327</td>
<td>324-405</td>
<td>360-life</td>
<td>360-life</td>
</tr>
<tr>
<td></td>
<td>39</td>
<td>262-327</td>
<td>292-365</td>
<td>360-life</td>
<td>360-life</td>
<td>360-life</td>
</tr>
<tr>
<td></td>
<td>40</td>
<td>292-365</td>
<td>324-405</td>
<td>360-life</td>
<td>360-life</td>
<td>360-life</td>
</tr>
<tr>
<td></td>
<td>41</td>
<td>324-405</td>
<td>360-life</td>
<td>360-life</td>
<td>360-life</td>
<td>360-life</td>
</tr>
<tr>
<td></td>
<td>42</td>
<td>360-life</td>
<td>360-life</td>
<td>360-life</td>
<td>360-life</td>
<td>360-life</td>
</tr>
<tr>
<td></td>
<td>43</td>
<td>360-life</td>
<td>360-life</td>
<td>360-life</td>
<td>360-life</td>
<td>360-life</td>
</tr>
</tbody>
</table>