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WE WILL DISCUSS

- CAREER OFFENDER.
 - GENERAL APPLICATION (§4B1.1)
 - CRIME OF VIOLENCE (§4B1.2(a))
 - CONTROLLED SUBSTANCE OFFENSE (§4B1.2(b))
- CATEGORICAL AND MODIFIED CATEGORICAL APPROACH.
- ARMED CAREER CRIMINAL.
 - GENERAL APPLICATION (§4B1.4)
 - VIOLENT FELONY
 - SERIOUS DRUG OFFENSE

CAREER OFFENDER

- GENERAL APPLICATION (§4B1.1)
 - AN INDIVIDUAL IS A “CAREER OFFENDER” IF:
 - (1) HE OR SHE WAS AT LEAST 18 AT THE TIME OF THE INSTANT OFFENSE, AND
 - (2) THE OFFENSE OF CONVICTION IS A FELONY CRIME OF VIOLENCE OR FELONY 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.

CAREER OFFENDER

THE GUIDELINES PROVIDE SIGNIFICANTLY ENHANCED OFFENSE LEVELS FOR CAREER OFFENDERS. GENERALLY, THE OFFENSE LEVEL INCREASES DEPENDING ON THE STATUTORY MAXIMUM OF THE OFFENSE OF CONVICTION.

THE GUIDELINES ESTABLISH THAT A CAREER OFFENDER'S CRIMINAL HISTORY CATEGORY IS VI.

§4B1.1. Career Offender

(a) 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.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

<u>Offense Statutory Maximum</u>		<u>Offense Level*</u>
(1)	Life	37
(2)	25 years or more	34
(3)	20 years or more, but less than 25 years	32
(4)	15 years or more, but less than 20 years	29
(5)	10 years or more, but less than 15 years	24
(6)	5 years or more, but less than 10 years	17
(7)	More than 1 year, but less than 5 years	12.

CAREER OFFENDER

PREDICATE CONVICTIONS

- ADULT CONVICTIONS REQUIRED.
 - ONLY ADULT CONVICTIONS CAN SERVE AS A PREDICATE UNDER THE CAREER OFFENDER GUIDELINES.
 - A DEFENDANT WHO WAS CONVICTED AS AN ADULT BUT WAS ONLY 17 CAN BE CONSIDERED A CAREER OFFENDER.
- PREDICATE CONVICTION MUST BE PRIOR TO FEDERAL OFFENSE.
 - THE CAREER OFFENDER ENHANCEMENT APPLIES TO CRIMINAL CONVICTIONS, NOT SENTENCES.
 - THE DEFENDANT MUST HAVE BEEN CONVICTED OF THE OFFENSE BEFORE HE COMMITTED THE FEDERAL OFFENSE.
 - THE DATE OF CONVICTION IS THE DATE THAT THE GUILT OF THE DEFENDANT HAS BEEN ESTABLISHED, WHETHER BY GUILTY PLEA, TRIAL, OR PLEA OF *NOLO CONTENDERE*.

CAREER OFFENDER

PREDICATE CONVICTIONS

- PREDICATE CONVICTIONS MUST BE COUNTED SEPARATELY.
 - MUST BE COUNTED SEPARATELY UNDER §4A1.1(a), (b), or (c).
- PREDICATE CONVICTIONS MUST BE SCORED.
 - PRIOR CONVICTIONS MUST NOT BE TOO OLD (i.e., OUTSIDE THE TIMELIMITS SET FORTH IN §4A1.2(d), (e)), AND
 - MUST RECEIVE CRIMINAL HISTORY POINTS UNDER §4A1.1(a), (b), or (c).

§4A1.1. Criminal History Category

The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

- (a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.
- (b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).
- (c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection.
- (d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.
- (e) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was treated as a single sentence, up to a total of 3 points for this subsection.

3. Application of "Single Sentence" Rule (Subsection (a)(2)).—

(A) Predicate Offenses.—In some cases, multiple prior sentences are treated as a single sentence for purposes of calculating the criminal history score under §4A1.1(a), (b), and (c). However, for purposes of determining predicate offenses, a prior sentence included in the single sentence should be treated as if it received criminal history points, if it independently would have received criminal history points. Therefore, an individual prior sentence may serve as a predicate under the career offender guideline (see §4B1.2(c)) or other guidelines with predicate offenses, if it independently would have received criminal history points. However, because predicate offenses may be used only if they are counted "separately" from each other (see §4B1.2(c)), no more than one prior sentence in a given single sentence may be used as a predicate offense.

For example, a defendant's criminal history includes one robbery conviction and one theft conviction. The sentences for these offenses were imposed on the same day, eight years ago, and are treated as a single sentence under §4A1.2(a)(2). If the defendant received a one-year sentence of imprisonment for the robbery and a two-year sentence of imprisonment for the theft, to be served concurrently, a total of 3 points is added under §4A1.1(a). Because this particular robbery met the definition of a felony crime of violence and independently would have received 2 criminal history points under §4A1.1(b), it may serve as a predicate under the career offender guideline.

Note, however, that if the sentences in the example above were imposed thirteen years ago, the robbery independently would have received no criminal history points under §4A1.1(b), because it was not imposed within ten years of the defendant's commencement of the instant offense. See §4A1.2(e)(2). Accordingly, it may not serve as a predicate under the career offender guideline.



CAREER OFFENDER

INCHOATE OFFENSES

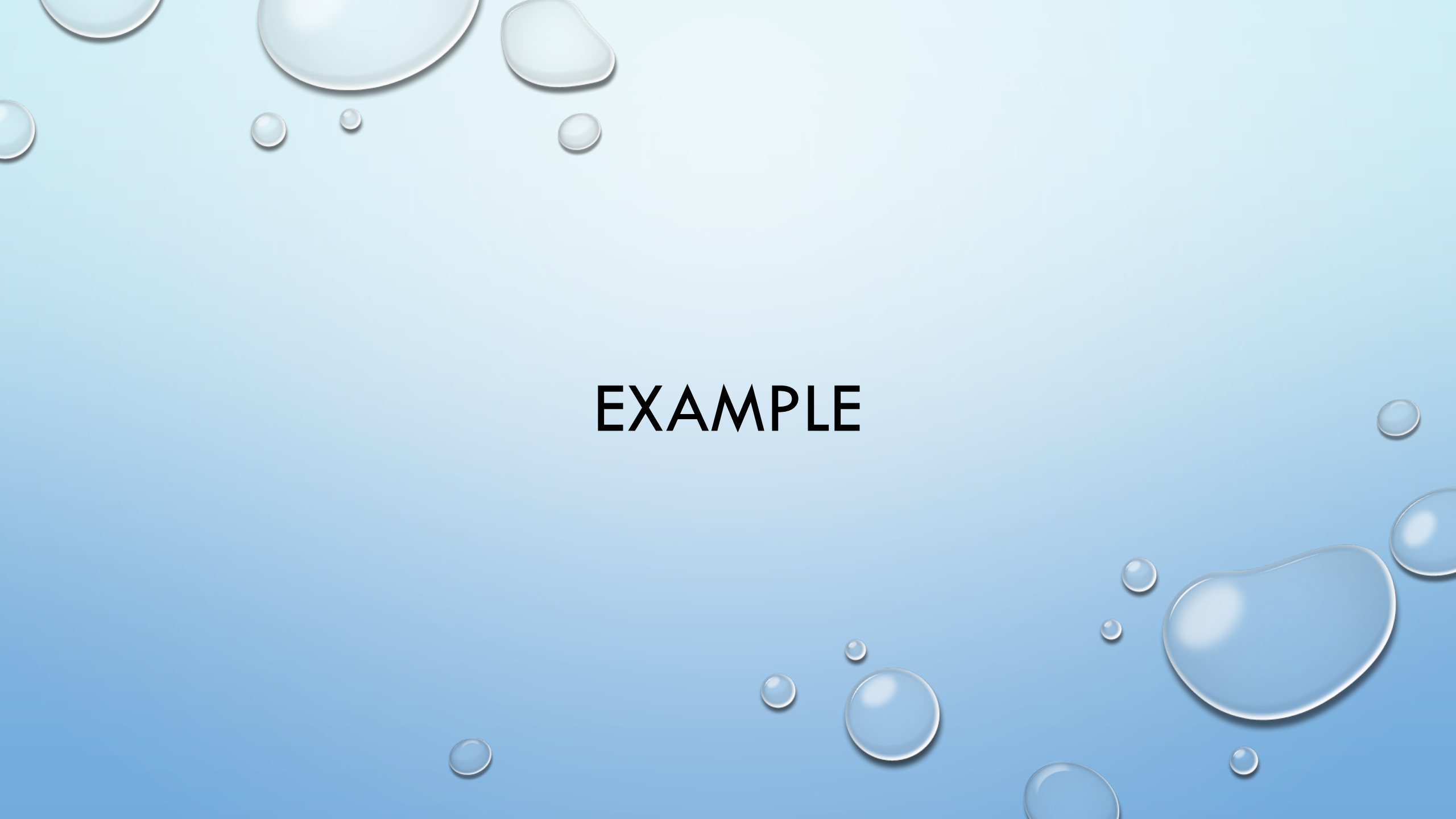
- CAREER OFFENDER GUIDELINE INCLUDES CONVICTIONS FOR INCHOATE OFFENSES SUCH AS AIDING AND ABETTING, CONSPIRING, AND ATTEMPTING TO COMMIT A “CRIME OF VIOLENCE” AND “CONTROLLED SUBSTANCE OFFENSE.”
 - THIS IS LIMITED TO CIRCUMSTANCES WHERE THE DEFENDANT INTENDED TO COMMIT OR FACILITATE THE SUBSTANTIVE OFFENSE.
- 

CAREER OFFENDER CRIME OF VIOLENCE (§4B1.2(a))

- 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 MURDER, VOLUNTARY MANSLAUGHTER, KIDNAPPING, AGGRAVATED ASSAULT, FORCIBLE SEX OFFENSE, ROBBERY, ARSON, EXTORTION, OR THE USE OR UNLAWFUL POSSESSION OF A FIREARM DESCRIBED IN 26 U.S.C. §5845(a) OR EXPLOSIVE MATERIAL AS DEFINED IN 18 U.S.C. §841(c).

CAREER OFFENDER CONTROLLED SUBSTANCES OFFENSE (§4B1.2(b))

- “[A]N OFFENSE UNDER FEDERAL OR STATE LAW, PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR, THAT PROHIBITS THE MANUFACTURE, IMPORT, EXPORT, DISTRIBUTION, OR DISPENSING OF A CONTROLLED SUBSTANCE (OR A COUNTERFEIT SUBSTANCE) OR THE POSSESSION OF A CONTROLLED SUBSTANCE (OR A COUNTERFEIT SUBSTANCE) WITH INTENT TO MANUFACTURE, IMPORT, EXPORT, DISTRIBUTE, OR DISPENSE.”

The background is a light blue gradient with several realistic water droplets of various sizes scattered across the surface. The droplets have highlights and shadows, giving them a three-dimensional appearance.

EXAMPLE

Count 1: Armed Bank Robbery

23.	Base Offense Level: The most applicable guideline for a violation of 18 U.S.C. § 2113(a) is found in USSG §2B3.1 of the guidelines. That section provides that an offense involving robbery has a base offense level of 20. USSG §2B3.1(a).	<u>20</u>
24.	Specific Offense Characteristics: Because the property of a financial institution was taken, the offense level is increased by two levels. USSG §2B3.1(b)(1).	<u>+2</u>
25.	Specific Offense Characteristics: Because a dangerous weapon was brandished or possessed, the offense level is increased by three levels. USSG 2B3.1(b)(2)(E).	<u>+3</u>
26.	Specific Offense Characteristics: Because the loss is more than \$10,000, the offense level is increased by one level. USSG 2B3.1(b)(7)(B).	<u>+1</u>
27.	Victim Related Adjustment: None	<u>0</u>
28.	Adjustment for Role in the Offense: None	<u>0</u>
29.	Adjustment for Obstruction of Justice: None	<u>0</u>
30.	Adjusted Offense Level (Subtotal):	<u>26</u>
31.	Chapter Four Enhancement: The defendant was at least 18 years old at the time of the instant offense of conviction; the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense; therefore, the defendant is a career offender. The offense level for a career offender is 34. USSG §4B1.1(b)(2).	<u>34</u>
32.	Acceptance of Responsibility: The defendant has demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. USSG §3E1.1(a).	<u>-2</u>
33.	Acceptance of Responsibility: The defendant has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly, the offense level is decreased by one additional level. USSG §3E1.1(b).	<u>-1</u>
34.	Total Offense Level:	<u>31</u>

38.	12/29/1982 (Age 18)	Burglary of a Habitation/El Paso County Court ; El Paso, TX; Case No.: 39427	06/06/1983: Guilty; five years confinement; 12/27/84 :Paroled; 10/28/86: Parole Revoked	4A1.2(e)(1)	0
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The defendant was represented by counsel. [REDACTED] was sentenced on June 6, 1983, to five years confinement for conduct which occurred on or about December 14, 1982. [REDACTED] was paroled on December 27, 1984, and on October 28, 1986, his parole was revoked.

39.	05/20/1986 (Age 22)	Unlawful Possession of a Controlled Substance/El Paso County Court ; Case No.: 47303-65	08/18/1986: Guilty; five years confinement; 12/87/87:Parole revoked; 05/16/88:Paroled with mandatory supervision until 06/07/91	4A1.2(e)(1)	0
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40.	06/18/1989 (Age 25)	Armed Robbery; Cibola County District Court ; Grants, NM; Case No.: CB-89-60- CR	04/10/1990: Guilty Plea; 8 years confinement with two years of parole to follow	4A1.2(e)(1)	0
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42.	11/14/1989 (Age 25)	Bank Larceny/U.S. District Court, District of New Mexico ; Albuquerque, NM; Case No.: CR 89-517- 01-JC	09/26/1990: Pled guilty; 4A1.1(a) 87 months imprisonment, three years supervised release; 04/14/98: Supervised release revoked, sentenced to 18 months imprisonment; 10/18/99: Discharged	3
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The investigation showed that [REDACTED] entered the United New Mexico Bank in Albuquerque, New Mexico, and handed the bank teller a note stating they had a gun and to place all of the money on the counter and no one would get hurt. [REDACTED] ordered the teller to "get the 100's." [REDACTED] exited the bank and entered a vehicle driven by [REDACTED]. The three were later apprehended and found to be fugitives, who were escapees from the Cibola County Jail in Grants, New Mexico.

43.	02/09/1997 (Age 32)	Distribution of Controlled or Counterfeit Substances/Seventh Judicial District County of Socorro, NM; Case No.: 0725-CR-97- 32 (FITCH)	05/18/1998: Pled guilty; 4A1.1(a) 18 months incarceration, one year of parole	3
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[REDACTED] was arrested on February 9, 1997, after he was stopped by New Mexico State Police, and found to be in possession of five pounds of marijuana. Charges were filed on April 11, 1997, and [REDACTED] was sentenced on May 18, 1998, to 18 months incarceration to be served consecutively to his federal sentence in CR89-517-01-JC.

The background is a light blue gradient with several realistic water droplets of various sizes scattered across it. The droplets have highlights and shadows, giving them a three-dimensional appearance.

CATEGORICAL AND MODIFIED CATEGORICAL APPROACH

CATEGORICAL AND MODIFIED CATEGORICAL APPROACH

- USED TO DETERMINE IF A DEFENDANT'S PRIOR CONVICTION IS A PREDICATE CONVICTION AS A CRIME OF VIOLENCE (§4B1.2(a)) OR A CONTROLLED SUBSTANCE OFFENSE (§4B1.2(b)) IN DETERMINATION OF CAREER OFFENDER STATUS.
- USED TO DETERMINE IF A DEFENDANT'S PRIOR CONVICTION IS A PREDICATE CONVICTION AS A VIOLENT FELONY OR SERIOUS DRUG TRAFFICKING OFFENSE TO DETERMINE IF THE DEFENDANT IS SUBJECT TO AN ENHANCED SENTENCE UNDER 18 U.S.C. §924(e).

CATEGORICAL APPROACH

- TAYLOR v. UNITED STATES, 495 U.S. 575 (1990)
 - COURTS MUST LOOK TO THE STATUTORY ELEMENTS OF AN OFFENSE, NOT THE DEFENDANT'S CONDUCT, TO DETERMINE THE NATURE OF A PRIOR CONVICTION.
 - A COURT IS NOT CONCERNED WITH THE "FACTS UNDERLYING THE PRIOR CONVICTION."

MODIFIED CATEGORICAL APPROACH

- APPROACH USED “WHEN A PRIOR CONVICTION IS FOR VIOLATING A ‘DIVISIBLE STATUTE’ – ONE THAT SETS OUT ONE OR MORE OF THE ELEMENTS IN THE ALTERNATIVE.
 - EXAMPLE: BURGLARY INVOLVING ENTRY INTO A BUILDING OR AN AUTOMOBILE.
- UNDER THIS APPROACH SENTENCING COURTS MAY CONSULT A LIMITED CLASS OF DOCUMENTS – INDICTMENTS AND JURY INSTRUCTIONS – TO DETERMINE WHICH ALTERNATIVE ELEMENT FORMED THE BASIS OF THE PRIOR CONVICITON.
 - PRIOR TRIAL CONVICTION – INDICTMENT AND JURY INSTRUCTIONS.
 - PRIOR GUILTY PLEA CONVICTION – CHARGING DOCUMENT, TERMS OF THE PLEA AGREEMENT, TRANSCRIPT OF THE PLEA.

MODIFIED CATEGORICAL APPROACH

- ABSTRACTS CANNOT BE USED TO DETERMINE THE NATURE OF THE PRIOR CONVICTION.
- “THE MODIFIED APPROACH SERVES – AND SERVES SOLELY – AS A TOOL TO IDENTIFY THE ELEMENTS OF THE CRIME OF CONVICTION WHEN A STATUTE’S DISJUNCTIVE PHRASING RENDERS ONE (OR MORE) OF THEM OPAQUE.” MATHIS v. UNITED STATES, 136 S. Ct. 2243 (2016).
- ONCE THE ELEMENTS OF THE CRIME OF CONVICTION ARE IDENTIFIED, THE CATEGORICAL APPROACH IS FOLLOWED.

CATEGORICAL AND MODIFIED CATEGORICAL APPROACH

- DESCAMPS V. UNITED STATES, 133 S. CT. 2276 (2013)
 - IN THE CATEGORICAL APPROACH, THE COMPARISON IS BETWEEN THE PRIOR CONVICTION'S ELEMENTS OF THE OFFENSE WITH THE ELEMENTS OF THE GENERIC OFFENSE.
 - A STATE CRIME CANNOT QUALIFY IF ITS ELEMENTS ARE BROADER THAN THOSE OF A LISTED GENERIC OFFENSE.
 - SENTENCING COURTS MAY NOT APPLY THE MODIFIED CATEGORICAL APPROACH WHEN THE CRIME OF WHICH THE DEFENDANT WAS CONVICTED HAS A SINGLE, INDIVISIBLE SET OF ELEMENTS.

CATEGORICAL AND MODIFIED CATEGORICAL APPROACH

- MATHIS V. UNITED STATES, 136 S. CT. 2243 (2016)
 - IF THE PREDICATE CONVICTION STATUTE ENUMERATES FACTUAL MEANS OF COMMITTING A SINGLE ELEMENT OF AN OFFENSE, THOSE ALTERNATIVE FACTUAL MEANS ARE NOT ELEMENTS OF THE OFFENSE.
 - SENTENCING COURT MUST DETERMINE WHETHER ITS LISTED ITEMS ARE ELEMENTS OR MEANS.
 - ADDRESSED USE OF AIDS IN MAKING THIS DETERMINATION – STATE SUPREME COURT OPINIONS.

ARMED CAREER CRIMINAL

- GENERAL APPLICATION (§4B1.4)
 - A DEFENDANT CONVICTED OF A VIOLATION OF 18 U.S.C. §922(g), AND WHO HAS THREE PRIOR CONVICTIONS, FOR A VIOLENT FELONY OR SERIOUS DRUG TRAFFICKING OFFENSE, OR BOTH, COMMITTED IN OCCASIONS DIFFERENT FROM ONE ANOTHER IS CONSIDERED AN “ARMED CAREER CRIMINAL.” THE DEFENDANT IS SUBJECT TO THE ENHANCED SENTENCE UNDER 18 U.S.C. §924(e).

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

§4B1.4. Armed Career Criminal

(a) A defendant who is subject to an enhanced sentence under the provisions of 18 U.S.C. § 924(e) is an armed career criminal.

(b) The offense level for an armed career criminal is the greatest of:

(1) the offense level applicable from Chapters Two and Three; or

(2) the offense level from §4B1.1 (Career Offender) if applicable; or

(3) (A) **34**, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a)*; or

(B) **33**, otherwise.*

*If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

(c) The criminal history category for an armed career criminal is the greatest of:

(1) the criminal history category from Chapter Four, Part A (Criminal History), or §4B1.1 (Career Offender) if applicable; or

(2) Category VI, if the defendant used or possessed the firearm or ammunition in connection with either a crime of violence, as defined in §4B1.2(a), or a controlled substance offense, as defined in §4B1.2(b), or if the firearm possessed by the defendant was of a type described in 26 U.S.C. § 5845(a); or

(3) Category IV.

ARMED CAREER CRIMINAL

- ACCEPTANCE OF RESPONSIBILITY – IS AVAILABLE AND WILL DECREASE THE OFFENSE LEVEL BUT NOT BELOW THE STATUTORY MANDATORY MINIMUM OF 180 MONTHS.
- 18 U.S.C. §924(2) DOES NOT PROVIDE FOR TIME LIMITATIONS IN PREDICATE CONVICTIONS.
- CATEGORICAL AND MODIFIED CATEGORICAL APPROACH APPLY TO THE DETERMINATION WHETHER AN OFFENSE IS A “CRIME OF VIOLENCE” OR “CONTROLLED SUBSTANCE OFFENSE.”

ARMED CAREER CRIMINAL

- “VIOLENT FELONY” MEANS:

- α. ANY CRIME PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR, OR ANY ACT OF JUVENILE DELINQUENCY INVOLVING THE USE OR CARRYING OF A FIREARM, KNIFE, OR DESTRUCTIVE DEVICE THAT WOULD BE PUNISHABLE OF SUCH TERM IF COMMITTED BY AN ADULT 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, ARSON, OR EXTORTION, INVOLVING THE USE OF EXPLOSIVES.

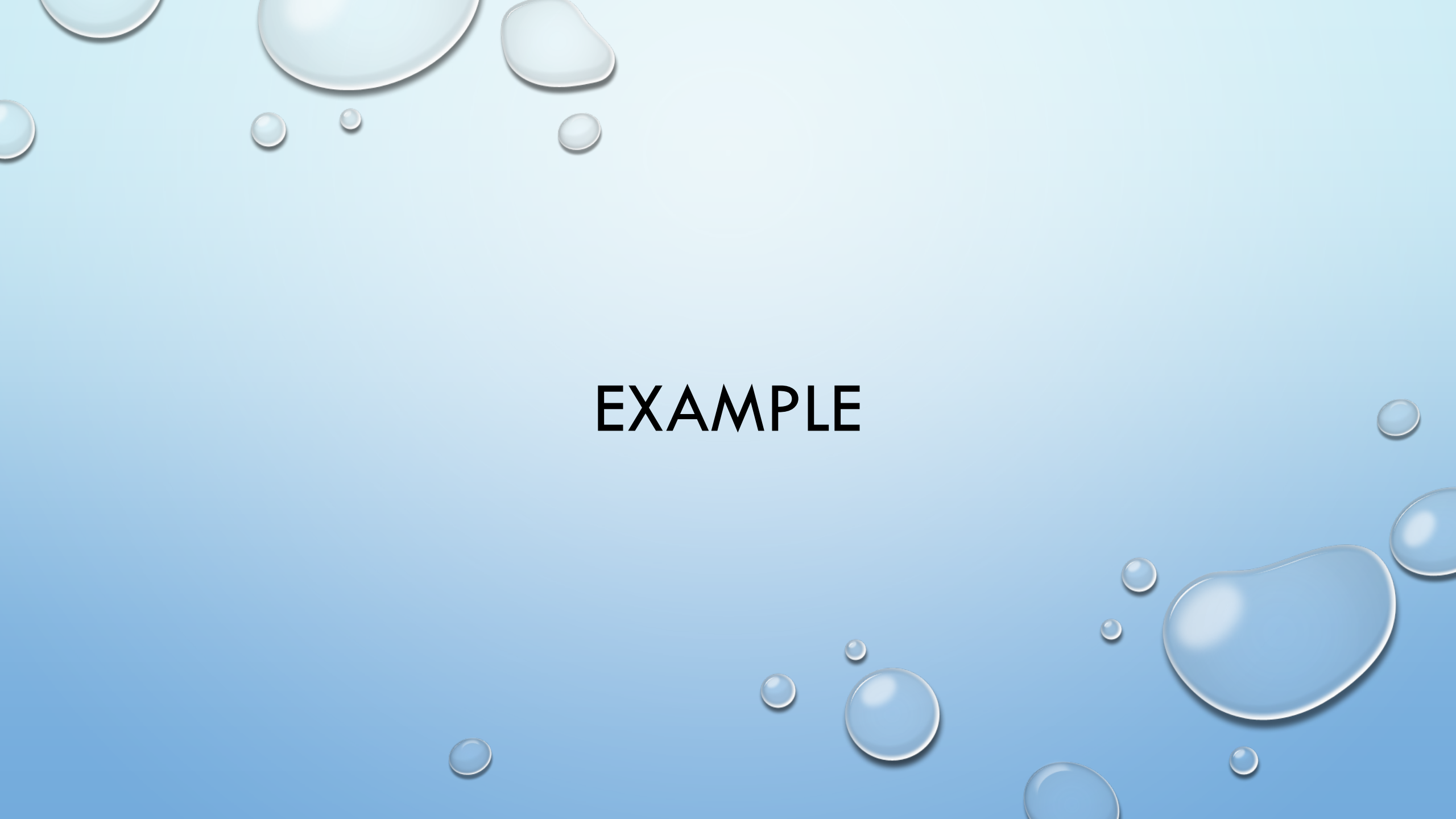
18 U.S.C. §924(e)(2)

ARMED CAREER CRIMINAL

- “SERIOUS DRUG OFFENSE” MEANS:

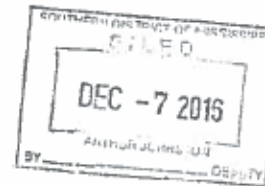
THE TERM SERIOUS DRUG OFFENSE REFERS TO AN OFFENSE UNDER 21 U.S.C. § 801 et seq., §951 et seq., or 46 U.S.C. §70501 et seq., OR AN OFFENSE UNDER STATE LAW INVOLVING THE MANUFACTURING, DISTRIBUTING, OR POSSESSING WITH INTENT TO MANUFACTURE OR DISTRIBUTE, A CONTROLLED SUBSTANCE FOR WHICH A MAXIMUM TERM OF IMPRISONMENT IS AT LEAST TEN YEARS.

18 U.S.C. §924(e)(2)

The background is a light blue gradient with several realistic water droplets of various sizes scattered across the surface. The droplets have highlights and shadows, giving them a three-dimensional appearance.

EXAMPLE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION



UNITED STATES OF AMERICA

v.

CRIMINAL NO.

2:16-cr-225-MJP

MICHAEL ANTHONY AMARAL

18 U.S.C. § 922(g)(1)

X NLT 15-13

The Grand Jury charges:

On or about March 17, 2015, in Covington County, in the Eastern Division of the Southern District of Mississippi, the defendant, **MICHAEL ANTHONY AMARAL**, having been convicted previously of certain felonies, that is, a crime which is punishable by imprisonment for a term exceeding one year, including, but not limited to the following felonies as defined in 18 U.S.C. § 924(e)(2)(B):

1. Kidnapping, Cause Number 113923, Alameda County Superior Court, California, convicted on December 31, 1992;
2. Aggravated Battery with a Deadly Weapon, Cause Number FC40465, Solano County Superior Court, California, convicted on February 23, 1996;
3. Aggravated Assault, Cause Number 09-409CR, Forrest County Circuit Court, Mississippi, convicted on September 23, 2010;

did knowingly possess two firearms, namely an Iberia Firearms (HiPoint) .40 caliber pistol model JCP-40, serial number X7109793 and a Haskell Manufacturing .45 caliber pistol model JS-45, serial number 02891, which had previously been shipped and transported in and affecting interstate commerce. In violation of Title 18, United States Code, Sections 922(g)(1) and 924(e)(1).

ABSTRACT OF JUDGMENT – PRISON COMMITMENT SINGLE OR CONCURRENT COUNT FORM

FORM DSL 290.1

(Not to be used for Multiple Count Convictions nor Consecutive Sentences)

☒ SUPERIOR
☐ MUNICIPAL
☐ JUSTICE

COURT OF CALIFORNIA, COUNTY OF Alameda

BRANCH OR JUDICIAL DISTRICT: _____

COURT (I.D.)
01

PEOPLE OF THE STATE OF CALIFORNIA versus
DEFENDANT: **MICHAEL ANTHONY AMARAL**
AKA: (AVN 241 2191699)

☒ PRESENT
☐ NOT PRESENT

113923

COMMITMENT TO STATE PRISON
ABSTRACT OF JUDGMENT

AMENDED
ABSTRACT ☐

FILED
ALAMEDA COUNTY

APR 25 1994

RONALD G. OVERHOLT, Exec. Off. Clerk
By Melinda Smith

DATE OF HEARING (MO) (DAY) (YR) 4/21/94	DEPT. NO 11	JUDGE MARTIN J. JENKINS	CLERK Miranda Edgerly
REPORTER Kathy Lyons	COUNSEL FOR PEOPLE Thomas Rogers, DDA	COUNSEL FOR DEFENDANT Maxine Fasulis, APD	PROBATION NO. OR PROBATION OFFICER Marva Smith, DPO

1. DEFENDANT WAS CONVICTED OF THE COMMISSION OF THE FOLLOWING FELONY (OR ALTERNATE FELONY/MISDEMEANOR):

COUNT	CODE	SECTION NUMBER	CRIME	YEAR CRIME COMMITTED	DATE OF CONVICTION			CONVICTED BY			TERM (L.M.J.)	TIME IMPOSED	
					MO	DAY	YEAR	JURY TRIAL	COURT TRIAL	PLEA		YEARS	MONTHS
1	PC	207(a) (1203)	Kidnapping	92	12	31	92			X	L	3	

5 WILLIAM M. BALDWIN
6 Assistant District Attorney

NOV 23 1992

RONALD G. OVERHOLT, Exec. Off./Clerk
By Kathleen Mountain

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11 THE PEOPLE OF THE STATE OF CALIFORNIA,)

12 v.)

13 MICHAEL A. AMARAL,)

14 Defendant.)
15

No. 113923
INFORMATION
PFN AVN241
CEN 2101699
TEAM 2

16 The District Attorney of the County of Alameda hereby accuses MICHAEL
17 A. AMARAL of a felony, to wit: KIDNAPING, a violation of Section 207(a) of the
18 Penal Code of California, in that on or about the 8th day of September, 1992, in the
19 County of Alameda, State of California, said defendant did then and there forcibly steal
20 and take SCOTT DABEL and did carry him into another part of the County of Alameda,
21 State of California.
22

West's Ann.Cal.Penal Code § 207

§ 207. Kidnapping defined

Effective: January 1, 2004

Currentness

(a) Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

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

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

relevant inquiry is whether the error is plain at the time of appellate consideration, not at the time of trial. *United States v. Martinez-Vega*, 471 F.3d 559, 561 (5th Cir.2006).

B. Crime of Violence Enhancement

1. Section 2L1.2(b)(1)(A)(ii)

Section 2L1.2(b)(1)(A)(ii) provides for a sixteen-level increase to a defendant's base *449 offense level if he was previously deported after being convicted of a felony that is a COV. *United States v. Cervantes-Blanco*, 504 F.3d 576, 578-79 (5th Cir.2007). The Guidelines Manual commentary defines a COV as "(1) any of a list of enumerated offenses, including 'kidnapping,' or (2) 'any offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.' " *Id.* at 579 (quoting § 2L1.2, cmt. n. 1(B)(iii)). This court uses different tests when analyzing whether a particular offense amounts to a COV, and the test used depends on whether the offense is an enumerated one or has physical force as an element. *United States v. Mendoza-Sanchez*, 456 F.3d 479, 481-82 (5th Cir.2006).

⁴ "In determining whether the [California] crime at issue here is the enumerated offense of 'kidnapping,' we look to the 'generic, contemporary' meaning of kidnapping, employing a 'common sense approach' that looks to the Model Penal Code, the LaFave and Scott treatises, modern state codes, and dictionary definitions." *United States v. Iniguez-Barba*, 485 F.3d 790, 791 (5th Cir.2007). State-law labels do not control this inquiry because the COV "enhancement incorporates crimes with certain elements, not crimes that happen to be labeled 'kidnapping' ... under state law." *Gonzalez-Ramirez*, 477 F.3d at 313.

⁵ "In determining whether an offense has as an element the use, attempted use, or threatened use of physical force against the person of another, this court uses the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575, 600-02, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), and examines the elements of the offense, rather than the facts underlying the conviction." *Mendoza-Sanchez*, 456 F.3d at 482.

⁶ ⁷ Under either approach, if the statute of conviction contains a series of disjunctive elements, this court may look beyond the statute to certain records made or used in adjudicating guilt to determine which subpart of the statute formed the basis of the conviction. *United States v. Mungia-Portillo*, 484 F.3d 813, 815 (5th Cir.), cert. denied, --- U.S. ---, 128 S.Ct. 320, 169 L.Ed.2d 226 (2007); *United States v. Murillo-Lopez*, 444 F.3d 337, 339-40 (5th

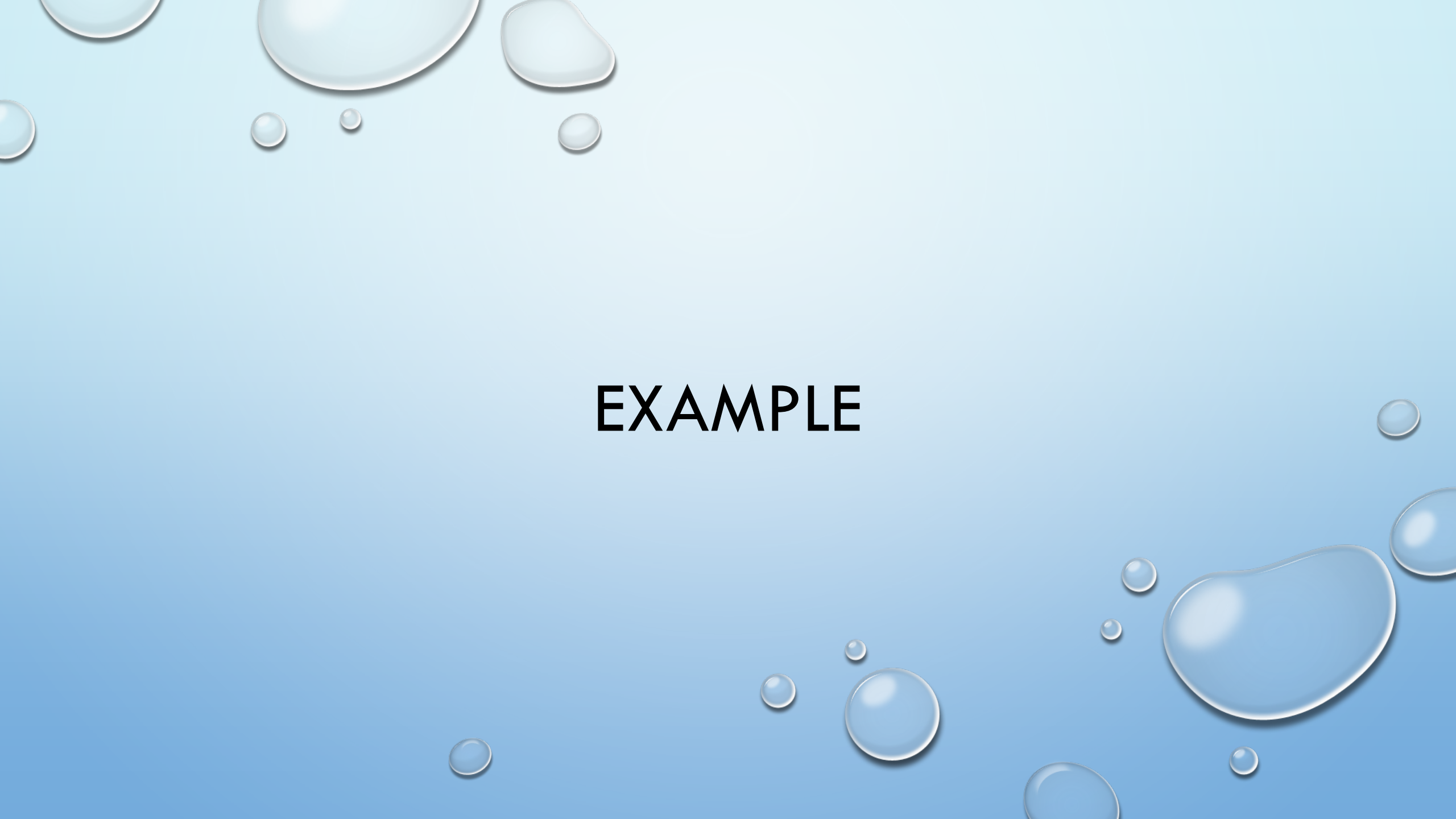
defendant assented.” *Murillo-Lopez*, 444 F.3d at 340 (quotations omitted); accord *Mungia-Portillo*, 484 F.3d at 815. If the statute of conviction cannot be narrowed, we consider “whether the least culpable act constituting a violation of that statute constitutes ‘kidnapping’ for purposes of U.S.S.G. § 2L1.2.” *Gonzalez-Ramirez*, 477 F.3d at 315-16.

⁸ In this case, the parties agree that Moreno-Florean's kidnapping conviction occurred pursuant to CAL.PENAL CODE § 207(a) as reflected in the indictment and abstract of judgment pertaining to the conviction.¹ Section 207(a) states, “Every *450 person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person into another country, state, or county, or into another part of the same county, is guilty of kidnapping.” The parties do not cite, and research did not reveal, any cases from this circuit or another circuit addressing the issue whether a conviction under § 207(a) is a COV, as the term is currently defined for § 2L1.2(b)(1)(A)(ii) purposes.²

2. Use of Physical Force as an Element

⁹ With respect to whether § 207(a) constitutes a crime of violence under the categorical approach because it has as an element the use, attempted use, or threatened use of physical force against the person of another, Moreno-Florean argues that the use of physical force is not a necessary element of § 207(a) because § 207(a) makes it unlawful for the offender to act “forcibly, or by any other means of instilling fear.” Count one of Moreno-Florean's indictment, the count underlying his kidnapping conviction, tracks this provision of § 207(a), charging that Moreno-Florean acted “wilfully, unlawfully, forcibly and by other means of instilling fear.” The Government does not dispute that the use of force is not a necessary element of § 207(a). See *People v. Majors*, 33 Cal.4th 321, 14 Cal.Rptr.3d 870, 92 P.3d 360, 363 (2004) (holding that “the force used against the victim need not be physical” in order to sustain a conviction for kidnapping under § 207(a)).

The Government argues that Moreno-Florean's record of conviction establishes that his kidnapping offense involved injury to the victim based on the use of physical force. The Government relies on the fact that Moreno-Florean's abstract of judgment reflects that he pleaded guilty not only to count one of his indictment, kidnapping in violation of § 207(a), but also to count three of his indictment, willfully inflicting corporal injury in violation of CAL.PENAL CODE § 273.5(a). The Government argues that the use of physical force is a necessary element of § 273.5(a), such that the record of conviction establishes *451 that Moreno-Florean used physical force with respect to his kidnapping conviction. See *People v. Jackson*, 77 Cal.App.4th 574, 91 Cal.Rptr.2d 805, 810 (2000); see also CAL.PENAL CODE § 273.5(c) (defining the term “traumatic condition”).

The background is a light blue gradient with several realistic water droplets of various sizes scattered across the surface. The droplets have highlights and shadows, giving them a three-dimensional appearance. The word "EXAMPLE" is centered in the middle of the image.

EXAMPLE

Count 1: Armed Bank Robbery

23.	Base Offense Level: The most applicable guideline for a violation of 18 U.S.C. § 2113(a) is found in USSG §2B3.1 of the guidelines. That section provides that an offense involving robbery has a base offense level of 20. USSG §2B3.1(a).	<u>20</u>
24.	Specific Offense Characteristics: Because the property of a financial institution was taken, the offense level is increased by two levels. USSG §2B3.1(b)(1).	<u>+2</u>
25.	Specific Offense Characteristics: Because a dangerous weapon was brandished or possessed, the offense level is increased by three levels. USSG 2B3.1(b)(2)(E).	<u>+3</u>
26.	Specific Offense Characteristics: Because the loss is more than \$10,000, the offense level is increased by one level. USSG 2B3.1(b)(7)(B).	<u>+1</u>
27.	Victim Related Adjustment: None	<u>0</u>
28.	Adjustment for Role in the Offense: None	<u>0</u>
29.	Adjustment for Obstruction of Justice: None	<u>0</u>
30.	Adjusted Offense Level (Subtotal):	<u>26</u>
31.	Chapter Four Enhancement: The defendant was at least 18 years old at the time of the instant offense of conviction; the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense; therefore, the defendant is a career offender. The offense level for a career offender is 34. USSG §4B1.1(b)(2).	<u>34</u>
32.	Acceptance of Responsibility: The defendant has demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. USSG §3E1.1(a).	<u>-2</u>
33.	Acceptance of Responsibility: The defendant has assisted authorities in the investigation or prosecution of the defendant's own misconduct by timely notifying authorities of the intention to enter a plea of guilty. Accordingly, the offense level is decreased by one additional level. USSG §3E1.1(b).	<u>-1</u>
34.	Total Offense Level:	<u>31</u>

42.	11/14/1989 (Age 25)	Bank Larceny/U.S. District Court, District of New Mexico ; Albuquerque, NM; Case No.: CR 89-517- 01-JC	09/26/1990: Pled guilty; 4A1.1(a) 87 months imprisonment, three years supervised release; 04/14/98: Supervised release revoked, sentenced to 18 months imprisonment; 10/18/99: Discharged	3
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The investigation showed that [REDACTED] entered the United New Mexico Bank in Albuquerque, New Mexico, and handed the bank teller a note stating they had a gun and to place all of the money on the counter and no one would get hurt. [REDACTED] ordered the teller to "get the 100's." [REDACTED] exited the bank and entered a vehicle driven by [REDACTED]. The three were later apprehended and found to be fugitives, who were escapees from the Cibola County Jail in Grants, New Mexico.

43.	02/09/1997 (Age 32)	Distribution of Controlled or Counterfeit Substances/Seventh Judicial District County of Socorro, NM; Case No.: 0725-CR-97- 32 (FITCH)	05/18/1998: Pled guilty; 4A1.1(a) 18 months incarceration, one year of parole	3
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[REDACTED] was arrested on February 9, 1997, after he was stopped by New Mexico State Police, and found to be in possession of five pounds of marijuana. Charges were filed on April 11, 1997, and [REDACTED] was sentenced on May 18, 1998, to 18 months incarceration to be served consecutively to his federal sentence in CR89-517-01-JC.

(A) the term “serious drug offense” means--

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

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

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

18 U.S.C.A. § 2113

§ 2113. Bank robbery and incidental crimes

Effective: November 2, 2002

Currentness

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding \$1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than ten years, or both;

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding \$1,000 belonging to, or in the care, custody, control, management, or possession of any bank, credit union, or any savings and loan association, shall be fined under this title or imprisoned not more than one year, or both.

<https://www.youtube.com/watch?v=I2MOimXE69s>