IS THAT PRIOR A VIOLENT FELONY OR A CRIME OF VIOLENCE?:
An Analytical Framework for Approaching ACCA (and Career Offender) Predicates[1]

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), mandates a minimum of fifteen years imprisonment for a felon who possesses a firearm and has "three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another." ACCA defines a "violent felony" as:

> any crime punishable by imprisonment 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 use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

18 U.S.C. § 924(e)(2)(B). The career offender provisions of the sentencing guidelines contain a similar, though not identical, definition for a crime of violence. *See* USSG § 4B1.2.[2]

The Supreme Court has decided six key cases interpreting ACCA, which courts have uniformly applied both to ACCA and the career offender guideline.[3] A brief summary of the six cases appears below[4] followed by a six step analytical framework for assessing your client's prior convictions.

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[2] USSG §4B1.2 includes only "burglary of a dwelling." The application note also enumerates additional "crimes of violence."

[3] *United States v. Polk*, 577 F.3d 515, 519 n.1 (3rd Cir. 2009); *United States v. Seay*, 553 F.3d 732, 739 (4th Cir. 2009); *United States v. Mohr*, 554 F.3d 604, 608-09 (5th Cir. 2009); *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008); *United States v. Gray*, 535 F.3d 128, 129 (2nd Cir. 2008); *United States v. Bartee*, 529 F.3d 357, 363 (6th Cir. 2008); *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008); *United States v. Williams*, 537 F.3d 969, 971 (8th Cir. 2008); *United States v. Coronado*, __ F.3d __, 2010 WL 1740929, *2-3 (9th Cir. May 3, 2010); *United States v. Tiger*, 538 F.3d 1297, 1298 (10th Cir. 2008); *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

[4] Those cases are discussed in detail elsewhere. *See, e.g.*, Timothy Crooks and Margaret Katze, *Begay and Beyond: Chipping Away at Crimes of Violence* (May 2008); Anne Blanchard and Sara Noonan, *Potential Uses of Begay and Chambers: Annotated Case Law Outline* (rev. June 21, 2010) (both available at fd.org).

I. SUPREME COURT CASE LAW: *Taylor, Shepard, James, Begay, Chambers*, and *Johnson*

A. The Categorical Method for Determining Whether a Prior Offense Qualifies Under ACCA: *Taylor, Shepard, and Chambers*

In *Taylor v. United States*, 495 U.S. 575, 592 (1990), the Court made clear that the offenses enumerated in subparagraph (ii) – that is, burglary, arson, and extortion – have a "uniform definition independent of the labels employed by the various States' criminal codes." Rejecting the common law definition of burglary, the Court looked to state criminal codes for a "generic, contemporary meaning of burglary." *Id*. at 589. The Court defined "generic burglary" as "an unlawful entry, into a building or structure, with intent to commit a crime." *Id.* at 598.

Taylor further held that, in determining whether an offense qualifies as an ACCA predicate under subparagraph (ii) (either as an enumerated offense or because it "otherwise involves a serious potential risk of physical injury to another"), the trial court should "look[] only to the statutory definitions of the prior offenses [categorical approach], and not to the particular facts underlying those convictions [circumstance-specific approach]." *Id*. at 600 (emphasis added). *Taylor* acknowledged that some burglary statutes are overbroad, meaning that they cover both unlawful entry of a building to commit a crime (generic burglary) and, for example, unlawful entry of an automobile to commit a crime (not generic burglary). *Id.* at 602. In such an instance, where the offense may be committed by more than one means, but not all of those means qualify as a violent felony, then the court may use a modified categorical approach, which under *Taylor*, permits courts to look to "the charging paper or jury instructions" to see whether the conviction "actually required the jury to find all the elements of generic burglary in order to convict the defendant." *Id.*

In *Shepard v. United States*, 544 U.S. 13, 19 (2005), the Court clarified that *Taylor*'s modified categorical approach applies for guilty pleas as well as jury verdicts. *Shepard* held that the "right analogs for applying the *Taylor* rule . . . would [in a bench trial] be a bench-trial judge's formal rulings of law and findings of fact, and in pleaded cases they would be the statement of factual basis for the charge, shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." *Id.* at 20. Thus, under the modified categorical approach in a jury case, the court may only look to the indictment, jury instructions, or verdict sheet; and in a pleaded case, the court may examine only the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Id*. at 16.

The categorical line drawn by *Taylor* and *Shepard* has important constitutional significance. In *Taylor*, the Court queried "[i[f the sentencing court were to conclude, from its own view of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?" *Taylor*, 495 U.S. at 601. *Shepard* later answered that question in the affirmative, because a sentencing judge that makes a disputed finding of fact about "what the defendant and state judge must have

understood as the factual basis of the prior plea . . . raises the [Sixth Amendment] concern underlying *Jones* and *Apprendi.*" *Shepard*, 544 U.S. at 25-26 (citations omitted).[5]

In *Chambers* v. United States, 129 S. Ct. 687 (2009) (discussed *infra*), the Court clarified that under the categorical approach, when a statute defines an offense to include multiple forms (or categories) of conduct, a court may look to the documents approved in *Shepard* to determine whether the defendant's conviction was for a particular one of those categories. *Id.* at 691 (where state escape statute criminalized multiple forms of escape, "[w]e know from the state-court information in the record that Chambers pleaded guilty to 'knowingly fail[ing] to report'"). If so, that offense category is the proper focus of the inquiry. *Id.* (treating the failure to report for custody as a separate offense from escape from custody even though both categories are covered under the same statute because a failure to report is "less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody").

B. ACCA Subparagraph (ii): "Otherwise Involves a Serious Potential Risk of Injury to Another": *James, Begay,* and *Chambers*[6]

a. *James*: Similar in Degree of Risk to Subparagraph (ii)'s Enumerated Offenses

In *James v. United States*, 550 U.S. 192 (2007), the Court applied the categorical approach to determine that attempted burglary as defined under Florida state law fits the "otherwise" clause in subparagraph (B)(ii) because it is similar in degree of risk to a completed burglary. First, the Court looked at the elements of the statute, which required only that the defendant "take any act toward commission" of the burglary offense. *See id.* at 202. Then the Court looked to see whether the state's courts had interpreted the statutory language and found that "while the statutory language is broad, the Florida Supreme Court has considerably narrowed its application in the context of attempted burglary, requiring an overt act directed

[5]This portion of *Shepard* was only joined by four justices (Justices Souter, Stevens, Scalia, and Ginsburg). Justice Thomas, however, separately concurred because he believed that even the factfinding line drawn by *Shepard* and *Taylor* violated the Sixth Amendment as interpreted by *Apprendi*. *See Shepard*, 544 U.S. at 28 (Thomas, J., concurring in part and concurring in judgment). Thus five justices agreed that, at the least, anything beyond the narrow category of documents approved in *Taylor* and *Shepard* would implicate the Sixth Amendment right to a jury.

[6]The Supreme Court set forth the elements of "generic burglary" under subparagraph (ii) in *Taylor*. *See* Part I(A), *supra.*. It has not yet weighed in on the elements of "generic arson" or "generic extortion." A good source for those elements, however, would be the version of LaFave & Scott that was current in 1986, when ACCA was passed. *See Taylor*, 495 U.S. at 598 (*citing* W. LaFave & A. Scott, Substantive Criminal Law § 8.13(a), (c), p. 466, 474 (1986) as its source for the "generic, contemporary meaning of burglary"). Nor has the Court weighed in on the elements of an offense that "otherwise involves use of explosives." At a minimum, however, the elements should satisfy the *Begay* test. *See* Part I(B)(b), *infra.*

toward entering or remaining in a structure or conveyance." *Id.* at 202. The Court had little difficulty finding that the risks associated with attempts to unlawfully enter or remain in a dwelling with intent to commit a felony therein (as required by Florida law) presented a risk "that is comparable to the risk posed by the completed offense" – that is, the possibility of a face to face confrontation between the attempted burglar and another. *Id.* at 204.

James noted that "the proper inquiry [under the categorical approach] is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Id.* at 208 (emphasis added). If a statute's elements permit a conviction for conduct that does not present a serious potential risk of injury to another, then it does not qualify as a predicate offense, even if the state typically invokes the statute to punish conduct that would qualify "in the ordinary case." *See id.* at 205 n.4 (listing cases finding that certain attempted burglary statutes did not qualify under ACCA because they could be based on such conduct as making a duplicate key, casing a building, obtaining floor plans, and possessing burglary tools). Although the Court stated that for an offense not to qualify as a predicate, there must be a "realistic probability, not a theoretical possibility," that the statute covers conduct that does not present a serious potential risk of physical injury, *id.* at 208, a defendant may show the breadth of the statute by "pointing to his own case or other cases in which the state courts did in fact apply the statute" in such a manner. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (cited in *James*, 127 S. Ct. at 208). [7]

b. *Begay*: Not Similar in Kind to Subparagraph (ii)'s Enumerated Offenses

In *Begay v. United States*, 553 U.S. 137 (2008), the Court again analyzed the "otherwise" clause, this time significantly narrowing its reach and finding that the predicate offense must be "similar in kind as well as in degree of risk posed" to subparagraph (ii)'s enumerated offenses to qualify as a "violent felony" under ACCA. *Id.* at 144 (emphasis added). To be similar in kind, the offense must involve "purposeful, violent, and aggressive conduct," *id.* at 145, such that it would be "potentially more dangerous when firearms are involved" and is "characteristic of the armed career criminal, the eponym of the statute." *Id.* at 145. The Court emphasized that the requirement that past crimes be "purposeful, violent and aggressive" was necessary to trigger ACCA, because they "show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger. We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist." *Id.* at 146. Applying this new test, the Court found that driving under the influence does not qualify as an ACCA predicate, chiefly because it is not a purposeful crime. *Id.* at 148.

[7] This case-specific look is not in conflict with the modified categorical approach described in Part I(A), *supra*., as it is used only to interpret what the elements of the statute actually require.

c. *Chambers*: Not Similar in Kind or Degree of Risk to Subparagraph (ii)'s Enumerated Offenses

In *Chambers v. United States*, 129 S. Ct. 687 (2009), the Court applied *Begay* to find that an Illinois escape conviction based on a failure to report to custody does not qualify as a violent felony under ACCA's "otherwise clause." First, the Court held that it is not similar in kind to the enumerated offenses because "the crime amounts to a form of inaction, a far cry from the 'purposeful, "violent," and "aggressive" conduct' potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion." *Id.* at 692 (citing *Begay*, 128 S. Ct. at 145). Second, the Court held that failure to report is not similar in degree of risk posed to the enumerated offenses. *Id.* Framing the question as whether an offender who fails to report is "significantly more likely than others to attack, or physically to resist, an apprehender," the Court relied heavily on data from the U.S. Sentencing Commission, which showed that of 160 failure to report cases in a two year period, none involved violence. *Id*. at 692. The Court also noted the government's failure to produce other empirical evidence showing a risk of violence. *Id.*

C. ACCA Subparagraph (i): Element of "Physical Force": *Johnson*

In *Johnson v. United States*, 130 S. Ct 1265 (2010), the Court for the first time analyzed subparagraph (i), which defines as a "violent felony" a prior conviction "that has as an element the use, threatened use, or attempted use of physical force against the person of another." *See* 18 U.S.C. § 924(e)(2)(B)(i). The defendant had been convicted of battery under a Florida statute. Like the offense in *Chambers*, the crime of battery could be committed under the statute in multiple ways (or categories). Unlike *Chambers*, however, nothing in the record suggested that the defendant had been convicted of any particular offense category. As a result, the Court analyzed whether the least serious offense category set forth in the battery statute satisfied subparagraph (i)'s definition. *See Johnson*, 120 S. Ct. at 1269 ("Since nothing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts, his conviction was a predicate conviction for a 'violent felony' under the Armed Career Criminal Act only if '[a]ctually and intentionally touch[ing] another person constitutes the use of physical force' within the meaning of § 924(e)(2)(B)(i).") (citations omitted).

As in *James*, the Court looked to how the elements of the battery statute had been interpreted by the state courts. *Id.* ("We are bound . . . by the Florida Supreme Court's interpretation of state law, including its determination of the elements" of the battery statute). Because the Florida Supreme Court had found that the element of "actually and intentionally touching" another person could be "satisfied by any physical contact, no matter how slight," *id.* at 1269-70 (citations omitted), the Court used that same interpretation in its ACCA analysis. The question then became whether "any physical contact, no matter how slight," constitutes "physical force" under subparagraph (i), and thus constitutes a "violent felony" under ACCA.

The Court concluded that the term "physical force" in subparagraph (i) means "violent force – that is force capable of causing physical pain or injury to another person." *Id.* at 1271 (emphasis in original). The Court reasoned that even though an unwanted touching constituted "physical force" under common law battery, it must interpret the phrase "physical force" in subparagraph (i) in context – that is, as defining what is and is not a "violent felony" for purposes of ACCA. *Id.* The Court determined that a "violent felony" necessarily required strong physical force, because the term "violent . . . connotes a substantial degree of force" and when attached to the term "felony, its connotation of strong physical force is even clearer." *Id.* The Court also found significant that battery was typically a nonviolent misdemeanor at common law, leading it to question even more the appropriateness of importing its definition of "force" into ACCA's definition of "violent felony." *Id.* at 1271-72.

II. CONSTITUTIONAL AND OTHER CHALLENGES: Preserving the Issues

In addition to ensuring that courts apply the proper analysis in deciding whether a prior counts as a "violent felony," counsel should preserve all constitutional and other challenges to the process and substance of mandatory minimum and recidivist sentencing.

For example, practitioners should preserve the argument that *Harris* and *McMillan* are incompatible with *Apprendi*, and thus should be overruled. As Justice Stevens recently explained, both cases "should be overruled, at least to the extent that they authorize judicial factfinding on a preponderance of the evidence standard of facts that expose a defendant to a greater punishment than what is otherwise legally prescribed." *United States v. O'Brien et al.*, __ S. Ct. __, 2010 WL 2025204, *15-16 (May 24, 2010) (Stevens, J., concurring) (citations and internal punctuation omitted); *see also id.* at 15 (Thomas, J., concurring in the judgment) ("If a sentencing fact either raises the floor or raises the ceiling of the range of punishments to which a defendant is exposed, it is, by definition an element . . . of a separate, aggravated offense that [must be] submitted to a jury and proved beyond a reasonable doubt.") (citations and internal punctuation omitted).

Practitioners may also want to preserve the argument that ACCA requires a court to go beyond "the fact of a prior conviction," *see Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), whenever it must find that a prior offense "otherwise involves a serious potential risk of physical injury to another." Insofar as the court makes a factual finding about what the defendant's prior conviction "involves," its fact finding goes well beyond the mere fact of a conviction, and thus violates a defendant's rights to a jury and proof beyond a reasonable doubt. *Accord Apprendi*, 530 U.S. at 490 ("[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").[8] Note, however, that *James* rejected a similar challenge because it

8 For a more fulsome discussion of this and other constitutional challenges to ACCA, see William R. Maynard, *Statutory Enhancement by Judicial Notice of Danger: Who Needs Legislators or Jurors?*. 31 Champion 42 (Jan/Feb/ 2007); William R. Maynard, *Judge-Made Enhancements: A Question of Fact, of Law, or of the Constitution?*, 25 Champion 14 (June 2001).

found that "[i]n determining whether attempted burglary under Florida law qualifies as a violent felony under § 924(e)(2)(B)(ii), the Court is engaging in statutory interpretation, not judicial factfinding. Indeed, by applying *Taylor*'s categorical approach, we have avoided any inquiry into the underlying facts of James' particular offense, and have looked solely to the elements of attempted burglary as defined by Florida law. Such analysis raises no Sixth Amendment issue." *See James*, 550 U.S. at 214.[9]

Counsel might also consider raising other constitutional claims, including arguments that the "otherwise" clause violates a defendant's right to notice and fair warning,[10] mandatory minimums violate the right to be treated equally;[11] mandatory minimum sentences are cruel and unusual under the Eighth Amendment;[12] enhanced sentences based on facts necessary to sustain

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9 *James* also rejected the argument that the Sixth Amendment requires a jury to find the fact of his prior conviction, relying on *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). *See James*, 550 U.S. at 214 n.8.

10 The Fifth Amendment's Due Process Clause requires that a penal statute define a criminal offense with sufficient definiteness to provide notice to potential offenders and protect against arbitrary and discriminatory enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."); *Smith v. Goguen*, 415 U.S. 566, 574 (1974) ("Due process requires that all be informed as to what the State commands or forbids, and that men of common intelligence not be forced to guess at the meaning of the criminal law.") (internal quotation marks and citations omitted). The otherwise clause violates this principle by permitting a court to base a sentence on what conduct it decides an offense categorically involved years (sometimes, decades) after the conduct, and after a subsequent offense is committed.

11 It is well settled that mandatory minimums increase sentences for black defendants far more frequently than for white defendants. For example, in 2008, 11,372 defendants were subject to mandatory minimum sentences that trumped the guideline range in their cases. That same year, although black defendants made up only 24% of all federal defendants, they comprised 31% of those subject to a mandatory minimum, meaning that black defendants are subjected to mandatory minimum sentences at a disproportionately high rate. *See also United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004) (discussing ways in which mandatory minimum sentences under 18 U.S.C. § 924(c) arbitrarily classify offenders and offenses); *United States v. McClinton*, 815 F.2d 1242, 1245 (8th Cir. 1989) (rejecting defendant's equal protection claim because "it is difficult to say that the increased penalty provided in [ACCA] was not rationally related to a legitimate concern of the federal government" but urging Congress to consider whether the resulting sentence is just).

12 *See Graham v. Florida*, 130 S. Ct. 2011 (2010) (applying framework for categorical challenges under the Eighth Amendment beyond the death context to strike down a sentence to a term of years (life without the possibility of parole) imposed on a juvenile offender convicted of a non-homicide offense); *cf. United States v. Farley*, __ F.3d __, 2010 WL 2179617 (11th Cir. June 2, 2010) (reversing district court's finding that 30-year mandatory minimum sentence for crossing state lines with intent to engage in a sexual act with a person under the age of twelve violated the Eighth Amendment).

a "violent felony" or "crime of violence" finding are substantively unreasonable and/or violate the Sixth Amendment as applied;[13] and ACCA violates separation of powers principles.[14]

Finally, in a jury trial, counsel should request that the jury be instructed about any mandatory minimum penalties facing the defendant. It would be wise to couch such a motion as a way to "better ensure that the jury bases [its] verdict solely on the evidence."[15]

13 *See* Amy Baron-Evans, Jennifer Coffin & Sara Noonan [Silva], *Deconstructing the Career Offender Guideline*, available at http://www.fd.org/odstb_SentDECON.htm; *see also* Brief for Respondent Martin O'Brien filed in *United States v. O'Brien et al.*, 2010 WL 181571 (Jan. 14, 2010) (arguing that any fact that is required to sustain a sentence under reasonableness review is thereby transformed into a constitutionally-meaningful fact to which *Apprendi* applies).

14 *See, e.g.*, Maynard, *Judge-Made Sentence Enhancements*, n. 8, *supra*. (ACCA and other judge-found sentence enhancements "violate Article I and separation of powers doctrine because they delegate to courts the power to decide which offenses are 'violent' . . . felonies based on the courts' assessment of risk . . . creat[ing] a new rule of law, equivalent to statutory law, but enacted by courts after the fact without political accountability (or jury scrutiny of fact allegations").

15 *See United States v. Polouizzi*, 564 F.3d 142 (2nd Cir. 2009) (noting that circuit precedent foreclosed defendant's argument that he had a Sixth Amendment right to trial by a jury that had been instructed on the mandatory minimum sentence applicable to his charges but finding that nothing precludes a district court from instructing the jury about the sentencing consequences of its verdict at least insofar as the instruction is designed to "better ensure that the jury bases that verdict solely on the evidence" and to "discourage nullification").

III. ANALYTICAL FRAMEWORK: Does the Prior Fit the Relevant Test?

With these cases as a guide, the following analytical framework should help you determine whether a conviction qualifies as a violent felony or crime of violence.

1. Obtain a copy of the court file for the prior conviction. Only the following information is acceptable. Any other information (such as that contained in a police report or complaining witness statement) should be objected to as inadmissible under ACCA and the Sixth Amendment (*Taylor*, *Shepard*).

    a. An indictment or charging document (in all types of cases)

    b. The jury instructions and verdict sheet (if a jury trial)

    c. The judge's formal rulings of law and findings of fact (if a bench trial)

    d. The written plea agreement presented to the court, transcript of plea colloquy, or any explicit factual finding by the trial judge to which the defendant assented (if a plea)

2. If the offense can be committed in multiple ways under the statute, and some of those ways satisfy the definition of "violent felony" and some do not, use the modified categorical approach to determine whether the record of conviction clarifies which category of offense your client committed (again, looking only to the charging document, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law, jury instructions, and/or verdict forms) (*Taylor, Shepard, Chambers*, *Johnson*).

    a. If the record fails to reveal any more information about the offense of conviction, the government must prove that the least serious offense category criminalized by the statute satisfies § 924(e)(2)(B) (*Johnson).*

3. Determine the statutory elements of the prior offense category and research any case law interpreting those elements (be sure to look at the elements as they existed at the time your client committed the prior offense). (*James* and *Johnson*).
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4. If subparagraph (i) of ACCA is at issue, does the offense of conviction have as an element the use of "violent force capable of causing physical pain or injury to another person?" (*Johnson*).

5. If subparagraph (ii) of ACCA is at issue,

    a. Is the offense a generic burglary, arson or extortion, as defined by LaFave & Scott in 1986? (*Taylor, Shepard).*

b. Did the offense involve use of explosives? (*Begay*).

c. If neither, go to step 6.

6. Was the offense similar in kind and degree of risk to burglary, arson, extortion or the use of explosives? (*Begay*)

   a. Do the statutory elements require purposeful, violent and aggressive conduct? (*Begay*)

   b. Is the "violence" required by the statute the kind of violence contemplated by the phrase "violent felony," i.e., substantial or strong physical force capable of causing physical pain or injury? (*Johnson)*

   c. Do the statutory elements raise a significant, non-hypothetical risk of violent conduct that is likely to result in bodily injury? (*James, Chambers*)

      i. Has the government produced any statistical evidence showing a significant risk of bodily injury? (*Chambers*).

      ii. Is there statistical evidence showing a low risk of bodily injury that you can introduce? (*Chambers)*

   d. Is the intent required by the statute indicative of the kind of person who would deliberately point a gun and pull the trigger? (*Begay*).