15-10430

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA

Plaintiff-Appellee,

vs.

ROGELIO SANCHEZ MOLINAR,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Arizona
No. 4:14-cr-01069-JAS-BGM-1

OPENING BRIEF OF APPELLANT

JON M. SANDS
Federal Public Defender

J. RYAN MOORE
Assistant Federal Public Defender
407 W. Congress St., Suite 501
Tucson, AZ 85701
Telephone: (520) 879-7500
Attorneys for Mr. Molinar

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE**

FEDERAL STATUTES

FEDERAL RULES

STATE CASES

STATE STATUTES

OTHER

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231 because the Appellant, Rogelio Sanchez Molinar, was charged with the federal crime of Possession of Ammunition by a Prohibited Possessor in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (CR 1; ER 1.)[1]

This Court has jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a) because the district court entered a final judgment of conviction on August 26, 2015. (CR 49; ER 49.)

Molinar filed a timely Notice of Appeal on August 26, 2015 (CR 50; ER 53), within 14 days after entry of the judgment. *See* FED. R. APP. P. 4(b)(1)(A)(i).

He is currently in the Bureau of Prisons' custody serving the concurrent, 44-month sentences imposed in this case, with a projected release date of December 31, 2018.

[1] "CR" refers to entries in the Clerk's Record. "ER" refers to Appellant's Excerpts of Record (in one volume). "RT" refers to Reporter's Transcript. "PSR" refers to the Presentence Report, and "SOR" refers to the Statement of Reasons, both filed separately, under seal.

ISSUES PRESENTED FOR REVIEW

I. Must Molinar's sentence for Possession of Ammunition by a Prohibited Possessor be vacated because his prior conviction for Attempted Armed Robbery does not categorically qualify as a "crime of violence" under U.S.S.G. § 4B1.2, which is the basis for the sentence enhancement at U.S.S.G. § 2K2.1(a)(4)(A)?

II. Must the sentence be vacated because the district court failed to conduct the "relevant conduct" analysis required by U.S.S.G. § 5G1.3 in determining whether to adjust the sentence to credit imprisonment already served in a related state case?

STATEMENT OF THE CASE

On June 8, 2014, the Government indicted Mr. Molinar on two counts of Possession of Ammunition by a Prohibited Possessor in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). (CR 1; ER 1.) The Government alleged that, subsequent to four prior felony convictions, he possessed 68 bullets when selling them to a pawn shop on June 10, 2013, and eight shotgun shells and four rifle bullets in his bedroom drawer on August 1, 2013. (*Id.*; PSR ¶ 3-4.)

At the time of his federal indictment, he was an inmate in state prison serving a 30-month sentence for selling stolen property to pawn shops in 2013. (PSR ¶ 28, p. 1.) The federal ammunition charges arose out of that same state investigation: local police, before eventually arresting him on August 1, 2013, discovered that along with selling stolen property to pawn shops in May and June, he had also sold ammunition. (PSR ¶¶ 3, 28.)

On September 11, 2014, he had his initial appearance pursuant to a writ of habeas corpus ad prosequendum. (CR 7, 9.)

He eventually pleaded guilty to both counts—initially, under a plea agreement that provided for 57-71 months. (CR 26 at 2.) A draft PSR increased his Base Offense Level from 14 to 24 under U.S.S.G. § 2K2.1(a)(2), reasoning that two of his prior convictions—including unlawful flight from law enforcement—qualified as "crimes of violence" under U.S.S.G. § 4B1.2 ("§4B1.2"). (CR 29 ¶ 9.) Several weeks later, however, the Supreme Court decided *Johnson v. United States*, 135 S. Ct. 2551 (2015), which overruled precedent holding that unlawful flight is a crime of violence under the Armed Career Criminal Act's ("ACCA") residual clause, which is identical to §4B1.2's.

Based on *Johnson*, he filed an unopposed motion to withdraw from the plea agreement but maintain his guilty plea to the indictment. (CR 37.) The district court granted the motion. (CR 43.)

A First Addendum to the PSR explained that, after *Johnson*, his conviction for unlawful flight no longer qualified as a crime of violence and the Base Offense Level of 24 for two prior crimes of violence no longer applied. (PSR p. 24.) The amended guideline calculation instead increased the Base Offense Level from 14 to 20 under §2K2.1(a)(4)(A) for one qualifying "crime of violence." (PSR ¶ 9.) The PSR concluded that his 2008 conviction for Attempted Armed Robbery, in

violation of Arizona Revised Statutes ("A.R.S.") §§ 13-1001, 13-1904(A)(1), and 13-1902, "has as an element the use, attempted use, or threatened use of physical force against the person" under §4B1.2(a)(1). (PSR ¶¶ 9, 24.)

Molinar filed a timely objection to the PSR. (CR 39.) He argued, *inter alia*, that this Court's decision in *United States v. Taylor*, 529 F.3d 1232 (9th Cir. 2008)—holding that an Arizona conviction for attempted armed robbery categorically qualifies as a crime of violence under §4B1.2—is clearly irreconcilable with both intervening state court and U.S. Supreme Court authority. (CR 39 at 1-21.)

The Government responded that the PSR's amended guideline calculation was correct (CR 45 at 2; CR 40 at 2-3), but it agreed that Molinar's other prior convictions were not categorical crimes of violence (CR 40 at 6).

Molinar also filed a separate sentencing memorandum. He argued, *inter alia*, that his sentence should be fully concurrent with his related state sentence. (CR 41 at 2-4, 7; ER 4-6, 9.) He asked the district court to adjust the sentence downward by the 24 months he had served in state custody because both offenses were part of a common "scheme" to sell stolen property to pawn shops for drug money, and because the Bureau of Prisons would not credit any of his state imprisonment—including his 11 months of federal pretrial detention under the writ—toward the federal sentence. (*Id.*)

At sentencing, the district court overruled his objection to the guideline calculation, concluding that *Taylor* "is still controlling law …." (RT 8/26/15 at 22; ER 31.) The court adopted the PSR's amended guideline calculation of a Base Offense Level of 20 (based on one qualifying crime of violence), a three-level adjustment for acceptance of responsibility, a Total Offense Level of 17, and a Criminal History Category of V, for a guideline range of 46-57 months. (*Id.* at 6, 23; ER 15, 32.)

The district court imposed a below-guideline sentence of 44 months of imprisonment on each count, concurrent with one another and consecutive to the state sentence. (CR 49; ER 49.) The court explained that it departed downward by two months under U.S.S.G. § 5K2.0 to credit only the two months that remained undischarged on the state sentence. (RT 8/26/15 at 34; ER 43; SOR at 2.) It also imposed concurrent, three-year terms of supervised release on each count and a total special assessment of $200. (CR 49; ER 49.)

SUMMARY OF ARGUMENT

First, the sentence must be vacated because Molinar's prior Arizona conviction for Attempted Armed Robbery does not categorically qualify as a crime of violence under §4B1.2 for an enhancement under §2K2.1(a)(4)(A). Although this Court held in *Taylor* that the same conviction qualifies as a crime of violence, that ruling has been effectively overruled by intervening state court authority that makes clear that attempt in Arizona does not require a "substantial step."

Independently, Arizona's armed robbery statute also does not categorically qualify as a crime of violence under controlling, post-*Taylor* federal authority. Under §4B1.2(a)(1)'s force prong, the statute can be violated by merely tugging on an item in a person's hand, which is not "violent" force as this Court has construed the term. The added involvement of a weapon or a simulated weapon does not alter the nature of the force used or threatened because, under the statute, the weapon need not be displayed or used but rather merely available for use.

Further, under §4B1.2(a)(2)'s enumerated offense prong, Arizona's armed robbery statute can never qualify as generic "extortion" because it does not encompass threats of future harm or threats against property. Nor can it qualify as generic "robbery" because it broadly encompasses self-help takings of specific personal property, but this Court has held that generic robbery does not; it also broadly encompasses a right not to be coerced, which is not obtainable "property"

subject to generic robbery or generic extortion; and it requires only *de minimis* force, rather than "violent" force. Moreover, after *Johnson*, §4B1.2's residual clause is unconstitutionally vague and, further, the generic crime of "robbery"—enumerated only in §4B1.2's commentary—must be disregarded because it interpreted the now invalid residual clause and is inconsistent with the text of the guideline that remains.

Second, the sentence must be vacated because the district court applied the wrong standard and never conducted the "relevant conduct" analysis required by §5G1.3 in determining whether to adjust a sentence to effectuate concurrent state and federal sentences. That guideline mandates reducing Molinar's sentence to credit all 24 months of his state imprisonment: both the state and federal offenses were part of the same common scheme to sell stolen property to pawn shops for drug money, both would be subject to the guidelines' grouping rules, and the Bureau of Prisons will not credit any of that time toward the federal sentence. But the district court focused on the fact that Molinar had not been prosecuted federally for the *identical* offense conduct as in the state case, rather than determining whether the state offense qualified as "relevant conduct" under §5G1.3.

Therefore, resentencing is required.

ARGUMENT

I. Molinar's Arizona conviction for attempted armed robbery does not categorically qualify as a "crime of violence" under U.S.S.G. § 4B1.2.

Review of whether a prior conviction qualifies as a crime of violence under §4B1.2 is *de novo*. *Taylor*, 529 F.3d at 1235.

Section 4B1.2(a) defines a "crime of violence" as (1) any offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another" (the "force" prong); (2) the generic crimes of "burglary of a dwelling, arson, or extortion, [or that] involve[] use of explosives" (the "enumerated offense" prong); and (3) any offense that "otherwise involves conduct that presents a serious potential risk of physical injury to another" (the "residual clause"). U.S.S.G. § 4B1.2(a). The guideline's commentary also includes the generic crimes of "robbery" and "attempt." *Id.* at cmt. n.1.

A. Neither Arizona's armed robbery statute nor its attempt statute categorically qualifies under §4B1.2(a)(1)'s "force" prong.

1. Armed robbery in Arizona does not categorically require "violent" physical force.

In 2008, *Taylor* summarily concluded that armed robbery in Arizona is a crime of violence because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." 529 F.3d at 1238. Two years later, however, the Supreme Court clarified that "physical force" under the ACCA's "force" prong "means violent force—that is, force capable of causing

physical pain or injury to another person." *Johnson v. United States*, 559 U.S. 133, 140 (2010). The identically-worded force prongs of the ACCA and §4B1.2 are interpreted interchangeably. *United States v. Park*, 649 F.3d 1175 (9th Cir. 2011). Now, under this Court's cases since *Johnson*, the Arizona statute does not categorically require a use or threat of "violent" force.

Under the categorical approach, a court must "presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized." *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (quoting *Johnson*, 559 U.S. at 137) (alteration in original).

Arizona's robbery statute broadly defines "force" as "*any physical act* directed against a person as a means of gaining control of property." A.R.S. § 13-1901(1) (emphasis added). Under this definition, the mere "yank[ing]" and "pull[ing]" of a wallet to remove it from a person's hand constitutes sufficient force for robbery. *State v. Moore*, No. 1 CA-CR13-0649, 2014 WL 4103951, at *2 (Ariz. Ct. App. Aug. 14, 2014) (unpublished) (when the victim grabbed the wallet tighter, defendant had to "yank" and "pull [the wallet] to get it out of [his] hand"; "the force Moore used was not … particularly violent").

This broad requirement of "any physical act directed against a person as a means of gaining control of property" encompasses the same types of acts that this Court has held do *not* constitute force "capable of causing physical pain or injury,"

including "bumping into" a person, "grabbing [his] jacket," "spitting in [his] face," or even resisting arrest by kicking. *United States v. Dominguez-Maroyoqui*, 748 F.3d 918, 921 (9th Cir. 2014) (federal felony assault statute does not categorically involve "violent" force where it may be accomplished by "any force whatsoever"); *United States v. Flores-Cordero*, 723 F.3d 1085, 1087-88 (9th Cir. 2013) (Arizona's resisting arrest statute does not categorically involve "violent" force where it requires a "use or threatened use of physical force against an officer"). In short, Arizona's robbery statute, like the statutes considered in *Dominguez-Maroyoqui* and *Flores-Cordero*, does not require a use or threat of "violent" force.

Arizona's additional requirement for armed robbery that the person must either "use[] or threaten[] to use," *or* merely be "armed with," a deadly weapon or a simulated deadly weapon does not change this conclusion.[2] The distinct "armed with" prong requires only that the deadly or simulated deadly weapon be "within the immediate possession or available for use of the accused," and it "need not be displayed by the accused nor seen by the victim." *State v. Garza Rodriguez*, 791 P.2d 633, 637 (Ariz. 1990) (en banc); *see also State v. Snider*, 311 P.3d 656, 658-59 (Ariz. Ct. App. 2013) (affirming armed robbery convictions in counts 20 and 22

[2] The statute provides, "A person commits armed robbery if, in the course of committing robbery as defined in § 13-1902, such person or an accomplice: (1) Is armed with a deadly weapon or a simulated deadly weapon; or (2) Uses or threatens to use a deadly weapon or dangerous instrument or a simulated deadly weapon." A.R.S. § 13-1904(A).

where the victims neither saw nor were threatened with a weapon; statute "does not require the use or threatened use of the weapon"); *State v. Yarbrough*, 638 P.2d 737, 738-40 (Ariz. Ct. App. 1981) (affirming an armed robbery conviction where the defendant never displayed, mentioned, referenced, or threatened the use of a weapon). Thus, under the statute, because an actual gun or a toy (simulated) gun need not be used in any way, but rather only possessed, the availability of a weapon does not necessarily result in any "force" being used or threatened.

Molinar pleaded guilty to an "amended" count of Attempted Armed Robbery, in violation of A.R.S. § 19-1904(A)(1) ("armed with" a deadly or simulated deadly weapon), rather than subsection (A)(2) ("uses or threatens to use" such a weapon). (PSR ¶ 24.) Thus, under the record, his plea may be for taking property by pulling it from a victim's hand while in possession of a toy gun concealed in a backpack. Such facts do not categorically constitute a use or threat of "violent" physical force under §4B1.2's "force" prong. *See Moncrieffe*, 133 S. Ct. at 1684.

Taylor's statement that "[a]rmed robbery under Arizona law involves the threat or use of force" is not binding and must be reexamined for two reasons. First, as shown, it is "clearly irreconcilable" with the Supreme Court's subsequent ruling in *Johnson* and this Court's cases of *Dominguez-Maroyoqui* and *Flores-Cordero*. *See Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc).

Second, that statement is not binding precedent. The only issue presented in *Taylor* was whether Arizona's *attempt* statute was overbroad; the defendant never argued the armed robbery statute was overbroad, and he even conceded that his separate prior conviction for "armed robbery" qualified as one of two career offender predicates. (Brief of Plaintiff-Appellee at 6, *Taylor*, 529 F.3d at 1232, No. 06-30580, 2007 WL 4732454.) As this Court has repeatedly held, "unstated assumptions on non-litigated issues are not precedential holdings binding future decisions." *United States v. Kimsey*, 668 F.3d 691, 699 (9th Cir. 2012) (quoting *Proctor v. Vishay Intertech. Inc.*, 584 F.3d 1208, 1226 (9th Cir. 2009)).

> [N]ot every statement of law in every opinion is binding on later panels. Where it is clear that a statement is made casually and without analysis, where the statement is uttered in passing without due consideration of the alternatives, or where it is merely a prelude to another legal issue that commands the panel's full attention, it may be appropriate to re-visit the issue in a later case.

United States v. Johnson, 256 F.3d 895, 915 (9th Cir. 2001) (en banc) (Kozinski, J., concurring).

In an analogous situation, a panel of this Court recently concluded that published circuit precedent that a state statute categorically qualified as a crime of violence under §2L1.2 was not binding in a subsequent case presenting the same broad question because "we did not consider" the specific issue of whether one element of that statute was overbroad. *United States v. Tovar-Jimenez*, 577 F. App'x 675, 676 n.1 (9th Cir. 2014) (unpublished).

Therefore, Arizona's armed robbery statute does not categorically qualify under §4B1.2's "force" prong and *Taylor* is not binding.

2. Attempt in Arizona is broader than generic attempt, and this Court's contrary precedent has been effectively overruled by intervening Arizona authority.

When a prior conviction is for an attempt crime, the state's attempt statute must categorically qualify as generic attempt, even if the underling substantive offense categorically "has as an element the use … or threatened use of physical force against the person of another." *Taylor*, 529 F.3d at 1238.

In 2008, this Court interpreted Arizona's statutory definition of attempt—which requires "any step" towards the commission of a crime—as being coextensive with generic attempt, which requires a "substantial step." *Id*. That holding has been effectively overruled by clearly irreconcilable, intervening state court authority. *See Miller*, 335 F.3d at 893; *United States v. Flores-Mejia*, 687 F.3d 1213, 1215 (9th Cir. 2012) (applying *Miller* to intervening state court authority where the prior circuit precedent at issue interpreted state law).

This Court has held that generic attempt requires "[1] an intent to commit the underlying offense, along with [2] an overt act constituting a substantial step towards the commission of the offense." *United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1243 (9th Cir. 2014) (citations and internal quotations omitted). "[I]t is not enough that the defendant have intended to commit a crime. There

must also be an act, and not any act will suffice." *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1102-03 (9th Cir. 2011) (quoting 2 W. LaFave, SUBSTANTIVE CRIMINAL LAW § 11.4 (2d ed. 2003) ("LaFave")). The rationale for this requirement is both to give the criminal incentive to change his mind at the last minute, and to give a person some benefit of the doubt about his intent, waiting to impose liability only until some firmness of criminal purpose is shown. *Id.* at 1103.

A substantial step only "occurs when a defendant's actions unequivocally demonstrat[e] that the crime will take place unless interrupted by independent circumstances." *Gonzalez-Monterroso*, 745 F.3d at 1243; *accord United States v. Garcia-Jimenez*, --- F.3d ----, 2015 WL 7292604, at *6 (9th Cir. 2015) (calling this the "probable desistance test"). This "probable desistance test" asks whether the actor had reached a point where it was unlikely he would have voluntarily desisted. Herbert Wechsler et. al., *The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation, and Conspiracy*, 61 COLUM. L. REV. 571, 588-89 (1961). "Mere preparation … does not constitute a substantial step." *Gonzalez-Monterroso*, 745 F.3d at 1243 (internal quotations omitted). "Even when the defendant's intent is clear, his actions must cross the line between preparation and attempt …." *Id.* at 1243-44.

In Arizona, "[a] person commits attempt if … [he] intentionally does or omits to do anything which … is *any step* in a course of conduct planned to

culminate in commission of an offense." A.R.S. § 13-1001(A)(2) (emphasis added). Although the statute on its face does not require a substantial step, *Taylor* relied on two decisions of the Arizona Court of Appeals stating—in *dicta*—that "any step" is equivalent to a "substantial step." 529 F.3d at 1238.

However, subsequent Arizona authority shows that the state applies its statute in a non-generic manner. After *Taylor*, the Arizona Supreme Court—which in the 30 years following the enactment of the current attempt statute has *never* held that a substantial step is required, *United States v. Martinez*, 602 F.3d 1166, 1172 (10th Cir. 2010)—reasoned that a conviction for attempted aggravated assault does not necessarily involve a use or threat of violence because "Arizona's attempt statute permits a crime to be committed with a single nonviolent step …." *State v. Kiles*, 213 P.3d 174, 185 (Ariz. 2009).

Also after *Taylor*, the Arizona Court of Appeals has affirmed at least two convictions for conduct that would not constitute a "substantial step" under this Court's precedent.

- *Compare State v. Johnson*, No. 1 CA-CR13-0143, 2014 WL 177535, at *1 (Ariz. Ct. App. Jan. 16, 2014) (sufficient evidence for attempted burglary where a known burglar delivered a package to home's occupant, drove away, and was arrested 45 minutes later somewhere else) *with United States v. Candoli*, 870 F.2d 496, 503 (9th Cir. 1989) (insufficient evidence for

attempted arson where defendants parked 100 yards from a business and one hour later were stopped driving away with bottles of gasoline in the trunk);

- *Compare State v. Williams*, 311 P.3d 1084, 1086-88 (Ariz. Ct. App. 2013) (sufficient evidence for attempted robbery where co-defendants drove and waited to meet the intended victim at the agreed upon location) *with United States v. Harper*, 33 F.3d 1143, 1147-48 (9th Cir. 1994) (insufficient evidence for attempted robbery where defendant modified an ATM machine to lure service people and was arrested waiting in a car on bank property with duct tape, a stun gun, ammunition, and latex gloves); *United States v. Still*, 850 F.2d 607, 610 (9th Cir. 1988) (insufficient evidence for attempted robbery where defendant was "sitting in his van, with the motor running, wearing a long blonde wig, parked approximately 200 feet away from the [bank]"); *United States v. Buffington*, 815 F.2d 1292, 1302 (9th Cir. 1987) (insufficient evidence for attempted robbery where defendants assembled weapons, cased banks, drove to a bank, exited armed from a vehicle, and directed their attention toward the bank, but made no movement toward it).

Moreover, after *Taylor*, Arizona's intermediate courts and non-binding pattern jury instructions have continued to define the law of attempt as requiring "any step" or "overt act," which is inconsistent with *Taylor's* view that the state

requires a substantial step.[3] Nor has any Arizona case used this Court's "probable desistance test" to describe or apply the current attempt statute.

Indeed, after *Taylor*, in unpublished but persuasive authority, the Arizona Court of Appeals specifically addressed and *rejected* the argument that more than mere preparation is required. *State v. Garcia*, No. 2 CA-CR2008-0020, 2009 WL 104639, at *2 (Ariz. Ct. App. Jan. 15, 2009). The *Garcia* court emphasized that "one need only take 'any step,' not necessarily a substantial one …." *Id.* at *4.

---

[3] *See, e.g.*, *State v. Ruiz*, 340 P.3d 396, 400 n.3 (Ariz. Ct. App. 2014); *State v. Bustamante*, No. 1 CA-CR 13-0657, 2014 WL 5342724, at *3 & *5 n.4 (Ariz. Ct. App. Oct. 21, 2014); *State v. Vanderschuit*, No. 1 CA-CR 13-0181 PRPC, 2014 WL 4658694, at *2 (Ariz. Ct. App. Sept. 18, 2014); *State v. Barricklow*, No. 2 CA-CR 2012-0515, 2013 WL 5864618, at *5 (Ariz. Ct. App. Oct. 29, 2013); *State v. Williams*, 311 P.3d 1084, 1087-88 (Ariz. Ct. App. 2013); *State v. Padilla-Contreras*, No. 2 CA-CR 2011-0004, 2012 WL 525568, at *2 (Ariz. Ct. App. Feb. 17, 2012); *State v. Busby*, No. 1 CA-CR 11-0368, 2011 WL 6808306, at *2 (Ariz. Ct. App. Dec. 27, 2011); *State v. Ewing*, No. 1 CA-CR 10-0903, 2011 WL 5964515, at *5 (Ariz. Ct. App. Nov. 29, 2011); *State v. Pallanes*, No. 2 CA-CR 2010-0305, 2011 WL 2695776, at *4 (Ariz. Ct. App. June 2, 2011); *State v. Marrufo*, No. 2 CA-CR 2010-0024, 2010 WL 3565252, at *2 (Ariz. Ct. App. Sept. 14, 2010); *State v. Martinez*, No. 2 CA-CR 2008-0189, 2009 WL 891042, at *6 (Ariz. Ct. App. Apr. 2, 2009); *State v. Leyvas*, 211 P.3d 1165, 1175 (Ariz. Ct. App. 2009) ("overt act"); *State v. Markland*, No. 1 CA-CR 06-0978, 2008 WL 4006022, at *2 (Ariz. Ct. App. Aug. 26, 2008); *see also State v. Bernini*, 310 P.3d 46, 49 n.5 (Ariz. Ct. App. 2013) (summarizing law of attempt as requiring "any step" in reasoning that plea to attempted assault with a knife does not prove "use" of knife); *State v. Whaley*, No. 1 CA-CR 09-0558, 2011 WL 92990, at *2 (Ariz. Ct. App. Jan. 6, 2011) (reversible error not to instruct on attempt, defined as "any step"); State Bar of Arizona, *Revised Arizona Jury Instructions – Statutory Criminal Instructions*, § 10.01, p. 60 (2013), *available at* http://www.azbar.org/media/58835/statutory_criminal_jury_instructions.pdf (last visited Dec. 21, 2015).

> "[T]he legislature rejected the Arizona Code Commission's suggestion that a person may not be found guilty of an attempt … unless the person has taken a 'substantial step' toward committing the crime. … Indeed, in the [30] years following the adoption of [the attempt statute], our courts repeatedly have stated that the crime of attempt merely requires a person to take 'any step,' not a substantial step, toward the commission of a crime.

Id. at *2-3.

This Court recently held that a Delaware attempt statute is broader than generic attempt because Delaware—like Arizona—rejected the Model Penal Code's definition of a "substantial step," and instead allows juries to decide the point at which there remains no reasonable doubt as to the defendant's intention to commit the crime. *Gonzalez-Monterroso*, 745 F.3d at 1244. Although *State v. Garcia* is not precedent, it is persuasive—along with Arizona's published cases—that Arizona's law of attempt is like Delaware's and is clearly irreconcilable with *Taylor*. *See Alvarado v. Holder*, 759 F.3d 1121, 1130 (9th Cir. 2014) (holding the BIA "would not have been precluded from granting … relief" based on the "argument that *Taylor* no longer constitutes binding law in light of *Garcia* ….").

Garcia's conclusion also demonstrates a "realistic probability" that Arizona applies its statute in a non-generic manner. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007); *Nunez v. Holder*, 594 F.3d 1124, 1137 n.10 (9th Cir. 2010) (unpublished opinions show how a statute is applied in practice).

Also after *Taylor*, Arizona cases have repudiated *Taylor*'s unsupported observation that "[n]o case suggests that the Arizona Supreme Court would decide otherwise." 529 F.3d at 1238. Because Arizona's criminal code was based on the MPC, the state's Supreme Court has repeatedly interpreted the legislature's decision not to enact a MPC provision as "evidenc[ing] its rejection" of the MPC's approach. *State v. Bowsher*, 242 P.3d 1055, 1056-57 (Ariz. 2010) (holding that statute authorized consecutive terms of probation because the legislature declined to adopt the MPC's concurrent-term mandate); *accord State v. King*, 235 P.3d 240, 243 (Ariz. 2010) (holding that Arizona adopted an objective standard for self-defense instead of the MPC's subjective standard); *State v. Mott*, 931 P.2d 1046, 1050 (Ariz. 1997), (holding that statute prohibited diminished capacity defense because the legislature declined to adopt the MPC's version "when presented with the opportunity to do so"). As one influential and respected Arizona commentator has observed, "[t]he [legislature's] repudiation of the requirement of 'substantial' in [the attempt statute] indicates Arizona's legislative intent to criminalize remote, preparatory acts, at the risk of penalizing possible equivocal behavior." 1 Rudolph J. Gerber, CRIMINAL LAW OF ARIZONA, Ch. 10, p. 1001-06 (2d ed. 1993).

Even Arizona cases published before *Taylor*—but never presented or addressed in *Taylor*—indicate that attempt penalizes acts that fall short of a substantial step. *See State v. Cleere*, 138 P.3d 1181, 1184 (Ariz. Ct. App. 2006)

("[B]ecause the … statute requires only intent and 'any step …,' one could commit attempted murder by taking a step far short of inflicting or even threatening serious physical injury."); *State v. Villarreal*, 666 P.2d 1094, 1095-96 (Ariz. Ct. App. 1983) (affirming a conviction for attempting to defraud an insurance company even though the defendant, after disposing of the insured property, took no steps toward submitting a false claim). Indeed, the Tenth Circuit found *Cleere*—which post-dates the two Arizona cases that *Taylor* relied upon—"particularly instructive" in disagreeing with *Taylor*. *Martinez*, 602 F.3d at 1171-72.

The above Arizona authority is not only clearly irreconcilable with *Taylor*, but is also inconsistent with the two state cases that *Taylor* relied upon, which did not conclusively resolve the question. In the first, *State v. Fristoe*, 658 P.2d 825, 829-31 (Ariz. Ct. App. 1982), the court rejected a sufficiency challenge to a conviction for attempted oral sexual contact with minors where the defendant drove up to multiple young children and asked for sex acts. But the defendant never argued that a "substantial step" is required; he argued only that "some overt act is required … and that his mere speaking of words … cannot be considered an act." *Id.* at 829-31. The court held, uncontroversially, that words may constitute a "step" for attempt depending on the circumstances, and that in "[c]onsidering the age of the young girls, and [his] conduct in driving his vehicle up to each victim, his words constituted acts sufficient to sustain a conviction for attempt viewed in

light of the circumstances in which they were uttered." *Id.* at 831. Although these acts clearly constituted a substantial step, the court nonetheless stated, in language unnecessary to the decision, that even though the legislature affirmatively rejected the term "substantial step" in favor of "any step," it did not intend to criminalize preparatory acts. *Id.* at 829-31. In Arizona, *obitur dictum*—"a statement of general law made by a court which is unnecessary to its decision"—is "not precedential." *Alejandro v. Harrison*, 219 P.3d 231, 235 (Ariz. Ct. App. 2009).

The second decision *Taylor* relied upon cited to *Fristoe's dicta*, but the distinction between "any step" and a "substantial step" was also irrelevant to the case because the facts extended far beyond preparation or even a "substantial step." *State v. Johnson*, 111 P.3d 1038, 1040 (Ariz. Ct. App. 2005). In disposing of the defendant's argument that his conviction for attempted sexual assault was not supported by sufficient evidence because his acts were merely preparatory, the court reached nothing more than the unremarkable conclusion that the entering of woman's home, cutting an electrical cord from her toaster and carrying it to her bedroom, climbing on top of her while she slept, kissing her thigh while trying to pull down her underwear, and leaving DNA on her leg, along with other evidence, constituted, at the least, a "substantial step toward engaging in sexual contact." *Id.* *Johnson* thus contributes little, if anything. In short, neither case relied upon in *Taylor* conclusively or reliably resolved the question.

In the district court, the Government pointed out that *State v. Clark*, 693 P.2d 987, 989 (Ariz. Ct. App. 1984) stated that attempt requires more than mere preparation. But *Clark*'s authority was *State v. Dale*, 590 P.2d 1379 (Ariz. 1979) (en banc), which, as the Tenth Circuit recognized in disagreeing with *Taylor*, is an "old law" case interpreting the former attempt statute.[4] *Martinez*, 602 F.3d at 1172. *Clark* also had no occasion to resolve the issue because the facts extended far beyond preparation. 693 P.2d at 989-90 (sufficient evidence for attempted robbery where the defendant, after being interrupted in a bathroom wearing a stocking over his face and gloves at 3:30 a.m., went on to point his sawed-off shotgun at one victim, evincing an intent to rob, and was immediately shot).

Although this Court has cited to and relied upon *Taylor* in published opinions, it has never *affirmed Taylor* over a challenge that it is irreconcilable with intervening Arizona authority, much less that presented here. *See United States v. Gomez*, 757 F.3d 885, 899 n.10 (9th Cir. 2014); *United States v. Quintero-Junco*, 754 F.3d 746, 750 n.1 (9th Cir. 2014); *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1175 (9th Cir. 2012). In *Gomez-Hernandez*, the defendant ignored his attempt conviction, making no argument about it in the district court or on appeal, and focused solely on his completed aggravated assault conviction. (Brief of the

[4] The former statute defined "attempt" as "the performance of an act immediately and directly tending to the commission of the crime with the intent to commit such crime, the consummation of which fails on account of some intervening cause." *Garcia*, 2009 WL 104639, at *2 (emphasis added).

Defendant-Appellant, *Gomez-Hernandez*, 680 F.3d at 1171, No. 10-10441, 2011 WL 2129908.) This Court, however, applied *Taylor* with the qualification—as the issue had not been raised—that "we are not aware of any subsequent Arizona decision deviating from the generic definition of attempt." *Gomez-Hernandez*, 680 F.3d at 1175. Nor was the issue argued or presented in any way in *Quintero-Junco.* (Brief of the Defendant-Appellant, *Quintero-Junco*, 754 F.3d at 746, No. 13-10087, 2013 WL 4781782.) And in *Gomez*, the defendant asserted that *Taylor* "has been significantly undermined by" the Tenth Circuit's decision in *Martinez*, 602 F.3d at 1166, but argued only that "the lack of clarity under Arizona law" required the issue "be certified to the Arizona Supreme Court for resolution …." (Brief of the Defendant-Appellant at 39-40, *Gomez*, 757 F.3d at 885, No. 11-30262, 2011 WL 7006845.) The *Gomez* court did not need to analyze the issue, and merely relied on *Taylor* in a footnote. 757 F.3d at 899 n.10.

Therefore, *Taylor* is clearly irreconcilable with intervening Arizona authority showing that the state applies its attempt statute to preliminary acts that would not constitute a substantial step.

B. Attempted armed robbery in Arizona does not categorically qualify as any generic crime listed under §4B1.2(a)(2)'s "enumerated offense" prong.

1. Arizona's armed robbery statute can never qualify as generic extortion.

This Court has defined generic "extortion" as "obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats." *United States v. Becerril-Lopez*, 541 F.3d 881, 891-92 (9th Cir. 2008) (quoting *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 409 (2003)); *United States v. Dixon*, 805 F.3d 1193, 1196 n.3 (9th Cir. 2015) (under ACCA).

A robbery statute may constitute generic extortion if it penalizes threats beyond those "involving immediate danger to the person," such as threats of future harm or threats against property. *Becerril-Lopez*, 541 F.3d at 891-92. But Arizona's robbery statute encompasses neither threats of future harm nor threats against property. *State v. Roque*, 141 P.3d 368, 391-92 (Ariz. 2006). Therefore, an Arizona robbery conviction can never categorically qualify as generic extortion.

2. The generic crime of "robbery"—listed only in §4B1.2's application note—must be disregarded because it is inconsistent with the text of the guideline that remains without the residual clause.

Guideline commentary is authoritative only if not inconsistent with the text of the guideline itself, which is controlling. *Stinson v. United States*, 508 U.S. 36,

38 (1993). Commentary that is inconsistent with the plain text of a guideline must be disregarded. *United States v. Lambert*, 498 F.3d 963, 966, 971 (9th Cir. 2007).

In the text of the guideline itself, §4B1.2 defines "crime of violence" to include subsection (a)(1)'s "force" prong and subsection (a)(2)'s enumerated crimes of "burglary of a dwelling, arson, or extortion, involves use of explosives," followed by the residual clause. U.S.S.G. §4B1.2(a). The generic crime of "robbery" is not included in this text, but appears only in the guideline's commentary—along with "murder, manslaughter, kidnapping, aggravated assault, [and] forcible sex offenses." *Id.* at cmt. n.1. However, as Molinar argued (CR 46 at 3), that commentary only interprets and explains the residual clause, and now must be disregarded because it is inconsistent with the text of the guideline that remains after *Johnson*.

The commentary reflects the Sentencing Commission's view that "robbery" presents a "serious potential risk of physical injury to another." *See United States v. Williams*, 110 F.3d 50, 52 (9th Cir. 1997) (citing to §4B1.2's commentary that "kidnapping" is a *per se* crime of violence in support of the conclusion that a kidnapping conviction qualified under the residual clause). Indeed, the Supreme Court interpreted the similar inclusion of "attempt" crimes in §4B1.2's commentary as applying to the residual clause. "This judgment was based on the Commission's review of empirical sentencing data and presumably reflects an

assessment that attempt crimes often pose a similar *risk of injury* as completed offenses." *James v. United States*, 550 U.S. 192, 206 (2007), *overruled by Johnson*, 135 S. Ct. at 2551 (emphasis supplied). The Sentencing Commission, in response to *Johnson*, has proposed to "delete the residual clause" and "move[] all enumerated offenses to the guideline." USSC, *Proposed Amendment to the Sentencing Guidelines* at 3-4 (Aug. 12, 2015), *available at* http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20150812_RF_Proposed.pdf (last visited Dec. 21, 2015). In other words, the application note is merely a list of offenses that the Commission believed fell within the residual clause.

Without the residual clause, however, these commentary crimes are inconsistent with the remaining text of the guideline because they do not necessarily satisfy subsection (a)(1)'s elements test, and they are distinct from subsection (a)(2)'s specific, enumerated list of "crimes against property." *See Begay v. United States*, 553 U.S. 137, 144 (2008) (so characterizing the ACCA's identically worded enumerated crimes, from which §4B1.2(a) was derived).

Before *Johnson*, this Court gave freestanding definitional power to §4B1.2's commentary offenses, reasoning that the term "crime of violence" includes the same *per se*, enumerated crimes wherever it appears in the guidelines. *United States v. Asberry*, 394 F.3d 712, 716 (9th Cir. 2005); *United States v. Granbois*,

376 F.3d 993, 996 (9th Cir. 2004). After *Johnson*, however, §4B1.2's commentary crimes no longer interpret or explain, and are inconsistent with, the text that remains. Therefore, the commentary offense of "robbery" must be disregarded.

3. Even if generic "robbery" remains a *per se* crime of violence under §4B1.2, Arizona's robbery statute is overbroad in ways that would also not constitute generic extortion.

First, *Becerril-Lopez* defined generic robbery as penalizing self-help takings for debt collection purposes, but *not* takings of specific personal property to which the defendant believed he was entitled. 541 F.3d at 892-93 (holding that such a distinction in California "keeps [the state's robbery statute] within the modern, generic definition of robbery"). But Arizona has abolished the "claim of right" defense altogether. *State v. Schaefer*, 790 P.2d 281, 284-85 (Ariz. Ct. App. 1990) (involving a bicycle). Under Arizona law, "one can now be criminally charged with taking one's own property," and "one may *not* simply take one's own property from another under a claim of title." *Id.* at 284 (emphasis in original). Thus, Arizona broadly penalizes conduct that would not constitute generic robbery or extortion.

Second, generic robbery and extortion encompass takings of "property," which is a distinct element limited to *obtainable* interests that can be passed from one person to another. Arizona, however, applies its "property" element in a non-

generic manner that broadly includes a "right" not to be coerced, which is not obtainable property for purposes of generic robbery and extortion.

As this Court has stated, generic robbery is "aggravated larceny, containing at least the elements of misappropriation of *property* under circumstances involving immediate danger to the person." *Becerril-Lopez*, 541 F.3d at 891 (emphasis added). "[G]eneric robbery is a theft offense," so the crimes share common elements. *United States v. Velasquez-Bosque*, 601 F.3d 955, 960 (9th Cir. 2010) (holding that generic robbery does not require intent to deprive "permanently" because generic theft does not); 3 LaFave § 20.3(a)(3) ("Property … which can be taken by larceny can be taken by robbery; and, conversely, items which cannot be stolen … cannot be the subject of robbery."). The "property" element of generic theft thus *excludes*, for example, "labor or services" and things that belong to no one. *Mandujano-Real v. Mukasey*, 526 F.3d 585, 590 (9th Cir. 2008) (identity theft statute not categorically generic theft because "a false social security number belongs to, and is therefore the property of, no one"); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1207-08 (9th Cir. 2002) (en banc), *superceded on other grounds by* U.S.S.G. § 2L1.2 cmt. n.4 (2002) (statute criminalizing theft of labor not categorically generic theft "because one's labor is not one's 'property'").

The same "property" element applies to generic extortion. Extortion "is, of course, closely related to the crime of robbery, having in fact been created in order to plug a loophole in the robbery law by covering sundry threats which will not do for robbery." 3 LaFave § 20.4(b) (quoted in *Becerril-Lopez*, 541 F.3d at 892). As the Supreme Court has defined generic extortion, "the [MPC] and a majority of States recognize the crime … as requiring a party to obtain or to seek to obtain *property*, as the Hobbs Act [also] requires …." *Scheidler*, 537 U.S. at 410 (emphasis added). According to LaFave, only a minority of state extortion statutes "leave the realm of property altogether and cover threats made to induce the defendant to do 'any act against his will.'" 3 LaFave § 20.4(a)(3).

"Arizona has adopted [a] broad definition[] of property …." *State v. Steiger*, 781 P.2d 616, 620 (Ariz. Ct. App. 1989). For the state crimes of theft, robbery, and theft by extortion, "property" means "any thing of value, tangible or intangible, including trade secrets." A.R.S. §§ 13-1902, 13-1901(3), 13-1801(A)(12)-(13), 13-1802, 13-1804. The Arizona Court of Appeals has broadly interpreted this definition to include a coerced vote at a board meeting, reasoning that a vote is "no less 'valuable' than the right to be free from outside pressure in making a business decision." *Steiger*, 781 P.2d at 620-21 (citing *United States v. Santoni*, 585 F.2d 667 (4th Cir. 1978)).

The Supreme Court, however, has rejected *Santoni*'s (and thus *Steiger's*) notion that the obtainable property covered by both generic extortion and Hobbs Act extortion encompasses a right to make a recommendation free from coercion. *Sekhar v. United States*, 133 S. Ct. 2720, 2727 (2013) (Hobbs Act); *Scheidler*, 537 U.S. at 406-08, 410 (generic extortion and Hobbs Act). "No fluent speaker of English would say that 'petitioner *obtained and exercised* the general counsel's right to make a recommendation' …." *Sekhar*, 133 S. Ct. at 2727 (Emphasis in original). "Whether one considers the personal right at issue to be 'property' in a broad sense or not, it certainly was not *obtainable property* under the Hobbs Act," i.e., "something of value … that can be exercised, transferred, or sold." *Id.* at 2726 (emphasis in original). Therefore, neither a vote nor the right to be free from coercion—which is "property" subject to robbery in Arizona—is covered by generic extortion or robbery.

Third, as discussed in Part I(A)(1), *supra*, Arizona requires only *de minimis* force that does not categorically involve "immediate danger to the person" for generic robbery or a "wrongful use of force, fear, or threats" for generic extortion. Molinar acknowledges this Court has held that generic robbery under §4B1.2 is satisfied by any quantum of force necessary to overcome resistance or compel surrender, i.e., something more than the mere force necessary to remove the property. *United States v. Harris*, 572 F.3d 1065, 1066 (9th Cir. 2009). However,

where found in §4B1.2's "crime of violence" enhancement, generic robbery and extortion should require a use or threat of "violent" force.

As Justice Scalia reasoned in a 2007 dissent, generic extortion under the ACCA's definition of "violent felony"—which also lists other crimes characterized by the potential for violence and physical harm—"cannot … incorporate the full panoply of threats that would qualify under the [MPC], many of which are inherently nonviolent." *James*, 550 U.S. at 222 (Scalia, J., dissenting), *overruled by Johnson*, 135 S. Ct. at 2551. As the Supreme Court reasoned in construing a "crime of violence" under 18 U.S.C. § 16,

> [W]e cannot forget that we ultimately are determining the meaning of the term "crime of violence." The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes ….

Leocal v. Ashcroft, 543 U.S. 1, 11 (2004). Similarly, those generic crimes that typically involve violence that are incorporated into §2K2.1(a)(4)'s "crime of violence" enhancement, such as robbery and extortion, must also require a use or threat of "violent" force.

Therefore, Arizona's armed robbery statute is overbroad and indivisible with respect to §4B1.2's "enumerated offense prong."

C. The residual clause of §4B1.2(a)(2) is unconstitutionally vague.

At sentencing, the Government did not oppose the extension of *Johnson's* holding—that the ACCA's residual clause is unconstitutionally vague, 135 S. Ct. at 2563—to the identically-worded residual clause of §4B1.2(a)(2). (CR 45 at 2.) In other recent cases, this Court has accepted that concession. *See, e.g.*, *United States v. Benavides*, 617 F. App'x 790 (9th Cir. 2015); *United States v. Talmore*, No. 13-10650 (9th Cir. Aug. 24, 2015).

This Court has interpreted the identically-worded residual clauses of the ACCA and §4B1.2 interchangeably. *See, e.g.*, *United States v. Willis*, 795 F.3d 986, 996 (9th Cir. 2015). Further, the advisory guidelines are subject to claims of unconstitutional vagueness. *Peugh v. United States*, 133 S. Ct. 2072, 2078 (2013) (holding that the Ex Post Facto Clause applies to advisory guidelines); *see also United States v. Johnson*, 130 F.3d 1352, 1354 (9th Cir. 1997) (then-mandatory guidelines were subject to vagueness challenges); *Gall v. United States*, 552 U.S. 38, 49 (2007) (continuing to require that the advisory guidelines are a starting point for sentencing). Therefore, the due process principles espoused in *Johnson* compel the conclusion that the identical residual clause of §4B1.2 is also unconstitutionally vague. *United States v. Madrid*, 805 F.3d 1204, 1211 (10th Cir. 2015); *see also Dimaya v. Lynch*, 803 F.3d 1110, 1120 (9th Cir. 2015) (holding 18 U.S.C. §

16(b)'s residual clause, as incorporated in 8 U.S.C. § 1101(a)(43)(F), is unconstitutionally vague).

Therefore, prior precedent holding that attempted armed robbery qualifies under §4B1.2's residual clause has been effectively overruled by intervening Supreme Court authority. *See Miller*, 335 F.3d at 893.

II. The district court applied the wrong standard and failed to conduct the "relevant conduct" analysis that §5G1.3 requires in determining whether to adjust the sentence to credit imprisonment already served in a related state case.

A. Standard of review

A district court's interpretation of the guidelines is reviewed *de novo*, its application of the guidelines to the facts is reviewed for abuse of discretion, and its factual findings are reviewed for clear error. *United States v. Christensen*, 801 F.3d 970, 1019 (9th Cir. 2015). A sentence may be set aside if substantively unreasonable or if procedurally erroneous in a way that is not harmless. *Id.*

The failure to apply the correct legal rule is an abuse of discretion. *United States v. Hinkson*, 585 F.3d 1247, 1261 (9th Cir. 2009). Applying the wrong standard to a defendant's request for concurrent, rather than consecutive, sentences is an error that is not harmless because a reviewing court cannot confidently conclude that the district court considered the appropriate factors. *United States v. Smith*, 561 F.3d 934, 942 (9th Cir. 2009) (en banc). Where a guideline provision conditions a mandatory adjustment on the application of "relevant conduct" rules,

a district court errs if it does not "explicitly consider whether [the conduct at issue] constituted 'relevant conduct.'" *See United States v. Vargem*, 747 F.3d 724, 729-30 (9th Cir. 2014) (remanding on plain error review where the district court did not conduct the required "relevant conduct" analysis before applying an enhancement).

B. Law

A district court has discretion to run a sentence concurrently with or consecutively to another sentence. 18 U.S.C. § 3584. Exercise of that discretion however, is predicated upon consideration of, *inter alia*, "the guidelines" and "any pertinent policy statement … issued by the Sentencing Commission." 18 U.S.C. §§ 3584(b), 3553(a)(4)-(5).

Section 5G1.3 of the Sentencing Guidelines "operates to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence." *Witte v. United States*, 515 U.S. 389, 405 (1995). Under §5G1.3(b), when a prior "term of imprisonment resulted from another offense that is *relevant conduct* to the instant offense of conviction," (1) the court "*shall* adjust the sentence" to credit any period of imprisonment already served on the prior sentence—if the Bureau of Prisons will not credit such imprisonment toward the federal sentence, and (2) the sentence "*shall* be imposed to run concurrently to the remainder of the undischarged term of imprisonment." U.S.S.G. § 5G1.3(b) (emphasis added). Effective November 1, 2014, §5G1.3(b) no longer requires that

the prior offense also "formed the basis for a Chapter Two or Chapter Three increase." U.S.S.G., App. C Supp., Amend. 787, p. 85, *available at* http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/APPENDIX_C_Supplement.pdf (last visited Dec. 21, 2015).

Relevant conduct includes, for "offenses of a character for which § 3D1.2(d) would require grouping of multiple counts," "all acts and omissions … that were part of the *same course of conduct* or *common scheme or plan* as the offense of conviction." U.S.S.G. §1B1.3(a)(2) (emphasis added). "For two or more offenses to constitute part of a common scheme or plan, they must be substantially connected to each other by at least one common factor, such as common victims, common accomplices, common purpose, or similar modus operandi." *Id.* at cmt. n.5(b)(i). "Offenses that do not qualify as part of a common scheme or plan may nonetheless qualify as part of the same course of conduct if they are sufficiently connected or related to each other as to warrant the conclusion that they are part of a single episode, spree, or ongoing series of offenses." *Id.* at cmt. n.5(b)(ii).

"[T]he essential components of the section 1B1.3(a)(2) analysis are similarity, regularity, and temporal proximity." *United States v. Hahn*, 960 F.2d 903, 910 (9th Cir. 1992).

C. Relevant procedural history

The PSR, in its "recommendation" section, directed the district court to §5G1.3 in determining whether to impose concurrent or consecutive sentences. (PSR p. 21) (stating §5G1.3(d) applied and recommending consecutive terms).

In his sentencing memorandum, Molinar argued, *inter alia*, for fully concurrent sentences effectuated by a 24-month downward adjustment under 18 U.S.C. § 3553(a) or U.S.S.G. § 5K2.0—tracking §5G1.3(b)'s "relevant conduct" analysis. (CR 41 at 2-4, 7; ER 4-6, 9.) He provided two cases in which courts adjusted sentences to effectuate concurrent sentences. (CR 41 at 3-4; ER 4-6, 9.) In *Schleining v. Thomas*, the "[a]pplication of § 5G1.3(b)(1) was appropriate" in adjusting the firearms sentence to credit time already served in a related state case. 642 F.3d 1242, 1244-45 (9th Cir. 2011). In *United States v. Sanchez-Rodriguez*, a downward departure under §5K2.0 was affirmed to credit time already served in a state case where the district court first "concluded that concurrent sentences were appropriate pursuant to … §5G1.3." 161 F.3d 556, 564 n.14 (9th Cir. 1998) (en banc). Molinar advanced his claim for concurrent sentences at the sentencing hearing, again tracking the "relevant conduct" analysis of §5G1.3. (RT 8/26/15 at 27-28; ER 36-37.)

First, as he established (CR 41 at 3-4; ER 5-6), and as the PSR agreed (p. 1), the Bureau of Prisons will not credit his imprisonment in the state case—including

his 11 months of federal pretrial detention while on loan from state custody pursuant to the writ of habeas corpus ad prosequendum—because that time is credited against the state sentence. *See* 18 U.S.C. § 3585(b); *Schleining,* 642 F.3d at 1244-45; *see also Taylor v. Reno,* 164 F.3d 440, 444 (9th Cir. 1998) (state prisoner in federal custody under writ ad prosequendum is still in state custody).

Second, the state offense *was* "relevant conduct" to the instant offense because both were "of a character for which § 3D1.2(d) would require grouping of multiple counts," *and* "all acts … were part of the same course of conduct or common scheme or plan as the offense of conviction." U.S.S.G. §1B1.3(a)(2). As he argued, "[u]nder USSG §3D1.2, [the state trafficking] offenses covered by the theft guideline, §2B1.1, are grouped with offenses covered by the prohibited possessor guideline, §2K2.1 …." (CR 41 at 4; ER 6.) Further, he argued both offenses were part of a common scheme: "at the time he was selling various stolen items to pawn shops for drug money" and "[h]e possessed the ammunition to sell as part of that scheme." (*Id.* at 2; ER 4; *accord* RT 8/26/15 at 25-27; ER 34-37.)

Indeed, the record before the district court established a common purpose, modus operandi, location, time-frame, and regularity—the hallmarks of a common scheme: (1) police discovered his sale of ammunition to the pawn shop while investigating him for selling other stolen items to pawn shops, and then involved federal agents (PSR ¶¶ 3-4); (2) the offenses he admitted in state court (i.e., selling

stolen property to pawn shops) occurred on May 29 and June 26, 2013 (PSR ¶ 28)—the same time-frame as his sale of bullets to the pawn shop on June 10, 2013 and possession of more bullets on August 1, 2013 (PSR ¶ 1); (3) he admitted in the PSR that he was "heavily under the influence of drugs at the time" and "engaged in criminal behavior, such as theft, to support his drug use" (PSR ¶¶ 7, 55); and (4) the Government agreed that "[t]he ammunition pawned by the defendant was pawned at the same location where he pawned other stolen items" (CR 40 at 3). Thus, the record established, and the Government never disputed, that he possessed the ammunition to sell as part of a scheme to sell stolen property to pawn shops for drug money. *See United States v. Nichols*, 464 F.3d 1117, 1120, 1123 (9th Cir. 2006) (holding possession of additional firearms was relevant conduct as part of a common scheme to burglarize houses and sell stolen guns for drug money).

The additional ammunition possessed in Count Two—the 12 bullets or shells found in his home upon execution of a search warrant hours after his arrest on August 1, 2013 (PSR ¶ 4)—was part of this same scheme. As he argued, and as the Government never disputed, "he possessed them to sell them, which was his well-established modus operandi at the time." (CR 41 at 2, 5; ER 4, 7.) He also proffered, without objection, that in addition to the May and June sales to pawn shops he admitted in state court, "the disclosure in that state case includes numerous other instances of the same at the time." (*Id.* at 41 at 5; ER 7.)

Alternatively, §5G1.3(d) authorizes a partially concurrent sentence and a downward departure when "the defendant has served a very substantial period of imprisonment on an undischarged term of imprisonment that resulted from conduct only partially within the *relevant conduct* for the instant offense." U.S.S.G. § 5G1.3, cmt. n.4(E) (emphasis added). The district court, however, conducted no "relevant conduct" inquiry whatsoever—whether under §5G1.3(b) or (d).

D. The district court's statements show it focused incorrectly on whether the state and federal cases prosecuted the identical offense conduct.

The district court applied the wrong standard to the request for concurrent, rather than consecutive, sentences. At sentencing, it initially asked Molinar if he wanted only the two months remaining on the state sentence to be run concurrently "from today." (RT 8/26/15 at 27; ER 36.) Molinar explained that his entire state term should be concurrent, which would require adjusting the sentence downward by 24 months. (*Id.* at 27-28; ER 36-37.) The district court, however, focused on the fact that the state had not prosecuted Molinar for the *identical* conduct of possessing ammunition, and said nothing in response to Molinar's attempt to redirect it to the fact that both offenses involved the same common scheme.

> DEFENSE COUNSEL: It … doesn't make sense that he should have to—[serve] … two and a half years in the state case and another chunk of time here for … really what was one scheme to sell stolen property that happened to be prosecuted by two different sovereigns.

THE COURT: Well, the stolen property I assume he was prosecuted for in state court was something *other than* the ammunition. Am I correct?

DEFENSE COUNSEL: That's right, but we know he was selling ammunition at the pawn shop—from the facts of this case. So we are asking the court to adjust the federal sentence by 24 months, the entire time he's spent in state custody now, to effectuate a concurrent sentence ….

(*Id.*) (Emphasis added.) But the court said nothing more about the matter.

Later, in explaining the sentence, it addressed only the two months that remained on the undischarged state sentence, and said nothing about the 24 months that §5G1.3(b)(1) mandated an adjustment for.

> I was going to impose a sentence at the bottom of the guidelines range. I'm going to take two months off of that which is the two months left on the state court sentence. It will be a sentence of 44 months on each of the two counts ….

(*Id.* at 34; ER 43.)

The court's written "Statement of Reasons" also does not establish that the court engaged in §5G1.3's analysis. The stated basis for the two-month reduction was a departure under §5K2.0 for "time served" in the state case. (SOR at 2.)

Had the district court engaged in the "relevant conduct" analysis required by §5G1.3, based on its statements, there is a reasonable probability that it would have imposed fully concurrent sentences. *See Vargem*, 747 F.3d at 729. First, it ran the two months that remained on the state sentence concurrent. Second, in explaining

the sentence, it agreed that Molinar's sale of ammunition was part of a scheme to sell stolen property to pawn shops: "I think your selling of the ammunition, *which it sounds to me like you were selling other things besides ammunition, other stolen property*, I think that is a very serious offense." (RT 8/26/15 at 34; ER 43.) (Emphasis added.) The court, however, treated that finding as an aggravating factor, and said nothing even suggesting that it gave that fact any significance under §5G1.3.

Third, the Judgment ordered that the 44-month terms be "with credit for time served," suggesting the court wanted Molinar to receive credit for his 11 months of federal pretrial detention. (CR 49; ER 49; *accord* RT 8/26/15 at 35; ER 44 ("He will be given credit for time served if any—time served in this case if any ….").) But the court's order will not be followed because district courts lack authority to award such credit. *United States v. Peters*, 470 F.3d 907, 909 (9th Cir. 2006). Thus, had the district court applied the correct standard, there is a reasonable probability that it would have imposed fully concurrent sentences.

Therefore, the district court failed to conduct the "relevant conduct" guideline analysis before it effectively rejected the guidelines' mandate to adjust the sentence to credit the 24 months served in the state case. This failure to apply the correct legal standard—to "explicitly consider" whether the conduct constituted "relevant conduct"—requires remanding for consideration of whether a concurrent

sentence would be proper under a correct interpretation of the guidelines. *See Vargem*, 747 F.3d at 729-30; *Hinkson*, 585 F.3d at 1261.

For these same reasons, the below-guideline sentence was substantively unreasonable. In increasing the sentence "by duplicative consideration of the same criminal conduct," *Witte*, 515 U.S. at 405, the district court failed to impose a sentence that was "sufficient but not greater than necessary" to achieve § 3553(a)'s statutory goals.

Therefore, this Court should remand for resentencing.

CONCLUSION

For the foregoing reasons, this Court should remand for resentencing.

Respectfully submitted: December 22, 2015

JON M. SANDS
Federal Public Defender

s/ *J. Ryan Moore*
J. RYAN MOORE
Assistant Federal Public Defender
407 W. Congress St., Suite 501
Tucson, AZ 85701
Telephone: (520) 879-7500
Attorneys for Mr. Molinar

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, undersigned counsel states he is aware of a pending cases in this Court deemed related to the issues raised herein:

1. *United States v. Gaspar Torres Hernandez*, Nos. 15-10111, 15-10205 (consolidated) (Reply Brief filed Nov. 9, 2015) (whether Arizona attempted armed robbery qualifies as a crime of violence under § 2L1.2).

2. *United States v. Jason Lee*, No. 13-10517 (Bea, Ikuta, and Hurwitz, CJJ) (ordering supplemental briefing on July 13, 2015 on the effect on the guidelines, if any, of *Johnson v. United States*, 135 S. Ct. 2551 (2015)).

3. *United States v. Gerald Leslie Tate*, No. 15-10283 (Government's Answering Brief filed Nov. 23, 2015) (whether generic "robbery"—listed only in §4B1.2's application note—must be disregarded because it is inconsistent with the text of the guideline that remains after *Johnson* invalidated the residual clause).

s/ *J. Ryan Moore*
J. RYAN MOORE
Assistant Federal Public Defender
Attorney for Appellant Molinar

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains approximately **9,468** words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced, 14-point, serif typeface (Times New Roman) using Microsoft Word 2010.

s/ *J. Ryan Moore*
J. RYAN MOORE
Assistant Federal Public Defender
Attorney for Appellant Molinar

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the
Appellate CM/ECF System

I hereby certify that on **December 22, 2015**, I electronically filed the foregoing Opening Brief of Appellant, Appellant's Excerpts of Record (in one volume), and electronically filed under seal the Presentence Investigation Report (PSR) and Statement of Reasons (SOR), with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *J. Ryan Moore*
J. RYAN MOORE
Assistant Federal Public Defender
Attorney for Appellant Molinar