



The Categorical Approach: *A step-by-step analysis*



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Discussion Outline

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- What is the categorical approach?
- Statutes and guidelines most commonly requiring use of the categorical approach
- Step-by-step process for using the categorical approach



The Categorical Approach

- The determination of whether a prior *conviction* (or the instant offense of conviction) meets the criteria of a certain category of offense; *e.g.*, crime of violence or violent felony.



It All About the Elements

- **Only the elements of the offense of conviction can be considered**
 - **Do not** rely on the title of the statute
 - **Do not** look to the facts of the specific case



Examples of Statutes Where the Categorical Approach Is Used

- 18 USC § 924(e) (Armed Career Criminal Act: ACCA)
- 18 USC § 16 (used for “aggravated felony” determination for illegal entry)
- 18 U.S.C. § 2252(b) (defining prior sex offense convictions)



Examples of Guidelines Where the Categorical Approach Is Used

- §§4B1.1 & 4B1.2 (Career Offender)
- §2K2.1 (Firearms)
- §2L1.2 (Immigration - Illegal Entry)**





The Categorical Approach

Step-by-Step



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Step 1:

Identify the definition under consideration



Definitions Frequently Considered in the Categorical Approach

- “Violent felony”
 - Armed Career Criminal Act (ACCA)
(18 USC § 924(e))
- “Crime of violence”
 - Career Offender (§4B1.2)
 - Illegal Entry (§2L1.2)



The Structure of a Definition of a Category of Offense

Two Potential Sections

- “Force” Clause
 - List of the elements that will include an offense in the category
- “Enumerated” Clause
 - List of offenses included in the category



EXAMPLE: ACCA Definition of “Violent Felony”

18 USC § 924(e)(2)(B)

- *....has as an element* the use, attempted use, or threatened use of physical force against the person of another, or
- *is* burglary, arson, or extortion, involves use of explosives, or
- *otherwise involves conduct* that presents a serious potential risk of physical injury to another....



Career Offender Guideline Definition for “Crime of Violence”

§4B1.2(a)

- **has as an element** the use, attempted use, or threatened use of physical force against the person of another, or
- **is** murder, voluntary manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, or extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5949 (a) or explosive material as defined in 18 U.S.C. § 841 (c).



Step 2: Establish the offense of conviction

- Examine the statute of conviction:
 - the “Categorical Approach”
- Only if necessary to establish the offense of conviction, use limited documents beyond the statute of conviction:
 - the “Modified Categorical Approach”



Examine the Statute of Conviction: The Categorical Approach

- When the judgment cites only the statute of conviction, examine **only** the statute of conviction
- Then, determine if the elements of the statute meet the categorical definition



Example 1

State Statute § 301: Burglary – 1st Degree

Burglary is the unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a felony



Examine the Statute of Conviction: The Categorical Approach

- When the judgment cites the *subsection* of the statute of conviction, examine **only** the subsection
- Determine if the elements of the subsection meet the categorical definition



Example 2

State Statute § 500: Burglary

- a. Unlawful or unprivileged entry into, or remaining in, a dwelling house, building, structure or room, with intent to commit a felony
-  **b. Unlawful or unprivileged entry into, or remaining in, a building or structure other than a dwelling, with intent to commit a felony**
- c. Unlawful or unprivileged entry into any automobile, truck, truck trailer, rail car, or vessel with intent to steal
- d. Breaking into or forcibly opening any coin-operated or vending machine with intent to steal



Example 3

State Statute § 500: Burglary

- a. Unlawful or unprivileged entry into, or remaining in, a dwelling house, building, structure or room, with intent to commit a felony
- b. Unlawful or unprivileged entry into, or remaining in, a building or structure other than a dwelling, with intent to commit a felony
- c. Unlawful or unprivileged entry into any automobile, truck, truck trailer, rail car, or vessel with intent to steal
- d. Breaking into or forcibly opening any coin-operated or vending machine with intent to steal



Modified Categorical Approach

(“When can I look at the documents?”)



What is the modified categorical approach?

- A way to determine the elements of the offense when a particular statute lists elements in the alternative.



When can I use the modified categorical approach?

- Only use modified categorical approach when the statute is *divisible*; that is, the statute contains different elements, rather than different means.



“Divisible” Statutes

Descamps v. U.S., 133 S.Ct. 2276 (2013)

- “That kind of statute sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building or an automobile.”



“Divisible” Statutes

Descamps v. U.S., 133 S.Ct. 2276 (2013)

- “If one alternative matches an element in the generic offense, but the other does not, the modified categorical approach permits sentencing courts to consult a limited class of documents....to determine which alternative formed the basis of the defendant’s prior conviction.”



What is an “element?”

- “Elements’ are the ‘constituent parts’ of a crime's legal definition—the things the “prosecution must prove to sustain a conviction. At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, see and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty.”
- *Mathis v. United States*, 136 S. Ct. 2243 (2016)



How is an element different from a fact?

- Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements . . . They are “circumstance[s]” or “event[s]” having no “legal effect [or] consequence”: In particular, they need neither be found by a jury nor admitted by a defendant.
- *Mathis v. United States*, 136 S. Ct. 2243 (2016)



Why is the elements v. facts (means) distinction important?

- Only use the modified categorical approach when there is a divisible statute that lists alternative elements and the question is: what section of the statute did the defendant plead guilty to?



Example

State Statute § 500: Burglary

- a. Unlawful or unprivileged entry into, or remaining in, a dwelling house, building, structure or room, with intent to commit a felony
- b. Unlawful or unprivileged entry into, or remaining in, a building or structure other than a dwelling, with intent to commit a felony
- c. Unlawful or unprivileged entry into any automobile, truck, truck trailer, rail car, or vessel with intent to steal
- d. Breaking into or forcibly opening any coin-operated or vending machine with intent to steal



Divisible?

- Maryland Fourth Degree Burglary
 - (a) A person may not break and enter the dwelling of another
 - (b) A person may not break and enter the storehouse of another
 - (c) A person, with the intent to commit theft, may not be in or on the dwelling or storehouse of another; or
 - (d) A person may not possess a burglar's tool with the intent to use in the commission of a violation of this subtitle.
- Is this a divisible statute?



Divisible?

- Illinois burglary:
 - Unlawfully enters without authority and remains within a building, house-trailer, watercraft, aircraft, motor vehicle, railroad car with intent to commit a felony or theft

- Is this a divisible statute?



How to determine if a statute is divisible?

- Plain language of the statute (different penalties?)
- Jury instructions
- State supreme court decisions interpreting the statute



Modified Categorical Approach: Documents

- Documents can be used only to determine which specific statutory subsection or provision formed the basis of the conviction.
 - Courts cannot consider the underlying conduct set forth in the documents
- Only limited documents are allowed for this analysis



Shepard Approved Documents

Permitted Documents

- Charging documents**
- Plea agreement
- Plea colloquy
- Jury instructions
- Comparable judicial record

Prohibited Documents

- Police Reports
- Witness statements
- Rap Sheet
- PSR*



Statute is Divisible but *Shepherd* Documents Not Helpful (or Don't Exist)

- If the statute has subsections or is otherwise *divisible*, but the judgment only cites the statute and not the specific subsection or specific offense of conviction, determine if either
 - ALL the subsections meet the categorical definition
 - OR
 - NONE of the subsections meet the categorical definition



Step 3:

Analyze the offense of conviction to determine if it meets the category of offense.



Analysis:
Whether a Conviction Meets
the *Enumerated Section*
of a Categorical Definition



Based on the Elements of the Offense of Conviction

- Requires a determination of whether the *elements* of the offense of conviction meet the generic definition for the enumerated offense



Use of the Generic, Contemporary Definition

- The elements of the offense of conviction must meet the elements of the enumerated offense in its generic, contemporary definition
 - It is not sufficient that the offense of conviction has the same title as an enumerated offense



ACCA

Definition for “Violent Felony”

18 USC § 924(e)(2)(B)

-*has as an element* the use, attempted use, or threatened use of physical force against the person of another, or
- *is* burglary, arson, or extortion, involves use of explosives



Crime of Violence Definition at Career Offender (§4B1.2(a))

- *....has as an element* the use, attempted use, or threatened use of physical force against the person of another, or
is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. 841(c).



Some Sources of Generic Definitions

- Model Penal Code
- Supreme Court and circuit court case law
- 50 state survey
- Guidelines (*e.g.*, extortion)



Analysis: *Enumerated Section* (cont.)

- *Generic Aggravated Assault*
- attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life
- *PA Aggravated Assault:*
- attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life



Analysis: *Enumerated Section* (cont.)

- *Generic form of Robbery*
 - Property to be taken from a person or person's presence by means of force or putting in fear
- *D.C. Robbery:*
 - Whoever by force or violence, whether against resistance, or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value



Analysis:
Whether a Conviction Meets
the *“Force” Section*
of a Categorical Definition

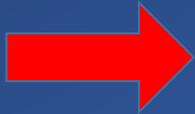


ACCA

Definition for “Violent Felony”

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- *is* burglary, arson, or extortion, involves use of explosives, or



Supreme Court Case Involving *Force Clause* of “Violent Felony”

Johnson v. U.S., 130 S. Ct. 1265 (2010)

- “The term violent...connotes a substantial degree of force.”
- Need force capable of causing physical pain or injury to another



Four Key Issues to Consider with the Force Clause

1. Force must be used intentionally, not recklessly or negligently
2. Requires “violent force,” not “unwanted touching”
3. Requires the use of force, not merely the causation of physical injury
4. Force must be directed against a person, not property



Issue #1: Intentional v. Reckless Conduct

- The offense must require intentional use of violent force, or intentional threat of violent force. Recklessness or negligent is not sufficient.



Issue #2: Violent Force

- Unwanted or offensive touching is not violent force; e.g., *de minimus* force.
- Examples of “unwanted touching” or “offensive touching”
 - Assault and Battery:
 - *United States v. Holloway*, 630 F.3d 252 (1st Cir. 2011) (Massachusetts)
 - Resisting Arrest
 - *United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. 2014) (en banc) (Maryland)
 - Battery on Law Enforcement
 - *United States v. Braun*, 801 F.3d 1301 (11th Cir. 2015) (Florida)



Issue #3: Using Force v. Causing Injury

- Offenses with elements requiring physical injury, serious physical injury, or even death, do not necessarily equal “violent force”
- Physical injury can be committed without the use of strong physical force such as:
 - Poisoning
 - Exposing someone to hazardous chemicals
 - Locking someone in the car on a hot day
 - Neglecting or starving someone



Issue #4: Property v. Person

- Force, even violent force, against property does not qualify under ACCA force clause.
 - E.g., Robbery statutes that include threats to property as well as threats to persons.



Scenario

Demonstrating the Step-by-Step
Process of the Categorical Approach

