

# Categorical Approach

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# The Categorical Approach: *Taylor v. U.S., Et Al*

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The Approach for Determining If a  
Conviction Meets the Criteria for a Certain  
Category of Offense

# Discussion Outline

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- Key Supreme Court cases establishing the categorical approach
- 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
- Scenario demonstrating the analysis in the categorical approach

# Key Supreme Court Cases Establishing the Categorical Approach

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- *Taylor v. United States*, 495 U.S. 575 (1990)
- *Shepard v. United States*, 544 U.S. 13 (2005)
- *James v. United States*, 550 U.S. 192 (2007)
- *Begay v. United States*, 128 S. Ct. 1581 (2008)

## Key Supreme Court Cases Establishing the Categorical Approach (cont.)

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- *United States v. Chambers*, 129 S. Ct. 687 (2009)
- *Johnson v. United States*, 130 S. Ct. 1265 (2010)
- *Sykes v. United States*, 131 S. Ct. 2267 (2011)
- *Descamps v. United States*, 133 S. Ct. 2276 (2013)

# The Categorical Approach

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- The determination of whether a prior *conviction* (or possibly the instant offense of conviction) meets the criteria of a certain category of offense

## The Categorical Approach (cont.)

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- In this determination, only *the elements of the offense of conviction can be considered*
  - **Do not** rely on the title of the statute
  - **Do not** use relevant conduct
  - **Do not** look to the facts of the specific case

# Examples of Statutes Where the Categorical Approach Is Used

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- 18 USC § 924(e) (Armed Career Criminal Act: ACCA)
- 18 USC § 16 (used for “aggravated felony” determination for illegal entry)
- 18 USC § 924(c) (use, carry, possession of firearm in crime of violence or drug trafficking)
- 18 USC § 2252 (prior sex offense conviction)



# Examples of Guidelines Where the Categorical Approach Is Used

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

# Example: Immigration Guideline

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- Defendant is awaiting sentencing in federal court upon conviction for illegal reentry (8 U.S.C. § 1326(b))
- The determination is being made as to whether a 16-level increase at specific offense characteristic §2L1.2(b)(1)(A)(ii) applies; specifically whether Defendant's prior 2009 Texas state conviction for Sexual Assault of a Child meets the definition of a "crime of violence"

# Example: Career Offender Guideline

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- Defendant is awaiting sentencing in federal court upon conviction for armed bank robbery (18 USC § 2113(a)&(d))
- The determination is being made as to whether Defendant is a Career Offender (§§4B1.1 & 4B1.2); specifically whether Defendant’s prior state convictions meet the definition of “crime of violence”:
  - Assault on a law enforcement officer; Violation § 999
  - Causing injury to a child; Violation § 204
  - Failure to stop for blue light; Violation § 714

# Example: Firearm Guideline

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- Defendant is awaiting sentencing in federal court upon conviction for felon in possession (18 U.S.C. § 922)
- The determination is being made as to whether a the defendant's prior Alaska conviction for third-degree assault is a crime of violence to apply a base offense level of 20

# The Categorical Approach

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**Step-by-Step**

# Steps in the Categorical Approach

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1. Examine the definition under consideration
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*”
3. Analyze the offense of conviction to determine if it meets the category of offense

# Step 1

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# Steps in the Categorical Approach

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1. Examine the definition under consideration
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# Definitions Frequently Considered in the Categorical Approach

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

# The Structure of a Definition of a Category of Offense

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## Three Potential Sections

- Elements section
  - List of the elements that will include an offense in the category
- Enumerated section
  - List of offenses included in the category
- Residual clause section
  - “Otherwise involves conduct” section
  - Describes conduct of an offense that will be included in the category

# EXAMPLE: 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, or
- *otherwise involves conduct* that presents a serious potential risk of physical injury to another....

# EXAMPLE: Career Offender Guideline Definition for “Crime of Violence”

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## §4B1.2(a)

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

## EXAMPLE: Career Offender Guideline Definition for “Crime of Violence” (cont.)

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### §4B1.2(a)(2), App. Note 1

- Note that the application note enumerates offenses in addition to those in §4B1.2(a)(2)
- “Consistent with these precedents, we reaffirm that offenses listed in Application Note 1 are “enumerated” for purposes of the crime-of-violence analysis.”
  - *U.S. v. Marrero*, 743 F.3d 389 (3d Cir. 2014)

# EXAMPLE: Illegal Entry Guideline Definition for “Crime of Violence”

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## §2L1.2, App. Note 1(B)(iii)

- *means* .... murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses..., statutory rape, sex abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or
- any other offense ....that *has as an element* the use, attempted use, or threatened use of physical force against the person of another

# Step 2

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# Steps in the Categorical Approach

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1. Examine the definition under consideration
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*”
3. Analyze the offense of conviction to determine if it meets the category of offense



# Examine the Statute of Conviction: The Categorical Approach

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- When the judgment cites only the statute of conviction, examine **only** the statute of conviction
  - Example: Defendant has prior conviction of State Statute § 301, Burglary: 1<sup>st</sup> Degree
  - Determine if the elements of the statute meet the categorical definition

# Example 1

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## **State Statute § 301: Burglary – 1<sup>st</sup> 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 (cont.)

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- When the judgment cites the *subsection* of the statute of conviction, examine **only** the subsection
  - Example: Defendant has prior conviction of State Statute § 500(b): Burglary
  - Determine if the elements of the subsection meet the categorical definition

# Example 2

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## 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

## Examine the Statute of Conviction: The Categorical Approach (cont.)

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- 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

# Example 3

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## 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” Statutes

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- If the judgment cites only to the statute of conviction and that statute is *divisible* and can be violated in multiple ways, some of which satisfy the definition and some do not, use *the modified categorical approach* to determine if the additional documents clarify the defendant’s specific offense of conviction

# “Divisible” Statutes

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## *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 (cont.)

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

- “If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) 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.”

## “Divisible” Statutes (cont.)

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### *U.S. v. Estrella*, 2014 WL 3362166 (11<sup>th</sup> Cir. 2014)

- “When we analyze a particular conviction under a divisible statute in an effort to determine which of the alternative elements formed the basis of the prior conviction, we must ask: Which “version” of the divisible statute formed the basis of the conviction—that is, which of the alternative elements did the jury all agree to or the defendant necessarily admit?. The goal is to determine “which statutory phrase was the basis for the conviction.”

# Divisible Statute

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- ARS § 13–1404, “[a] person commits sexual abuse by intentionally or knowingly engaging in sexual contact with any person who is fifteen or more years of age without consent of that person or with any person who is under fifteen years of age if the sexual contact involves only the female breast.”
- Is this a divisible statute?

# Divisible Statutes

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- “As this language demonstrates, a defendant can violate the statute in two distinct ways. First, a defendant violates the statute if he “intentionally or knowingly engag[es] in sexual contact with any person who is fifteen or more years of age without consent of that person.”
  - *U.S. v. Quintero-Junco*, 754 F.3d 746 (9<sup>th</sup> Cir. 2014)

# Divisible Statutes

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- “Alternatively, a defendant also violates the statute if he “intentionally or knowingly engag[es] in sexual contact ... with any person who is under fifteen years of age if the sexual contact involves only the female breast.”
- “Because the Arizona statute “list[s] potential offense elements in the alternative,” it is divisible, and the modified categorical approach may be applied to discern the prong under which Quintero–Junco was convicted.”
  - *U.S. v. Quintero-Junco*, 754 F.3d 746 (9<sup>th</sup> Cir. 2014)

# Divisible Statutes

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- “A defendant may be convicted of Pennsylvania simple assault if his actions were accompanied by one of three different mental states—intent, knowledge, or recklessness. Because the Pennsylvania statute “list[s] potential offense elements in the alternative,” it is “divisible,” and the modified categorical approach applies. *See Descamps*, 133 S. Ct. at 2283.”
  - *U.S. v. Marrero*, 743 F.3d 389 (3d Cir. 2014)

## “Divisible” Statutes (cont.)

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### *U.S. v. Covington*, 738 F.3d 759 (6<sup>th</sup> Cir. 2013)

- “A person imprisoned in a prison of this state who breaks prison and escapes, breaks prison though an escape is not actually made, escapes, leaves the prison without being discharged by due process of law, attempts to break prison, or attempts to escape from prison, is guilty of a felony... Mich. Comp. Laws 750.193(1).”

## “Divisible” Statutes (cont.)

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*U.S. v. Covington*, 738 F.3d 759 (6<sup>th</sup> Cir. 2013)

- “Because the statute lists several, alternative ways to violate the statute, including some escapes that involve the element of breaking and some that do not, the statute is divisible... Accordingly, we apply the modified categorical approach.”



# Steps in the Categorical Approach

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1. Examine the definition under consideration
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  - Examine the statute of conviction: “the Categorical Approach”
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# The Use of Documents Beyond the Statute of Conviction

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- Documents can be used only if the statute for the offense of conviction alone does not establish whether the offense of conviction falls within the category in question
- When documents are used, only limited documents are allowed

# Examples of Documents Allowed in the Modified Categorical Approach

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- Charging document (*e.g.*, indictment)
- Plea agreement
- Plea colloquy in which the defendant confirmed the elements of the offense of conviction
- Jury instructions
- Comparable judicial record
- Judicially-ruled documents

# Modified Categorical Approach

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*U.S. v. Gallegos-Galindo*  
704 F.3d 1269 (9th Cir. 2013)

- “The government offers Gallegos–Galindo's Statement as evidence that the sexual assault was committed without the consent of the victim. The Statement is contained in a judicially noticeable document—a signed guilty plea—and indeed states that the victim did not consent to the offense. Gallegos–Galindo's conviction can thus be said to fall within the Guidelines' definition.”

# Examples of Documents Generally NOT Allowed in the Modified Categorical Approach

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- Police reports
- Presentence reports
- Rap sheets
- Complaints

# Documents Not Allowed in the Modified Categorical Approach

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- **NOTE:** The fact a document may not be allowed in the modified categorical approach does not necessarily preclude the use of that document in other aspects of guideline application or sentencing
- **Example:** The court can use a “rap sheet” to determine the length of a prior sentence for purposes of determining criminal history points

# Step 3

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# Steps in the Categorical Approach

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1. Examine the definition under consideration
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3. Analyze the offense of conviction to determine if it meets the category of offense



# NOTE

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- In the determination as to whether a prior conviction for a state statute falls within the definition under consideration, the state court interpretation of their own statute can be critical

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

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# The Structure of a Definition of a Category of Offense

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## Three Potential Sections

- **Elements section**
  - List of the elements that will include an offense in the category
- Enumerated section
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- Residual clause section
  - “Otherwise involves conduct” section
  - Describes conduct of an offense that will be included in the category

# EXAMPLE: ACCA

## Definition for “Violent Felony”

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### 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....*

# Supreme Court Case Involving *Elements Section* of “Violent Felony”

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

- Florida’s battery conviction **is not** a violent felony under the “force” component because the statute did not require physical force of a violent nature
- “The term violent...connotes a substantial degree of force.”
- Need force capable of causing physical pain or injury to another

# Use of Force Example 1

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- OK Assault and Battery § 644C
  - any person who commits an assault and battery against a current or former spouse ... [or] a child ... shall be guilty of domestic abuse.”
- Does a conviction under this statute count as a crime of violence under §2L1.2?

# Use of Force Example 1

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- “We must therefore determine whether a violation of section 644C has as an element the attempted, threatened, or actual use of physical force capable of causing physical pain or injury. Our precedents mandate a categorical inquiry that “looks to the elements of the crime, not to the defendant's actual conduct in committing it.”
  - *U.S. v. Miranda-Ortegon*, 670 F.3d 661 (5<sup>th</sup> Cir. 2012)

# Use of Force Example 1

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- “The offense was not a crime of violence merely because it included as an element the word “force.” Instead, the determinative issue was whether the amount of force necessary to satisfy that element of the crime could only be satisfied by “force capable of causing physical pain or injury to another person.”
  - *U.S. v. Miranda-Ortegan*, 670 F.3d 661 (5<sup>th</sup> Cir. 2012)



# Use of Force Example 1

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- “Even though the OK Assault and Battery statute has an element of “force or violence,” that element could be satisfied by “only the slightest touching.”
  - *U.S. v. Miranda-Ortegon*, 670 F.3d 661 (5<sup>th</sup> Cir. 2012)

# Use of Force Example 1

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- “The Oklahoma Court of Criminal Appeals has held that “only the slightest touching is necessary to constitute the ‘force or violence’ element of battery.” *Steele v. State*. Moreover, the definition of “force” in that court's uniform jury instructions for assault and battery offenses states: “Any touching of a person regardless of how slight may be sufficient to constitute force.”
- “...under the categorical inquiry our precedents require, a 644C offense is not a “crime of violence” within the meaning of § 2L1.2(b)(1)(A)(ii).”

# Use of Force Example 2

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- GA Cruelty to a Child Ga. Code Ann. § 16–5–70(b) (2010).
  - Any person commits the offense of cruelty to children in the first degree when such person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.
- Does this offense involve the use of the force under §2L1.2?

## Force Example 2

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- “In the instant case, the language of the statute makes clear that “the use, attempted use, or threatened use of physical force” is not necessary to commit the crime. Specifically, a person can commit first-degree child cruelty and maliciously inflict excessive pain upon a child by depriving the child of medicine or by some other act of omission that does not involve the use of physical force.
  - *U.S v. Resendiz-Moreno*, 705 F.3d 203 (5<sup>th</sup> Cir. 2013)

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

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# Challenges of the Categorical Approach

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*U.S. v. Rodriguez*

711 F.3d 541 (5<sup>th</sup> Cir. 2013) (en banc)

“Deriving the “generic, contemporary meaning” of an offense category enumerated in the Guidelines is challenging because Taylor and its progeny do not specify whether we must use a particular method when engaging in a Taylor analysis. For these reasons, we have found it difficult to apply Taylor's categorical approach.”

# The Structure of a Definition of a Category of Offense

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## Three Potential Sections

- Elements section
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# EXAMPLE: ACCA

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- *....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....



# EXAMPLE: Illegal Entry Guideline Definition for “Crime of Violence”

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§2L1.2, App. Note 1(B)(iii)

- *means* .... murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses..., statutory rape, sex abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or
- any other offense ....that has as an element the use, attempted use, or threatened use of physical force against the person of another <sup>65</sup>

## Analysis: *Enumerated Section* (cont.)

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### Based on the Elements of the Offense of Conviction

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

## Analysis: *Enumerated Section* (cont.)

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### 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

## Analysis: *Enumerated Section* (cont.)

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### Sources for Finding the Generic, Contemporary Definition

- “In divining the generic contemporary meaning, we look to a number of sources, including federal law, the Model Penal Code, treatises, and modern state codes.”
  - *U.S. v. Pascacio-Rodriguez*, 2014 WL 1407541 (5<sup>th</sup> Cir. 2014)

# Generic Offenses

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- “[C]ontemporary usage of [a] term” governs its generic definition under the categorical approach. To identify that “contemporary usage,” we survey the definitions codified in state and federal statutes, adopted by the Model Penal Code and endorsed by scholarly commentary. *See, e.g., U.S. v. Esparza–Herrera*, 557 F.3d 1019, 1023 (9th Cir.2009). The generic definition of an offense “roughly correspond[s] to the definitions of [the offense] in a majority of the States' criminal codes.”
  - *U.S. v. Garcia-Santana*, 743 F.3d 666 (9<sup>th</sup> Cir. 2014)

# “Non-common law offenses”

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- “Today, we join the First, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits and adopt a plain-meaning approach when determining the “generic, contemporary meaning” of non-common-law offense categories enumerated in federal sentencing enhancements. Under this approach, our application of *Taylor's* categorical approach to a prior state conviction proceeds in the following four steps”
  - *U.S. v. Rodriguez*, 711 F.3d 541 (5<sup>th</sup> Cir. 2013)

# Generic Offenses

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- “A survey of state conspiracy statutes reveals that the vast majority demand an overt act to sustain conviction. By our count, thirty-six states do so; if the District of Columbia, Guam, Puerto Rico, and the Virgin Islands are included, then the tally rises to forty of fifty-four jurisdictions.”

– *U.S. v. Garcia-Santana*, 743 F.3d 666 (9<sup>th</sup> Cir. 2014)

## Analysis: *Enumerated Section* (cont.)

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- Generic form of burglary (based on *Taylor*):
  - Unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime
- 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



## Analysis: *Enumerated Section* (cont.)

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- Generic form of robbery:
  - Property to be taken from a person or person's presence by means of force or putting in fear
- DC 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

# Generic Offense: Burglary

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- “The generic offense of burglary of a dwelling requires entering a habitation with the intent to commit a crime
  - *U.S. v. Conde-Castaneda*, 753 F.3d 172 (5<sup>th</sup> Cir. 2013)

# Texas Burglary

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## Texas Penal Code § 30.02

A person commits an offense if, without the effective consent of the owner, the person:

- (1) enters a habitation ... not then open to the public, with intent to commit a felony ... or
- (2) remains concealed, with intent to commit a felony ... in a ... habitation; or
- (3) enters a ... habitation and commits or attempts to commit a felony....

Is this a divisible statute?

# Texas Burglary

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- “Because § 30.02(a)(1) expressly requires this intent, we have held that a prior conviction for violating that section is a “burglary of a dwelling” under the Sentencing Guidelines. *United States v. Garcia–Mendez*, 420 F.3d 454, 456–57 (5th Cir.2005). By contrast, § 30.02(a)(3) lacks such an intent requirement and consequently does not qualify as a “burglary of a dwelling.”
  - *U.S. v. Conde-Castaneda*, 753 F.3d 172 (5<sup>th</sup> Cir. 2013)

# Murder

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- “Accordingly, we hold that murder is generically defined as causing the death of another person either intentionally, during the commission of a dangerous felony, or through conduct evincing reckless and depraved indifference to serious dangers posed to human life.”
  - *U.S. v. Marrero*, 743 F.3d 389 (3<sup>rd</sup> Cir. 2014)

# Aggravated Assault

## Generic Definition

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- A person is guilty of aggravated assault if he:
  - (a) 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 or
  - (b) attempts to cause or purposely or knowingly causes bodily injury to another with a dangerous weapon...” Model Penal Code § 211.1(2).
- *U.S. v. Martinez-Flores*, 720 F.3d 293 (5<sup>th</sup> Cir. 2013)

# N.J. Aggravated Assault

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- “A person is guilty of aggravated assault if he attempts to cause significant bodily injury to another or causes significant bodily injury purposely or knowingly or, under circumstances manifesting extreme indifference to the value of human life recklessly causes significant bodily injury.”
- Does this offense meet the enumerated offense of aggravated assault?

# N.J. Aggravated Assault

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- “Simply put, significant bodily injury does not rise to the level of serious bodily injury.”
- “Stated another way, the difference between serious bodily injury and significant bodily injury is certainly not a “slight imprecision” that it precludes this Court from finding a sufficient equivalence. Thus, defendant’s 3<sup>rd</sup> degree aggravated assault conviction does not constitute an enumerated offense”
  - *U.S. v. Martinez-Flores*, 720 F.3d 293 (5<sup>th</sup> Cir. 2013)



# Generic Statutory Rape

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*U.S. v. Gomez*, 757 F.3d 885  
(9<sup>th</sup> Cir. 2014)

- The elements of generic statutory rape
  - 1) sexual intercourse
  - 2) with a minor under 16
  - 3) who is at least four year younger than the defendant

# Sexual Abuse of a Minor

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- Generic definition of sexual abuse of minor is those offenses which involve “a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification.”
  - *U.S. v. Ramirez-Gonzalez*, 2014 WL 2808132 (11<sup>th</sup> Cir. 2014)

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

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# The Structure of a Definition of a Category of Offense

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## Three Potential Sections

- Elements section
  - List of the elements that will include an offense in the category
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  - List of offenses included in the category
- **Residual clause section**
  - **“Otherwise involves conduct” section**
  - **Describes conduct of an offense that will be included in the category**

# EXAMPLE: ACCA

## Definition for “Violent Felony”

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### 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....***

# Pointer Regarding the *Residual Clause Section*

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- Requires a determination of whether the *elements of the offense of conviction* meet the conduct requirement



# Recent Supreme Court Cases Involving the *Residual Clause Section* of the Armed Career Criminal Act (ACCA) Definition of “Violent Felony”

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*James, v. U.S.*, 550 U.S. 192 (2007)

*Begay v. U.S.*, 128 S. Ct. 1581 (2008)

*Sykes v. U.S.* 131 S. Ct. 2267 (2011)

# Cert. Granted: ACCA Case

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*Johnson v. U.S.* 526 F. App'x 708 (8<sup>th</sup> Cir. 2013), *cert granted*, 134 S. Ct. 1871 (U.S. 2014)

- Whether mere possession of a shotgun with a short barrel should be treated as a violent felony under the Armed Career Criminal Act





# Conducting an Analysis Under the Residual Clause

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# Threshold Question: *Mens Rea* Requirement

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## The Statute's Requirement as to the Mental State of the Defendant in Committing the Offense

- Must first determine if the statute is one that is strict liability, negligent, reckless, or intentional conduct, because there are different tests based on whether the statute requires intentional conduct

## Threshold Question: *Mens Rea* Requirement (cont.)

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### The Statute's Requirement as to the Mental State of the Defendant in Committing the Offense

- If a statute has various sections, some for intentional conduct, some for non-intentional (such as negligent), the categorical approach must be used to determine which section of a statute the defendant was convicted of

# Intentional Crimes

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- If the offense of conviction has a mens rea requirement of intentional conduct, the court must determine **only**
  - Whether, based on the elements of the offense of conviction, the offense involves a serious potential risk of physical injury to another

## Intentional Crimes (cont.)

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- To decide if the crime has a serious potential risk of physical injury to another, the court must determine if in the typical case the crime is roughly similar in kind and similar in degree of risk to the enumerated offenses (*e.g.*, the ACCA lists burglary, arson, extortion, or use of explosives)
- Statistical information might be helpful (*Chambers and Sykes*)

# Reckless, Negligent, or Strict Liability Crimes

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- If the offense has a mens rea requirement of reckless, negligent, or strict liability conduct, the court must determine **both**
  1. Whether, based on the elements of the offense of conviction, the offense involves a serious potential risk of physical injury to another

**AND**

  2. Whether the conduct was purposeful, violent, **and** aggressive conduct (per *Begay*)

## Reckless, Negligent, or Strict Liability Crimes (cont.)

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- Under the requirement of purposeful, violent, **and** aggressive conduct
  - It is unlikely that a strict liability crime or a negligent crime will meet the “purposeful” requirement
  - It is questionable whether a reckless crime will meet the “purposeful” requirement
    - *See U.S. v. Espinoza*, 733 F.3d 568 (5<sup>th</sup> Cir. 2014)

# Examples Involving the *Residual Clause Section* of “Violent Felony”

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- Indiana felony vehicle flight which involved intentional fleeing is a “violent felony” (*Sykes*)
- New Mexico DUI, which is not intentional, and is not purposeful, violent **and** aggressive is not a “violent felony” (*Begay*)



# Pointers Regarding the Analysis Used for the Residual Clause Section (Pursuant to *Sykes* and *Begay*)

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- The analysis in the determination of a violent offense under the *residual clause section*
  - Does NOT apply if the violent offense falls under the *elements section* (the “use of physical force” part of the definition)
  - Does NOT apply if the violent offense falls under the *enumerated section*

# Scenario

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

# Steps in the Categorical Approach

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1. Examine the definition under consideration
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*”
3. Analyze the offense of conviction to determine if it meets the category of offense

# Career Offender Scenario

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- Defendant is awaiting sentencing in federal court upon conviction for armed bank robbery (18 USC § 2113(a)&(d))
- The determination is being made as to whether Defendant is a Career Offender (§§4B1.1 & 4B1.2); specifically whether Defendant’s prior state convictions meet the definition of “crime of violence”:
  - Assault on a law enforcement officer; Violation § 999
  - Causing injury to a child; Violation § 204
  - Failure to stop for blue light; Violation § 714

## Scenarios (cont.)

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- Determine if each of the prior convictions meets the “crime of violence” definition for Career Offender (§§4B1.1 & 4B1.2)

# Judgments

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- The judgment for each of the three convictions only provides the name and code section of the statute of conviction:
  - Assault on a law enforcement officer; Violation § 999
  - Causing injury to a child; Violation § 204
  - Failure to stop for blue light; Violation § 714

# Assault on a Law Enforcement Officer

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## State Statute § 999

- Whoever intentionally uses physical force in a manner that causes serious bodily injury to an individual known to be a law enforcement officer is guilty of a felony first degree.

## Assault on a Law Enforcement Officer (cont.)

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- Would it matter if the indictment and the written plea agreement both state that the defendant intentionally discharged a firearm, shooting and causing bodily injury to an individual who had identified himself to the defendant as a law enforcement officer?



# Causing Injury to a Child

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## State Statute § 204

- Whoever
  - a. uses physical force against a child with intent to cause bodily injury, or
  - b. negligently places a child in an unsafe environment which results in the child suffering bodily injury
- is guilty of a felony third degree.

## Causing Injury to a Child (cont.)

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- Would it matter if the indictment only cites the language of the statutory code, which includes both ways in which the statute can be violated, the date and location of the offense, and that the defendant's three year old child suffered bodily injury in a fall down an open stairwell?
- Would it matter if neither the plea agreement nor the plea colloquy confirm that the plea was to the offense of using physical force against the child?

## Causing Injury to a Child (cont.)

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- Would it matter if the police report in the case states that the defendant's wife called the police when her husband in a fit of rage kicked the child down the open stairwell?

# Failure to Stop for Blue Light

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## State Statute § 714

- A driver of a motor vehicle who willfully fails to stop the vehicle upon notification by a blue light operated by an authorized law enforcement officer is guilty of a felony fourth degree.

## Failure to Stop for Blue Light (cont.)

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- Would it matter if the indictment only cites the language of the statutory code, and the date, highway and duration of the defendant failing to stop?
- Would it matter if the plea agreement and the plea colloquy provide no more than the indictment?

## Failure to Stop for Blue Light (cont.)

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- Would it matter if the police report in the case states that the law enforcement officer with blue light in operation pursued the car driven by the defendant for 15 miles, at speeds up to 100 miles per hour, and that the defendant swerved his car into the law enforcement officer's car in an attempt to force the officer's car into a bridge abutment?

END

# Recent Circuit Cases

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**Armed Career Criminal Act (ACCA)**

**“Violent Felony” (VF)**

**&**

**§4B1.1 - Career Offender**

**“Crime of Violence” (COV)**

6/16/14



# 1<sup>st</sup> Circuit

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**“Violent Felony” (VF)**  
**&**  
**“Crime of Violence” (COV)**

# 1<sup>st</sup> Circuit VF & COV Cases

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- *U.S. v. Anderson*, 745 F.3d 593(1st Cir. 2014)
  - MA Assault and Battery on a Court Officer is a VF
- *U.S. v. Carrigan*, 724 F.3d 39 (1<sup>st</sup> Cir. 2013)
  - MA Resisting Arrest is a VF
  - MA Assault and Battery with Deadly Weapon is a VF

# 1<sup>st</sup> Circuit VF & COV Cases

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- *U.S. v. Mouscardy*, 722 F.3d 68 (1<sup>st</sup> Cir. 2013)
  - MA Assault and Battery on a Police Officer is a VF
- *U.S. v. Ramirez*, 708 F.3d 295 (1<sup>st</sup> Cir. 2013)
  - Florida's Burglary of Dwelling is COV
- *U.S. v. Sumrall*, 690 F.3d 42 (1<sup>st</sup> Cir. 2012)
  - MA Assault and Battery on a Police Officer is a COV

# 2<sup>nd</sup> Circuit

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**“Violent Felony” (VF)**  
**&**  
**“Crime of Violence” (COV)**

## 2nd Circuit VF & COV Cases

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- *U.S. v. Davis*, 2014 WL 1303201 (2d Cir. 2014)
  - CT Second-degree Assault (intentional part) is a COV
- *U.S. v. Roy*, 550 F. App'x 17 (2d Cir. 2013)
  - CT Third Degree Burglary is a VF
- *U.S. v. Wiggan*, 530 F. App'x 51 (2d Cir. 2013)
  - CT First Degree Robbery is a VF
  - CT Assault on a Peace Officer is a VF

# 3<sup>rd</sup> Circuit

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**“Violent Felony” (VF)  
&  
“Crime of Violence” (COV)**

## 3rd Circuit VF & COV Cases

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- *U.S. v. Marrero*, 743 F.3d 389 (3d Cir. 2014)
  - PA Simple Assault (intentional) is a COV
  - PA Third Degree Murder is COV
- *U.S. v. Jones*, 740 F.3d 127 (3d Cir. Cir. 2014)
  - PA Misdemeanor Fleeing is a COV
- *U.S. v. Blair*, 734 F.3d 218 (3d Cir. 2013)
  - PA First Degree Robbery is a VF

# 4<sup>th</sup> Circuit

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## “Violent Felony” (VF) & “Crime of Violence” (COV)

6/16/14



## 4th Circuit VF & COV Cases

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- *U.S. v. Mungro*, 2014 WL 2600075 (4<sup>th</sup> Cir 2014)
  - NC Breaking and Entering is a VF
- *U.S. v. Martin*, 2014 WL 2525214 (4<sup>th</sup> Cir. 2014)
  - MD Fourth Degree Burglary is not a COV
- *U.S. v. Hayes*, 2014 WL 2445778 (4<sup>th</sup> Cir. 2014)
  - NC Burning Personal Property is a COV
- *U.S. v. Terry*, 547 F. App'x 367 (4th Cir. 2013)
  - NC Breaking and Entering is a VF

## 4th Circuit VF & COV Cases

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- *U.S. v. Hemmingway*, 734 F.3d 323 (4<sup>th</sup> Cir. 2013)
  - SC Assault and Battery of High and Aggravated nature not categorically a VF
- *U.S. v. Carthone*, 726 F.3d 503 (4<sup>th</sup> Cir. 2013)
  - VA Assault and Battery of a Police Officer not categorically a COV
- *U.S. v. Riley*, 542 F. App'x 290 (4th Cir. 2013)
  - NC Fleeing/Eluding in a Motor Vehicle is a VF

# 5<sup>th</sup> Circuit

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## “Violent Felony” (VF) & “Crime of Violence” (COV)

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# 5th Circuit VF & COV Cases

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- *U.S. v. Jones*, 2014 WL 2616892 (5<sup>th</sup> Cir. 2014)
  - Federal Escape (from a halfway house) is not a COV
- *U.S. v. Spann*, 2014 WL 1410318 (5<sup>th</sup> Cir. 2014)
  - TX Evading Arrest Using a Vehicle is a VF
- *U.S. v. Curry*, 552 F. App'x 309 (5<sup>th</sup> Cir. 2014)
  - LA Attempted Aggravated Oral Sexual Battery is a VF
- *U.S. v. Espinoza*, 733 F.3d 568 (5<sup>th</sup> Cir. 2013)
  - TX Reckless Assault 22.01(a) is a VF under residual clause

# 5th Circuit VF & COV Cases

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- *U.S. v. Nieto*, 721 F.3d 357 (5<sup>th</sup> Cir. 2013)
  - TX Injury to a Child is a COV at §4B1.2
- *U.S. v. Hanner*, 549 F. App'x 289 (5<sup>th</sup> Cir. 2013)
  - LA Manslaughter is a VF
- *U.S. v. Ramirez*, 524 F. App'x 145 (5<sup>th</sup> Cir. 2013)
  - TX Possession of a Deadly Weapon in Penal Institution
- *U.S. v. Stoker*, 706 F.3d 643 (5<sup>th</sup> Cir. 2013)
  - Retaliating Against and Threatening a Witness is not a COV

# 6<sup>th</sup> Circuit

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## “Violent Felony” (VF) & “Crime of Violence” (COV)

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## 6th Circuit VF & COV Cases

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- *U.S. v. Phillips*, 2014 WL 2180176 (6<sup>th</sup> Cir. 2014)
  - FL Third Degree Burglary is a VF
- *U.S. v. Elliott*, 2014 WL 2139142 (6<sup>th</sup> Cir. 2014)
  - KY Facilitation to Commit Robbery is a VF
- *U.S. v. Mitchell*, 743 F.3d 1054 (6<sup>th</sup> Cir. 2014)
  - TN Robbery is a VF

## 6th Circuit VF & COV Cases

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- *U.S. v. Price*, 2014 WL 1243787 (6<sup>th</sup> Cir. 2014)
  - OH Assault conviction is a VF
- *U.S. v. Willoughby*, 742 F.3d 229 (6<sup>th</sup> Cir. 2014)
  - 18 U.S.C. 1591 (Sex trafficking) is a COV
- *U.S. v. Cooper*, 739 F.3d 873 (6<sup>th</sup> Cir. 2014)
  - TN Aggravated Assault is a COV



## 6<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Covington*, 738 F.3d 759 (6<sup>th</sup> Cir. 2014)
  - MI Breaking and Escaping Prison is not a COV
- *U.S. v. Barnett*, 540 F. App'x 532 (6<sup>th</sup> Cir. 2013)
  - OH Domestic Violence is a VF
- *U.S. v. Hockenberry*, 730 F.3d 645 (6<sup>th</sup> Cir. 2013)
  - PA Burglary is a VF
  - OH Failure to Comply in the Fourth Degree is a VF

## 6<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Denson*, 728 F.3d 603 (6<sup>th</sup> Cir. 2013)
  - OH Inciting to Violence is a VF under modified
  - OH Felonious Assault is a VF
- *U.S. v. Adkins*, 729 F.3d 559(6<sup>th</sup> Cir. 2013)
  - OH Gang Activity is a COV
- *U.S. v. Stafford*, 721 F.3d 380 (6<sup>th</sup> Cir. 2013)
  - OH Aggravated Riot is a VF
- *U.S. v. Johnson*, 707 F.3d 655 (6<sup>th</sup> Cir. 2013)
  - KY First Degree Stalking is a VF

# 7<sup>th</sup> Circuit

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## “Violent Felony” (VF) & “Crime of Violence” (COV)

6/10/14

## 7<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Johnson*, 743 F.3d 1110 (7<sup>th</sup> Cir. 2014)
  - Indiana Domestic Battery in the Presence of a Child is a VF
- *U.S. v. Miller*, 721 F.3d 435 (7<sup>th</sup> Cir. 2013)
  - Mere Possession of a Sawed-off Shotgun is not a VF
- *U.S. v. Misleveck*, 735 F.3d 983 (7<sup>th</sup> Cir. 2013)
  - Wisconsin conviction for Arson of Property Other than a Building is a VF

## 7<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Meherg*, 714 F.3d 457 (7<sup>th</sup> Cir. 2013)
  - Wisconsin conviction for Aggravated Stalking is a COV
- *U.S. v. Womack*, 732 F.3d 745 (7<sup>th</sup> Cir. 2013)
  - Illinois conviction for Aggravated Discharge of a Firearm is a COV

# 8<sup>th</sup> Circuit

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## “Violent Felony” (VF) & “Crime of Violence” (COV)

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## 8<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Miller*, 2014 WL 2057771 (8<sup>th</sup> Cir. 2014)
  - MO conviction for Felony Resisting Arrest is a VF
- *U.S. v. Stokes*, 2014 WL 1673132 (8<sup>th</sup> Cir. 2014)
  - MI conviction for Vehicular Flight is a COV
- *U.S. v. Olsson*, 742 F.3d 855 (8<sup>th</sup> Cir. 2014)
  - MS Second Degree Burglary is a COV

# 8<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Adams*, 716 F.3d 1066 (8<sup>th</sup> Cir. 2013)
  - CA conviction for Felony Assault with a Deadly Weapon is a VF
  - CA conviction for Felony Infliction of Corporal Injury to a Spouse is a VF
- *U.S. v. Johnson*, 526 Fed. Appx (8<sup>th</sup> Cir. 2013)
  - Felon-in-Possession of a sawed-off shotgun is a VF
  - MN conviction for Attempted Simple Robbery is a VF
- *U.S. v. Rucker*, 545 Fed. Appx (8<sup>th</sup> Cir. 2013)
  - MN conviction for Theft from a Person is a VF
  - MN conviction for Aggravated Robbery is a VF



# 9<sup>th</sup> Circuit

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## “Violent Felony” (VF) & “Crime of Violence” (COV)

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## 9<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Chandler*, 743 F.3d 648 (9<sup>th</sup> Cir. 2014)
  - NV Conspiracy to Commit Robbery is a VF
  - NV Second Degree Kidnapping is a VF
- *U.S. v. Dominguez-Maroyoqui*, 748 F.3d 918 (9<sup>th</sup> Cir. 2014)
  - Felony conviction for Assaulting Federal Officer not a COV
- *U.S. v. Gonzalez-Monterroso*, 745 F.3d 1237 (9<sup>th</sup> Cir. 2014)
  - DE Fourth Degree Attempted Rape not a COV

## 9<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Colon-Arreola*, 2014 WL 2119134 (9<sup>th</sup> Cir. 2014)
  - CA conviction for Battery with Injury on a Peace Officer is a COV
- *U.S. v. Spencer*, 724 F.3d 1133 (9<sup>th</sup> Cir. 2013)
  - HI conviction for Criminal Property Damage First Degree is a COV
- *U.S. v. Flores-Cordero*, 723 F.3d 1085 (9<sup>th</sup> Cir. 2013)
  - AZ conviction for Resisting Arrest not a COV

# 10<sup>th</sup> Circuit

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## “Violent Felony” (VF) & “Crime of Violence” (COV)

6/10/14

# 10<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Wilfong*, 528 Fed.Appx. 814 (10<sup>th</sup> Cir. 2013)
  - OK conviction for Larceny is a COV
- *U.S. v. Miller*, 539 Fed.Appx. 874 (10<sup>th</sup> Cir. 2013)
  - OK conviction for Assault with a Dangerous Weapon is a VF
- *U.S. v. Rodriguez*, 528 Fed.Appx. 921 (10<sup>th</sup> Cir. 2013)
  - TX conviction for Enhanced Felony Assault is a COV

# 11<sup>th</sup> Circuit

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## “Violent Felony” (VF) & “Crime of Violence” (COV)

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# 11<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Smith*, 742 F.3d 949 (11<sup>th</sup> Cir. 2014)
  - FL conviction for Fleeing and Eluding a Police Officer is a VF
- *U.S. v. Contreras*, 739 F.3d 592 (11<sup>th</sup> Cir. 2014)
  - FL conviction for Second Degree Sexual Battery is a COV
- *U.S. v. Coronado-Cura*, 713 F.3d 597 (10<sup>th</sup> Cir. 2013)
  - FL conviction for Simple Vehicle Flight is an Aggravated Felony

# 11<sup>th</sup> Circuit VF & COV Cases

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- *U.S. v. Hall*, 714 F.3d 1270 (11<sup>th</sup> Cir. 2013)
  - Possession of Unregistered Sawed-off Shotgun is a COV
- *U.S. v. Boggan*, 550 Fed.Appx. 731 (11<sup>th</sup> Cir. 2013)
  - AL conviction for Third Degree Burglary is a VF
- *U.S. v. Turner*, 530 Fed.Appx. 866 (11<sup>th</sup> Cir. 2013)
  - FL conviction of Sexual Battery of a Minor not a COV