



The Categorical Approach: *Taylor v. U.S., and subsequent cases*

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



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Discussion Outline

- 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

- *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.)

- *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

- 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.)

- 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



Common Terms and Phrases in Categorical Approach

- Divisible Statute
- Overbroad Statutes
- *Shepard* Documents
- Enumerated Offenses
- Generic Contemporary Definition



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. § 2250 (Failure to Register)



Examples of Guidelines Where the Categorical Approach Is Used

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



Example: Immigration Guideline

- Defendant is awaiting sentencing in federal court upon conviction for illegal reentry (8 USC § 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

- 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





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)
- “Crime of violence”
 - Illegal Entry (§2L1.2)



The Structure of a Definition of a Category of Offense

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....



ACCA

Johnson v. U.S., 135 S. Ct. 2551 (2015)

- The Armed Career Criminal Act’s “residual clause” is unconstitutionally vague.
- “Our contrary holdings in *James* and *Sykes* are overruled. Today’s decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act’s definition of a violent felony.”



EXAMPLE: 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*** 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.)

§4B1.2(a)(2), App. Note 1

- Note that the application note enumerates offenses in addition to those in §4B1.2(a)(2)
- “...murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling”



Johnson and Career Offender

- *U.S. v. Willis*, 2015 WL 4547542 (9th Cir. 2015)
 - “Like “violent felony” in ACCA, “crime of violence” in § 4B1.2(a)(2) of the Sentencing Guidelines is defined as including an offense that “otherwise involves conduct that presents a serious potential risk of physical injury to another.” We make no distinction between “violent felony” in ACCA and “crime of violence” in § 4B1.2(a)(2) for purposes of interpreting the residual clauses. See *United States v. Spencer*, 724 F.3d 1133 (9th Cir. 2013). But we have not yet considered whether the due process concerns that led *Johnson* to invalidate the ACCA residual clause as void for vagueness are equally applicable to the Sentencing Guidelines.”



Johnson and Career Offender

U.S. v. Harbin, 2015 WL 4393889 (6th Cir. 2015)(unpublished)

- “Following *Johnson*, the Supreme Court has vacated the sentences of offenders who were sentenced under the residual clause of the Sentencing Guidelines. See *United States v. Maldonado*, 581 F. App'x 19, 22–23 (2d Cir.2014), vacated, No. 14–7445, 2015 WL 2473524, at *1 (U.S. June 30, 2015); *Beckles v. United States*, 579 F. App'x 833, 833–34 (11th Cir.2014), vacated, No. 14–7390, 2015 WL 2473527, at *1 (U.S. June 30, 2015. 6, 2015) (per curiam)



Johnson and Career Offender

U.S. v. Harbin, 2015 WL 4393889 (6th Cir. 2015)

- “see also *Wynn v. United States*, No 14–9634, 2015 WL 2095652, at *1 (U.S. June 30, 2015) (vacating a Sixth Circuit order, which denied habeas relief based on a predicate offense qualifying under the residual clause of the career offender enhancement). Accordingly, Harbin is entitled to the same relief as offenders sentenced under the residual clause of the ACCA. See *United States v. Darden*, No. 14–5537 (6th Cir. Jul. 6, 2015) (per curiam).”



EXAMPLE: Illegal Entry Guideline Definition for “Crime of Violence” §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: 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
 - Example: Defendant has prior conviction of State Statute § 301, Burglary: 1st Degree
 - 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 (cont.)

- 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

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.)

- 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

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

- 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

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 (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

- *U.S. v. Serrano-Mercado*, 784 F.3d 838 (1st Cir. 2015)
 - “To deal with this wrinkle, we employ what the precedents call—not surprisingly—a “modified categorical approach.” Under this approach, we look to limited materials, often called *Shepard* documents, from the convicting court, such as charging documents, plea agreements, plea colloquies, and jury instructions. (relying on *Shepard v. U.S.*, 544 U.S. 13, (2005)).”



“Divisible” Statutes

- *U.S. v. Serrano-Mercado*, 784 F.3d 838 (1st Cir. 2015)
 - “We do so not to determine the conduct the defendant engaged in while committing an offense, as such conduct is of no relevance. We instead inspect these materials in order to identify (if such identification is possible) the actual offense of conviction from among the distinct offenses set forth in a divisible statute.”



“Divisible” Statutes

- *U.S. v. Carrasco-Tercero*, 745 F.3d 192 (5th Cir. 2014)
 - “When, as here, the statute of conviction encompasses multiple, divisible offenses, we apply a modified categorical approach. We may consider parts of the record of conviction to “pare down [the] statute” to determine the specific offense of which the defendant was convicted.”



“Divisible” Statutes

- *U.S. v. Estrella*, 758 F.3d 1239 (11th Cir. 2014)
 - “We should ask ourselves the following question when confronted with a statute that purports to list elements in the alternative: If a defendant charged with violating the statute went to trial, would the jurors typically be required to agree that their decision to convict is based on one of the alternative elements?”



“Divisible” Statutes

- *Is this a divisible statute?*
- “[a]ny person who employs physical force or psychological abuse, intimidation or persecution against the person of [a domestic partner] ... to cause physical harm to the person, the property held in esteem by him/her, ... or to another's person, or to cause grave emotional harm....”



“Divisible” Statutes

- *United States v. Serrano-Mercado*, 784 F.3d 838 (1st Cir. 2014)
 - “The first thing to note is that Article 3.1 is a divisible statute. It covers “[a]ny person who employs physical force or psychological abuse, intimidation or persecution against the person of [a domestic partner] ... to cause physical harm to the person, the property held in esteem by him/her, ... or to another's person, or to cause grave emotional harm....” P.R. Laws Ann. tit. 8, § 631



“Divisible” Statutes

- *United States v. Serrano-Mercado*, 784 F.3d 838 (1st Cir. 2014)
 - The statute thus sets out multiple constellations of elements in the alternative. One set of elements requires the use or threat of “physical force.” The others require “psychological abuse, intimidation or persecution.”



Is This a Divisible Statute?

- 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.”



“Divisible” Statutes

U.S. v. Quintero-Junco, 754 F.3d 746 (9th Cir. 2014)

- “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.”



“Divisible” Statutes

U.S. v. Quintero-Junco, 754 F.3d 746 (9th Cir. 2014)

- “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.”



Is This a Divisible Statute?

- FLA. Stat. § 784.03(1)(A) “The offense of battery occurs when a person: (1) actually and intentionally touches or strikes another person against the will of the other; or (2) intentionally causes bodily harm to another person.”



“Divisible” Statutes

U.S. v. Braun, 2015 WL 5201729 (11th Cir. 2015)

- “There are three ways to commit aggravated battery on a pregnant woman under Florida law: (1) actually and intentionally touching, against her will, a woman that you know or should know is pregnant; (2) actually and intentionally striking, against her will, a woman that you know or should know is pregnant; or (3) intentionally causing bodily harm to a woman that you know or should know is pregnant.”



Modified Categorical Approach

- 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



Examples of Documents Allowed in the Modified Categorical Approach

- 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 Approach

- *U.S. v. Mathis*, 786 F.3d 1068 (8th Cir. 2015)
 - “Upon examining the charging documents that correspond with Mathis's burglary convictions, Mathis was charged with and convicted of entering garages in relation to two of his burglary convictions. Because a garage is clearly a “building,” we find that Mathis was convicted under the element of the Iowa burglary statute that conforms with generic burglary.



Modified Approach

- *U.S. v. Thornton*, 766 F.3d 875 (8th Cir. 2014)
 - “We conclude that *Shepard* requires more than what the government offered at sentencing in this case. A charging document (a complaint) was submitted, but the parties agree that it is not the charging document (an information) to which Thornton pleaded guilty.”



Types of Documents

- “We have held that a district court cannot rely on a criminal complaint to establish the elements of a prior conviction where evidence in the record affirmatively indicates that a separate information superseded the complaint.”
- *U.S. v. Gomez-Alvarez*, 781 F.3d 787 (5th Cir. 2015)



Examples of Documents Generally NOT Allowed in the Modified Categorical Approach

- Police reports
- Presentence reports
- Rap sheets
- Complaints (those that are not charging documents)



Types of Documents

U.S. v. Lopez-Cano, 516 F. App'x 350 (5th Cir. 2013)

“The docket sheet and the case summary are not *Shepard*-approved documents because they were prepared by court (clerical staff) not judges. *U.S. v. Gutierrez–Ramirez*, 405 F.3d 352, 357–59 (5th Cir.2005) (no abstracts) *Jimenez–Banegas*, 209 F. App'x 384, 389 n. 3 (“[D]istrict court docket sheets are not the type of judicial record that a court should consider.”).



Modified Approach

- “We have little trouble concluding that a sentencing court may not rely on a PSR's description of a defendant's pre-arrest conduct that resulted in a prior conviction to determine that the prior offense constitutes a “crime of violence” under U.S.S.G. § 4B1.2(a)(1), even where the defendant does not object to the PSR's description.”
 - *U.S. v. Reyes*, 691 F.3d 453 (2d Cir. 2012)



Documents Not Allowed in the Modified Categorical Approach

- **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:

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



NOTE

- 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



The Structure of a Definition of a Category of Offense

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



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



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....



Supreme Court Case Involving *Elements Section* of ⁶⁰ “Violent Felony”

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

- *U.S. v. Maid*, 772 F.3d 1118 (8th Cir. 2014)
 - IA assault while displaying a dangerous weapon is a COV under the threatened use of force part of the crime of violence definition at §4B1.2
- “The requirement of “[i]ntentionally point[ing] any firearm toward another” and the requirement of “display[ing] in a threatening manner any dangerous weapon toward another” under Iowa Code § 708.1(3) (2002) categorically constitute a “threatened use of physical force” under § 4B1.2(a)(1).”



Use of Force

- *U.S. v. Serrano-Mercado*, 784 F.3d 838 (1st Cir. 2015)
 - “In making physical force an element, the text of Article 3.1 suggests that something more than a mere non-consensual touching is required to satisfy that element. Instead, the text requires the physical force be intended to “cause physical harm.” The Puerto Rico Supreme Court has also interpreted the physical-force element of Article 3.1. And consistent with the text, that court has construed that element to “prohibit[] ... physical abuse,”



Use of Force

- *U.S. v. Serrano-Mercado*, 784 F.3d 838 (1st Cir. 2015)
 - “Taken together, the text of Article 3.1 and the Puerto Rico Supreme Court's interpretation of it strongly suggest the statute's physical-force element involves the kind of violent force “capable of causing physical pain or injury to another person.” *Johnson*, 559 U.S. at 140, 130 S.Ct. 1265. And that is the kind of force required by the crime of violence sentencing guidelines' force clause.”



Use of Force

U.S. v. Ayala-Nicanor, 659 F.3d 744 (9th Cir. 2013)

- “CA 273.5 (Willful infliction of corporal injury on a spouse) is categorically a crime of violence because it requires the intentional use of physical force against the person . . . the plain terms of the statute require a person willfully to inflict upon another person a traumatic condition, thus satisfying both the elements of intent and active violence...”



Use of Force

U.S. v. Ker Yang, 2015 WL 4978999 (7th Cir. 2015)

- “Under the statute, an individual is guilty of felony domestic assault if he “(1) commits an act with an intent to cause fear in another of immediate bodily harm or death; or (2) intentionally inflicts or attempts to inflict bodily harm upon another” and does so within a specified amount of time of having committed other qualified domestic violence-related offenses. Minn.Stat. § 609.224(1), (4). A conviction under this statute qualifies as a violent felony because it has “as an element the use, attempted use, or threatened use of physical force against the person of another.”



Use of Force

U.S. v. Whindleton, 2015 WL 4719600 (1st Cir. 2015)

- “Massachusetts statute for ADW, “which criminalizes ‘an assault upon another’ by ‘means of a dangerous weapon,’ ‘has as an element the use, attempted use, or threatened use of physical force’ ” as required by the ACCA's Force Clause.”



Use of Force

U.S. v. Herrera-Alvarez, 753 F.3d 132 (5th Cir. 2014)

“Because section 14:34 criminalizes aggravated batteries committed by administering poison, which does not necessarily entail the use of destructive or violent physical force, the statute as a whole does not categorically qualify as a crime of violence.”



Use of Force

- *U.S. v. Parral-Dominguez*, 794 F.3d 440 (4th Cir. 2015)
 - NC discharging a firearm into occupied building was not a crime of violence under §2L1.2
 - J. Wilkinson dissent :
 - “The majority contends that a central concern of the North Carolina statute at issue here is the protection of property. Wrong! The statute explicitly requires that the attacked property be occupied. Who does the majority think occupies the property? Pigs and chickens? No, the statute self-evidently has in mind actual people, a.k.a. human beings.”



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



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**



EXAMPLE: Illegal Entry Guideline Definition for ⁷¹ “Crime of Violence”

§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



Analysis: *Enumerated Section* (cont.)

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.)

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.)

Labels

- “The label a state attaches to an offense is not conclusive as to whether it qualifies as an enumerated offense under § 2L1.2, and we must determine if the conviction offense is equivalent to the generic definition of the crime enumerated in the commentary”
- *U.S. v. Palomino-Garcia*, 606 F.3d 1317 (11th Cir. 2010)



Analysis: *Enumerated Section* (cont.)

Sources for Finding the Generic, Contemporary Definition

- “The label a state uses for a crime does not control whether the crime fits the generic definition. Rather, we “derive the crime's uniform meaning from the generic, contemporary meaning employed by most states, guided by scholarly commentary.” The Model Penal Code (MPC) may “serve as an aid.” Ultimately, we derive the meaning of the enumerated Guidelines crime not by the ordinary meaning of the crime, but by surveying the Model Penal Code and state statutes to determine how they define the offense.”
 - *U.S. v. Marquez-Lobos*, 697 F.3d 759 (9th Cir. 2012)



Analysis: *Enumerated Section* (cont.)

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*, 749 F.3d 353 (5th Cir. 2014)



Analysis: *Enumerated Section* (cont.)

- 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



Enumerated

- *U.S. v Duquette*, 778 F.3d 314 (1st Cir. 2015)
 - “Pursuant to Taylor, our task is to examine the Maine burglary statute under which Duquette was convicted and determine whether it sets forth the “generic burglary” elements of (1) unlawful or unprivileged entry into, or remaining in, (2) a building or structure, with (3) intent to commit a crime.”
- ME burglary meets the generic definition of burglary under the ACCA enumerated section



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
- 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



Statutory Rape Definition

U.S. v. Sullivan, 2015 WL 4547498 (9th Cir. 20153)

- “In addition, we have previously determined that a statutory rape offense constitutes “the generic offense of ‘sexual abuse of a minor’ “ if it includes the elements set forth in 18 U.S.C. § 2243, specifically: “(1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least four years between the defendant and the minor.”



Aggravated Assault - Generic Definition

U.S. v. Martinez-Flores, 720 F.3d 293 (5th Cir. 2013)

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).



N.J. Aggravated Assault

- “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 meet the enumerated offense of aggravated assault?



N.J. Aggravated Assault

U.S. v. Martinez-Flores, 720 F.3d 293 (5th Cir. 2013)

- “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 3rd degree aggravated assault conviction does not constitute an enumerated offense”



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



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....



Scenario

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



Steps in the Categorical Approach

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

- 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.)

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



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*** 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



Judgments

- 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

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.)

- If the court was unsure about its determination could the court look to the indictment and the written plea agreement which 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

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.)

- If the indictment 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, does this assist the court in its determination?
- 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.)

- 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

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.)

- If the indictment stated 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, would this assist the court in its determination?





END



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