CATEGORICAL APPROACH EXERCISES

Categorical Approach Examples

You are tasked with drafting a Presentence Report for a defendant named John Williams. Mr. Williams has pleaded guilty to one count of Possession of a Firearm by Prohibited Person in violation of 18 U.S.C. §922(g). You have gathered records from Mr. Williams' prior convictions and determined that all of his prior convictions score under Chapter 4.

Your next step is to determine whether Mr. Williams qualifies as an Armed Career Criminal under 18 U.S.C. §924(e) and if not, whether any of his prior convictions affect his base offense level under U.S.S.G. §2K2.1.

RELEVANT FEDERAL STATUTES

18 U.S.C. 924(e)

(1) In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . .

(2) As used in this subsection—

(A) the term "serious drug offense" means—

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year . . . that—

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

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RELEVANT SENTENCING GUIDELINES

§2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

(2) **24**, if the defendant committed any part of the instant offense subsequent to sustaining at least ***two felony convictions of either a crime of violence or a controlled substance offense***;

(4) **20**, if —

(A) the defendant committed any part of the instant offense subsequent to sustaining ***one felony conviction of either a crime of violence or a controlled substance offense***; or

(6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense; (B) is convicted under 18 U.S.C. § 922(d); or (C) is convicted under 18 U.S.C. § 922(a)(6) or § 924(a)(1)(A) and committed the offense with knowledge, intent, or reason to believe that the offense would result in the transfer of a firearm or ammunition to a prohibited person;

§4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) 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).

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

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Application Notes:

1. Definitions.—For purposes of this guideline— . . .

"Extortion" is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.

Prior Convictions

Date	**Location**	**Offense of Conviction**	**Sentence**
March 3, 2015	St. Louis, MO	Second Degree Robbery Mo. Ann. Stat §570.025	18 months
July 15, 2014	Oklahoma City, OK	Second Degree Burglary Ok. Stat. Title 21, §1435	18 months, 12 months suspended
June 10, 2010	Dallas, TX	Manufacture or Delivery of Controlled Dangerous Substance Tx. Health and Safety Code §481.112(a).	3 years

Texas Conviction

Manufacture or Delivery of Controlled Dangerous Substance

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Texas Manufacture or Delivery of Controlled Dangerous Substance

Documents you have gathered:

- Judgment indicating that Mr. Williams was convicted of Texas Health and Safety Code §481.112(a).
- A copy of the statute of conviction
- A copy of a plea agreement signed by Mr. Williams that states the following:

> *On June 10, 2010, officers from the Dallas Police Department executed a search warrant at the home located at 100 Forrest Street in Dallas, Texas, Mr. Williams' home. Once inside, the officers found 100 grams of crack cocaine in a bedroom, $2500 in cash, small baggies, a Pyrex dish containing cocaine residue, and other paraphernalia. Mr. Williams was home during the search and when questioned about the drugs, he admitted that the drugs and money belonged to him and that he intended to distribute the drugs.*

Statute of Conviction and Definitions

V.T.C.A., Health & Safety Code § 481.112

§ 481.112. Offense: Manufacture or Delivery of Substance in Penalty Group 1

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1 . . .

V.T.C.A., Health & Safety Code § 481.002

§ 481.002. Definitions

(8) "Deliver" means to transfer, actually or constructively, to another a controlled substance, counterfeit substance, or drug paraphernalia, regardless of whether there is an agency relationship. The term includes offering to sell a controlled substance, counterfeit substance, or drug paraphernalia.

CATEGORICAL APPROACH EXERCISES

Case Law Excerpts

United States v. Hinkle, 832 F.3d 569 (5th Cir. 2016)

Texas state courts construing sections 481.112(a) and 481.002(8) of the Texas Health and Safety Code have held that the method used to deliver a controlled substance is not an element of the crime. In *Lopez v. State*, the Texas Court of Criminal Appeals cited approvingly a lower court opinion—*Rodriguez v. State*—in which a "jury charge authorized conviction if the jurors found that Rodriguez delivered marijuana by actually transferring, constructively transferring, or offering to sell." The *Rodriguez* court found no error even though there was the "potential for a non-unanimous verdict," concluding that only one offense was committed. The *Lopez* court opined that "[t]he result was a permissible general verdict because the defendant was charged with two alternative theories of committing the same offense, and not two separate deliveries."

Texas law is therefore clear, as was the Iowa statute in *Mathis*: section 481.002(8)'s listed methods of delivery "are not alternative elements, going toward the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying [the] single [delivery] element." As the Supreme Court held in *Mathis*, "[w]hen a ruling of that kind exists, a sentencing judge need only follow what it says." The Government cites Texas state court decisions holding that prosecutors must specify the precise method or methods of delivery under section 481.002(8) in a charging instrument, and that when a single form of delivery is alleged, that method of delivery, and no other, must then be proven beyond a reasonable doubt. The Government's interpretation of these Texas decisions confuses evidentiary and notice requirements with the elements of an offense. One of these cases recognizes that Texas law permits a prosecutor to charge more than one method of delivery but does not require proof beyond a reasonable doubt as to each method of delivery charged when more than one method is charged.

Oklahoma Conviction
Second Degree Burglary

CATEGORICAL APPROACH EXERCISES

Oklahoma Second Degree Burglary

Documents you have gathered

- Judgment indicating that Mr. Williams was convicted after a jury trial of Count One of the Indictment
- The Indictment states in Count One:

> *On July 15, 2014, Mr. Williams broke and entered into the residence at 1234 Willow Street in Oklahoma City with the intent to steal property therein, in violation of Oklahoma Statute Title 21, §1435.*

- Copy of the statute of conviction
- Relevant jury instructions

§ 1435. Burglary in second degree--Acts constituting

Every person who breaks and enters any building or any part of any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection, in which any property is kept, or breaks into or forcibly opens, any coin-operated or vending machine or device with intent to steal any property therein or to commit any felony, is guilty of burglary in the second degree.

Oklahoma Uniform Jury Instructions-Criminal
OUJI-CR 5-13 Burglary in the Second Degree—Elements

No person may be convicted of burglary in the second degree unless the State has proved beyond a reasonable doubt each element of the crime. These elements are:

- First, breaking;
- Second, entering;
- Third, a/an building/room/booth/tent/(railroad car)/automobile/truck/trailer/vessel/structure/erection;
- Fourth, of another;
- Fifth, in which property is kept;
- Sixth, with the intent to steal/(commit any felony).

Case Law Excerpts

U.S. v. Hamilton, 06-CR-188-TCK, 2017 WL 368512, at *10 (N.D. Okla. Jan. 25, 2017)

A jury is typically instructed on a single location because location is rarely disputed, and locations typically fit one of the listed items. If there was a case where the location burglarized did not fit within the list, it seems clear a defendant could still be convicted of burglarizing some other type of unlisted structure or erection. This indicates the list is merely one of "illustrative examples." *See Mathis*, 136 S.Ct. at 2256 (internal quotations omitted). Further, in a case where a location arguably fit two of the listed locations, such as a booth shaped like a tent, the state could charge the defendant with burglarizing a "booth or tent." A jury would not have to agree on whether the structure was a booth or tent, and these elements could be listed disjunctively in the appropriate case.

Oklahoma case law and a "peek" at Defendant's charging documents indicate that Oklahoma courts generally *treat* the location more like an element than a means of committing the crime. Prosecutors generally charge and prove, and courts instruct, as to just one location. In turn, Oklahoma appellate case law typically discusses the location as an element. However, because these sources are not explicitly discussing the means/elements distinction in the *Mathis* context, they are not of persuasive value to the Court. Any inferences that can be raised from these sources are insufficient to overcome the legal reasoning in *Mathis* and the similarity between the Oklahoma and Iowa statutory schemes. Like the Iowa statute, the Oklahoma statute lists the locations in the disjunctive and creates an illustrative list of examples. This indicates the Oklahoma legislature intended to create one crime for breaking and entering various locations, not numerous different crimes depending on the location burglarized.

As a practical matter, unless a state's highest criminal court has explicitly ruled on the means/element question raised in *Mathis* and reached a different conclusion than Iowa's court, a disjunctive list of locations in a burglary statute will likely always be considered means. *Mathis* tells courts to look to state law, but this is largely an exercise in futility. How a state charges, instructs, or discusses listed locations in a burglary statute is of little significance because state courts—and therefore state law—are simply not concerned with the means/elements distinction. They deal with real-world crimes as charged. For purposes of determining whether a conviction is an ACCA predicate, federal courts now deal exclusively with crimes in the abstract.

Missouri Conviction
Second Degree Robbery

CATEGORICAL APPROACH EXERCISES

Missouri Second Degree Robbery

Documents you have gathered

- Judgment indicating that Mr. Williams was convicted of Missouri Second Degree Robbery
- A transcript of a guilty plea colloquy where Mr. Williams agrees to the following statement:

  > *On March 3, 2010, Mr. Williams approached Victim #1 on the street from behind. Mr. Williams punched Victim #1 in the back of Victim #1's head. Victim #1 fell to the ground, at which point Mr. Williams took Victim #1's laptop bag and fled. Mr. Williams was quickly apprehended and arrested. When questioned, Mr. Williams admitted that he hit Victim #1 and stole the laptop bag.*

- Copy of the statute of conviction

Relevant Statutes

Annotated Missouri Statutes
570.025. Robbery in the second degree--penalty

1. A person commits the offense of robbery in the second degree if he or she forcibly steals property and in the course thereof causes physical injury to another person.
2. The offense of robbery in the second degree is a class B felony.

Annotated Missouri Statutes
570.010. Chapter Definitions

(13) **"Forcibly steals"**, a person, in the course of stealing, uses or threatens the immediate use of physical force upon another person for the purpose of:
(a) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
(b) Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the theft;

***United States v. Bell*, 840 F.3d 963 (8th Cir. 2016)**

Section 2K2.1 incorporates the definition of "crime of violence" used in § 4B1.2(a). *See* U.S.S.G. § 2K2.1 cmt. n.1. Under the relevant provision of § 4B1.2(a), the phrase "crime of violence" means "any offense [that] ... has as an element the use, attempted use, or threatened use of physical force against the person of another." In Missouri, "[a] person commits the crime of robbery in the second degree when he forcibly steals property." Mo. Rev. Stat. § 569.030.1. The term "forcibly steals" is further defined in a separate statute providing in relevant part that "a person 'forcibly steals,' and thereby commits robbery, when, in the course of stealing ... he uses or threatens the immediate use of physical force upon another person."

Accordingly, Missouri courts have identified § 569.030.1 as setting forth a single indivisible crime containing two generic elements: "stealing and the use of actual or threatened force." At first blush, then, it appears as though Bell's conviction would qualify as a crime of violence: a crime of violence has as an element the use, attempted use, or threatened use of physical force against another person, and an element of second-degree robbery in Missouri is the use or threat of "physical force upon another person." Mo. Rev. Stat. § 569.010(1).

The *amount* of physical force required for a person to be convicted of second-degree robbery in Missouri does not, however, "necessarily" rise to the level of physical force required for a crime of violence under the Guidelines. The Supreme Court has described this as a "demanding requirement." *Shepard v. United States*, 544 U.S. 13, 24, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (plurality opinion).

According to the Supreme Court, "physical force" means "violent force—that is, force capable of causing physical pain or injury to another person." *Johnson v. United Stat*es, 559 U.S. 133, 140, (2010). Thus, the "merest touch" is insufficient, but the "degree of force necessary to inflict pain—a slap in the face, for example" is sufficient to establish "physical force." When determining whether Missouri's second-degree robbery statute requires the level of violent force described in Johnson, we must consider not just the language of the state statute involved, but also the Missouri courts' interpretation of the elements of second-degree robbery. *See id*. at 138, 130 S.Ct. 1265 ("We are ... bound by the [state] Supreme Court's interpretation of state law, including its determination of the elements of [the state statute.]").

Moreover, when our focus is on the generic elements of the offense—as is the case here—rather than a specific defendant's conduct, we must consider the lowest level of conduct that may support a conviction under the statute. *See Moncrief*fe v. *Holder,* —— U.S. ——, 133 S.Ct. 1678, 1684, 185 L.Ed.2d 727 (2013) ("Because we examine what the state conviction necessarily involved, not the facts underlying the

case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts [would qualify as a crime of violence].")

A Missouri court upheld a conviction for second-degree robbery in at least one situation where a defendant's conduct appears to have fallen short of using "force capable of causing physical pain or injury to another person." *Johnson*, 559 U.S. at 140, 130 S.Ct. 1265. In *State v. Lewis,* the Missouri Court of Appeals sustained a conviction based on the victim's testimony that the defendant " 'bumped' her shoulder and 'yanked' her purse away from her [,]" while "another witness testified that [the defendant] 'nudged' [the victim]," and yet a "third witness testified that there was a 'slight' struggle" over the purse. 466 S.W.3d 629, 631 (Mo. Ct. App. 2015). Significantly, the victim did not testify the slight struggle caused her any pain, or that she was injured by the incident. *Id*. Even more significantly, the court explained the line between the amount of force sufficient to sustain a conviction for second-degree robbery, and insufficient force: "In sum, where there was no physical contact, no struggle, and no injury, [Missouri] courts have found the evidence insufficient to support a [second-degree] robbery conviction. But where *one or more* of those circumstances is present, a jury reasonably could find a use of force." *Id*. at 632 (internal citation omitted) (emphasis added).

In other words, in Missouri a defendant can be convicted of second-degree robbery when he has physical contact with a victim but does not necessarily cause physical pain or injury.[4]