

2017
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Categorical Approach: 2017 Annual National Seminar

After the Supreme Court's decision in *Mathis v. United States*, 136 S. Ct. 2242 (2016), courts continue to grapple with the categorical approach, including the means vs. elements test. This document outlines the four steps in the categorical approach and defines key term frequently used in the analysis.

Steps in the categorical approach:

- Step 1** Identify the definition at issue (for example: "violent felony" in ACCA, "crime of violence" in Career Offender)
- Step 2** Determine the statute of conviction. If the statute contains multiple crimes and is divisible into separate crimes, use the "modified" approach to determine the defendant's statute of conviction
- Step 3** List the elements of the statute of conviction
- Step 4** Compare the elements in the statute of conviction to those in the definition

Glossary of Key Terms

Categorical Approach - the method for determining whether an offense (generally a prior conviction) fits within a given definition, such as for "crime of violence" "drug trafficking offense" "violent felony" or other similar terms. To do so, the court must compare the elements of the prior offense to the relevant definition. Under the categorical approach, courts are not permitted to look to the conduct underlying the prior the conviction, only to the statute of conviction, to determine the elements of the prior offense.

Divisible Statute - a statute that sets out different offenses within one statute. For example, a statute with subsections (a) through (d) that sets out burglary of: (a) a habitation, (b) a motor vehicle, (c) and air or water craft, or (d) a coin-operated vending machine or parking meter, is a divisible statute because it sets out four separate burglary crimes. The Supreme Court currently has before it a case in which

Court will decide whether a statute is divisible when it sets out different means of committing an offense (for example kidnapping by force, fear, coercion or fraud) or whether the statute must set out distinct elements in order to be divisible.

Elements Clause ("Force Clause") - that part of a definition that requires that a prior conviction have as an element the use, attempted, or threatened use of physical force against a person [or property]. Although in theory an elements



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Glossary of Key Terms, Cont'd.

clause could require that any specific element be present, as a practical matter the only element that is part of commonly used definitions is the element of the use of force. For this reason, the elements clause is often referred to as the “force clause.”

Enumerated Offenses – those offenses that are specifically listed in a definition. For example, both ACCA and the career offender guideline define violent felony and crime of violence, respectively, to include “arson” and “extortion” specifically. The “aggravated felony” definition in Title 8 lists about 20 offenses that constitute aggravated felonies.

Generic Contemporary Definition – the common, modern-day understanding of one of the enumerated offenses. The Supreme Court in *Taylor*, decided that when Congress listed “burglary, arson, extortion” as violent felonies, Congress must have meant the contemporary, generic understanding of those offenses. So, for example, under common law

the government would have to prove that a breaking and entering took place “in the nighttime” for the offense to constitute burglary. “In the nighttime” was an element of the offense. But, our modern conception of burglary does not include “in the nighttime” as a modern burglary in most states does not require that the breaking and entering occur at night.

Modified Categorical Approach – similar to the categorical approach, the modified categorical approach is used to determine whether an offense (generally a prior conviction) fits within a given definition, such as for “crime of violence” “violent felony” or similar term. The court must compare the elements of the offense of conviction to the relevant definition. Under the modified approach, the court may use certain additional documents, such as a charging document or plea agreement from the prior conviction, to determine the elements of the offense of conviction.

Overbroad Statutes – a statute that proscribes a larger sphere of conduct than is targeted by the generic offense. For example, a burglary statute that includes habitations, watercraft, aircraft, and coin-operated vending machines, is overbroad compared to generic burglary, which is focused on structures (buildings and homes).

Shepard Documents – the narrow class of additional documents the court is permitted to consult when using the modified categorical approach to determine the elements of the prior conviction. In the *Shepard* case, the Supreme Court specifically mentioned charging documents (indictments, for instance), transcripts of plea colloquies, and written plea agreements, jury instructions, and comparable judicial records. Similar document may be consulted, but circuit courts have provided further guidance on permissible documents, as state courts produce different kinds of documents depending upon the criminal procedures in that state.

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The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.