



Categorical Approach (Part 2)

National Seminar

Baltimore, MD

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U.S.S.C. §2K2.1

- (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 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;
 - (6) **14**, if the defendant (A) was a prohibited person at the time the defendant committed the instant offense . . .



Definition of Crime of Violence

§4B1.2(a): The term "crime of violence" means any offense 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).



Definition of Controlled Substance Offense

- §4B1.2(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.



Definition of Violent Felony

18 U.S.C. 924(e) ...

(2)(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



Definition of Serious Drug Offense

18 U.S.C. 924(e)

(2)(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



Prior Convictions

- 2010 conviction for Manufacture/Delivery of CDS in Texas
- 2014 conviction for 2nd Degree Burglary in Oklahoma
- 2015 conviction for 2nd Degree Robbery in Missouri

Are these crimes of violence under §4B1.2(a)?

Are they violent felonies under §924(e)?



Is the statute divisible?



Facts (means) v. Elements in a Nutshell

- Does the statute list:
 - Different ways to commit one offense (means) ?
OR
 - Different offenses (elements)?



What is an “element?”

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



How is an element different from a fact?

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



How to determine if a statute is divisible?

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



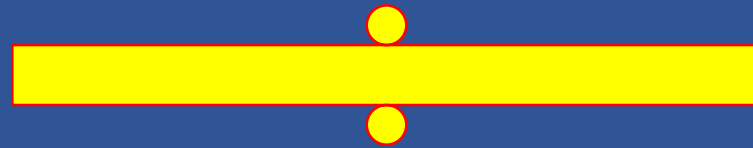
Why does it matter if a statute is divisible

- If the statute is divisible, then you may use the modified categorical approach; that is, you may look at certain underlying documents to determine the elements.



Helpful documents

- Judgment and conviction
- Copy of the statute of conviction
- Jury instructions



- Indictment or other charging documents
- Plea agreement
- Statement of facts
- Plea colloquy



Even if a statute is divisible, the facts are still irrelevant

- Under the modified categorical approach, you only look to the documents to determine which portion of the statute the defendant was convicted of, not to determine what the defendant did.



When a statute is not divisible (i.e., when the statute sets out one offense)

- When a statute lists only one offense, you *do not* look at any supporting documents.

Plea Agreement

Changing Documents

Plea Conference



Jury Instructions



Analyzing an offense under the “Force” clause



Definition for “Crime of Violence” under 4B1.2

- 
- *...has as an element* the use, attempted use, or threatened use of physical force against the person of another, or
- 



Supreme Court Case Involving *Force Clause*¹⁹ of “Violent Felony”

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

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



Four Key Issues to Consider with the Force Clause

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



Most Innocent Conduct

- When determining if an offense requires the use of force, we look to the “minimum conduct necessary” to sustain a conviction under that statute.
- BUT: “such minimum culpable conduct includes any conduct to which there is a “realistic probability, not a theoretical possibility,” that a state would apply the law.”



Analyzing an offense under the “Enumerated” clause



Enumerated Clauses

18 U.S.C. §924 (e)

(B)(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;~~

U.S.S.G. 4B1.2(a)

(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).



Enumerated Offenses

- Just because something is listed as an enumerated offense does not mean a prior offense necessarily meets the definition of crime of violence under §4B1.2.
- Instead, we look to see whether the *elements* of the offense of conviction meet the generic definition for the enumerated offense



Generic Definitions

- Where to find generic definitions of crimes?
 - Model Penal Code
 - Westlaw and case law
 - Guidelines Manual



EXAMPLES

