



Categorical Approach

National Seminar

Baltimore, MD

June 1, 2017



Ten Tips to Remember



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What is the Categorical Approach Anyway?

3

The determination of whether a prior *conviction* (or the instant offense of conviction) meets the criteria of a certain category of offense; *e.g.*, crime of violence or violent felony.



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).



Prior Convictions

2010 conviction for Robbery in DC

2012 conviction for Robbery in DC

2014 conviction Causing Injury to a Child

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



Tip #1:
**No one really knows the
right answer.**



See e.g., Mathis v. United States

Holdings: The Supreme Court, Justice Kagan, held that:

1) a prior conviction does not qualify as the generic form of a predicate violent felony offense listed in the ACCA if an element of the crime of conviction is broader than an element of the generic offense, . . .

Justice Kennedy filed a concurring opinion.

Justice Thomas filed a concurring opinion.

Justice Breyer filed a dissenting opinion, in which Justice Ginsburg joined.

Justice Alito filed a dissenting opinion.



This is hard

- The Categorical Approach is hyper-technical legal analysis
- Categorical approach confuses lawyers
- Judges get reversed on categorical approach cases
- Appellate judges cannot agree on outcome.

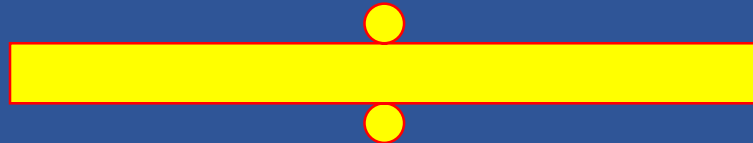


Tip #2:
**Get all the documents you
can find regarding the
prior conviction.**



Helpful documents

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



- Indictment or other charging documents
- Plea agreement



Tip # 3

Make sure you know exactly which statute (and subsection) the defendant pleaded guilty to.



Prior Convictions

2010 conviction for Robbery in DC

2012 conviction for Robbery in DC

2014 conviction Causing Injury to a Child

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



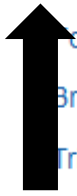
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- + Chapter 15. Out-of-State Witnesses.
- + Chapter 17. Death Penalty. [Repealed]
- + Chapter 19. Crime Victims' Rights.

- Title 24. Prisoners and Their Treatment.

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Chapter 26. Prison Misconduct.

- IV DC Code T. 22, Subt. I, Ch. 26, Refs & Annos
+ Subchapter I. Escape.
+ Subchapter II. Misprisions.
+ Subchapter III. Introduction of Contraband into Penal Institution.

Chapter 27. Prostitution; Pandering.

- + Subchapter I. General.
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Chapter 27A. Protest Targeting a Residence.

- § 22-2751. Definitions.
§ 22-2752. Engaging in an Unlawful Protest Targeting a Residence.

Chapter 28. Robbery.

- § 22-2801. Robbery.
§ 22-2802. Attempt to Commit Robbery.
§ 22-2803. Carjacking.



Chapter 29. Sale of Unwholesome Food. [Repealed]

- § 22-2901. Sale of Unwholesome Food-Prohibited. [Repealed]
§ 22-2902. Sale of Unwholesome Food-"Food" Defined. [Repealed]
§ 22-2903. Sale of Unwholesome Food-Inspection Authorized. [Repealed]
§ 22-2904. Sale of Unwholesome Food-Council to Make Rules and Regulations. [Repealed]
§ 22-2905. Sale of Unwholesome Food-Prosecutions for Violations. [Repealed]
§ 22-2906. Sale of Unwholesome Food-Penalty. [Repealed]
§ 22-2907. Chapter Supplemental to Federal Food, Drug, and Cosmetic Act. [Repealed]

Chapter 30. Sexual Abuse.

- + Subchapter I. General Provisions.
+ Subchapter II. Sex Offenses.
+ Subchapter II-A. Child Sexual Abuse Reporting Requirements.
+ Subchapter III. Admission of Evidence in Sexual Abuse Offense Cases.

Chapter 30A. Non-Consensual Pornography.

§ 22-2801. Robbery.

West's District of Columbia Code Annotated 2001 Edition | Division IV. Criminal Law and Procedure and Prisoners. | Effective: June 11, 2013 (Approx. 2 pages)

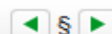
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Title 22. Criminal Offenses and Penalties. (Refs & Annos)
 *Sub*title I. Criminal Offenses.
 *Ch*apter 28. Robbery.

Effective: June 11, 2013

DC ST § 22-2801

Formerly cited as DC ST 1981 § 22-2901

§ 22-2801. Robbery.**Currentness**

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, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than 2 years nor more than 15 years. In addition to any other penalty provided under this section, a person may be fined an amount not more than the amount set forth in § 22-3571.01.

Credits

(Mar. 3, 1901, 31 Stat. 1322, ch. 854, § 810; Dec. 27, 1967, 81 Stat. 737, Pub. L. 90-226, title VI, § 603; June 11, 2013, D.C. Law 19-317, § 303(h), 60 DCR 2064.)

Notes of Decisions (896)**NOTES OF DECISIONS (896)**

Validity

Construction with federal law

Construction and application

Purposes and legislative intent

Common law

Nature and elements of robbery

Degrees, nature and elements of robbery

Intent, nature and elements of robbery

Property subject of robbery, nature and elements of robbery

Taking generally, nature and elements of robbery

Taking from person or presence of another, nature and elements of robbery

Stealth, nature and elements of robbery

Fear, nature and elements of robbery

Force, nature and elements of robbery

Nature and elements of related offenses

Assault with intent to rob, nature and elements of related offenses

Kidnapping, nature and elements of related offenses

Larceny, nature and elements of related offenses

Different offenses in same transaction

Robbery is an enumerated offense

- §4B1.2(a): The term "crime of violence" means
- (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, **robbery**, arson, extortion, . . .

Is that the end of the story?



Tip #4:

Robbery ≠ Robbery



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
 - Guidelines Manual





Enter terms, citations, databases, anything ...

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Looking for this?

- Model Penal Code (Uniform Laws Annotated)
- Model Penal Code: Sentencing
- Model Penal Code: Sentencing Archive

Secondary Sources

- Model Penal Code** REST 3d TORTS-PEH INDEX M160 | 10/27/2016
- Model Penal Code** REST 2d FOREL INDEX M80 | 10/6/2016
- Discussion Of **Model Penal Code: Sentencing** 2003 ALI-PROCEED 202 | 11/17/2015

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- + Article 3. General Principles of Justification
- + Article 4. Responsibility
- + Article 5. Inchoate Crimes
- + Article 6. Authorized Disposition of Offenders
- + Article 7. Authority of Court in Sentencing

Part II. Definition of Specific Crimes

- + Offenses Involving Danger to the Person
- + Offenses Against Property
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- + Offenses Against Public Order and Decency

Part III. Treatment and Correction

- + Article 301. Suspension of Sentence; Probation
- + Article 302. Fines
- + Article 303. Short-Term Imprisonment
- + Article 304. Long-Term Imprisonment
- + Article 305. Release on Parole
- + Article 306. Loss and Restoration of Rights Incident to Conviction or Imprisonment

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Part II. Definition of Specific Crimes

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Offenses Involving Danger to the Person

- Article 210. Criminal Homicide
- Article 211. Assault; Reckless Endangering; Threats
- Article 212. Kidnapping and Related Offenses; Coercion
- Article 213. Sexual Offenses

Offenses Against Property

- Article 220. Arson, Criminal Mischief, and Other Property Destruction
- Article 221. Burglary and Other Criminal Intrusion
- Article 222. Robbery
 - § 222.1. Robbery. 
- Article 223. Theft and Related Offenses
- Article 224. Forgery and Fraudulent Practices

Offenses Against the Family

- Article 230. Offenses Against the Family

Offenses Against Public Administration

- Article 240. Bribery and Corrupt Influence
- Article 241. Perjury and Other Falsification in Official Matters
- Article 242. Obstructing Governmental Operations; Escapes
- Article 243. Abuse of Office

Offenses Against Public Order and Decency

- Article 250. Riot, Disorderly Conduct, and Related Offenses
- Article 251. Public Indecency

§ 222.1. Robbery.

Uniform Model Penal Code | Model Penal Code (Refs & Annos) (Approx. 33 pages)

Document Notes of Decisions (279) History (10) Citing References (497) Context & Analysis (3) Powered by KeyCite

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Offenses Against Property
Article 222. Robbery

Model Penal Code § 222.1

§ 222.1. Robbery.

Currentness

(1) **Robbery Defined.** A person is guilty of robbery if, in the course of committing a theft, he:

- (a) inflicts serious bodily injury upon another; or
- (b) threatens another with or purposely puts him in fear of immediate serious bodily injury; or
- (c) commits or threatens immediately to commit any felony of the first or second degree.

An act shall be deemed "in the course of committing a theft" if it occurs in an attempt to commit theft or in flight after the attempt or commission.

(2) **Grading.** Robbery is a felony of the second degree, except that it is a felony of the first degree if in the course of committing the theft the actor attempts to kill anyone, or purposely inflicts or attempts to inflict serious bodily injury.

Editors' Notes

EXPLANATORY NOTE

Article 222 contains the single offense of robbery, defined to include specified aggravated behavior occurring "in the course of

Compare elements to elements

- When analyzing a statute under the enumerated clause, compare the elements of the generic definition with the elements of the prior conviction



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
- *D.C. 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



Definition of Crime of Violence

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



What about facts?

- Police Report
- “ On July 15, 2010 at 10:01pm Mr. Jones approached Victim #1 on the street from behind. Mr. Jones punched Victim #1 in the back of Victim #1’s head. Victim #1 fell to the ground, at which point Mr. Jones took Victim #1’s laptop bag and fled. Mr. Jones was quickly apprehended and arrested. When questioned, Mr. Jones admitted that he hit Victim #1 and stole the laptop bag.



What about facts?

- Police Report
- “ On November 15, 2012 at 3:30pm Victim #1 was sitting on a bench with her handbag next to her. At some point, while she was speaking on her cell phone, Mr. Jones approached Victim #1 and took her handbag from the park bench. Victim #1 realized her handbag was stole and called the police. A few moments later, Mr. Jones was apprehended at the park and Victim #1’s credit cards were found in his pocket.



**Tip #5:
Facts do not matter.
At all**



Why?

- We are trying to figure out the statute of conviction, not what the defendant did.
- The categorical approach cares **ONLY** about the *elements* of offense of conviction.
- D.C. Robbery example above:
 - One statute, two different ways the crime was committed.



Tip #6: Facts ≠ 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)



What is an “element?”

- D.C. Robbery:
 - What are the elements of DC Robbery?
 - What does the defendant necessarily have to admit in order to be guilty?



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)



What is a “fact?”

- D.C. Robbery:
 - What are the facts in D.C Robbery ?
 - Do facts matter to determination of guilt?



Facts (means) v. Elements in a Nutshell

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



D.C. Robbery: Facts v. elements

- 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

Is guilty of robbery

*Different offenses or different ways
to commit one offense?*



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.



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



Statute § 351.512: Causing Injury to a Child

(A) Whoever intentionally uses physical force against a child with intent to cause bodily; or

(B) Whoever negligently places a child in an unsafe environment which results in the child suffering bodily injury; or

(C) Whoever otherwise assaults a child, even with minimal force:

Is guilty of a felony in the third degree

*Different offenses or different ways
to commit one offense?*



Tip #7

**Sometimes, you get to
look at the documents.**



When can I use the modified categorical approach? (i.e., “When do I get to look at the documents.”)

- Only use modified categorical approach when the statute is *divisible*; that is, the statute contains different elements that make up different crimes.



When the judgement lists the statute and subsection of conviction, only consider that subsection.

(A) Whoever intentionally uses physical force against a child with intent to cause bodily; or

(B) Whoever negligently places a child in an unsafe environment which results in the child suffering bodily injury; or

(C) Whoever otherwise assaults a child, even with minimal force:

Is guilty of a felony in the third degree



Statute § 351.512: Causing Injury to a Child

(A) Whoever intentionally uses physical force against a child with intent to cause bodily; or

(B) Whoever negligently places a child in an unsafe environment which results in the child suffering bodily injury; or

(C) Whoever otherwise assaults a child, even with minimal force:

Is guilty of a felony in the third degree



Modified categorical approach

- Use the modified categorical approach to determine which elements the defendant was convicted of when the statute is divisible.
- In the example above:
 - Section (A) is possibly a crime of violence
 - Sections (B) and (C) are probably not crimes of violence
- Look at the documents to see which one of the elements the defendant pleaded guilty to.



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.



Tip #8

**Not all documents are
created equal.**



Modified Categorical Approach: Documents

- 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



Shepard Approved Documents

Permitted Documents

- Charging documents**
- Plea agreement
- Plea colloquy
- Jury instructions
- Comparable judicial record

Prohibited Documents

- Police Reports
- Witness statements
- Rap Sheet
- PSR*



Statute is Divisible but *Shepherd* Documents Not Helpful (or Don't Exist)

- 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



Tip # 9

Trying to decide if the statute requires the use of force?

Try these ideas.



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* 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”
3. Requires the use of force, not merely the causation of physical injury***
4. Force must be directed against a person, not property



Least Culpable 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.”



Tip #10

Make lawyers do lawyer work



Questions?

