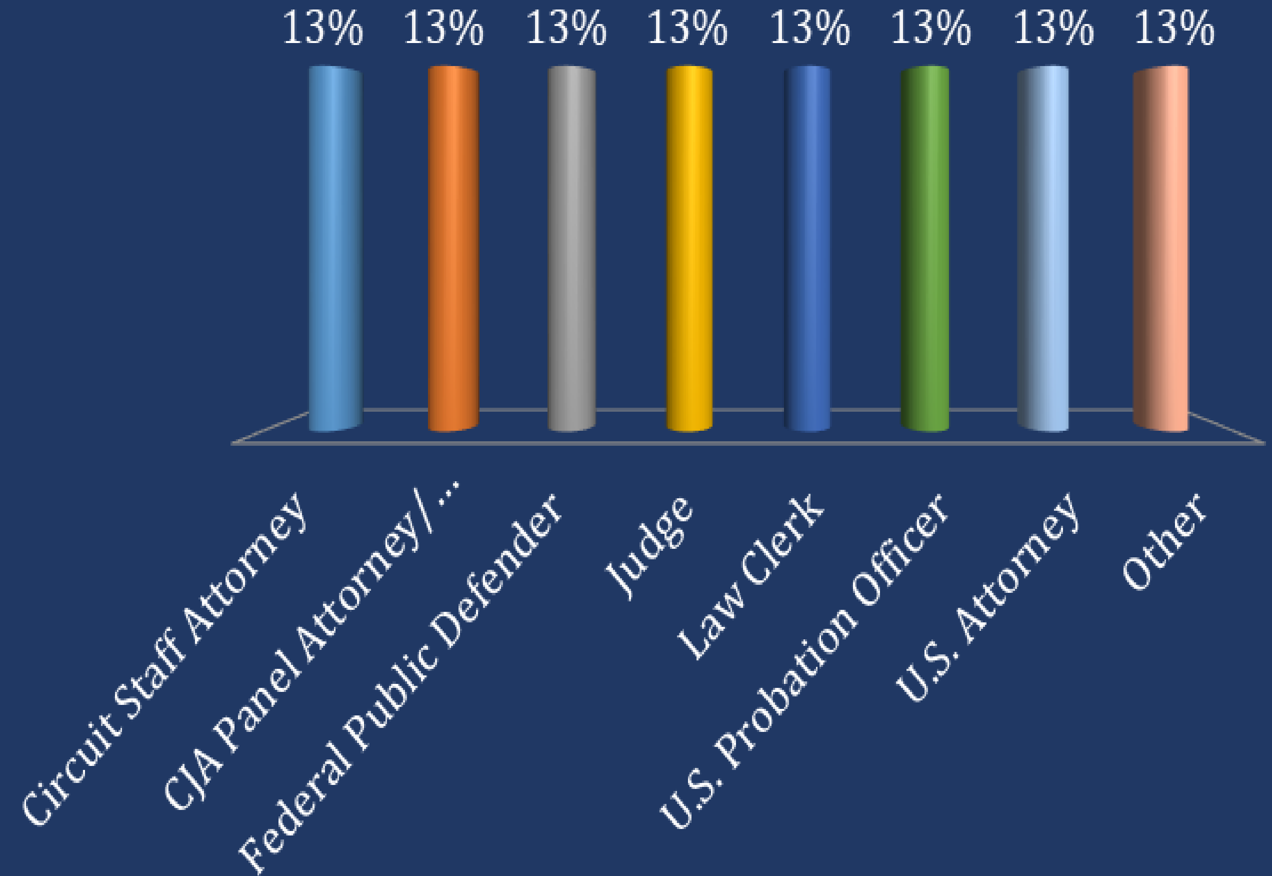
Categorical Approach

Taylor v. U.S., 495 U.S. 575 (1990)

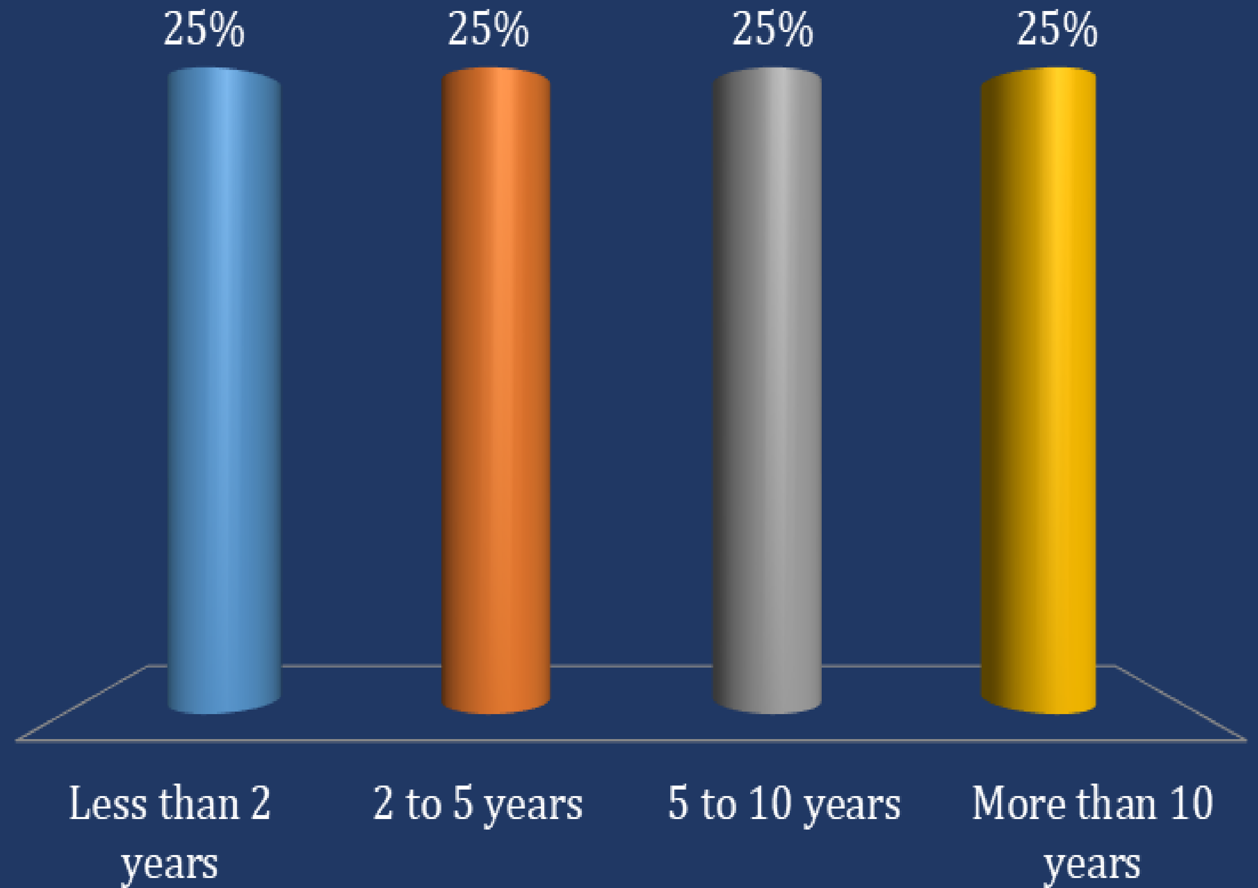
Who's in the audience?

A. Circuit Staff Attorney
B. CJA Panel Attorney/ Private Defense Attorney
C. Federal Public Defender
D. Judge
E. Law Clerk
F. U.S. Probation Officer
G. U.S. Attorney
H. Other



Years of experience with federal sentencing?

A. Less than 2 years
B. 2 to 5 years
C. 5 to 10 years
D. More than 10 years



Questions This Session Hopefully Will Address

- What is the modified categorical approach?
- I was never good at math, why do I need to know about whether something is “divisible”?
- I was terrible at science, why do I need to know about “elements”?
- The defendant admitted pointing a gun at a person, how is this offense not a crime of violence?
- Do I really have to listen to this accent for another hour and twenty eight minutes
- What time is lunch so I can get a drink because my head is now spinning?

What is the Categorical Approach Generally?

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

When to use Categorical Approach

- Whether a prior conviction is a crime of violence or violent felony (*e.g.*, §§2K2.1 & 4B1.2, 18 U.S.C. § 924(c), ACCA))
- Whether a prior conviction is a controlled substance offense or serious drug trafficking offenses (§4B1.2, ACCA)
- Whether a prior conviction is a prior sex offense (*e.g.*, § 2251(e))
- Whether a prior conviction is a Tier III, II, or I under SORNA

Example: Career Offender Guideline

- Defendant is convicted of armed bank robbery (18 U.S.C. § 2113(a)&(d))

- The defendant has three prior convictions:
  - CA Aggravated Assault
  - Texas Injury to a Child
  - D.C. Robbery

- Does this defendant have two prior crimes of violence to qualify as a career offender at §4B1.2

Example: §2K2.1 (Felon in Possession)

- Defendant convicted of felon-in-possession (§ 922(g))
- Defendant has 2 prior convictions:
  - Federal Conspiracy to Commit Murder
  - MA Resisting arrest
- §2K2.1 Base Offense Level
  - (2) 24, if the defendant has two prior felony crimes of violence or a controlled substance offense;
  - (4) 20, if the defendant has one prior felony crime of violence or a controlled substance offense;

Example: ACCA

- Defendant is convicted of felon-in-possession (§ 922(g))

- If defendant has 3 or more violent felonies or serious drug trafficking offenses, he qualifies under ACCA

- Defendant has 3 prior convictions:
  - MA Armed Robbery
  - AZ Armed Robbery
  - OK Pointing a Firearm

Steps

- When looking at type or nature of offense, you must determine what is offense of conviction
- Get the statute of conviction at time of plea/trial
- Determine exact part of statute if multiple phrases
- Determine if using elements or enumerated sections

Determining Nature of a Prior Conviction

- “The Categorical Approach”
- “The Modified Categorical Approach” (Limited Circumstances)

ACCA and Categorical Approach Comments

- “This is an ACCA “violent felony” issue case. So here we go down the rabbit hole again to a realm where we must close our eyes as judges to what we know as men and women. It is a pretend place in which a crime that the defendant committed violently is transformed into a non-violent one because other defendants at other times may have been convicted, or future defendants could be convicted, of violating the same statute without violence. Curiouser and curiouser it has all become, as the holding we must enter in this case shows. Still we are required to follow the rabbit.”
    - Chief Judge Carnes, *U.S. v. Davis*, 875 F.3d 592 (11th Circuit 2017)

ACCA and Categorical Approach View

- "It has embraced the principle that law must of necessity be counterintuitive, that the straightforward must yield to the convoluted, and that the obscure must supersede the obvious, as though clouds had been summoned to hide the sun.
- And this, finally, is what we have come to: plotting to murder one's fellow human beings is not a crime of violence. Heaven help us."
  - Judge Wilkinson, *U.S. v. McCollum*, 885 F.3d 300 (4th Cir. 2018) (dissent)

Categorical Approach View

- "Were I a poet, I would opine that the "categorical approach" is an albatross hung round my neck. But were this "bird" really dead, I would feel no guilt for having killed it.
- "The Majority's preferred approach would have sentencing judges "ignore facts already known and instead proceed with eyes shut." That willful blindness—which may allow violent offenders to evade accountability—has been lambasted before and I do so again today. If the albatross around my neck cannot be slayed, I will at least have the noose around its neck tightened."
  - Judge Roth, *U.S. v. Lewis*, (3d Cir. 2018) (concurring)

Categorical Approach View

- "I continue to urge the Commission to simplify the Guidelines to avoid the frequent sentencing adventures more complicated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls."
  - Judge Owens, *U.S. v. Perez-Silvan,* 861 F.3d 935 (9th Cir. 2017) (describing the categorical approach)

"Offenses to Examine Closely"

- Aggravated Assault
- Shooting at Buildings
- Sexual Offenses
- Drug trafficking
- Robbery
- Forget the above list: "Just research every offense"

Categorical Approach

- ***Only the elements of the offense of conviction can be considered***
  - **Do not** rely on the title of the statute
  - **Do not** look to the facts of the specific case
  - It is all about the offense of conviction

Categorical Approach

- *U.S. v. Hill,* -F.3d-, 2018 WL 2122417 (2d Cir. 2018)
  - "As relevant here, the categorical approach requires us to consider the minimum conduct necessary for a conviction of the predicate offense and then to consider whether such conduct amounts to a crime of violence . . ."

What is the Modified Categorical Approach?

- Modified Categorical Approach
  - Permits a court to look at a limited class of documents from the record of a prior conviction to determine what crime, with what elements, a defendant was convicted of
  - Can only be used in limited circumstances (*i.e.*, when statute is divisible)

Modified Categorical Approach

- When does the modified categorical approach apply?

- Two questions:
  - 1) Does the statute contain multiple phrases?
  - 2) If the statute contains multiple phrases, are those phrases elements or means?

- If statute contains multiple elements, then it is divisible.

Example

- Texas 22.01(a)(1) Aggravated Assault
  - “Intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse ... [and] the offense is committed against ... a person [who is a family member or has another defined relationship with the defendant] ... [and] the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth.

Divisible?

Divisible Views in *Mathis*

- "This threshold inquiry—elements or means?—is easy in this case, as it will be in many others. Here, a state court decision definitively answers the question."
  - Justice Kagan
- "Now the Court tells them they must decide whether entering or remaining in a building is an "element" of committing a crime or merely a "means" of doing so. I wish them good luck."
  - Justice Alito Dissent

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, see and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty.”

How is an element different from a fact/mean?

- "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)

Facts (means) v. Elements in a Nutshell

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

    OR
  - Different offenses (elements)?

Tools to Use in Deciding Whether Elements or Means

1. Statute on its face will provide the answer (*e.g.*, different punishments)

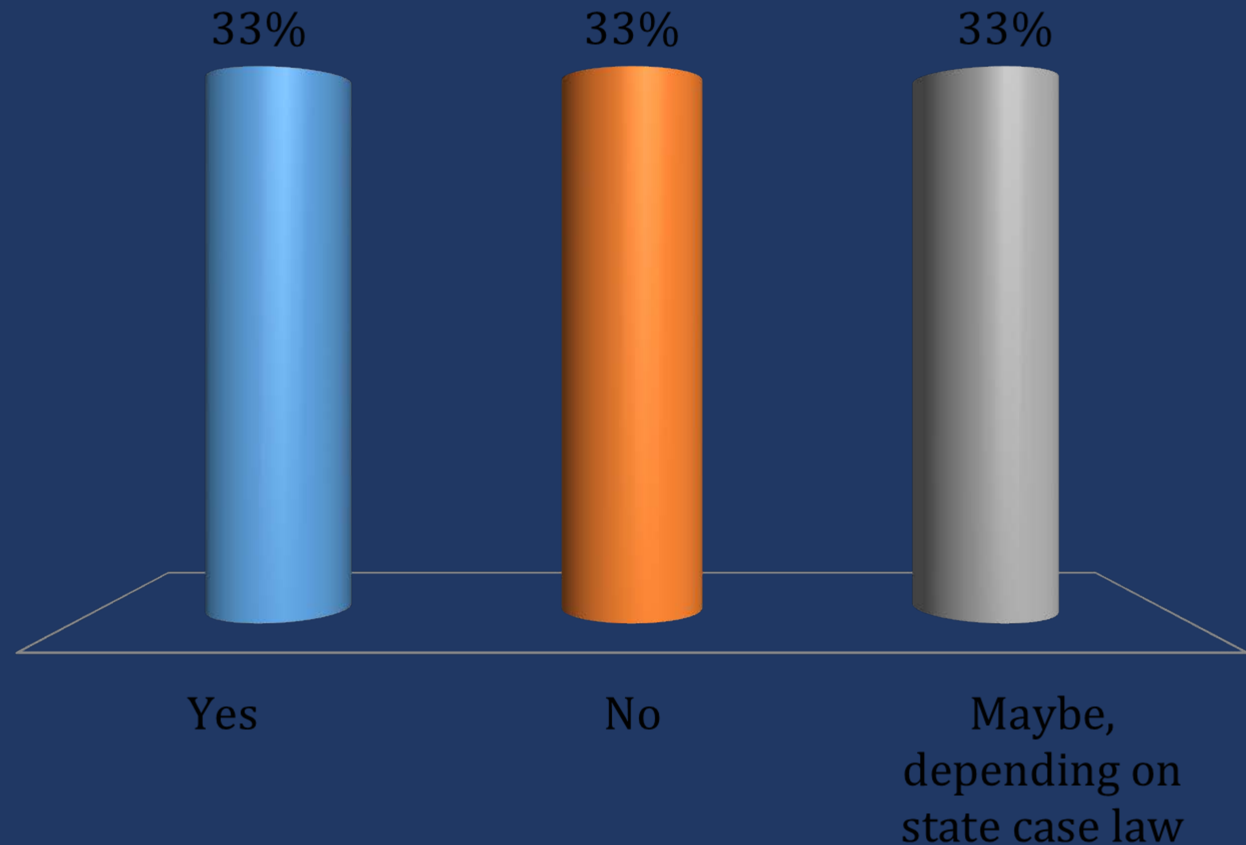
2. State court decisions may answer the question (*e.g.*, state supreme court cases)

3. Record of a prior conviction itself ("Peek at the records")

U.S. v. Mathis, 136 S. Ct. 2243 (2016)

Is this a divisible statute?

A. Yes
B. No
C. Maybe, depending on state case law



Different Punishments

- *U.S. v. Covington*, 880 F.3d 129 (4th Cir. 2018)
  - "It is clear that the West Virginia statute in question is divisible in that it lists two separate crimes with different elements and punishments."

Different Punishments

- *U.S. v. Perez-Silvan*, 861 F.3d 935 (9th Cir. 2017)
  - "At the time of Perez–Silvan's conviction, Tennessee Code Annotated § 39–13–102(d)(1) provided that an "[a]ggravated assault under subdivision (a)(1) ... is a Class C felony," while "[a]ggravated assault under (a)(2) is a Class D felony."
  - "Thus, because (a)(1) and (a)(2) carry different penalties, they necessarily contain distinct elements, rather than alternative means of committing aggravated assault. Thus, under *Mathis*, § 39–13–102(a) is divisible into two crimes: aggravated assault in violation of (a)(1) and aggravated assault in violation of (a)(2)."

Tools to Use in Deciding Whether Elements or Means

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U.S. v. Mathis, 136 S. Ct. 2243 (2016)

Example

- Texas 22.01(a)(1) Aggravated Assault
  - "Intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse ... [and] the offense is committed against ... a person [who is a family member or has another defined relationship with the defendant] ... [and] the offense is committed by intentionally, knowingly, or recklessly impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth.

Divisible

- *U.S. v. Howell,* 838 F.3d 489 (5th Cir. 2016)
  - "In light of *Mathis*, we know that we must determine whether "listed items" in a state statute "are elements or means," and if "a state court decision definitively answers the question" our inquiry is at an end."
  - "The Texas Court of Criminal Appeals has held that the three mental states listed in section 22.01(a) do not describe three distinct offenses."

Divisible

- *U.S. v. Howell,* 838 F.3d 489 (5th Cir. 2016)
  - "This means that the offense for which Howell was convicted is not divisible on the basis of a defendant's mental state. A jury could permissibly find a defendant guilty even though some jurors might conclude the accused acted 'intentionally,' others might conclude that the accused acted 'knowingly,' and others might find only that the accused acted 'recklessly,' as long as the jury found that the accused 'intentionally, knowingly, or recklessly imped[ed] the normal breathing or circulation of the blood of the person' assaulted."

Example

- **Texas Injury to a Child: § 22.04**
  - (a) A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child, elderly individual, or disabled individual:

    (1) serious bodily injury;
    (2) serious mental deficiency, impairment, or injury; or
    (3) bodily injury

State Court Decisions

- *U.S. v. Martinez-Rodriguez*, 857 F.3d 282 (5th Cir. 2017)
  - "We find that the Texas Court of Criminal Appeals has answered this precise question by concluding that the Texas Legislature intended the 'act or omission' language in § 22.04(a) to 'constitute the **means** of committing the course of conduct element of injury to a child' rather than elements of the offense about which a jury must be unanimous. *Jefferson v. State*, 189 S.W.3d 305 (Tex. Crim. App. 2006)."

State Court Decisions

- *U.S. v. Ford,* 888 F.3d 922 (8th Cir. 2018)
  - "Reference to Iowa state court cases confirms that the drug at issue is an element given in jury instructions, showing that it must be proven to sustain a conviction."

State Court Decisions

- *U.S. v. Deshazior*, 882 F.3d 1352 (11th Cir. 2018)
  - "Florida courts have treated the various sections of § 794.011 as distinct crimes with different elements, and the Florida Standard Jury Instructions provide different instructions for the different sections of § 794.011. *See Gould v. State*, 577 So.2d 1302 (Fla. 1991); Fla. Std. Jury Instr. 11.1–11.6(a) (1989)."
  - "Accordingly, § 794.011 essentially defines "multiple crimes" and is divisible."

Tools to Use in Deciding Whether Elements or Means

1. Statute on its face will provide the answer (*e.g.*, different punishments)

2. State court decisions may answer the question (*e.g.*, state supreme court cases)

3. Record of a prior conviction itself ("Peek at the records")

Jury Instructions

- *U.S. v. Murillo-Alvarado,* 876 F.3d 1022 (9th Cir. 2017)
  - “The jury instructions for section 11351 “require a jury to fill in a blank identifying ‘a controlled substance’—i.e., only one—demonstrating that the jury identify and unanimously agree on a particular controlled substance.” see Judicial Council of California Criminal Jury Instructions CALCRIM No. 2302 (2017 edition). The jury instructions thus treat the particular controlled substance as an element, not a means.”

"Peek at the Record"

- "Because these authoritative sources fail to provide an answer, we are allowed a "peek" at "the record of the prior conviction itself ... for the sole and limited purpose of determining whether [the listed items are] element[s] of the offense." We have in our record indictments from two of Kinney's prior convictions, and each charges Kinney with burgling "a building or occupied structure."
  - *U.S. v. Kinney*, 888 F.3d 360 (8th Cir. 2018)

"Peek at the record"

- "The indictments "thus reiterat[e] all the terms of [North Dakota's] law," and "[t]hat is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt." Given that the alternatives are means, the statute is indivisible. Because the statute is both overbroad and indivisible, Kinney's prior convictions cannot serve as predicate felonies under the ACCA."
  - *U.S. v. Kinney*, 888 F.3d 360 (8th Cir. 2018)

"Peek at the Record"

- "If an indictment or jury instruction includes the statute's alternative terms, "[t]hat is as clear an indication as any that each alternative is only a possible means of commission, not an element."

- "Conversely, an indictment ... could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime
  - *U.S. v. Titties*, 852 F.3d 1257 (10th Cir. 2017)
  - *U.S. v. Degare*, 884 F.3d 1241 (10th Cir. 2018)

"Peek at the Record"

- "Richardson's burglary indictments charge him with burglarizing "the dwelling house of another," (R. 35-1, PID 135), "a building, to wit: [a café,]" (id. at 139), and "the dwelling house of another,". Each indictment references only one of the several alternative locations listed in Georgia's burglary statute. This supports the government's argument (and Gundy's holding) that the alternative locations are elements and the statute is divisible as to the locations that can be burglarized."
  - *Richardson v. U.S.*, -F.3d-, 2018 WL 2207241 (6th Cir. 2018)

What if unsure?

- “We can't be more certain than not that § 888(B) is divisible. And that means the district court erred in applying the modified categorical approach.”
  - *U.S. v. Degeare,* 884 F.3d 1241 (10th Cir. 2018)

Divisibility Cases

- *U.S. v. Faust,* 853 F.3d 39 (1st Cir. 2017)
  - MA ABPO is divisible between reckless and intentional form
- *Stuckey v. U.S.*, 878 F.3d 62 (2d Cir. 2017)
  - NY first-degree robbery is divisible
- *U.S. v. Steiner,* 847 F.3d 103 (3d Cir. 2017)
  - PA burglary is not divisible
- *U.S. v. Diaz,* 865 F.3d 168 (4th Cir. 2017)
  - Fed Interference with flight crew is not divisible

Divisibility Cases

- *U.S. v. Herrold,* 883 F.3d 517 (5th Cir. 2018) (*en banc*)
  - Texas Burglary 30.02 is not divisible
- *U.S. v. Perez,* 885 F.3d 984 (6th Cir. 2018)
  - NY robbery in the second degree is divisible
- *U.S. v. Franklin,* 884 F.3d 331 (7th Cir. 2018)
  - WI burglary is divisible
- *U.S. v. Kinney*, 888 F.3d 360 (8th Cir. 2018)
  - ND burglary is not divisible

Divisibility Cases

- *U.S. v. Murillo-Alvarado,* 876 F.3d 1022 (9th Cir. 2017)
  - CA possession or purchase for sale divisible
- *U.S. v. Degare,* 884 F.3d 1241 (10th Cir. 2018)
  - OK forcible sodomy is not divisible in this case
- *U.S. v. Deshazior,* 882 F.3d 1352 (11th Cir. 2018)
  - SC Burglary is not divisible
- *U.S. v. Sheffield,* 832 F.3d 296 (D.C. Cir. 2016)
  - DC attempted robbery is not divisible

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 ("*Shepard* 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*

Shepard Documents

- *U.S. v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017)
  - "This case, the district court properly examined the plea colloquy in which Martinez-Lopez was asked, "[O]n or about December 31st, 1997, [did] you ... sell cocaine base—.42 grams of cocaine base?" He responded, "Yes." Based on this exchange, we can say—with the certainty that Taylor demands—that Martinez-Lopez's 1998 conviction under section 11352 was for selling cocaine."

Shepard Documents

- *U.S. v. Murillo-Alvarado,* 876 F.3d 1022 (9th Cir. 2017)
  - Government provided reliable documents that clearly specified that defendant pled guilty to count 1 of the information.
  - "The guilty plea form stated that Murillo-Alvarado pled guilty to count '1 of the information.' The form further specified that count 1 was for a violation of 'H & S 11351.' Likewise, the court's minute order reflected that Murillo-Alvarado pled guilty to '11351 HS as charged in count 1' of the "[o]riginal information." The abstract of judgment stated that Murillo-Alvarado pled guilty to count '1A' for violating 'HS'."

Determining if an offense is a Crime of Violence or a Violent Felony

Example: Career Offender Guideline

- Defendant is convicted of armed bank robbery (18 USC § 2113(a)&(d))
- The defendant has three prior convictions:
  - CA Aggravated Assault
  - Texas Injury to a Child
  - D.C. Robbery
- The defendant might be a career offender under §4B1.1 if his instant offense is a crime of violence and two of his prior convictions are crimes of violence

Crime of Violence Definition (§4B1.2)

- Means any offense under federal or state law punishable by imprisonment for a term exceeding one year that –
  - has as an element the use, attempted use, or threatened use of physical force against the person of another, or
  - 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)

Example: ACCA

- Defendant is convicted of felon-in-possession (18 U.S.C. § 922(g)

- If defendant has 3 or more violent felonies or serious drug trafficking offenses, he qualifies under ACCA

- Defendant has 3 prior convictions:
  - MA Armed Robbery
  - AZ Armed Robbery
  - OK Pointing a Firearm

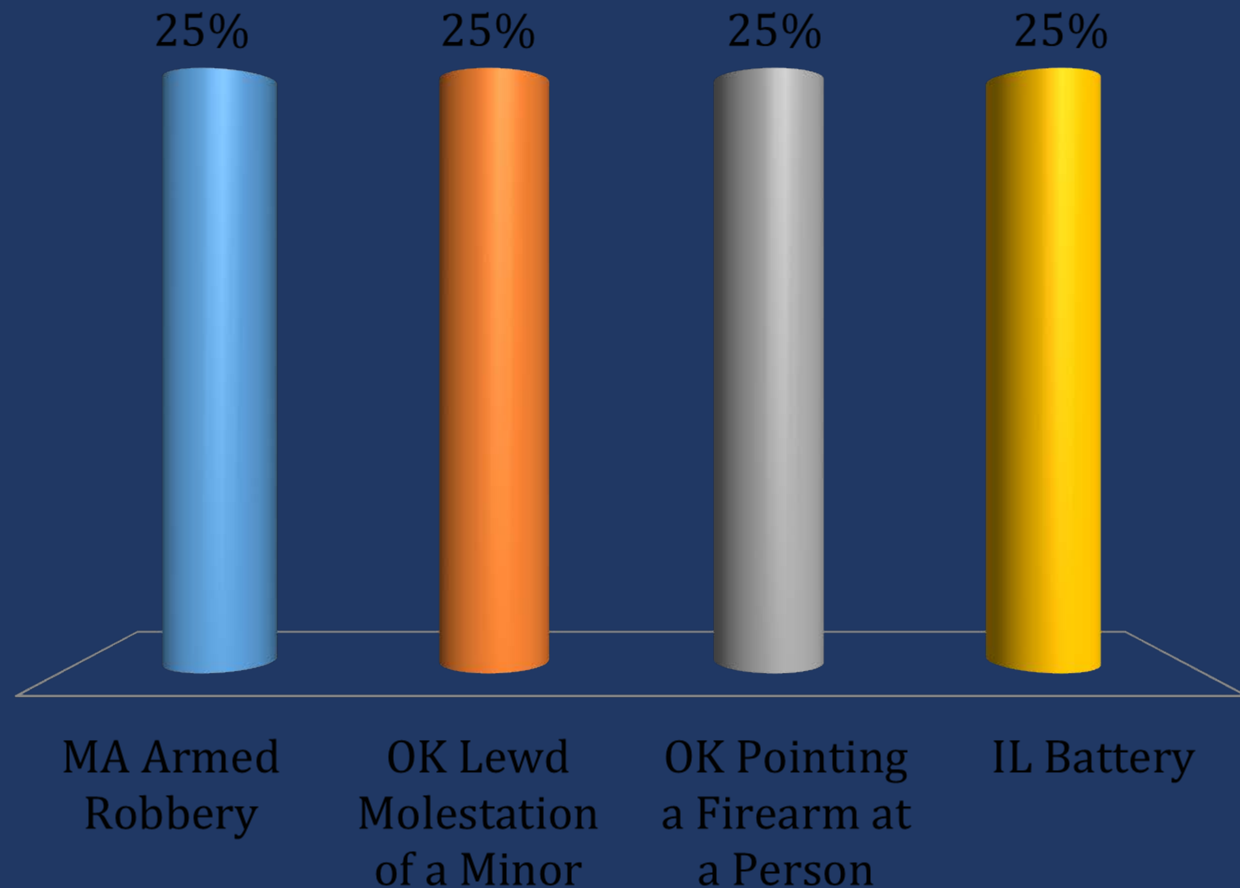
Definition for "Violent Felony"

18 U.S.C. § 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

Which offense has a circuit held is a VF under the ACCA?

A. MA Armed Robbery
B. OK Lewd Molestation of a Minor
C. OK Pointing a Firearm at a Person
D. IL Battery



Use of Force

Crime of Violence Definition (§4B1.2)

- Means any offense under federal or state law punishable by imprisonment for a term exceeding one year that –
  - has as an element the use, attempted use, or threatened use of physical force against the person of another, or
  - 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)

EXAMPLE: ACCA
Definition for "Violent Felony"

18 U.S.C. § 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

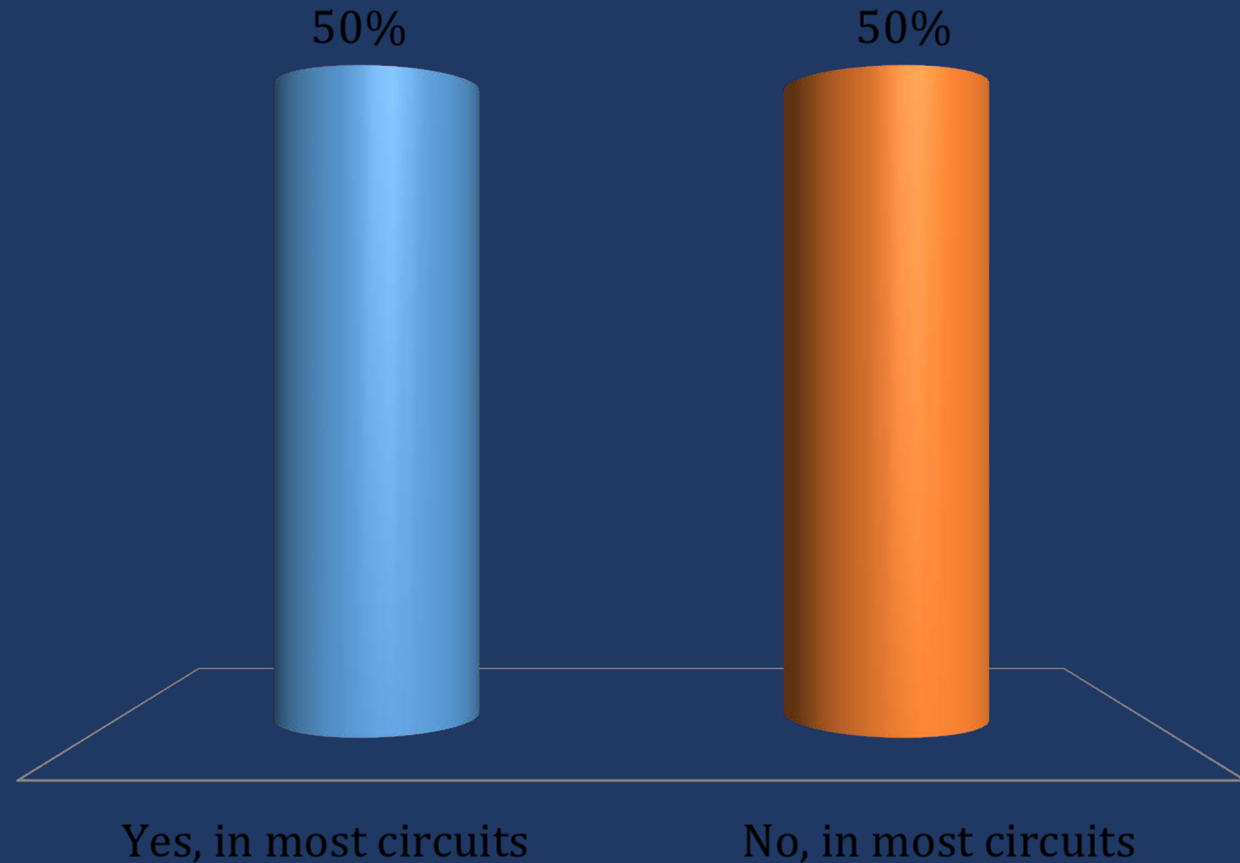
Supreme Court Case Involving *Force Clause* of "Violent Felony"

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
- More than *de minimis* force

Is poising someone, conduct that could fall under the force clause?

A. Yes, in most circuits
B. No, in most circuits



Use of Force

- "A defendant uses physical force whenever his volitional act sets into motion a series of events that results in the application of a force capable of causing physical pain or injury to another person."
  - *U.S. v. Castleman,* 134 S. Ct. 1405 (2014)

Use of Force

- When a statute requires the use of force "capable of causing physical pain or injury to another person," whether that use of force "occurs indirectly, rather than directly (as with a kick or punch), does not matter."

- "Poisoning someone, "sloshing" bleach in a victim's face, or saying the word "sic" to a dog may not involve the direct application of violent force. However, neither does pulling the trigger of a gun. Instead, in each instance, the actor knowingly employs a device to indirectly cause physical harm—from a bullet, a dog bite, or a chemical reaction."
    - *U.S. v. Deshazior,* 882 F.3d 1352 (11th Cir. 2018)

Does *Castleman* applies to VF or COV

YES

- *U.S. v. Hill*, -F.3d-, 2018 WL 2122417(2d Cir. 2018)
- *U.S. v. Chapman*, 866 F.3d 129 (3d Cir. 2017)
- *In re Irby*, 858 F.3d 231 (4th Cir. 2017)
- *U.S. v. Verwiebe,* 874 F.3d 258 (6th Cir. 2018)
- *Hill v. U.S.*, 877 F.3d 717 (7th Cir. 2017)
- *U.S. v. Rice*, 813 F.3d 704 (8th Cir. 2016)
- *U.S. v. Calvillo*-Palacios, 860 F.3d 1285 (9th Cir. 2017)
- *U.S. v. Benton,* 876 F.3d 1260 (10th Cir. 2017)
- *U.S. v. Deshazior,* 882 F.3d 1352 (11th Cir. 2018)

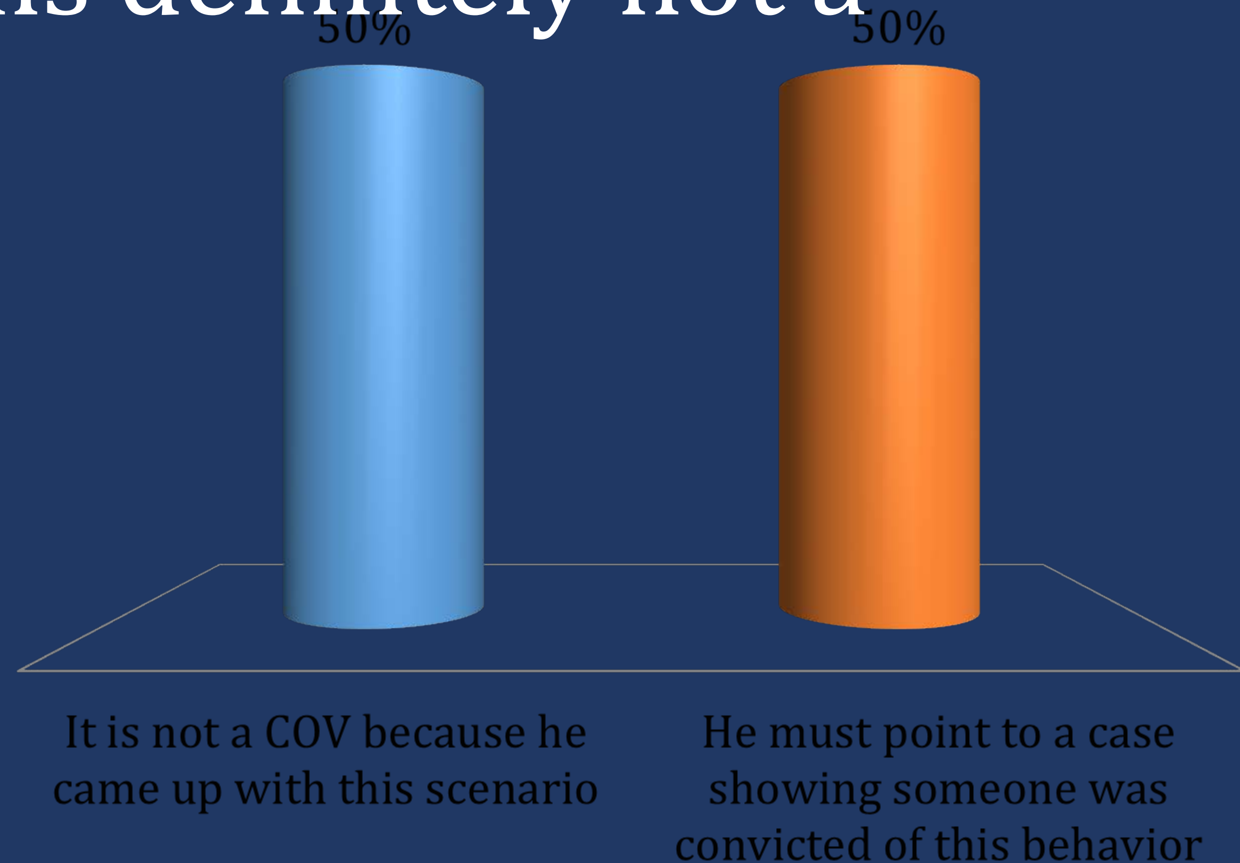
NO

- *U.S. v. Reyes-Contreras,* 882 F.3d 113 (5th Cir. 2018

Scenario 2: Now that the defendant has come up with a scenario that likely does not involve force, is this definitely not a crime of violence?

A. It is not a COV because he came up with this scenario

B. He must point to a case showing someone was convicted of this behavior



Realistic Probability

- When construing the minimum culpable conduct required for a conviction, "such conduct only includes that in which there is a 'realistic probability, not a theoretical possibility' the state statute would apply."

- State supreme court decisions provide the best indication of a 'realistic probability,' supplemented by decisions from the intermediate-appellate courts."
    - *U.S. v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017)

Realistic Probability

- "There must be "a realistic probability, not a theoretical possibility," that the statute at issue could be applied to conduct that does not constitute a crime of violence. To show that a particular reading of the statute is realistic, a defendant "must at least point to his own case or other cases in which the ... courts in fact did apply the statute in the ... manner for which he argues."
  - *U.S. v. Hill*, -F.3d-, 2018 WL 2122417 (2d Cir. 2018)

Realistic Probability

- "To our knowledge, there is likewise no case in which tapping, tickling, or lotion-applying—or any remotely similar conduct—has been held to constitute a felony battery under Florida Statute § 784.041."
  - *U.S. v. Vail Bailon,* 868 F.3d 1293 (11th Cir. 2017)

Realistic Probability

- "He theorizes that a person could be convicted of robbery under Indiana law if he "took property from an alektorophobe by showing him chickens, or a pteromerhanophobe by taking him on an airplane."
- "But in applying the categorical approach, we are concerned with the ordinary case, not fringe possibilities."
  - *U.S. v. Duncan,* 833 F.3d 751 (7th Cir. 2016)

“Force” Cases

Attempted Murder

- WA attempted first degree murder is a COV at both 16(a) and §4B1.2
  - *U.S. v. Studhorse,* 883 F.3d 1198 (9th Cir. 2018)

- Iowa attempted murder is a COV under §4B1.2.
  - *U.S. v. Peeples,* 879 F.3d 282 (8th Cir. 2018)

Conspiracy to Commit Murder

- Federal Conspiracy to commit murder in aid of racketeering was not a COV
  - "Because § 1959(a)(5) does not require an overt act, it criminalizes a broader range of conduct than that covered by generic conspiracy. McCollum's § 1959(a)(5) conviction therefore cannot support his enhanced sentence because it is not categorically a crime of violence."
  - *U.S. v. McCollum,* 885 F.3d 300 (4th Cir. 2018)

Voluntary Manslaughter

- NC voluntary manslaughter is a VF
  - *U.S. v. Smith*, 882 F.3d 460 (4th Cir. 2018)
- MO voluntary manslaughter not a COV
  - *U.S. v. Reyes-Contreras*, 882 F.3d 113 (5th Cir. 2018)
- OK manslaughter is a COV
  - *U.S. v. Steward*, 880 F.3d 983 (8th Cir. 2018)

Involuntary Manslaughter

- IL manslaughter is a COV under elements clause
  - *U.S. v. Teague*, 884 F.3d 726 (7th Cir. 2018)

- SC involuntary manslaughter is not a VF
  - *U.S. v. Middleton*, 883 F.3d 485 (4th Cir. 2018)

Robbery Might be a VF or COV

- NC common law robbery is not a VF
  - *U.S. v. Gardner,* 823 F.3d 793 (4th Cir. 2016)

- NC common law robbery is not a COV under force section
  - *U.S. v Gattis*, 877 F.3d 150 (4th Cir. 2018)

- NC robbery with a dangerous weapon (§14-87) is a VF
  - *U.S. v Burns-Johnson*, 864 F.3d 313 (4th Cir. 2017)

Robbery Might be a VF or COV

- OH robbery (2911.02(A)(3)) is not a COV
  - *U.S. v. Yates*, 866 F.3d 723 (6th Cir. 2017)

- OH aggravated robbery (2911.01(A)(1)) is a VF
  - *U.S. v. Patterson*, 853 F.3d 298 (6th Cir. 2017)

Robbery Might be a VF

- FL robbery (812.13(a)) is a VF
  - *U.S. v. Fritts*, 841 F.3d 937 (11th Cir. 2016)

- FL robbery (812.13(a)) is not a VF
  - *U.S. v. Geozos,* 870 F.3d 890 (9th Cir. 2017)

Stokeling v. United States, 684 F. App'x 870 (11th Cir. 2017), *cert. granted*, 2018 WL 1568030 (2018)

- Whether a state robbery offense that includes "as an element" the common law requirement of overcoming "victim resistance" is categorically a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i), when the offense has been specifically interpreted by state appellate courts to require only slight force to overcome resistance.

Robbery Not a VF

- ME robbery not a VF
  - *U.S. v. Mulkern*, 854 F.3d 87 (1st Cir. 2017)
- VA common law robbery not a VF
  - *U.S. v. Winston*, 850 F.3d 677 (4th Cir. 2017)
- AL armed robbery not a VF
  - *U.S. v. Walton*, 881 F.3d 768 (9th Cir. 2018)
- CA second degree robbery not a VF
  - *U.S. v. Walton*, 881 F.3d 768 (9th Cir. 2018)

Robbery

- "The notion that robbery is not a "violent felony," as that term is defined in the Armed Career Criminal Act (ACCA), strikes me as counterintuitive to say the least. Holding that armed robbery doesn't qualify as a violent felony seems even more absurd. But, as the court's opinion persuasively explains, that conclusion is compelled by two oddities of Massachusetts law."
  - *U.S. v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (concurrence by Judge Watford)

Robbery is a VF

- CT first degree robbery is a VF under elements clause
  - *U.S. v. Bordeaux*, 886 F.3d 189 (2d Cir. 2018)
- NY Second degree robbery is divisible and here it was VF
  - *Perez v. U.S.*, 885 F.3d 984 (6th Cir. 2018)
- IL armed robbery is a VF
  - *Shields, v. U.S.*, 885 F.3d 1020 (7th Cir. 2018)
- MN first degree robbery is a VF
  - *U.S. v. Pettis*, -F.3d-, 2018 WL 1972751 (8th Cir. 2018)
- MO second degree robbery is a VF
  - *U.S. v. Swopes*, 886 F.3d 668 (8th Cir. 2018)
- NM robbery (§ 30-16-2) is a VF
  - *U.S. v. Garcia*, 877 F.3d 944 (10th Cir. 2018)

Robbery

- Arizona's armed robbery (§ 13-1904) is not a COV under force section because the statute does not require the defendant "actually use or even threaten to use a weapon" and the offense can be committed with minimal force.
  - *U.S. v. Molinar,* 881 F.3d 1064 (9th Cir. 2017)

- Arizona attempted robbery is a COV under the enumerated section of §4B1.2. While Arizona robbery does not qualify as a crime of violence under the force clause because minimal force can be used in committing the offense, the statute meets the generic definition of robbery.
  - *U.S. v. Molinar,* 881 F.3d 1064 (9th Cir. 2017)

Hobbs Act Robbery is a COV under force

- *U.S. v. Hill*, -F.3d-, 2018 WL 2122417 (2d Cir. 2018)
- *U.S. v. Robinson*, 844 F.3d 137 (3d Cir. 2016)
- *U.S. v. Gooch*, 850 F.3d 285 (6th Cir. 2017)
- *U.S. v. Rivera*, 847 F.3d 847 (7th Cir. 2017)
- *Diaz v. U.S.*, 863 F.3d 781 (8th Cir. 2017)
- *U.S. v. St. Hubert*, 883 F.3d 1319 (11th Cir. 2018)

Sex Abuse

- OK forcible sodomy not a VF
  - *U.S. v. Degeare*, 884 F.3d 1241 (10th Cir. 2018)
- OK lewd molestation is not a COV
  - *U.S. v. Gieswein*, 887 F.3d 1054 (10th Cir. 2017)
- AL Sexual Abuse by Forcible Compulsion is not a VF
  - *U.S. v. Davis*, 875 F.3d 592 (11th Cir. 2017)

Discharging or Pointing a Firearm

- NC assault with a deadly weapon with intent to kill is a VF
  - *U.S. v. Townend*, 886 F3d 441 (4th Cir. 2018)
- IA assault with dangerous weapon on a peace officer is a VF
  - *U.S. v. Ford*, 888 F.3d 922 (8th Cir. 2018)
- NM shooting at or from a motor vehicle is a VF
  - *U.S. v. Pam*, 867 F.3d 1191 (10th Cir. 2017)
- AZ exhibiting deadly weapon is a VF
  - *Boaz v. U.S.*, 884 F.3d 808 (8th Cir. 2018)

Discharging or Pointing a Firearm

- NC discharging a firearm into occupied structure not a VF
  - *Higdon v. U.S.*, 882 F.3d 605 (6th Cir. 2018)
  - *U.S. v. Parral–Dominguez,* 794 F.3d 440 (4th Cir. 2015)

- OK pointing a firearm at another (21 § 1289.16) not a VF
  - *U.S. v. Titties,* 852 F.3d 1257 (10th Cir. 2017)

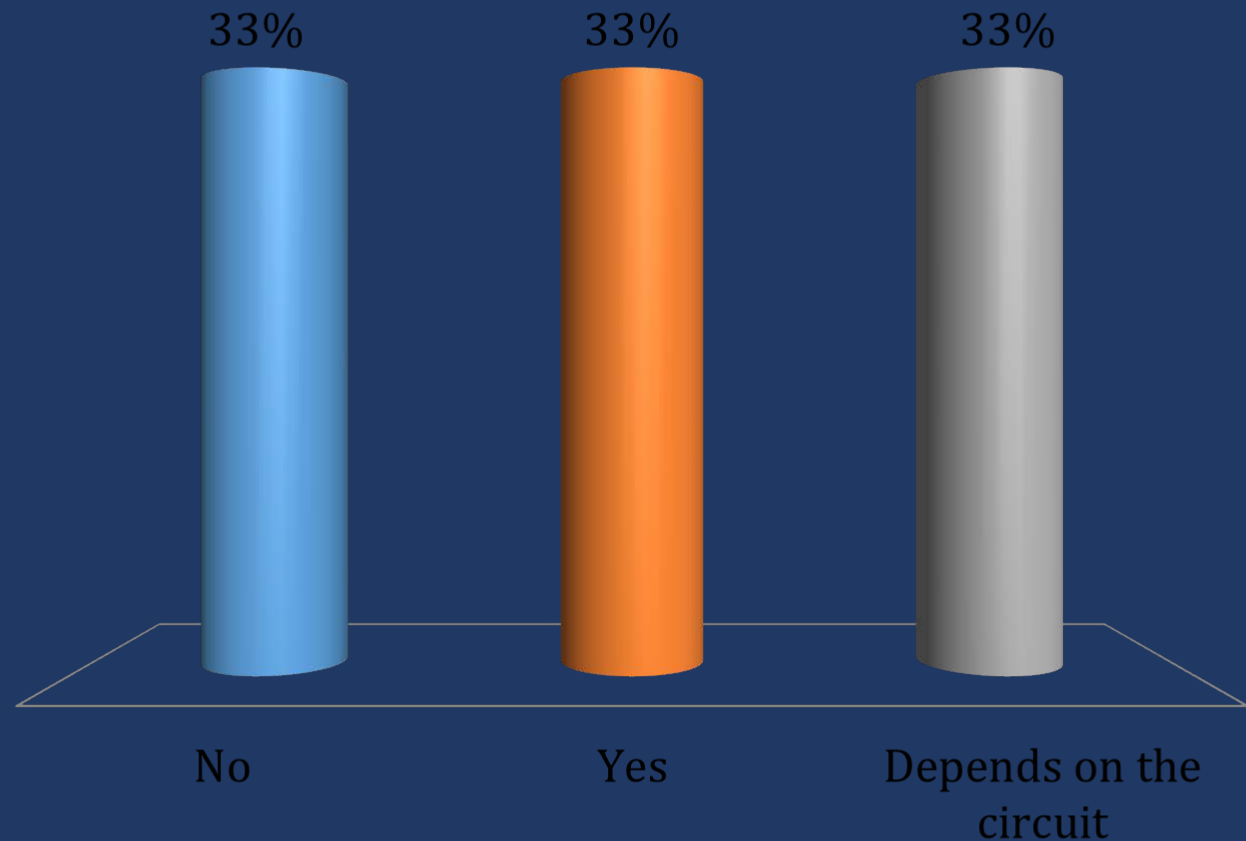
Domestic Violence

- Arkansas aggravated assault on family member was a VF
  - *U.S. v. Pyles*, -F.3d-, 2018 WL 2054907 (8th Cir. 2018)

- MI felony domestic assault is not a COV under the force clause
  - *U.S. v. Morris*, 885 F.3d 405 (6th Cir. 2018)

If a statute only requires a "reckless" mens rea, can it be a crime of violence?

A. No
B. Yes
C. Depends on the circuit



Voisine v. U.S, 136 S. Ct. 2272 (2016)

- Reckless domestic assault qualifies as a "misdemeanor crime of domestic violence" under statute prohibiting possession of a firearm by person convicted of a misdemeanor crime of domestic violence (921(a)(33)(A))

- "Our decision today concerning § 921(a)(33)(A)'s scope does not resolve whether § 16 includes reckless behavior."

Reckless Conduct

Reckless can count as VF or COV

- *U.S. v. Howell*, 838 F.3d 489 (5th Cir. 2016)
- *U.S. v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017)
- *U.S. v. Ramey*, 880 F.3d 447 (8th Cir. 2018)
- *U.S. v. Pam*, 867 F.3d 1191 (10th Cir. 2017)

Reckless not a VF or COV

- *U.S. v. Windley*, 864 F.3d 36 (1st Cir. 2017)
- *U.S. v. Fields*, 863 F.3d 1012 (8th Cir. 2017)

Enumerated Offenses:
Key Point: Titles Mean Nothing

Enumerated Offenses

- §4B1.2
  - 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)
- ACCA
  - is burglary, arson, or extortion, involves use of explosives

Enumerated Offenses

- Title of the Offense Means Nothing

- Instead, 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
  - Guidelines Manual (*e.g.* “forcible sex offense”)
  - Case Law (*e.g.*, burglary)
  - State Surveys

Enumerated

- "The most important factor in defining the generic version of an offense is the approach of the majority of state statutes defining the crime. Affording predominant weight to the majority of states best recognizes that "Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity." While the MPC is a useful starting point, its definition of "robbery" does not supersede the way in which the majority of states have defined that offense."
  - *U.S. v. Graves*, 877 F.3d 494 (3d Cir. 2017)

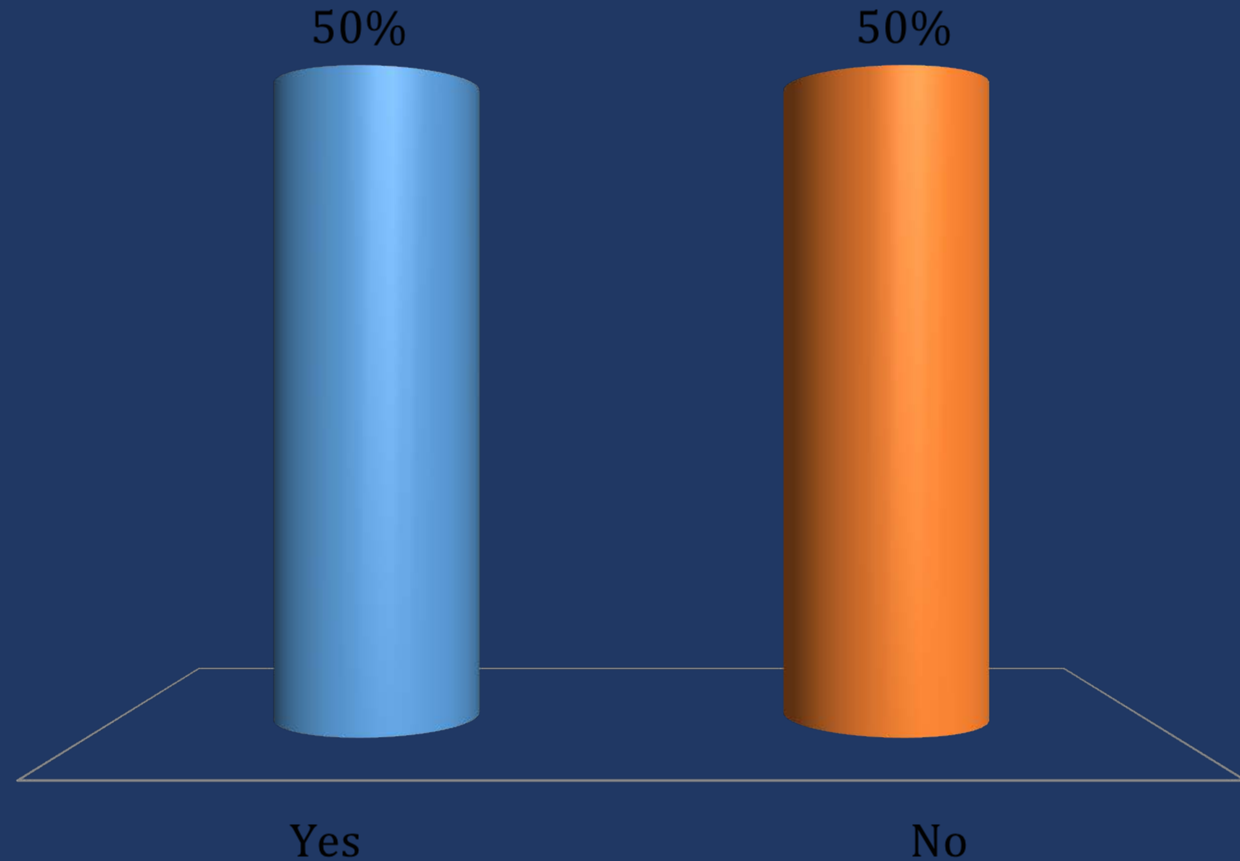
Analysis: *Enumerated Section*

- *Generic form of Robbery in Circuit*
  - Property to be taken from a person or a 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

Does DC robbery meet the generic definition in this circuit?

A. Yes
B. No



Generic Robbery

- “Thus, we hold that for a state crime to be equivalent to generic robbery, it must require property to be taken from a person or a person's presence by means of force or putting in fear.”

- “The generic definition of robbery encompasses not only de minimis force sufficient to compel acquiescence to the taking of or escaping with property, but also the implied threat of force.”

U.S. v. Molinar, 881 F.3d 1064 (9th Cir. 2017)

Generic Robbery

- "Robbery may be thought of as aggravated larceny, containing at least the elements of misappropriation of property under circumstances involving [immediate] danger to the person."
  - *U.S. v. Gattis*, 877 F.3d 150 (4th Cir. 2017)
  - *U.S. v. Montiel-Cortes*, 849 F.3d 221 (5th Cir. 2017)

Generic Burglary

- "Generic burglary means an unlawful or unprivileged entry into or remaining, in a building or other structure, with intent to commit a crime"
  - *Taylor v. U.S.*, 495 U.S. 575 (1990)

Burglary

- TX burglary statute is not a VF
  - *U.S. v. Herrold,* 883 F.3d 517 (5th Cir. 2018) (*en banc*) MN 2nd degree burglary not a VF
  - *Van Cannon v. U.S.*, -F.3d-, 2018 WL 2228251 (7th 2018)
  - *U.S. v. McArthur*, 850 F.3d 925 (8th Cir. 2017)
- OK burglary not a VF
  - *U.S. v. Hamilton*, -F.3d-, 2018 WL 2074632 (10th Cir. 2018)
- MO 2nd degree burglary is not a VF
  - *U.S. v. Naylor*, 887 F.3d 397 (8th Cir. 2018)
- ND burglary is not a VF
  - *U.S. v. Kinney*, 888 F.3d 360 (8th Cir. 2018)

Burglary

- KY second-degree burglary is a VF
  - *U.S. v. Malone,* -F.3d-, 2018 WL 2107179 (6th Cir. 2018)
- IL residential burglary is a VF
  - *Smith v. U.S.*, 877 F.3d 720 (9th Cir. 2018)
- Indiana Class B burglary (§ 35-43-2-1) is a VF
  - *U.S. v. Foster,* 877 F.3d 343 (7th Cir. 2018)
- New Mexico residential burglary (§ 30-16-3) is a VF
  - *U.S. v. Turrietta,* 875 F.3d 1340 (10th Cir. 2018)

U.S. v. Sims, 842 F.3d 1037 (8th Cir. 2017), *cert. granted*, 2018 WL 1901590 (2018) and *U.S. v. Stitt*, 860 F.3d 854 (6th Cir. 2017), *cert. granted*, 2018 WL 1901589 (2018)

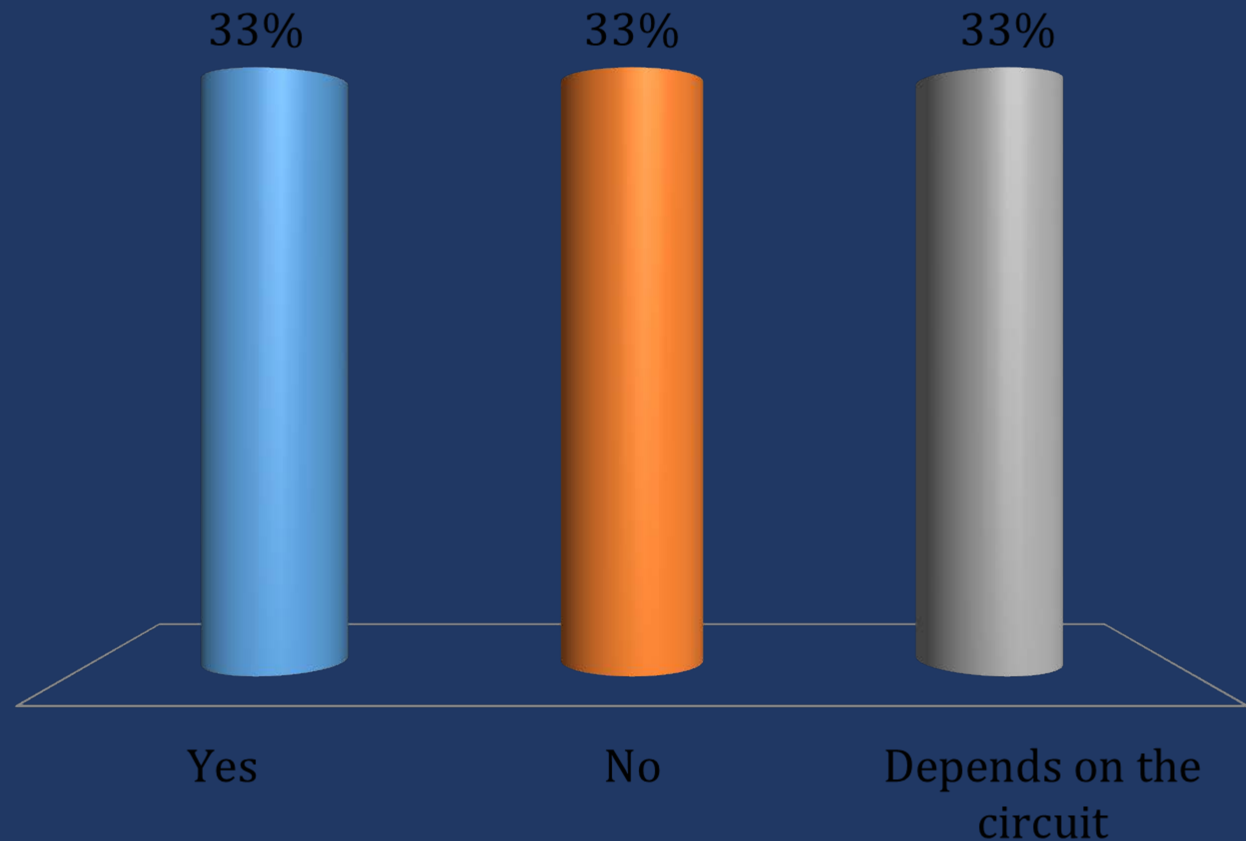
- Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii).

Does this Colorado drug statute qualify as a controlled substance offense under 4B1.2?

A. Yes

B. No

C. Depends on the circuit



Controlled Substance Offense at §4B1.2

- TX delivery of controlled substance not a controlled substance offense because it includes offer to sell drugs
  - *U.S. v. Hinkle,* 832 F.3d 569 (5th Cir. 2016)
- CO unlawful distribution, manufacturing, dispensing, or sale of a controlled substance” not a controlled substance offense because the statute includes “offer to sell drugs”
  - *United States v. McKibbon,* 878 F.3d 967 (10th Cir. 2017)
- KS possession with intent to sell cocaine and marijuana not a controlled substance offense
  - *U.S. v. Madkins,* 866 F.3d 1136 (10th Cir. 2017)

Controlled Substance Offense at §4B1.2

- Illinois delivery of a controlled substance (§ 720 ILC 570) meets the definition of controlled substance at §4B1.2 because the statute does not include offers to sell drugs.
  - *U.S. v. Redden,* 875 F.3d 374 (7th Cir. 2017)

- MO sale of controlled substance and possession with intent to deliver imitation controlled substances qualified as controlled substances under 4B1.2. Under Missouri law, an "offer therefor" is at least an attempt to distribute a controlled substance.
  - *U.S. v. Thomas,* 886 F.3d 1274 (8th Cir. 2018)

Categorical Tips

- Facts do not matter for the categorical or modified categorical approach
- Title of statute does not matter
- Under the modified categorical approach, you can only examine certain documents

Categorical Tips

- Force must be capable of causing physical pain or injury, not *de minimis* force
- Even if statute contains the word "force", it might not be a crime of violence or violent felony
- While you cannot "use facts" under the categorical approach, can "use facts" for a departure or variance.