Categorical Approach

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

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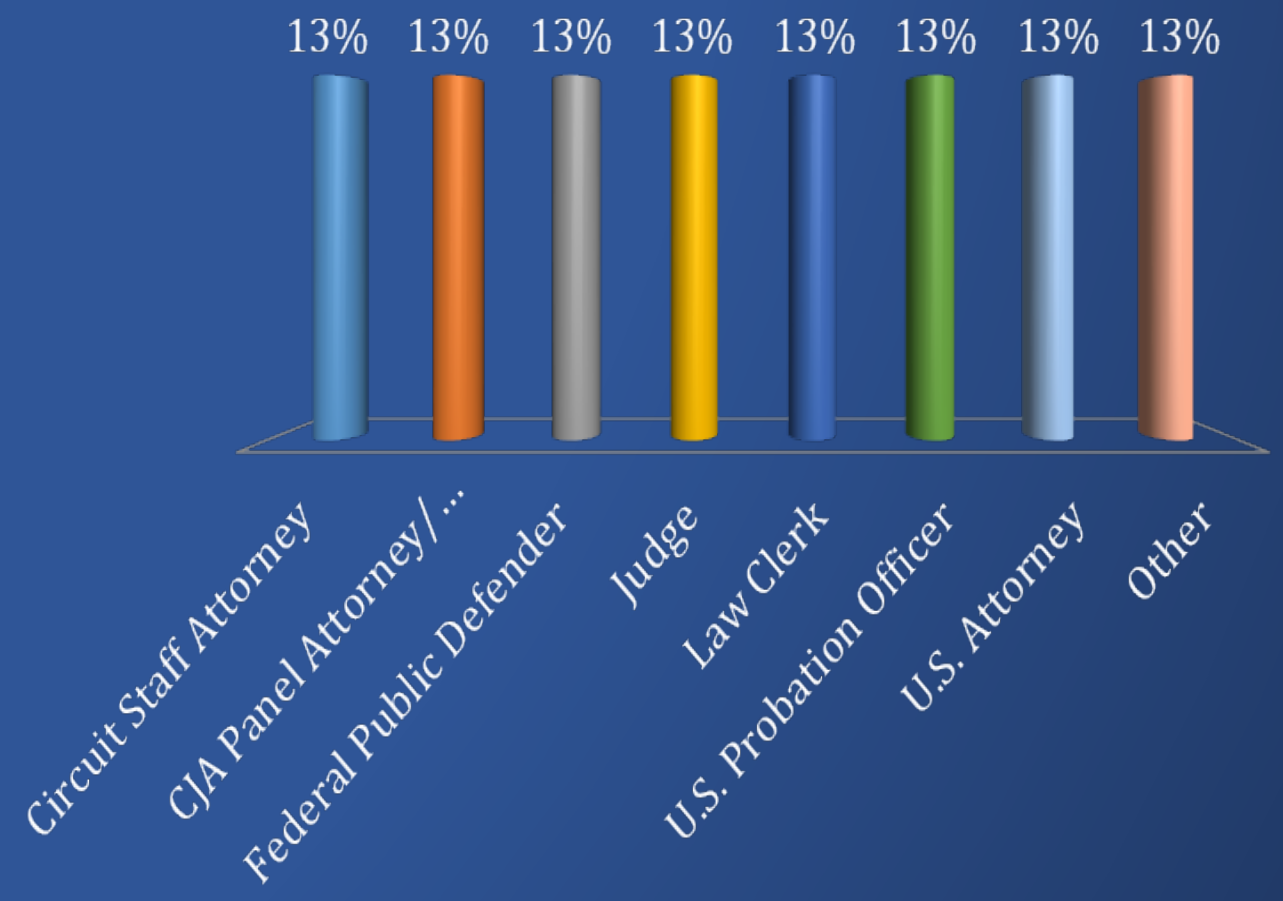
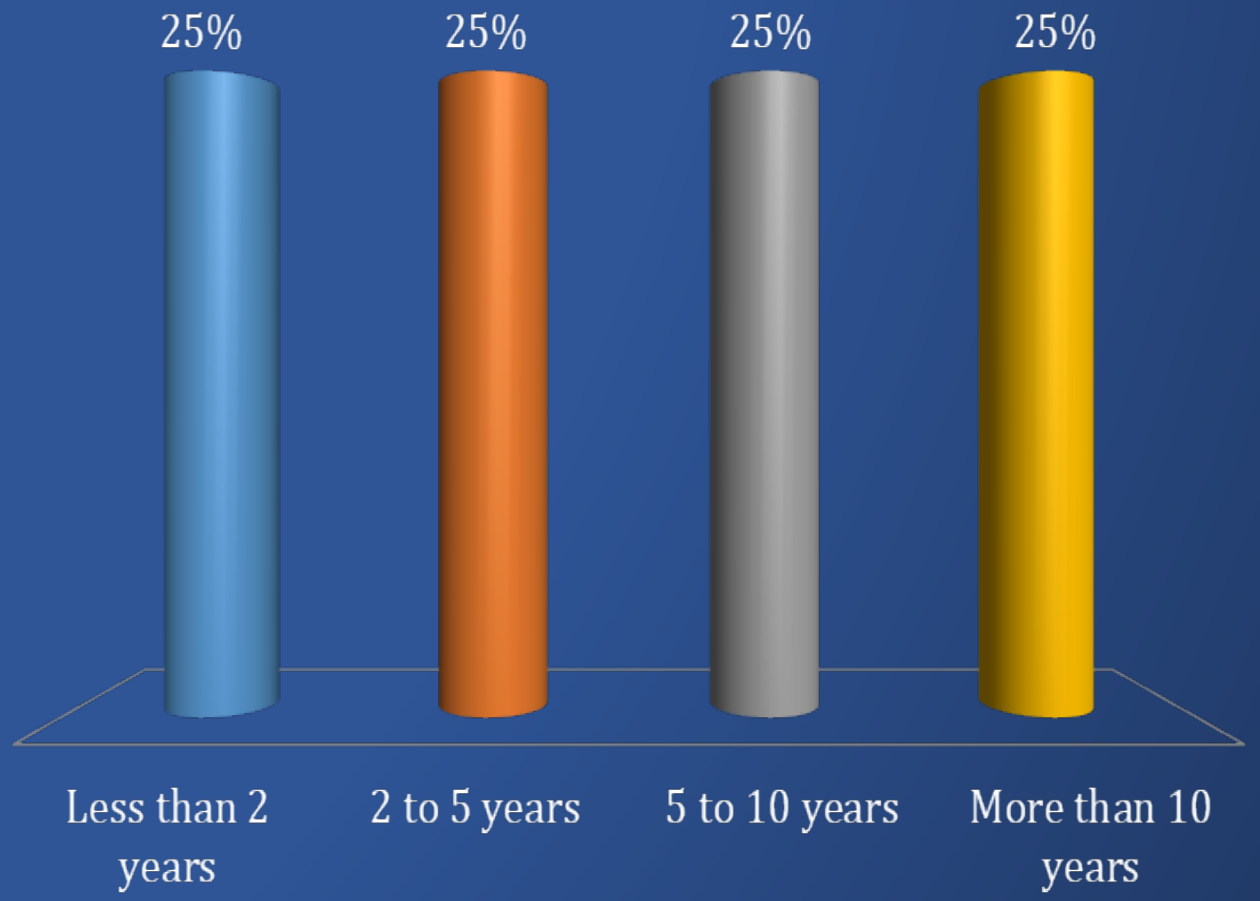
Who's in the audience?

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

- ***<u>Only</u> 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)

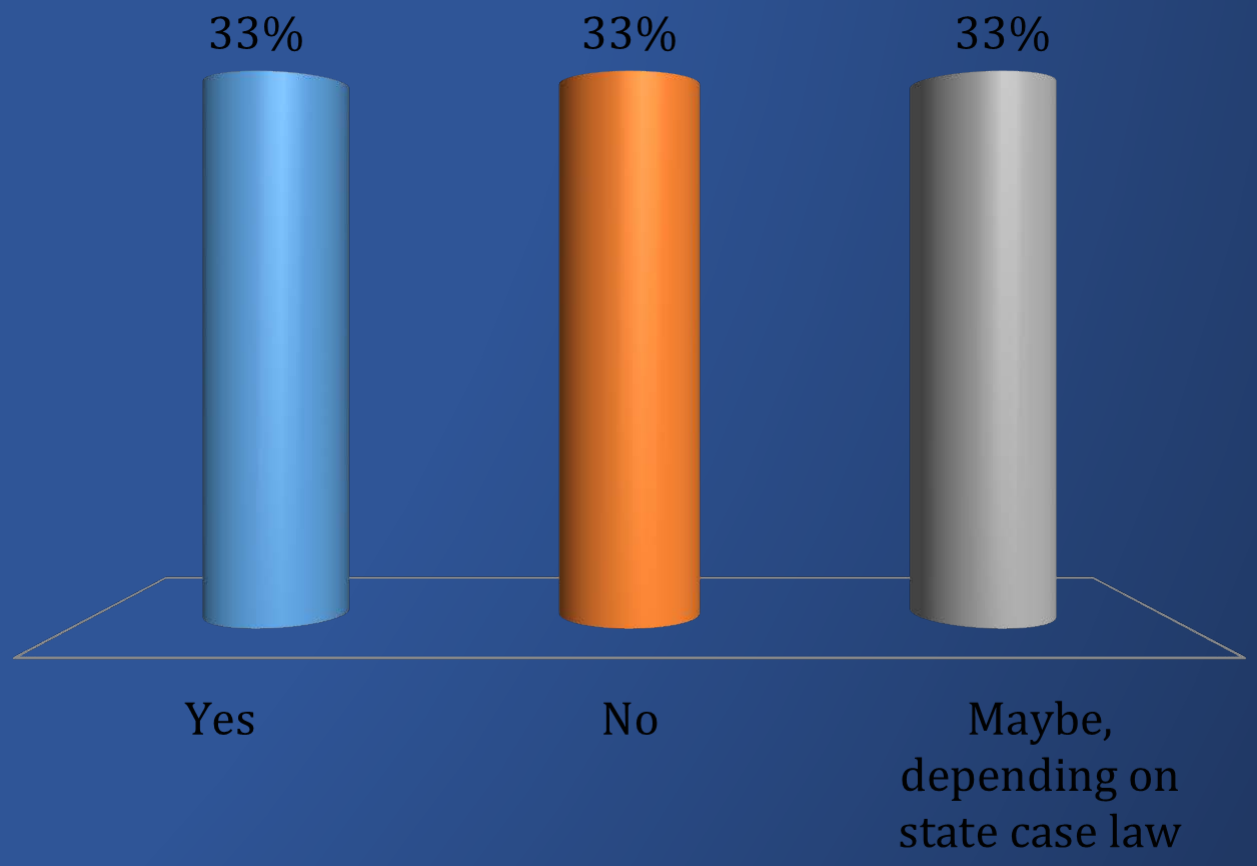
2. State court decisions may answer the question (*e.g.*, state supreme court cases)

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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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)

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"

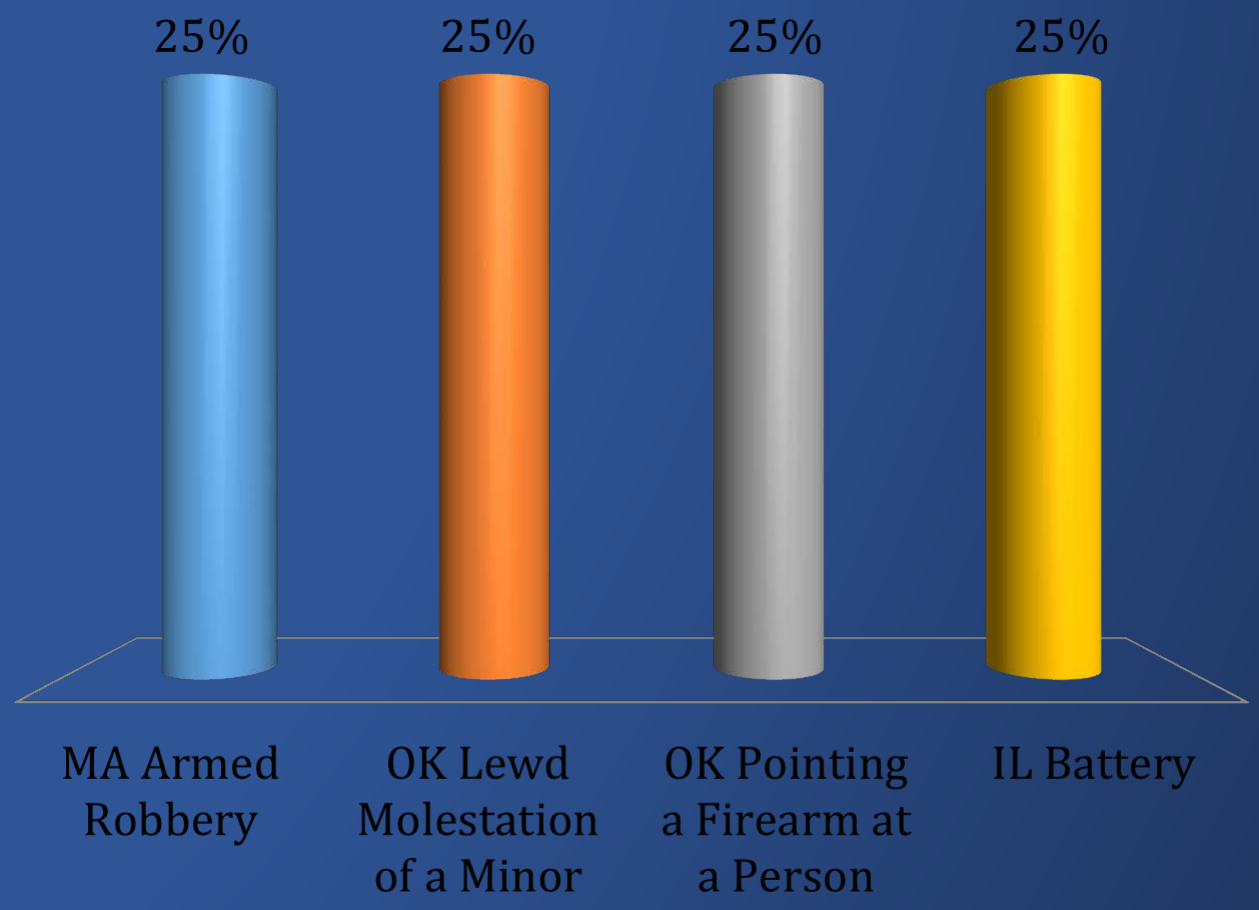
18 U.S.C. § 924(e)(2)(B)

- ***....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

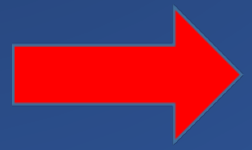


Use of Force

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

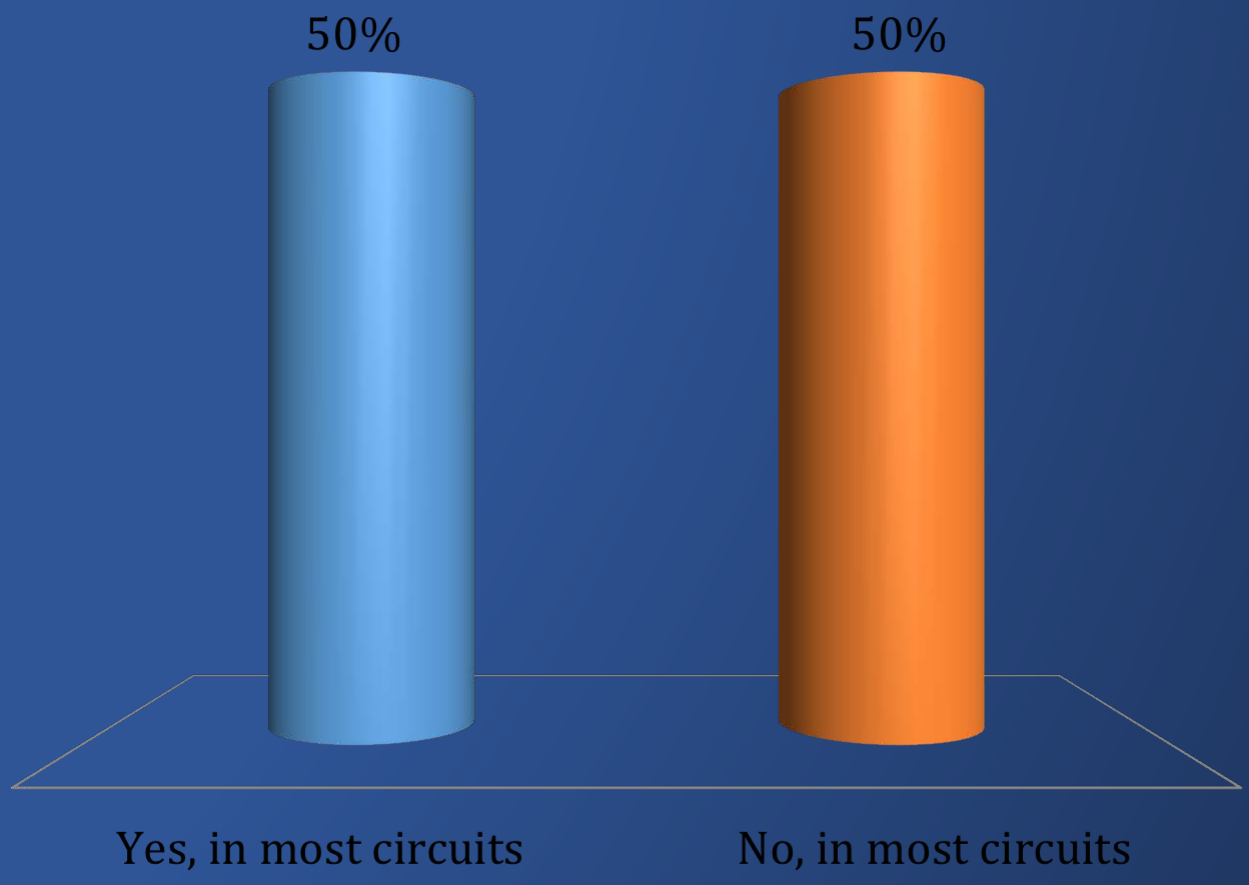
Supreme Court Case Involving *Force Clause* of "Violent Felony"

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

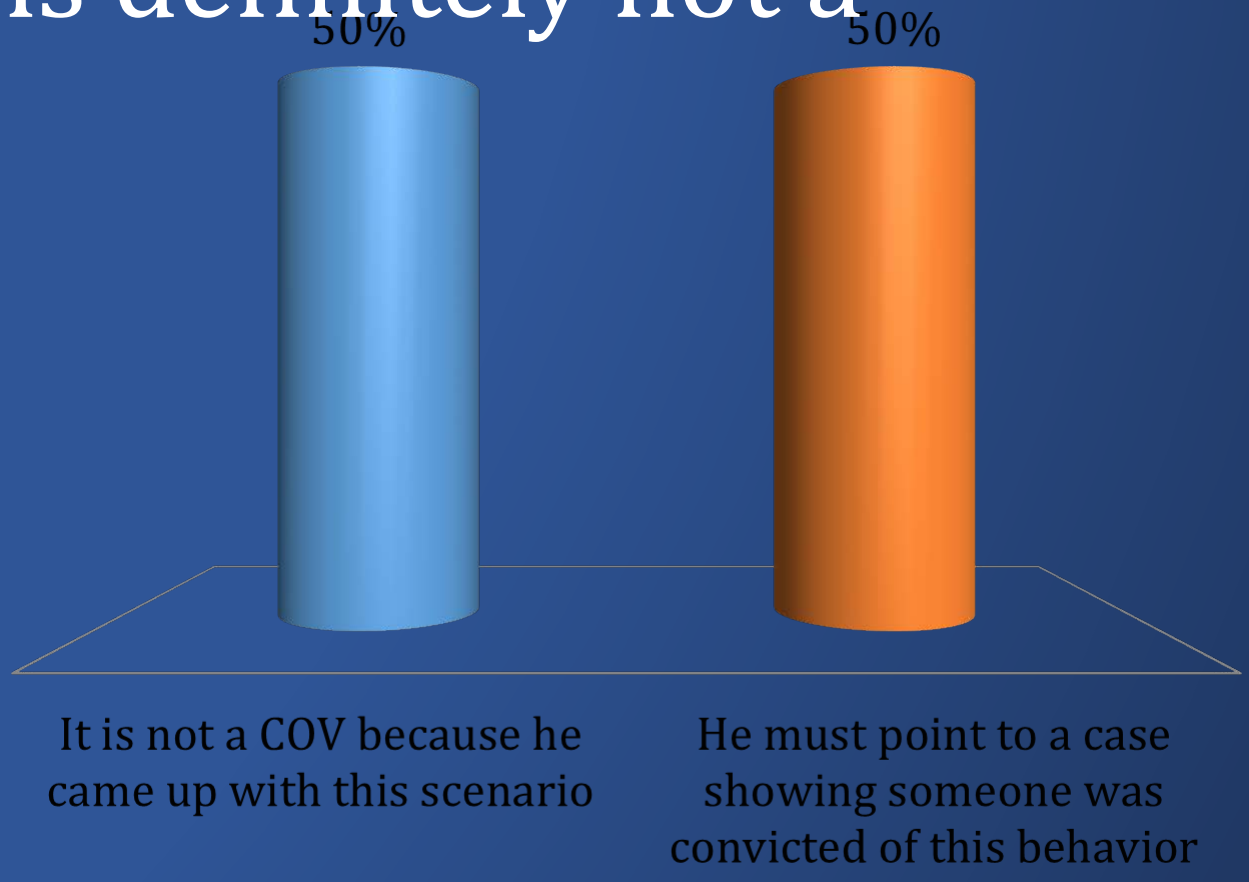
- *U.S. v. Hill*, -F.3d-, 2018 WL 2122417(2d Cir. 2018)
- *U.S. v. Chapman*, 866 F.3d 129 (3d Cir. 2017)
- *In re Irby*, 858 F.3d 231 (4th Cir. 2017)
- *U.S. v. Verwiebe,* 874 F.3d 258 (6th Cir. 2018)
- *Hill v. U.S.*, 877 F.3d 717 (7th Cir. 2017)
- *U.S. v. Rice*, 813 F.3d 704 (8th Cir. 2016)
- *U.S. 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. Winst*on, 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)

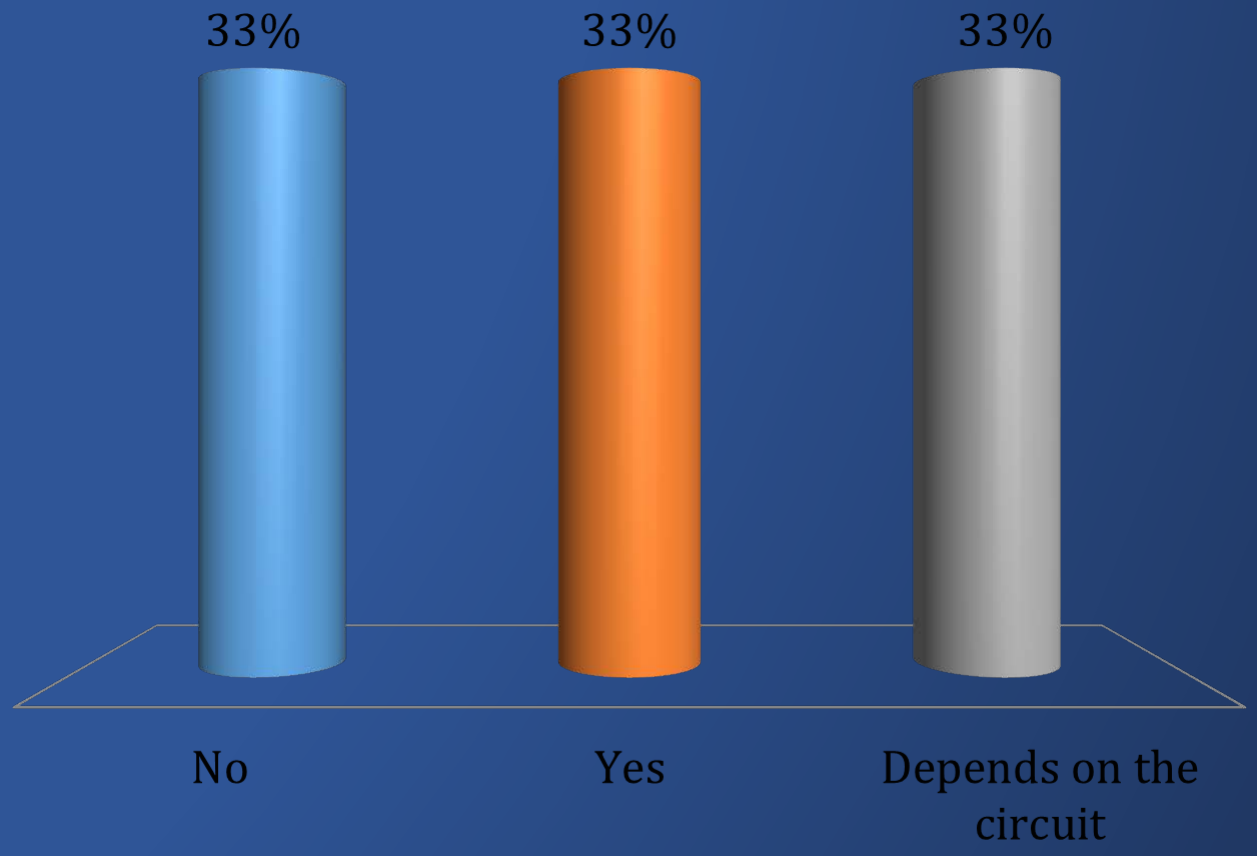
Domestic Violence

- 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)

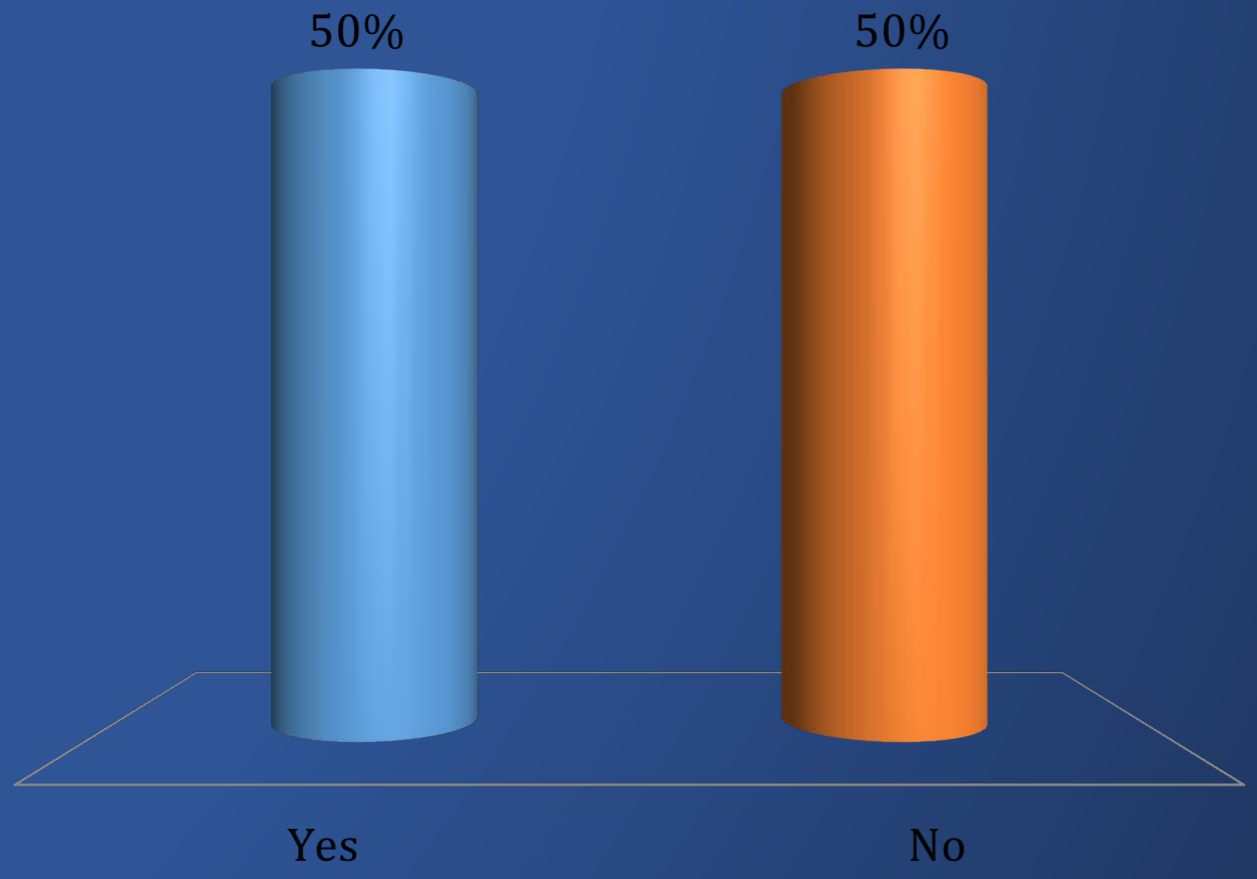
Analysis: *Enumerated Section*

- *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)

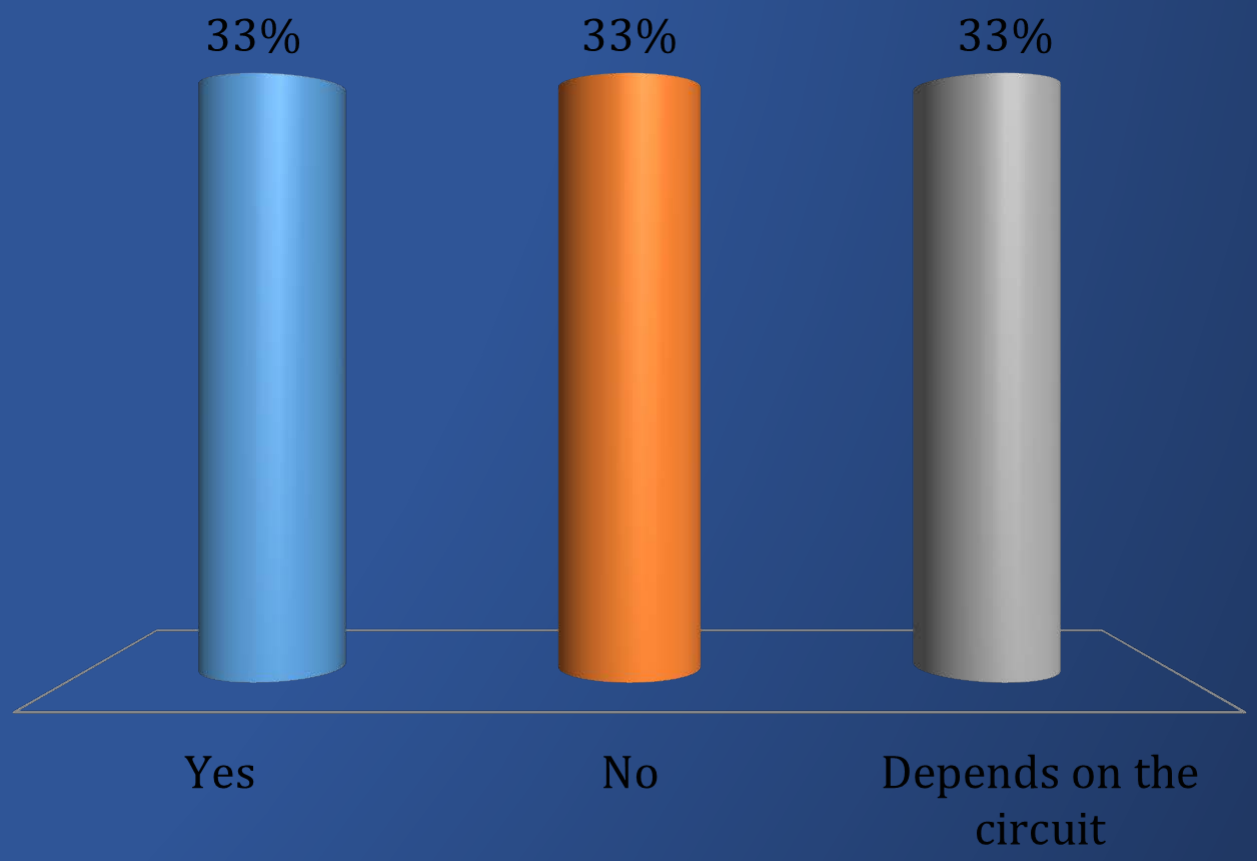
- Whether burglary of a nonpermanent or mobile structure that is adapted or used for overnight accommodation can qualify as "burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. § 924(e)(2)(B)(ii).

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.

CATEGORICAL APPROACH SCENARIOS

Question 1

The defendant has a prior conviction for West Virginia Code § 61-2-9(a) which provides:

> If any person maliciously shoots, stabs, cuts or wounds any person, or by any means causes him or her bodily injury with intent to maim, disfigure, disable or kill, he or she … is guilty of a felony and shall be punished by confinement in a state correctional facility not less than two nor more than ten years.
>
> If the act is done unlawfully, but not maliciously, with the intent aforesaid, the offender is guilty of a felony and shall either be imprisoned in a state correctional facility not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding $500.

Is this a divisible statute?

_____

_____

_____

Question 2

Defendant is convicted of Indiana battery. The statute requires that the defendant intentionally use force that causes serious injury to a person. The defendant claims a light touch such as tickling another person entails force because if the tickled person twitches, falls, and strikes his head on a coffee table, the victim could suffer a serious injury.

Now that the defendant has described a scenario under the statute that does not involve "the amount of force" required under *Johnson*, is this offense no longer a crime of violence under the force clause at §4B1.2?

_____

_____

_____

Question 3

The defendant has a prior robbery conviction under D.C. Code § 22-3571.01. The statute provides:

> 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.

The government alleges that this offense is a crime of violence under §4B1.2 because it meets the generic definition of robbery. The circuit has defined generic robbery as:

> Property to be taken from a person or a person's presence by means of force or putting in fear.

Does D.C. robbery match the generic definition of robbery in this circuit?

_____
_____
_____
_____

Question 4

The defendant is convicted of felon in possession (18 U.S.C. § 922(g)) and has a prior conviction for Colorado drug trafficking under § 18-18-405(1)(a). The probation officer applies base offense level 22 at §2K2.1 because the Colorado drug trafficking offense qualifies as a controlled substance offense under the guideline.

The Colorado drug statute makes it:

> unlawful for any person knowingly to manufacture, dispense, sell, or distribute, or to possess with intent to manufacture, dispense, sell or distribute, a controlled substance.

Colorado defines "sell" to mean "a barter, an exchange, or a gift, or an offer therefor."

The guidelines define "controlled substance offense" at §4B1.2 as:

> 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.

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

_____
_____
_____

PRIMER

CATEGORICAL APPROACH

July 2017

Prepared by the Office of General Counsel, U.S. Sentencing Commission

TABLE OF CONTENTS

The purpose of this primer is to provide a general overview of the history, major statutes, sentencing guidelines, and case law relating to the categorical approach. It is not intended as a comprehensive compilation of case law on the topic.

I. INTRODUCTION AND OVERVIEW

Both in federal statutes and in the United States Sentencing Guidelines, offenders whose criminal history evidences violence or other types of serious felony conduct are sometimes subject to enhanced penalties. For instance, for offenders convicted of illegally reentering the country after deportation, the statutory maximum increases depending on the number and nature of an offender's prior convictions.[1] For felons in possession of firearms, the Armed Career Criminal Act imposes a 15-year mandatory minimum penalty on offenders with three or more felony convictions for certain violent or drug trafficking crimes.[2] Mandatory minimums can also be triggered by offenses occurring concomitant with the instant offense of conviction. For instance, 18 U.S.C. § 924(c) contains graduated mandatory minimum penalties when a firearm is used during a crime of violence or a drug trafficking offense.[3]

Congress, in statutes, and the Commission, in the sentencing guidelines, have each attempted to single out the types of prior convictions that they consider particularly relevant to sentencing, and which therefore have a greater effect on sentence length. For instance, the offenses that trigger the 15-year mandatory minimum for felon in possession of a firearm are listed in the Armed Career Criminal Act. These include, among others, burglary, arson, and extortion, as well as any other felony offense that involves a substantial risk of the use of physical force against a person. Similarly, in the *Guidelines Manual*, the Commission lists "crimes of violence" and "controlled substance offenses" as the types of prior convictions that increase the sentencing range for career offenders.

Sentencing and appellate courts have interpreted these terms through application of the "categorical approach" mandated by the Supreme Court in *Taylor v. United States*.[4] Under the categorical approach, courts must look to the statutory elements of an offense, rather than the defendant's conduct, when determining the nature of a prior conviction. This form of analysis permits a federal sentencing court to examine only the statute under which the defendant sustained a conviction (and, in certain cases, judicial documents surrounding that conviction) in determining whether the prior conviction fits within a federal predicate definition. The scope and requirements of the categorical approach have

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1 *See* 8 U.S.C. § 1326(b).

2 *See* 18 U.S.C. § 924(e).

3 U.S. SENT'G COMM'N, MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (2011) at 269–71.

4 Taylor v. United States, 495 U.S. 575 (1990).

resulted in significant litigation and more than a dozen Supreme Court opinions over the last 26 years.[5]

II. ORIGIN OF THE CATEGORICAL APPROACH

A. CATEGORICAL APPROACH: *TAYLOR V. UNITED STATES*, 495 U.S. 575 (1990)

In *Taylor v. United States*,[6] the Supreme Court first outlined the categorical approach as a framework in order to determine the meaning of the word "burglary" as it is used in the Armed Career Criminal Act ("ACCA").[7] At issue was the ACCA sentencing enhancement for a defendant who was convicted under 18 U.S.C. § 922(g) (Unlawful Possession of a Firearm) and who had three prior convictions for "burglary."[8]

The courts of appeals had defined "burglary" in different ways — by reference to the law of the state where the burglary occurred, or by reference to the definition of burglary at common law. The Supreme Court was not willing to assume that Congress intended the common-law definition, which would have included the somewhat antiquated requirement that the burglary occur in the nighttime.[9] Nor would the Court assume that Congress intended the definition of burglary to depend upon the varied manner in which individual states had defined it. Instead, the Court held that burglary must be defined by reference to its contemporary, generic meaning. In constructing a contemporary, generic definition of burglary, the Court looked to the definitions used by the Model Penal Code and the majority of states. [10]

The Court emphasized that courts must use "a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions."[11] The Court cited three main factors in adopting a statutory-

[5] For brief summaries of a selection of Supreme Court case law addressing the categorical approach, see Appendix A, *infra* pp. 21–24.

[6] Taylor v. United States, 495 U.S. 575 (1990).

[7] *See* 18 U.S.C. § 924(e).

[8] Taylor, 495. at 577–78.

[9] *Id.* at 582.

[10] "We believe that Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States." *Id.* at 598 (citations omitted).

[11] *Id*. at 600. In a conduct-based system, "the trial court would have to determine what [the] conduct was," in some cases requiring reintroducing "the Government's actual proof at [the first] trial," perhaps even by calling live witnesses again if no transcript was available. The court wondered whether the defendant would then be entitled to call his own witnesses or argue that he was entitled to another jury determination of his conduct. Furthermore, the Court noted the difficulties of applying a conduct-based analysis to guilty plea cases, where "there often is no record of the underlying facts." *Id*. at 600–02.

based categorical approach instead of a conduct-based one: 1) the language of § 924(e) indicates that Congress intended the sentencing court to determine if a defendant had been convicted of crimes falling within certain categories, rather than look to the facts of the offenses; 2) the legislative history showed that Congress generally took a categorical approach to predicate offenses; and 3) that practical difficulties and potential unfairness of a factual approach are daunting.[12]

The Court concluded, therefore, "that an offense constitutes 'burglary' for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant."[13] The sentencing court is thus required to determine the modern generic definition of the listed offense, and then determine if the statute of conviction falls within that definition. An investigation into the facts of the case or conduct of the defendant is not permitted.[14] In order to determine if the jury was required to find all of the elements of generic burglary, sentencing courts were permitted to review certain court documents to determine if a prior conviction fell into the category of statutes that yield a sentencing enhancement.[15]

B. Modified Categorical Approach: *Shepard v. United States*, 544 U.S. 13 (2005)

After *Taylor*, two key questions remained regarding the determination of whether a statute of conviction falls within a given definition. The first was *when* – that is, in what types of cases – a court could look to additional documents beyond the fact of conviction and the statutory definition of the prior offense? The second question was when permitted to do so, what documents are courts allowed to rely upon to determine the nature of the defendant's prior conviction? The Supreme Court answered the second question (what documents could be consulted) in *Shepard v. United States*,[16] years before it answered the first (when courts were permitted to consult additional documents).[17]

12 *Id.* at 601.

13 *Id*. at 602.

14 *Id.*

15 "This categorical approach, however, may permit the sentencing court to go beyond the mere fact of the conviction into a narrow range of cases where a jury was actually required to find all the elements of generic burglary." *Id.*

16 Shepard v. United States, 544 U.S. 13 (2005).

17 Mathis v. United States, 136 S. Ct. 2243 (2016), *see infra* pp. 15–17.

In *Shepard v. United States*, the defendant had pled guilty to being a felon in possession of a firearm,[18] and had prior convictions for Massachusetts "burglary." The Court noted that the offenses charged in the state cases were "broader than generic burglary" and there were no jury instructions as the cases had not proceeded to trial.[19] At sentencing, the district court rejected the argument of the Government, which urged the district court to look at police reports in order to prove that the defendant's convictions fulfilled the narrower elements of generic burglary as required by *Taylor*. On appeal, the First Circuit vacated the sentence and ruled that complaint applications and police reports could be reviewed in place of jury instructions in order to determine if the convictions fell under the generic burglary definition.

In a 4-1-3 plurality opinion authored by Justice Souter, the Supreme Court reversed the First Circuit's application of an ACCA enhancement based on police reports. The *Shepard* plurality concluded that the documents admissible to establish the nature of an ACCA predicate conviction arrived at by guilty plea were "the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the plea was confirmed by the defendant, or some comparable judicial record of this information."[20] These are now commonly referred to as "*Shepard* documents." The Court concluded that that these documents would enable the "later court [to] generally tell whether the plea had 'necessarily' rested on the fact" that brought the predicate offense into the ambit of ACCA.[21]

The Court rejected the Government's call to allow sentencing courts to cast a wider evidentiary net because it "amount[ed] to a call to ease away from the *Taylor* conclusion, that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime state."[22] Essentially, by using police records, the district court would turn the inquiry into a factual one, rather than a statutory one. The Court then noted that the rationales (accuracy and avoiding inconsistency) for such broader consideration were not limited to guilty-plea cases, but would equally suggest

[18] 18 U.S.C. § 922(g)(1).

[19] Shepard, 544 U.S. at 17.

[20] *Id*. at 26. Justice Thomas concurred, suggesting that Almendarez-Torres v. United States, 523 U.S. 224 (1998), establishing the "prior-conviction exception," to Sixth Amendment jury trial right was wrongly decided and should be overruled in an appropriate case. *Shepard*, 544 U.S. at 26–28 (Thomas, J., concurring). Justice O'Connor, joined by Justices Kennedy and Breyer, dissented, arguing that *Taylor* itself had already departed from the "most formalistic" approach, and there was no reason not to allow the inquiry conducted by the First Circuit. *Id*. at 29–39 (O'Connor, J., dissenting). Chief Justice Rehnquist did not take part.

[21] *Id.* at 21 (quoting *Taylor*, 495 U.S. at 602).

[22] *Id.* at 23.

that *Taylor* itself should be reconsidered, to allow, for example, consideration of jury trial transcripts, a proposition the Court rejected.[23]

C. USE OF THE CATEGORICAL APPROACH

As noted, the *Taylor* and *Shepard* decisions have strongly influenced interpretations of similar terms far beyond the Armed Career Criminal Act. The categorical approach has been used to decide the nature of prior convictions in the sentencing guidelines, in both criminal and administrative aspects of immigration law (*e.g.*, defining "aggravated felony" in 8 U.S.C. § 1104(a)(43)),[24] and in other federal statutes (*e.g.*, "crime of violence" in 18 U.S.C. § 16 and elsewhere). Courts have applied the approach when deciding whether a prior state conviction triggers a mandatory minimum sentencing enhancement, (*e.g.*, for child pornography offenders)[25] and also when deciding whether a coterminous offense is a crime of violence (*e.g.*, when a defendant is charged under 18 U.S.C. § 924(c) with possessing a firearm in furtherance of a crime of violence).[26] In each case, unless existing federal case law establishes the nature of the particular state statute of conviction at issue, the court must first determine the modern generic definition of the listed offense, then whether the statute of conviction falls within that definition.

III. APPLYING THE CATEGORICAL APPROACH

Applying the categorical approach can be summarized as a four-step procedure:

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.

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[23] *Id.* at 22–23.

[24] *See, e.g.*, United States v. Torres-Diaz, 438 F.3d 529 (5th Cir. 2006); United States v. Romero-Hernandez, 505 F.3d 1082 (10th Cir. 2007).

[25] *See* United States v. Simard, 731 F.3d 156 (2d Cir. 2013) (holding that defendant's prior conviction in Vermont for lewd and lascivious conduct with a child triggered the 10-year mandatory minimum for child pornography possessors); United States v. Cammorto, 859 F.3d 311 (4th Cir. 2017) (holding that defendant's prior conviction in Georgia for rape qualifies categorically as a predicate offense for sentencing the defendant as a Tier III offender under USSG §2A3.5(a)(1)).

[26] *See* United States v. McGuire, 706 F.3d 1333 (11th Cir. 2013) (applying categorical approach to determining whether the defendant possessed a firearm in furtherance of a crime of violence under the sentence enhancement provisions at 18 U.S.C. § 924(c)); United States v. Ivezaj, 568 F.3d 88 (2d Cir. 2009) (same).

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.

A. THRESHOLD PRINCIPLES

In conducting the above analysis, several threshold principles apply in determining whether the defendant's prior conviction meets the definition. First, reliance on a statute's title alone to determine the nature of the offense is inappropriate because the statute title may prohibit more than the conduct one would assume is covered by such a statute.[27] Second, courts are not permitted to consider relevant conduct.[28] Third, courts are not to look at the facts of the specific case, but rather only the elements of the offense of conviction.[29]

B. STEP 1: IDENTIFY THE DEFINITION AT ISSUE

At the first step, the sentencing court determines the relevant statutory or guideline definition (*e.g.*, the definition of "crime of violence" or "aggravated felony"). Although these definitions come from a variety of places, there are several definitions that are more frequently considered using the categorical approach.

1. Common Statutory and Guideline Provisions

a. 18 U.S.C. § 16 – Crime of Violence Definition

The "crime of violence" definition most widely used throughout title 18 of the United States Code is found at 18 U.S.C. § 16:

> The term 'crime of violence' means —
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

[27] *See*, *e.g.*, Johnson v. United States, 559 U.S. 133 (2010) (Comparing Florida's "battery" statute with the generic definition of "battery"); In re Sealed Case, 548 F.3d 1085, 1089 (D.C. Cir. 2008) (Comparing D.C. "robbery" definition with the generic definition.).

[28] Taylor, 495 U.S. at 600 (Courts are not permitted to consider the conduct of a defendant when applying the categorical approach, only the elements of the predicate statute of conviction.).

[29] *Id.*

This definition had its origin in Comprehensive Crime Control Act of 1984 ("CCA"),[30] which repealed a previous definition of the term "crime of violence." Legislative history to the CCA observed that while the term "crime of violence" was "occasionally used in present law, it is not defined, and no body of case law has arisen with respect to it."[31] Several federal criminal statutes refer to section 16's definition,[32] and crimes meeting this definition can trigger certain collateral consequences.[33] The two criteria established in section 16 — whether the elements of the prior offense include violence, and whether an offense "by its nature" presented a risk of force — later gave rise to the categorical approach described in *Taylor*.[34]

In application of the guidelines, section 16 was most notably used in conjunction with §2L1.2 (Unlawfully Entering or Remaining in the United States), which previously referenced the statutory definition of "aggravated felony."[35]

b. 18 U.S.C. 924(e) – Armed Career Criminal Act ("ACCA")

Section 924(e) provides that any person who violates 18 U.S.C. 922(g), and who has three previous convictions[36] by any court referred to in section 922(g)(1) for a "violent

[30] Pub. L. 98–473, tit. II, § 1001(a), 98 Stat. 1976, 2136 (1984).

[31] S. Rep. No 98–225, at 307 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3486; *see also* S. 1630, 97th Cong. § 111 (1st Session 1981); S. Rep. No. 97–307 (1981).

[32] *See, e.g.*, 18 U.S.C. § 25 (use of minors in crimes of violence); 18 U.S.C. § 119 (release of personal information of certain people with the intent to incite the commission of a crime of violence); 18 U.S.C. § 3663A (Mandatory Victims Restitution Act); 21 U.S.C. § 841(b)(7) (penalty enhancement for selling drugs with the intent to commit a crime of violence).

[33] *See, e.g.*, 8 U.S.C. § 1227 (Grounds for deportation) (citing § 16 in its definition of "crime of domestic violence"); 11 U.S.C. § 707(c) (Grounds for dismissal of a bankruptcy case); 18 U.S.C. § 3181 (authorizing extradition of foreign nationals who have committed crimes of violence in other countries).

[34] "The difficulty posed by this and similar cases arises from the fact that there is no master list of offenses that qualify as crimes of violence. Rather, section 16 sets forth two qualitative definitions of the term 'crime of violence,' leaving it to the courts to measure each crime against these definitions[]. The candidates for satisfying these definitions are legion and varied. Each state defines its own crimes, generally without reference to (and often, we presume, without knowledge of) the section 16 definitions. Similar-sounding crimes may have different elements from state to state." United States v. Fish, 758 F.3d 1, 4 (1st Cir. 2014).

[35] The Sentencing Commission drastically reworked the calculation of Illegal Entry offenses under §2L1.2 in Amendment 802 (eff. Nov. 1, 2016). This amendment largely removed the categorical approach from illegal entry calculations, except in rare cases.

[36] Committed on separate occasions.

felony"[37] or a "serious drug offense,"[38] or both, is subject to a mandatory minimum of not less than fifteen years. The Act adopted a new term — "violent felony" — which differs significantly from 18 U.S.C. § 16's definition of "crime of violence," and may include a greater number of offenses.[39]

The guidelines applicable to cases involving § 924(e) are §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions involving Firearms or Ammunition) and §4B1.4 (Armed Career Criminal).[40]

c. 18 U.S.C. 2252 – Prior Sex Offense Convictions

Section 2252 makes it unlawful for an individual to knowingly transport, ship, transmit, distribute, receive, reproduce, sell, or possess child pornography. Section 2252(b)(1) is the penalty provision, which provides that if a defendant has a prior conviction under this chapter, or section 1591, chapter 71, chapter 109A, or chapter 117, or section 920 of title 10, or under any state law related to sexual offenses, there is a sentencing enhancement carrying a mandatory minimum term of imprisonment of 15 years. The categorical approach is used in determining whether the mandatory minimum enhancement applies.

Section 2252 is referenced in the guidelines to §2G2.2 (Trafficking in Material Involving the Sexual Exploitation of a Minor; Receiving Transporting, Shipping, Soliciting, or Advertising Material Involving the Sexual Exploitation of a Minor; Possessing Material Involving the Sexual Exploitation of a Minor with Intent to Traffic; Possessing Material Involving the Sexual Exploitation of a Minor).[41]

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[37] "Violent felony" means "any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult that 1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or 2) is burglary, arson, or extortion, or involves use of explosives…" 18 U.S.C. 924(e)(2)(B).

[38] "Serious drug offense" means an offense under the Controlled Substances Act, 21 U.S.C. 801 *et. seq.*, the Controlled Substances Import and Export Act, 921 U.S.C. 951, *et seq*.; or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or an offense under state law involving manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance for which a maximum term of imprisonment of ten years or more is proscribed by law. 18 U.S.C. § 924(e)(2)(A).

[39] *See* Zivkovic v. Holder, 724 F.3d 894, 905-6 (7th Cir. 2013) ("The standard under ACCA thus differs materially from the one under 18 U.S.C. § 16(b): the latter requires *active* use of physical force, while the former looks only for *potential* risk of physical injury."); *see also* Leocal v. Ashcroft, 543 U.S. 1, 10, n.7 (2004) (under § 16, "[t]he 'substantial risk' . . . relates to the use of force, not to the possible effect of a person's conduct."); United States v. Fish, 758 F.3d 1, 5 ("Adding further insight, but perhaps further confusion as well, the United States Sentencing Guidelines define the term 'crime of violence' using language that is almost, but not quite, the same as the language that ACCA uses to define the term 'violent felony.'").

[40] *See* USSG Appendix A (Statutory Index).

[41] *See* USSG Appendix A (Statutory Index).

d. Sections 4B1.1 & 4B1.2 – Career Offender

Tracking the statutory criteria set forth in 28 U.S.C. § 994(h), the Commission implemented Congress's directive by identifying a defendant as a career offender if (1) the defendant was at least eighteen years old at the time he or she committed the instant offense of conviction; (2) the instant offense is a felony that is a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.[42] Where these criteria are met, the directive at section 994(h), and therefore §4B1.1, provide for a guideline range "at or near the maximum [term of imprisonment] authorized" — typically resulting in a guidelines range significantly greater than would otherwise apply.

The terms "crime of violence" and "controlled substance offense" are defined in §4B1.2. In §4B1.2, "crime of violence" is defined as:

> …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).[43]

"Controlled substance offense" is defined as:

> …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.[44]

The categorical approach is used to determine if a defendant's prior convictions fall under these definitions, and therefore qualify for a career offender enhancement.

[42] USSG §4B1.1(a).

[43] USSG §4B1.2(a).

[44] USSG §4B1.2(b).

e. Section 2L1.2 and 8 U.S.C. § 1326 – Illegal Entry (Until November 1, 2016)

The illegal reentry guideline found in §2L1.2 was completely reworked by Amendment 802.[45] This amendment largely removed the necessity of using the categorical approach to determine sentencing enhancements by altering how prior offenses are scored under the guideline. Nevertheless, the categorical approach may still be necessary in determining whether enhanced statutory penalties apply.[46]

Congress has defined serious offenses in immigration law, both administrative and criminal. Section 1101(a)(43) of title 8 defines "aggravated felony" in 21 subsections. The definition of "aggravated felony" determines substantive and procedural rights for non-citizens regarding deportation, removal, and exclusion from the United States. In addition, the definition of aggravated felony determines the penalty range for aliens convicted of returning to the United States without the permission of the Attorney General after their removal from the country.[47] The maximum term of imprisonment for illegal reentry after removal increases from two to 20 years in prison if the defendant was removed after a conviction for an aggravated felony.

Since 1988, Congress has repeatedly expanded the definition of "aggravated felony."[48] Often the changes were spurred by concerns by members of Congress or executive branch agencies that the existing definition failed to include aliens who had committed serious offenses that should subject them to deportation or harsher penalties if criminally prosecuted for reentry.[49] The addition of "crime of violence" to the list of

[45] USSG App. C, amend 802 (eff. Nov. 1, 2016). Previously, the *Guidelines Manual* listed certain types of prior convictions, including "crimes of violence" and "drug trafficking offenses," which could increase the sentencing range for illegal entry offenders. These definitions often required the application of the categorical approach.

[46] Section 1326(b)(1) of title 8 provides that if a defendant's prior removal was for the commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony, shall be fined, subject to imprisonment for a term not more than 10 years, or both. If, however, the prior removal was for an 'aggravated felony,' the statutory maximum term of imprisonment increases to 20 years. The categorical approach continues to be required in determining if the prior offense was an 'aggravated felony.'

[47] *See* 8 U.S.C. § 1326(b) (Reentry of Removed Aliens).

[48] *See, e.g.*, Pub. L. 101–649, § 501, 104 Stat. 5048 (1990) (adding money laundering, all drug trafficking offenses, and crimes of violence, and eliminating a requirement that the crime have been committed within the United States); Pub. L. 103–416, § 222, 108 Stat. 4320–22 (1994) (significantly expanding the definition); Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. 104–32, § 440(e), 110 Stat. 1277 (1996) (substantially expanding the definition to near its current form); Pub. L. 104–208, § 321, 110 Stat. 3009-627-28 (1996) (reducing the triggering fraud and tax evasion amounts to $10,000 from $100,000, reducing the minimum requirement sentence to trigger some subsections from five to one years, and making other changes); Pub. L. 108–93, § 4, 117 Stat. 2879 (2003) (adding human trafficking offenses).

[49] *See, e.g.*, *Criminal Aliens: Hearing on H.R. 3333 Before the Subcomm. On Immigration, Refugees, and Int'l Law of the H. Comm. on the Judiciary*, 101st Cong., at 130 (1989) (prepared statement of John W. Fried, Manhattan ADA, expressing concern over confusion about whether state drug offenses were covered under the existing

aggravated felonies came in the Immigration Act of 1990,[50] and the definition is that found in 18 U.S.C. § 16.

2. Different Structures of Definitions

In broad terms, many of the federal statutes and guidelines noted above have one or more categories of predicate offenses: "elements" clauses (*e.g.*, ACCA's violent felony "*has as an element* the use, attempted use, or threatened use of physical force against another"); "enumerated" clauses (*e.g.*, ACCA's violent felony "*is* burglary, arson, or extortion, involves the use of explosives"); and "residual" clauses.[51] For example, both the ACCA and the definition of "crime of violence" at the career offender guideline (USSG §4B1.2(a)) contain elements and enumerated clauses. In addition, the definition of "crime of violence" in the illegal reentry guideline (USSG §2L1.2) contains an enumerated clause ("means . . . murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses . . . , statutory rape, sex abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling") and an elements clause ("any other offense . . . that has as an element the use, attempted use, of threatened use of physical force against the person of another").

a. Element Clauses

Most definitions that require the application of the categorical approach contain an elements clause. Pursuant to the elements clause, a prior offense generally qualifies if it "has as an element the use, attempted use, or threatened use of physical force against the person of another."[52] Although in theory an elements 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."

As discussed below, the Supreme Court has interpreted "physical force" in reference to its "ordinary meaning."[53] Some states, however, have interpreted the element of "force"

definition of "aggravated felony"), *reprinted in* 12 Igor I. Kavass, *The Immigration Act of 1990: A Legislative History of Pub. L. 101–649* at 917 (1997); H.R. Rep. 104–22, at 7-8 (1995) (explaining AEDPA's addition of offenses that often were committed by those involved in "organized immigration crime," such as prostitution-related offenses, alien smuggling, forging documents, and stolen vehicle trafficking).

[50] Pub. L. 101–649, § 501, 104 Stat. 5048 (1990).

[51] In Johnson v. United States, 135 S. Ct. 2551 (2015), the Supreme Court struck down the residual clause in 18 U.S.C. § 924(e), holding that such a clause was unconstitutionally vague. However, Congress has not yet altered section 924(e) in response to the *Johnson* case. Additionally, the Commission removed a residual clause from its "career offender" definition located at §§4B1.1 and 4B1.2. For these reasons, this primer only addresses elements and enumerated clauses.

[52] 18 U.S.C. § 924(e)(2)(B)(i).

[53] Johnson v. United States, 559 U.S. 133, 138 (2010).

to include a range of conduct from incidental touching to violent battery.[54] Relying upon definitions found in both layman and legal dictionaries, the Court reasoned that "[a]ll of these definitions suggest a degree of power that would not be satisfied by the merest touching."[55] The Court concluded that "in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force – that is, force capable of causing physical pain or injury to another person."[56]

b. Enumerated Clauses

Most definitions to which the categorical approach is applied also contain an enumerated clause. An enumerated clause includes a specific list of offenses to which the prior offense must be compared. 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[57] lists about 20 offenses that constitute aggravated felonies. Enumerated sections require a determination of whether the elements of the offense of conviction meet the definition for the enumerated offense. In making this determination, it is not sufficient that the offense of conviction has the same title as an enumerated offense. Instead, the courts must analyze the elements of the prior conviction in relation to the elements of the "contemporary generic" definition of the enumerated offense. In order to determine at the generic contemporary definition, courts "look to a number of sources, including federal law, the Model Penal Code, treatises, and modern state codes."[58]

C. Steps 2 and 3: Determining the Statute of Conviction and its Elements

Once the court has identified the relevant recidivist definition, the court must next determine what was the predicate offense of conviction. Where a statute provides for a single crime, this determination can be straightforward and the court moves to the next step. The analysis may be more complicated, however, where the defendant was convicted of an offense with multiple subsections (providing for distinct crimes) or where a single provision can be violated in multiple ways. Such a provision raises multiple questions the court must address.

First, the court should determine if the judgement makes clear of which subsection or provision the defendant was convicted. In some instances, the specific statute of

[54] For example, Florida's battery statute, Fla. Stat. § 784.03(2), was at issue in Johnson. The Court noted that Florida courts had interpreted the statute is "satisfied by *any* intentional physical contact, 'no matter how slight.'" Johnson, 559 U.S. at 139 (citations omitted).

[55] *Id.*

[56] *Id.* at 134.

[57] 8 U.S.C. § 1101(a)(43).

[58] U.S. v. Pascacio-Rodriguez, 749 F.3d 353, 359 (5th Cir. 2014).

conviction is readily identifiable from the judgement of conviction. If such a determination cannot be made, the court should determine if all or none of the subsections meet the definition in question. If all of the subsections meet the definition, then the statute qualifies as a predicate offense. If none meet the definition, then the statute does not qualify.

If the court is still unable to determine which provision the defendant was convicted, the court must decide if the statute is divisible. As discussed further below, this requires a determination of whether the statute is comprised of different crimes, or one crime that can be violated in different ways. As the Supreme Court held in *Mathis v. United States*[59], a statute is divisible only when it contains different crimes with alternative elements, allowing courts to use the modified categorical approach to determine if the additional documents clarify the defendant's specific offense of conviction. If the statute is not divisible, then the modified categorical approach is not permitted. When a statute is divisible and the modified categorical approach is applied, the "*Shepard* documents" can only be used to determine which specific statutory subsection or provision formed the basis of conviction. Courts cannot use the documents to investigate the underlying conduct of the prior offense. Only after the court has determined the statute (or specific subsection or provision of a divisible statute) of conviction can the court identify the elements to compare to the relevant element clause or enumerated offenses.

The various aspects of these steps, including what constitutes divisibility, are explored in further detail below.

1. Divisibility

Questions remained after *Shepard* about precisely which cases appropriately permitted review of the *Shepard* documents. A deep circuit split over that question eventually led the Court to weigh in to answer the second question left open after *Taylor*, namely, when may courts use the modified categorical approach? Circuit courts had taken different approaches to this question. The Eighth Circuit limited use of the modified categorical to divisible statutes, where the statute in question proscribes "discrete, alternative sets of elements, one or more of which was not, generically, a violent felony[.]"[60] In contrast, the Ninth Circuit allowed broad and liberal use of the modified categorical approach regardless of whether the statute is divisible.[61] This question of when a sentencing court can review the *Shepard* documents was discussed in *Descamps v. United States.*[62] Descamps presented the issue of whether a sentencing court may only consult

[59] 136 S. Ct. 2243 (2016), *see infra* pp. 15–17.

[60] United States v. Salean, 583 F.3d 1059, 1061 (8th Cir. 2009).

[61] United States v. Aquilas-Montes de Oca, 655 F.3d 915 (9th Cir. 2011), *abrogated by* Descamps v. United States, 133 S. Ct. 2276 (2013).

[62] 133 S. Ct. 2276 (2013).

Shepard documents when a statute is divisible,[63] or whether it may do so when the statute of conviction is indivisible.[64]

In *Descamps*, the defendant was convicted of being a felon in possession of a firearm,[65] and the Government sought an enhanced sentence under ACCA based upon Descamps' prior state convictions for burglary, robbery, and felony harassment.[66] The burglary conviction was a violation of California Penal Code § 459, which provides that a "person who enters" certain locations "with intent to commit grand or petit larceny or any felony is guilty of burglary." In objection to the ACCA enhancement, Descamps argued that California burglary was too broad to serve as a predicate offense for ACCA because it covers individuals who enter a store during business hours, and does not require a breaking as in the generic definition. The district court disagreed, and applied the ACCA enhancement. On appeal, the Ninth Circuit affirmed, relying on its decision in *United States v. Aguila-Montes de Oca*.[67] The Ninth Circuit held that when a conviction is "categorically broader than the generic offense," the modified categorical approach may be applied to determine the factual basis of the conviction.[68]

The Supreme Court reversed the Ninth Circuit, holding that the California burglary statute was not "divisible" and therefore, the modified categorical approach may not be used to look at the facts of the case. It reasoned "the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute."[69] When a statute sets out multiple, alternative elements, the modified categorical approach may be applied and the *Shepard* documents may be reviewed. However, if a statute has a single, indivisible set of elements, and is simply broader than the generic definition, a sentencing court may not use the modified categorical approach. In that case, rather, the conviction simply doesn't count as a predicate offense for ACCA purposes.[70] The Court stressed that by conflating divisible and indivisible statutes, the Ninth Circuit was transforming the elements-based inquiry required under *Taylor* into a fact-specific one.[71]

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[63] A divisible statute is one that sets out one or more elements of the offense in the alternative. The most frequent example is a burglary statute that involves entry into a building or an automobile – where they are separate alternative elements of the crime and not simply a single locational element with alternative means of commission. *See id.* at 2281.

[64] An indivisible statute is one that does not contain alternative elements. *Id.*

[65] 18 U.S.C. § 922(g).

[66] 133 S. Ct. at 2282.

[67] 655 F.3d 915 (9th Cir. 2011) (en banc) (*per curiam*).

[68] *Id.* at 940.

[69] 133 S. Ct at 2285.

[70] *Id.* at 2286.

[71] "Indeed, accepting the Ninth Circuit's contrary reasoning would altogether collapse the distinction between a categorical and a fact-specific approach." *Id.* at 2290.

The Court also took the opportunity to discuss the meaning of the "modified categorical approach" generally. It noted that the modified approach was frequently (and legitimately) employed to narrow state burglary statutes prohibiting breaking into a variety of structures or vehicles. In such cases, the approach could be used to identify those cases where the defendant had been convicted of the burglary of a building, as required to meet *Taylor*'s generic definition of that offense, and not illegal entry into a railroad car or automobile, which would be beyond the scope of generic burglary and thus could not be categorized as burglary.[72] By contrast, it was not legitimate to employ the modified approach to turn the elements-based inquiry required under *Taylor* into an evidence-based one. This practice, the Court held, subverted the fundamental precepts of the categorical approach by authorizing a sentencing court to determine what the defendant's underlying conduct actually entailed, and created "daunting difficulties and inequities" in application.[73]

2. Elements v. Means

While *Descamps* brought needed clarity to the application of the modified categorical approach, new controversies have emerged in its wake, as judges have expressed disagreement about how to determine whether a statute is "divisible" within the meaning of the Court's decision.[74] In *Mathis v. United States*,[75] the Supreme Court addressed the issue of "whether ACCA makes an exception to [the rule that a prior conviction counts as an ACCA predicate if its elements match the generic offense] when a defendant is convicted under a statute that lists multiple, alternative means of satisfying one (or more) of its elements."[76] The Supreme Court held that there is no exception, and that alternate means of committing a single element does not make a statute divisible for the purposes of applying the modified categorical approach.[77]

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[72] *Id*. at 2281.

[73] *Id.* at 2287–89.

[74] *See, e.g.*, Omargharib v. Holder, 775 F.3d 192, 197–98 (4th Cir. 2014) (distinguishing between statutes with "alternative elements," which are divisible, and statutes with "alternative means" of commission, which are not); *id*. at 201 (Niemeyer, J., concurring) (describing *Descamps* as a "source of confusion" about this distinction, and recommending the Court expand the permissible use of *Shepard* documents); United States v. Cabrera-Umanzor, 728 F.3d 347, 353 (4th Cir. 2013) (explaining that a "merely illustrative" list of possible means of commission does not make a statute divisible). *But cf.* Rendon v. Holder, 782 F.3d 466, 467 (9th Cir. 2015) (Graber, J., dissenting from the denial of rehearing *en banc*) ("Remarkably, the [panel] opinion holds that we must do precisely what the Court instructed us not to do: parse state law to determine whether the statutory alternatives are elements or means."). This controversy apparently stems from footnote 2 of *Descamps*, which disavows a distinction between "elements" and "means of commission," with other portions of the opinion, which appear to rely on such a distinction, at least in some instances. *See Descamps*, 133 S. Ct. at 2285 & n.2; *Rendon*, 782 F.3d at 469–70 (explaining the issue).

[75] 136 S. Ct 2243 (2016).

[76] *Id.* at 2248.

[77] *Id.*

At issue in *Mathis* was whether an Iowa burglary statute[78] counted as a predicate offense for ACCA purposes. The statute at issue listed a broader range of places than the generic definition of burglary, including any building, structure, [or] land, water, or air vehicle."[79] The district court imposed the ACCA enhancement after reviewing the *Shepard* documents and finding that the facts of his case – that his burglary was of a structure rather than a vehicle – matched the generic definition of burglary. The Eighth Circuit affirmed, reasoning that there was no difference in whether the listing of different locations amounted to separate "elements" or merely separate "means of commission."[80]

The Supreme Court reversed, once again stressing that the categorical approach is an elements-based approach, and that the facts of the prior conviction are ultimately irrelevant when doing an ACCA analysis. The court addressed the "element v. means" debate by stressing that elements are the 'constituent parts' of a crime's legal definition – they are 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."[81] 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."[82] In *Mathis*, the alternative locations formed different "means of commission" that could be used to fulfil a single locational element. Indeed, under Iowa case law, a jury did not even need to agree on which of the locations was involved in the commission of the crime.[83] The Eight Circuit permitting the categorical approach based upon "alternative means of commission" simply mistakes "alternative means of commission" to create a divisible statute. That is, such a statute is merely overbroad for ACCA purposes and cannot count as a predicate for an enhancement.[84]

The Court laid out the proper way for a sentencing court to approach a statute that has alternate phrasing within it. It stated: "The first task for a sentencing court faced with an alternatively phrased statute is thus to determine whether its listed items are elements or means."[85] *Mathis* instructs courts to first look to state law to determine if a statute

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78 Iowa Code § 702.12 (2013).

79 *Id.*

80 786 F.3d 1068, 1075 (8th Cir. 2015).

81 Mathis, 136 S. Ct at 2248.

82 *Id.*

83 *See* State v. Duncan, 312 N.W.2d 519, 523 (Iowa 1981); State v. Rooney, 862 N.W.2d 367, 376 (Iowa 2015).

84 "In short, the statute defines one crime, with one set of elements, broader than generic burglary – while specifying multiple means of fulfilling its locational element, some but not all of which (*i.e.*, buildings and other structures, but not vehicles) satisfy the generic definition." 136 S. Ct. at 2250.

85 *Id.* at 2256.

contains alternative means or alternative elements.[86] If state law fails to provide clear answers, "federal judges have another place to look: the record of a prior conviction itself."[87] Consistent with the categorical approach precedent, a statute with alternative elements is divisible and the modified categorical approach may be applied. However, "if instead they are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution."[88] In practice, this "means vs. elements" question is the test that often determines the divisibility of a statute. Essentially, the modified categorical approach is available only when the statute lists alternative elements, and the question is "what section of the statute did the defendant plead guilty to." Courts have applied *Mathis*' guidance on divisibility to a number of statutes, including Georgia's 'burglary' statute,[89] Texas' 'burglary' statute,[90] Michigan's 'breaking and entering' statute,[91] Oklahoma's 'assault' statute,[92] and Massachusetts' 'resisting arrest' statute.[93]

D. Step 4: Comparing the Elements of the Statute of Conviction to the Definition

Having identified the definition at issue in step one, and then subsequently identifying and listing the elements of the statute of conviction, the final step is for the court to analyze them to determine whether the statute of conviction meets the statutory or guideline definition at issue. The court must always limit its analysis to comparing the elements of the predicate offense to the applicable definition. The court may not look to the underlying conduct, even where the parties have access to the allegations, or even to uncontroverted proof, about the predicate offense. Even where courts are authorized to review the documents authorized by *Shepard* to determine the elements of statute of

[86] *Id.* As a starting point, state court decisions may provide a dispositive answer as to whether a statute contains alternative elements or means. Additionally, the statute itself may provide an answer. If a statute contains alternative punishments, or if the statute identifies alternative things that must be charged, the statute contains alternative elements. On the other hand, when a statutory list is drafted to offer only "illustrative examples," the statute includes a crime's means of commission.

[87] *Id.*

[88] *Id.*

[89] United States v. Gundy, 842 F.3d 1156 (11th Cir. 2016) (Holding that Georgia's 'burglary' statute contains alternative elements rather than a single locational element with alternative means of commission.).

[90] United States v. Uribe, 838 F.3d 667 (5th Cir. 2016) (Holding that Texas' 'burglary' statute contains alternative elements.).

[91] United States v. Ritchey, 840 F.3d 310 (6th Cir. 2016) (Holding Michigan's 'breaking and entering' statute contains merely alternative means of commission.).

[92] United States v. Taylor, 843 F.3d 1215 (10th Cir. 2016) (Holding that Oklahoma's 'assault, battery, or assault and battery with dangerous weapon' statute provides for alternative elements rather than alternative means of commission.).

[93] United States v. Faust, 853 F.3d 39 (1st Cir. 2017) (Holding Massachusetts' 'resisting arrest' statute merely lists alternative means of commission.).

conviction, the focus of the inquiry does not become the underlying conduct, but instead remains only on determining the statute of conviction.

As set forth below, the steps in applying the categorical approach are generally the same for both elements clauses and when comparing to an enumerated offense. Nevertheless, each clause involves different applications issues addressed below.

1. Elements Clauses

In interpreting the meaning of the phrase "has as an element the use, attempted use, or threatened use of *physical force* against the person of another," the Supreme Court held that the phrase "physical force," which is not defined in the statute, should be given "its ordinary meaning."[94] The adjective "physical," the Court found, was clear in meaning but of little help: "It plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force."[95] The Supreme Court concluded that "[u]ltimately, context determines meaning[,]" and "in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person."[96]

In recent decisions, the Supreme Court has further refined its guidance as to what constitutes sufficient force. Generally, force sufficient to satisfy the "force clause" must be used either intentionally[97] or, in some circumstances, recklessly.[98] Accidental or negligent conduct will not qualify. In *Leocal v. Ashcroft,* the Court held: "Interpreting [18 U.S.C.] § 16 to encompass accidental or negligent conduct would blur the distinction between the 'violent' crimes Congress sought to distinguish for a heightened punishment and other crimes."[99] Additionally, physical force generally requires "violent force," and will not be satisfied by "unwanted touching." In *Johnson v. United States*, the Court held "[a]ll of these definitions suggest a degree of power that would not be satisfied by the merest touching."[100] However, the Court recently held that in the context of misdemeanor domestic violence, offensive touching and other minor uses of force may satisfy the force

94 Johnson, 559 U.S. at 138.

95 *Id*.

96 *Id*. at 139.

97 *See, e.g.*, Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) (Force clause requires a higher degree of intent than negligent or merely accidental conduct.).

98 *See, e.g.*, Voisine v. United States, 136 S. Ct. 2272 (2016) (Holding that a reckless domestic assault qualifies as a "misdemeanor crime of domestic violence.").

99 Leocal, 543 U.S. at 11.

100 Johnson, 559 U.S. at 137.

requirement.[101] Finally, the force clause requires the use of force, rather than the mere causation of physical injury. However, the Court recently softened the distinction between the use of force and causation of physical injury by holding that "the knowing and intentional causation of bodily injury necessarily involves the use of physical force…"[102] In evaluating each of these principles, the court must first determine the scope of the predicate statute of conviction. Specifically, the court should look to relevant state case law to determine how state courts have interpreted particular provisions of the prior offense.[103]

2. Enumerated Clauses

As noted above, the Supreme Court in *Taylor* decided that when Congress listed offenses, it must have meant the contemporary, generic understanding of those offenses. Thus, in comparing the elements of the prior offense to an enumerated offense, the court must first determine the enumerated offense's contemporary, generic definition. In establishing the contemporary, generic definition, courts look to numerous sources, including the Model Penal Code,[104] Supreme Court and circuit case law, state surveys,[105] legal dictionaries,[106] or definitions specifically provided in the guidelines.[107]

As summarized by the Fifth Circuit,[108] three methods are most common among the courts to give meaning to enumerated offenses — the "plain-language" approach, employed by the majority of circuits, and defining terms by reference to legal and other dictionaries; the "multi-source" approach, applied by the D.C., Third, and (at times) Fifth Circuits, looking to a greater number of sources, including state codes and the Model Penal Code; and a "mixed-method" approach used by the Ninth and Eleventh Circuits, which applied different analyses depending on whether an offense had been defined at common law.[109]

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[101] United States v. Castleman, 134 S. Ct. 1405 (2014) (Holding that in the context of domestic violence, offensive touching may qualify as a use of force.").

[102] Castleman, 134 S. Ct. at 1414–15 (Explaining "use of force" includes knowingly or intentionally employing a device (such as poison or a handgun trigger) to cause physical harm.").

[103] *See, e.g.*, Johnson, 559 U.S. at 138 ("We are, however, bound by the Florida Supreme Court's interpretation of state law…").

[104] *See, e.g.*, United States v. Torres-Diaz, 438 F.3d 529, 536 (5th Cir. 2006) (The "primary source for the generic contemporary meaning of [a category of offenses] is the Model Penal Code…").

[105] *See, e.g.*, United States v. Gonzalez-Ramirez, 477 F.3d 310, 318 (5th Cir. 2007) (After surveying the law of all 50 states, the court determined that because a majority of the states rejected any specific purpose requirement, such a requirement was not part of the "generic" definition of kidnapping under §2L1.2.).

[106] *See, e.g.*, United States v. Iniguez-Barba, 485 F.3d 790, 792 (5th Cir. 2007) (Relying on *Black's Law Dictionary* along with legislative history.).

[107] USSG §4B1.2, comment. (nt. 1) (Providing definitions for "forcible sex offense" and "extortion.").

[108] The Fifth Circuit uses a "common sense approach" in connection with the categorical approach only when interpreting enumerated offense categories that are based on common law crimes

[109] United States v. Rodriguez, 711 F.3d 541, 550–52 & n. 13–15 (5th Cir. 2013) (en banc).

The plain-language approach looks to the "ordinary, contemporary, [and] common" meaning.[110] The Fifth Circuit has noted courts can "properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.' If these words are unambiguous, we end our inquiry with them."[111] Courts that apply the multi-source approach, however, attempt to cast a wider net. For example, the District of Columbia Circuit Court has reasoned "[m]any jurisdictions separate kidnapping offenses into simple and aggravated forms or grade them as first and second degree. Because our task is to determine the meaning of 'kidnapping' in any form or degree, *we look to all offenses termed kidnapping by the various criminal codes.*"[112] Finally, courts that apply the mixed method apply one of the two possible methodologies, depending on whether the qualifying offense is described in terms that embrace a traditional common law crime.[113] If the offense is defined in terms of a common law crime, then the court applies the generic, core meaning.[114] However, if the qualifying offense is defined in terms that do not embrace a traditional common law crime, the court applies the "ordinary, contemporary, and common meaning" of the statutory words.[115]

Once the court has determined the contemporary, generic definition using one of the methods described above, the court then compares the elements of the prior offense to the elements of the generic definition. Where the prior offense meets or is narrower than the generic offense, it qualifies under the statutory or guideline provision.[116] If it is overbroad – that is, it proscribes a larger sphere of conduct than is targeted by the generic offense – it does not qualify.[117]

[110] United States v. Izaguirre-Flores, 405 F.3d 270, 275 (2005).

[111] United States v. Zavala-Sustaita, 214 F.3d 601, 604 (internal citations omitted).

[112] United States v. De Jesus Ventura, 565 F.3d 870, 876 (D.C. Cir. 2009) (emphasis added).

[113] United States v. Corona-Sanchez, 291 F.3d 1201, 1204 (9th Cir. 2002) *superseded on other grounds by* USSG §2L1.2 comment. (n. 4) (2002).

[114] *Id.*

[115] *Id.*

[116] Descamps, 133 S. Ct. at 2281 ("The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense.").

[117] Mathis, 136 S. Ct. at 2251 ("We have often held, and in no uncertain terms, that a state crime cannot qualify as an ACCA predicate if its elements are broader than those of a listed generic offense.").

APPENDIX A

SELECTED SUPREME COURT CASE LAW

The following section provides brief summaries of the Supreme Court's most important cases addressing the categorical approach and the modified categorical approach.

Taylor v. United States, 495 U.S. 575 (1990). "Burglary," within meaning of the Armed Career Criminal Act, refers to a conviction for any crime, regardless of its exact definition or label, that has the basic elements of "generic" burglary — that is, an unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime. To determine whether a defendant was previously convicted of generic burglary, a sentencing court may only look to the statutory definition of the prior offense, and not to the particular facts underlying the conviction. This "categorical approach" however, may permit the sentencing court to go beyond the mere fact of conviction in a "narrow range of cases where a jury was actually required to find all the elements of generic burglary." Therefore, an offense constitutes "burglary" for the ACCA enhancement "if either its statutory definition substantially corresponds to 'generic' burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant."

Leocal v. Ashcroft, 125 S. Ct. 377 (2004). State driving under the influence statutes that either do not have a *mens rea* component or require only negligence in the operation of a vehicle are not crimes of violence under 18 U.S.C § 16, and therefore are not aggravated felonies warranting deportation under the Immigration and Nationality Act. The plain meaning of both 18 U.S.C § 16(a) and (b) require the use of physical force against the person or property of another, which requires a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense.

Shepard v. United States, 544 U.S. 13 (2005). Judicial inquiry into whether a plea of guilty to burglary necessarily admitted elements of the generic offense, and is therefore a "violent felony" under the ACCA, "is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."

Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007). The term "theft offense" in 8 U.S.C. § 1101(a)(43)(G) includes the crime of "aiding and abetting" a theft offense, because the generic sense in which the term "theft" is now used in state and federal law covers such aiders and abettors as well as principals.

James v. United States, 550 U.S. 192 (2007). Attempted burglary under Florida law is a "violent felony" under the residual clause of the ACCA because it presents a serious potential risk of physical injury to another. "Here, the risk posed by attempted burglary is

comparable to that posed by its closest analog among the enumerated offenses, completed burglary."

Begay v. United States, 128 S. Ct. 1581 (2008). A conviction for felony driving under the influence is not a "violent felony" under the residual clause of the ACCA, because, even presuming that a DUI involves conduct that "presents a serious potential risk of physical injury to another," a DUI does not sufficiently resemble the enumerated crimes (burglary, arson, or extortion, involving the use of explosives) to bring it within the ambit of the statute. The listed examples should be read "as limiting the crimes [the clause] covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves." The example crimes typically involve purposeful, violent, and aggressive conduct, whereas DUI statutes typically do not and are more comparable to crimes that impose strict liability, negligence, or recklessness.

Chambers v. United States, 129 S. Ct. 687 (2009). The Illinois crime of failure to report for penal confinement falls outside the scope of ACCA's "violent felony" definition. Because the Illinois statute placed together in a single numbered statutory section several different kinds of behaviors, the court properly looked to the state-court information in the record to determine that the defendant was convicted of knowingly failing to report to a penal institution. This crime does not satisfy ACCA's violent felony definition because it does not involve conduct that presents a serious potential risk of physical injury to another.

Nijhawan v. Holder, 129 S. Ct. 2294 (2009). The "$10,000 loss" requirement in 8 U.S.C. § 1101(a)(43)(M)(i), which includes in the definition of aggravated felony "an offense that . . . involves fraud or deceit in which the loss to the . . . victims exceeds $10,000," refers to the specific acts in which the defendant engaged (a "circumstance-specific" interpretation), and not to the generic crime (a "categorical" interpretation). The cases endorsing the categorical approach concerned the Armed Career Criminal Act, but the "aggravated felony" statute in the Immigration and Nationality Act, while resembling ACCA when it lists several "offenses" in language that must refer to generic crimes, also lists other "offenses" using language that almost certainly refers to specific circumstances.

Johnson v. United States, 130 S. Ct. 1265 (2010). The Florida offense of battery by "[a]ctually and intentionally touching" another person is not a violent felony because it does not have as an element the use of physical force against the person of another as required by 18 U.S.C. § 924(e)(2)(B)(i). Under Florida law, the element of "[a]ctually and physically touching" another person is satisfied by any intentional physical contact, no matter how slight, while, in contrast, "[w]e think it clear that in the context of a statutory definition of '*violent* felony,' the phrase 'physical force' means *violent* force—that is, force capable of causing physical pain or injury to another person."

Sykes v. United States, 131 S. Ct. 2267 (2011). Prior conviction under Indiana law for knowing or intentional flight from law enforcement officer by vehicle is a "violent felony" for purposes of the ACCA. A fleeing criminal creates risks comparable to, and arguably

greater than, those involved in arson and burglary. *Begay* and *Chambers* did not require that ACCA predicate crimes be purposeful, violent, and aggressive in ways that vehicle flight is not. While *Begay* used the "purposeful, violent, and aggressive" language, it also gave a more specific reason for its holding, namely that DUI is analogous to strict liability, negligence, and recklessness crimes. Vehicle flight, in contrast, has a stringent *mens rea* requirement, and, because its risks are comparable to the listed crimes, it is a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."

Descamps v. United States, 133 S. Ct. 2276 (2013). As described in past precedent, the modified categorical approach allows courts to look beyond the statutory elements, to the charging papers and jury instructions or, in the case of a guilty plea, the terms of the plea agreement or transcript of the colloquy between judge and defendant, only in a "narrow range of cases", namely to help a court determine which statutory phrase within a statute listing several different crimes was the basis of the conviction. Courts may not apply the modified categorical approach to sentencing under ACCA when the crime of which the defendant was convicted has a single, indivisible set of elements; courts may only apply this approach if the statute is divisible.

United States v. Castleman, 134 S. Ct. 1405 (2014). Distinguishing *Johnson v. United States*, 130 S. Ct. 1265 (2010), the Court held that offensive touching may qualify as a "use of force" in the context of domestic violence. Domestic violence differs from ACCA's requirement of "physical force" in that it often encompasses acts that one might not characterize as "violent" in a nondomestic context. The requirement of force under 18 U.S.C. § 922(g)(9), which forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence" may therefore be satisfied by a lesser amount of force than required by ACCA's violent force requirement.

Johnson v. United States, 135 S. Ct. 2551 (2015). The Court held that ACCA's residual clause is unconstitutionally vague, and therefore imposing an increased sentence under it violates the Due Process clause. The Court reasoned that application of the categorical approach to crimes purportedly falling under the residual clause requires a sentencing court to imagine the conduct a crime involves in the "ordinary case," and then determine whether that presents a serious potential risk of physical injury. Because judges have no guidepost other than the speculative "ordinary case," the residual clause left grave uncertainty about how to estimate the risk posed by a crime. At the same time, the residual clause also left uncertainty as to the amount of risk required for a crime to qualify as a violent felony.

Mathis v. United States, 136 S. Ct. 2243 (2016). Iowa's burglary statute, which provided for breaking into any building, structure, or land, water, or air vehicle, is broader than the contemporary, generic meaning and therefore cannot serve as an ACCA predicate offense. The fact that the statute sets out multiple alternative means of fulfilling a single locational element did not make the statute divisible, and therefore the application of the

modified categorical approach was improper. As precedent dictates, the modified categorical approach may only be used in situations where a statute is divisible. A statute is divisible only when it sets out multiple alternative elements. A list of alternative means of commission of a single element will not suffice.

Voisine v. United States, 136 S. Ct. 2272 (2016). Maine's misdemeanor domestic assault statute, which provides for "intentionally, knowingly, or recklessly causing bodily injury" to another, can qualify as a predicate "misdemeanor crime of domestic violence" under 18 U.S.C. § 922(g)(9). Section 922(g)(9) forbids the possession of firearms by anyone convicted of a "misdemeanor crime of domestic violence." In *United States v. Castleman,* the Supreme Court had left open the question of whether a reckless assault could qualify as a misdemeanor that necessarily involves the "use…of physical force." The Court answered that question by holding that reckless conduct involves the conscious disregard of a known risk, which is a deliberate decision rather than an accident.