CASE LAW UPDATE - CATEGORICAL SCENARIOS

Scenario 1:

If the conduct in the video is the least culpable means of committing an offense under a robbery statute, is the statute a violent felony or crime of violence?

Answer: Yes, because after *Stokeling*, if a robbery statute requires the defendant to overcome the victim's resistance, the offense has as an element the use, attempted use, or threatened use of physical force against the person.

Scenario 2:

If the conduct in the video is the least culpable means of committing an offense under a robbery statute, is the statute a violent felony or crime of violence?

Answer: No, because the offense involves snatching which, does not involve overcoming the victim's resistance.

Scenario 3:

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?

Answer: It is a crime of violence. When determining the minimum conduct required for a conviction, circuit courts have required that "such conduct only include that in which there is a realistic probability, not a theoretical possibility the state statute would apply. To prove that the conduct is not violent and realistic, circuit courts require the defendant "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." Here, the defendant would have to show that a defendant had been convicted of Indiana battery with this set of circumstances.

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Scenario 4:

The defendant has a prior conviction for Oklahoma Pointing a Firearm which provides:

> It shall be unlawful for any person to willfully or without lawful cause point a shotgun, rifle or pistol, or any deadly weapon, whether loaded or not, at any person or persons for the purpose of threatening or with the intention of discharging the firearm or with any malice or for any purpose of injuring, either through physical injury or mental or emotional intimidation, or for purposes of whimsy, humor or prank....

Both the government and defendant agree that the statute is not divisible. The defendant argues that pointing a firearm at a person for the purposes of "whimsy, humor, or prank" does not involve the use of force and is not a crime of violence under §4B1.2.

The government argues that the defendant has not located one case where someone was convicted under the "whimsy, humor, or prank" part of the statute, and because the rest of the statute requires threatening the use of force or causing injury, the statute is a crime of violence.

Is the government correct that the defendant must point to a case to show that someone was convicted of pointing a firearm at a person for purposes of whimsy, humor, or prank for the offense to be a crime of violence?

Answer: No. The statute lists means to commit the crime in a non-violent manner. The statute of not divisible, and some means of committing it do not qualify as violent under the force clauses of the Armed Career Criminal Act at the crime of violent definition of USSG § 4B1.2.

Scenario 5:

The defendant was convicted of 21 U.S.C. § 841(b)(1)(A) and has two prior convictions under a South Carolina drug statute (44-53-375(B)) which provides:

> A person who manufactures, distributes, dispenses, delivers, purchases, or otherwise aids, abets, attempts, or conspires to manufacture, distribute, dispense, deliver, or purchase, or possesses with intent to distribute, dispense, or deliver methamphetamine or cocaine base [that is, crack cocaine] ... is guilty of a felony.

The government believes the defendant is a career offender because the offense meets the definition of controlled substance offense at §4B1.2

> "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

Is the government correct that the South Carolina statute on its face qualifies as a controlled substance offense under §4B1.2 and that the defendant is a career offender?

Answer: No. Because the South Carolina statute includes "purchasing meth or crack" and "controlled substance offense" does not include "purchasing drugs", the offense is not a match under the categorical approach.

Scenario 6

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?

Yes. If statutory alternatives carry different punishments, then the statute is divisible. This statute contains different penalties because one section carries a penalty of "not less than two years nor more than ten years" and another section carries a penalty of "not less than one nor more than five years."