



Case Law Update- Categorical Approach

Thursday, September 5, 2019

9:00am – 10:30am; 10:45am – 12:15pm

Alan Dorhoffer

Who is 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

- Are you kidding, there are really different definitions of crimes of violence?
- How is it possible that Federal Kidnapping is not a crime of violence but Washington Harassment is a violent felony?
- The defendant admitted pointing a gun at a person, how is this prior offense not a crime of violence?
- Where is nearest place to get a strong “Hurricane” drink to get me through this session?
- Why does Alan talk so fast?

What is the Categorical Approach Anyway?

- Look only to the **statutory elements** of an offense to determine if the conviction meets the criteria of a certain category of offense (*e.g.*, **crime of violence or violent felony, controlled substance offense**)
- **DO NOT:**
 - Rely on the title of the statute
 - Look to the specific facts of the case for this analysis

When to use the 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:
 - Massachusetts Armed robbery
 - Texas Injury to a Child
 - Michigan Domestic violence
- Does this defendant have two prior crimes of violence to qualify as a career offender at §4B1.2?

Guidelines Definition of Crime of Violence

§4B1.2(a)

Force Clause

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

Enumerated Offenses

- **is** murder, manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, or extortion, involves use of explosives, certain firearms offenses

Example: Felon in Possession

- Defendant convicted of felon-in-possession (§ 922(g))
- Defendant has 2 prior convictions:
 - New York Robbery in Third-Degree
 - Washington Harassment
- §2K2.1 Base Offense Level

(2) 24, if the defendant has two prior felony crimes 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:
 - North Carolina Common Law Robbery
 - Illinois Attempted Murder
 - OH Burglary

ACCA Definition of Violent Felony

18 U.S.C. § 924(e)

Force Clause

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

Enumerated Offenses

- **is** burglary, arson, or extortion, or involves use of explosives

Only one of the Following Offenses Has a Circuit Court Held to Be a Violent Felony under the ACCA

- A. Illinois Aggravated Sexual Battery
- B. Washington Second Degree Murder
- C. Wyoming Interference with a Peace Officer
- D. Arkansas Kidnapping

Categorical Approach Views

“How did we ever reach the point where this Court, sitting *en banc*, must debate whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK-47 at her family is a crime of violence? It’s nuts. And Congress needs to act to end this ongoing judicial charade.”

Judge William Pryor

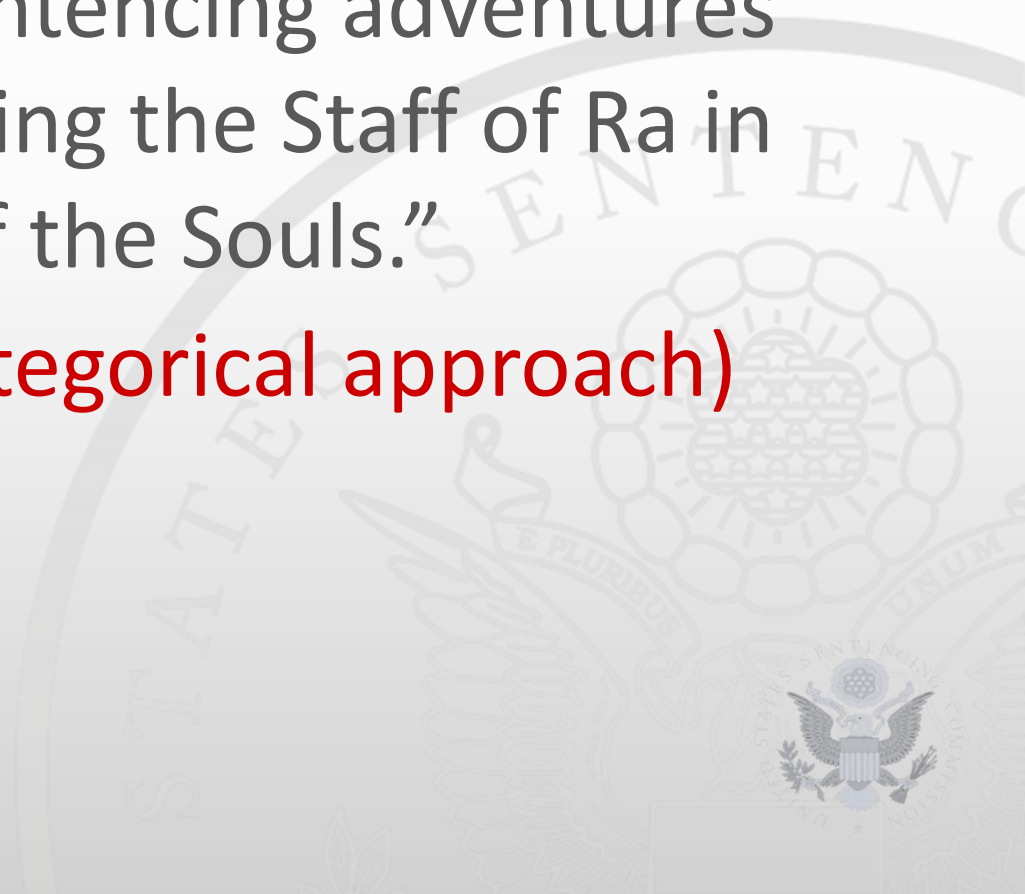
“MURDER in the second-degree is NOT a crime of violence??? How can this be? I feel like I am taking crazy pills.”

Judge Randy Smith

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 (describing the categorical approach)



Force Clause Definitions

Crime of Violence at §4B1.2

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

Violent Felony

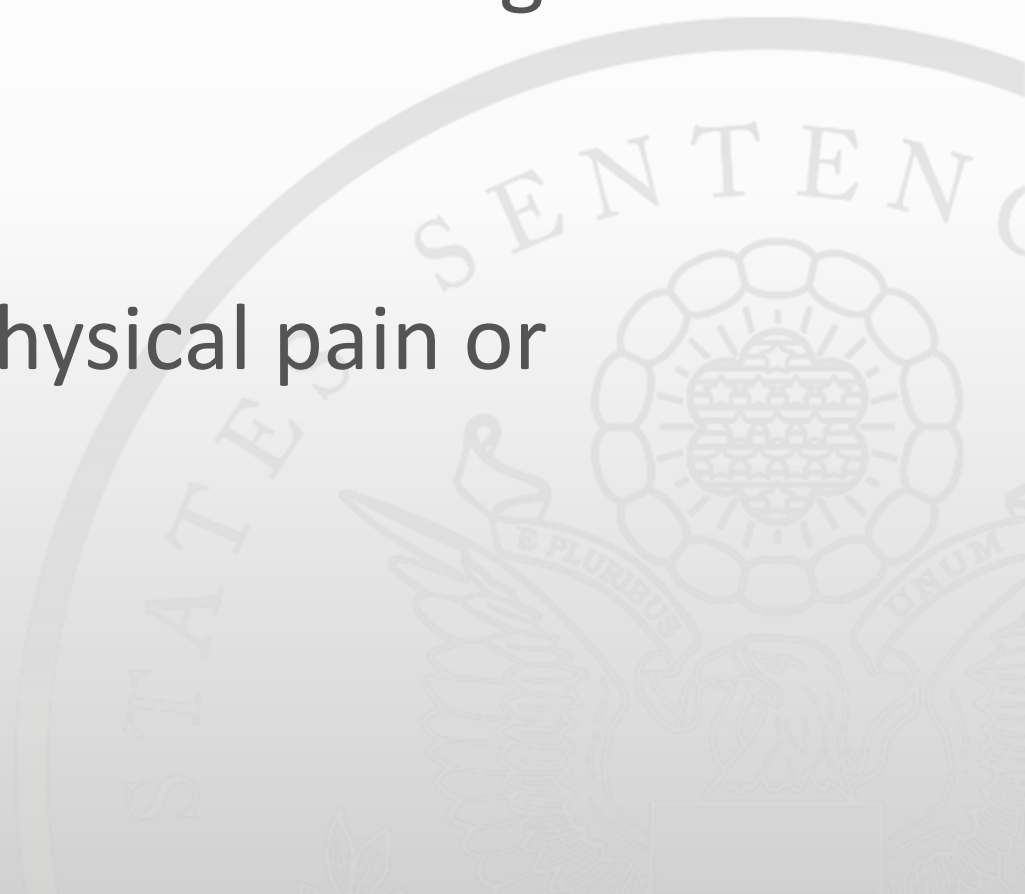
- **Has as an element** the use, attempted use, or threatened use of physical force against the person of another

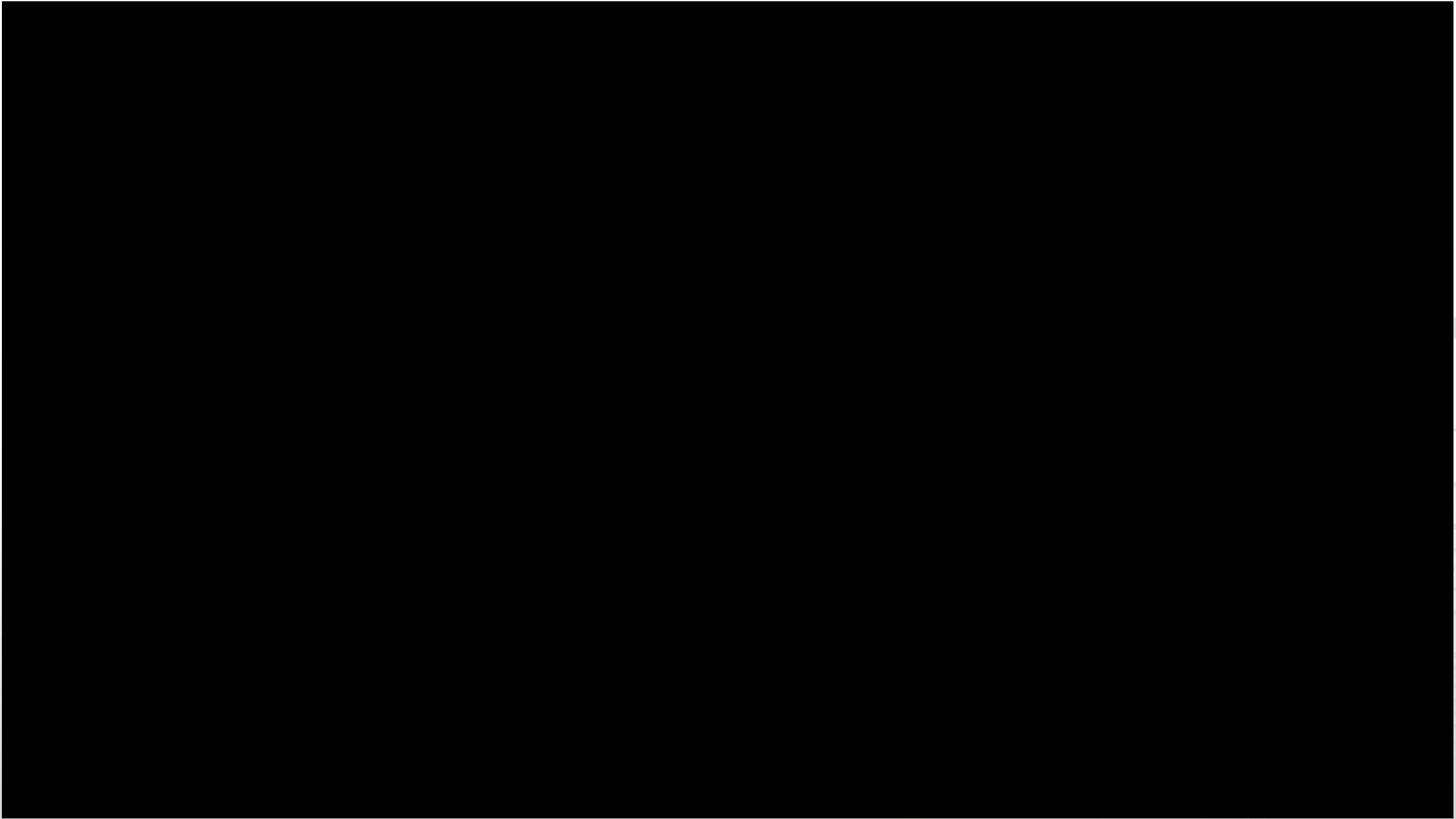
Crime of Violence at § 924(c)

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

What is Force under ACCA and §4B1.2?

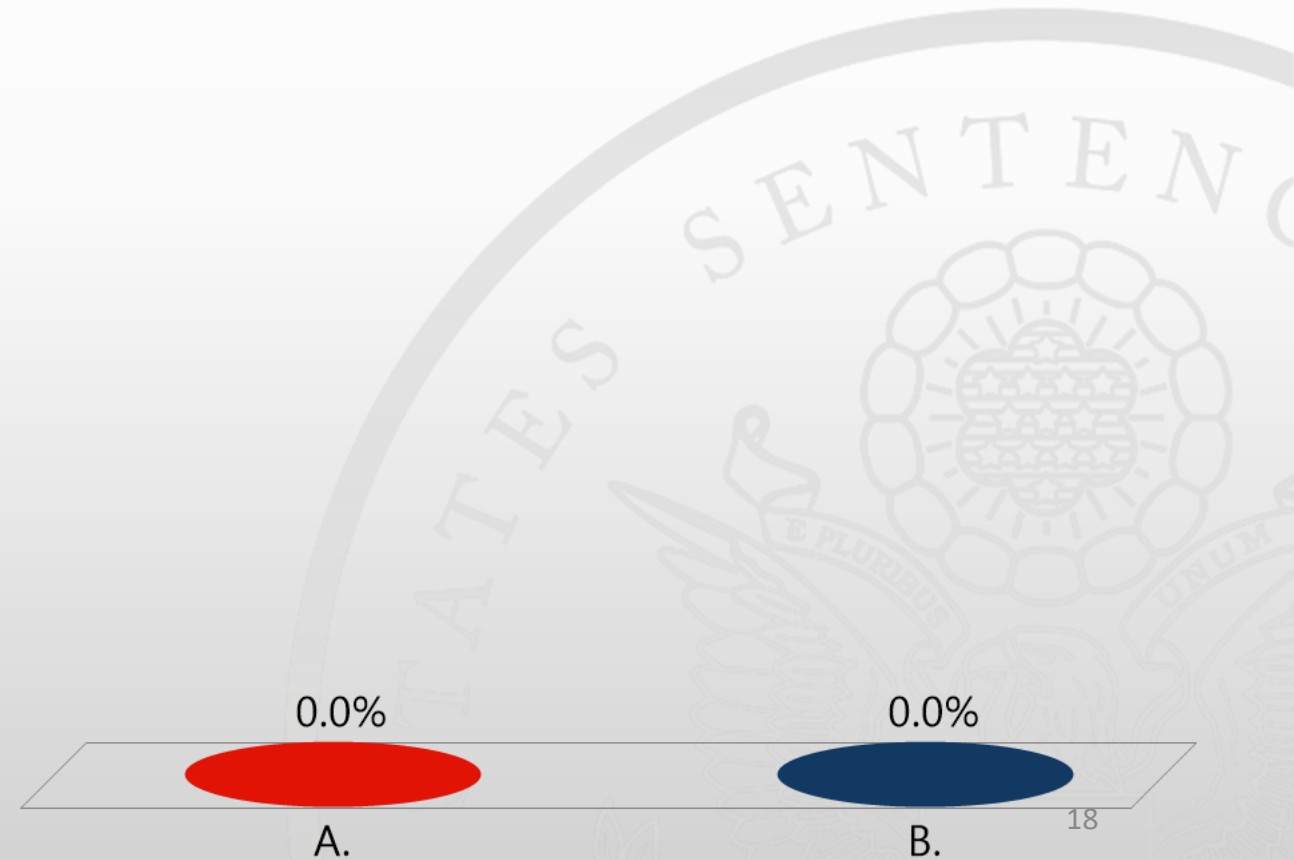
- *Johnson v. U.S.*, 130 S. Ct. 1265 (2010)
 - “The term violent...connotes a substantial degree of force.”
- Need force capable of causing physical pain or injury to another
- More than *de minimis* force





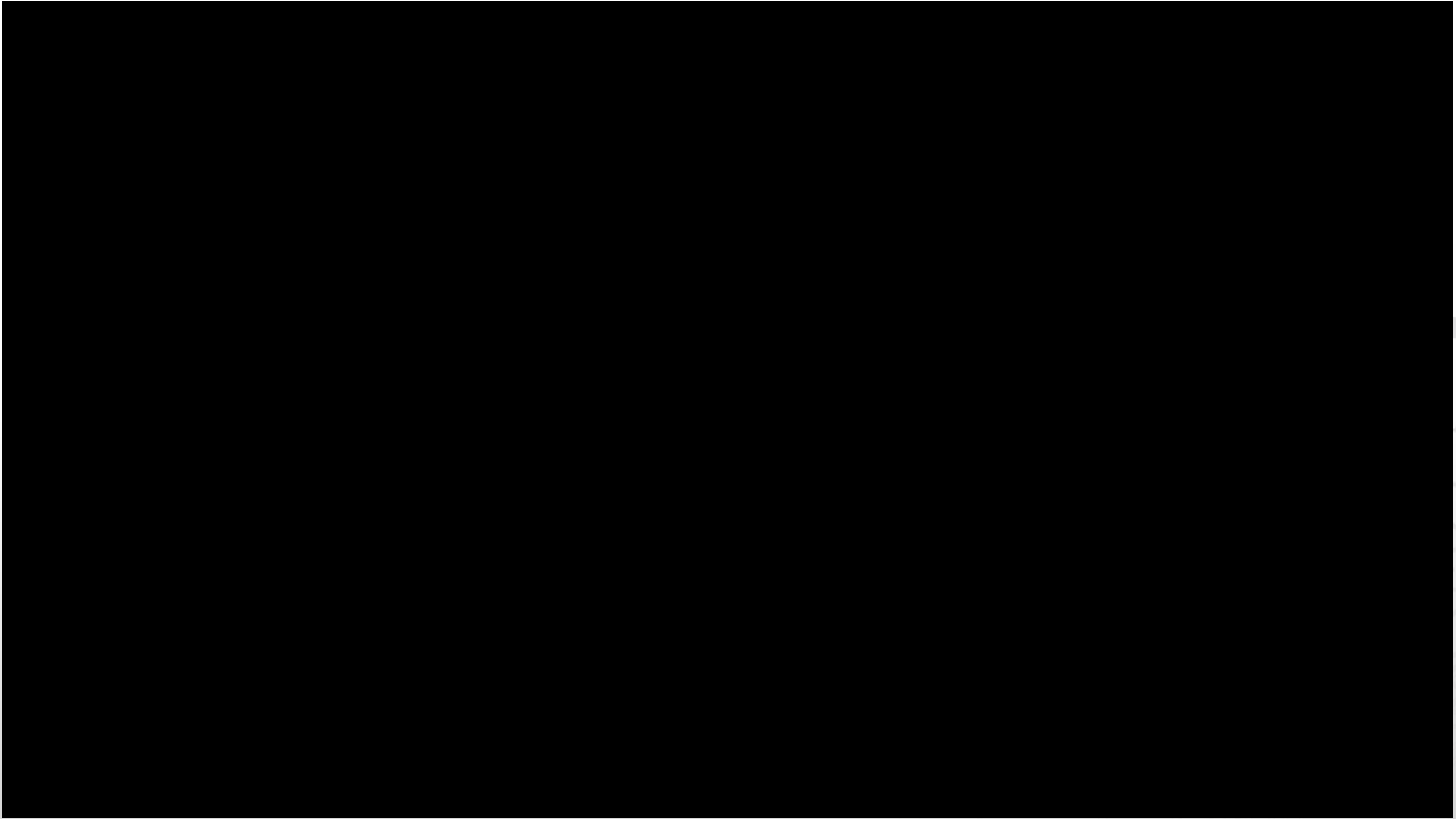
Scenario 1: If this conduct is the least culpable conduct for a conviction under a robbery statute, is the statute a violent felony or crime of violence?

- A. Yes
- B. No



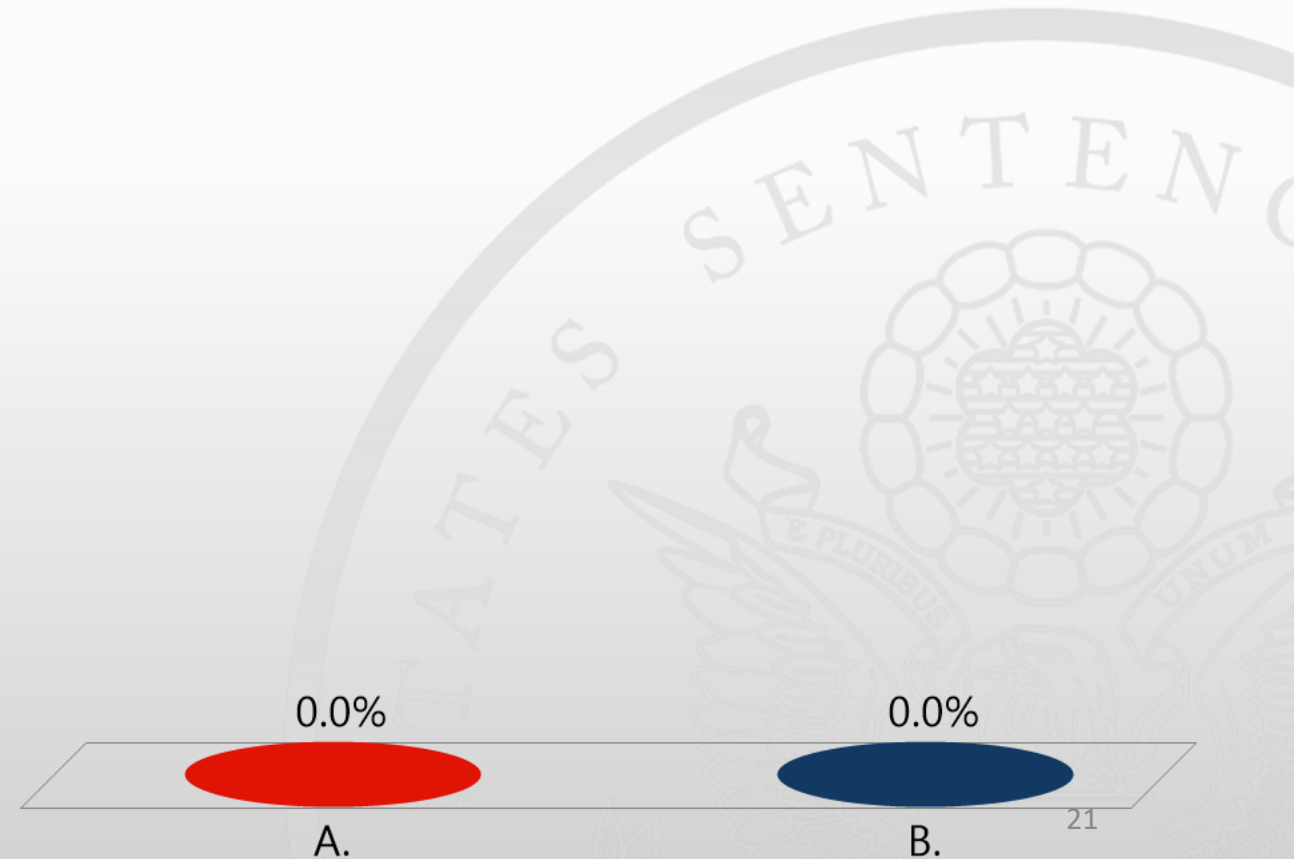
Stokeling v. United States, 139 S. Ct. 544 (2019)

A robbery offense that has an element of force sufficient to overcome a victim's resistance meets the level of force necessary to qualify as a violent felony under the elements clause of the Armed Career Criminal Act



Scenario 2: If this conduct is the least culpable conduct for a conviction under a robbery statute, is the statute a violent felony?

- A. Yes
- B. No



Robbery Offenses

If offense requires
overcoming victim resistance



Likely Crime of
Violence/Violent Felony

If offense doesn't require
overcoming victim
resistance (*e.g.*, snatching)



Likely not a Crime of
Violence/Violent Felony

Robbery Offenses

- Kansas robbery not a violent felony because a defendant can be convicted of snatching property without any resistance

U.S. v. Bong, 913 F.3d 1252 (10th Cir. 2019)

- Missouri 2nd-degree robbery is a crime of violence

“The line is drawn, therefore, between robbery that can be accomplished by the mere snatching of property and robbery that requires overcoming even slight victim resistance.”

U.S. v. Ash, 917 F.3d 1238 (10th Cir. 2019)

Robbery

“Thus, the degree of force needed to satisfy the ACCA’s force clause need not be ‘substantial,’ nor must the altercation between the offender and the victim result in any injury or pain. Rather, a physical contest between two individuals over the possession of property ‘is itself ‘capable of causing physical pain or injury.’ ”

“A robbery that can be committed by the ‘[m]ere snatching of property’ will not suffice to meet the ACCA’s definition of ‘physical force.’”

U.S. v. Dinkins, 928 F.3d 349 (4th Cir. 2019)

Robbery Offenses that Qualify as a Violent Felony

- New York Robbery in 3rd degree
 - *U.S. v. Thrower*, 914 F.3d 770 (2d Cir. 2019)
- New Jersey second-degree robbery
 - U.S. v. McCants*, 920 F.3d 169 (3d Cir. 2019)
- North Carolina common law robbery
 - U.S. v. Dinkins*, 928 F.3d 349 (4th Cir. 2019)
- Texas simple robbery
 - U.S. v. Burris*, 920 F.3d 942 (5th Cir. 2019)

Robbery Offenses that Qualify as a Violent Felony

- Michigan unarmed robbery

U.S. v. Fuller-Ragland, 931 F.3d 456 (6th Cir. 2019)

- Illinois robbery

Klinko v. U.S., 928 F.3d 539 (7th Cir. 2019)

- Arkansas robbery

U.S. v. Smith, 928 F.3d 714 (8th Cir. 2019)

- Missouri robbery

Jones v. U.S., 922 F.3d 864 (8th Cir. 2019)

Attempted Robbery

IL attempted robbery is crime of violence under §4B1.2

U.S. v. Brown, 916 F.3d 706 (8th Cir. 2019)

NY attempted robbery in third degree is a violent felony

U.S. v. Thrower, 914 F.3d 770 (2d Cir. 2019)

MI attempted unarmed robbery is a violent felony

Chaney v. U.S., 917 F.3d 895 (6th Cir. 2019)

Robbery and Conspiracy and Accessory Before the Fact

Ohio Complicity to Commit Aggr. Robbery qualifies at §4B1.2 because the underlying crime meets the force clause and a conviction for complicity requires proof of the underlying crime,

U.S. v. Johnson, -F.3d-, 2019 WL 3540662 (6th Cir. Aug. 5, 2019)

N.C. common law accessory before the fact of armed robbery is a violent felony

U.S. v. Dinkins, 928 F.3d 349 (4th Cir. 2019)

Federal Robbery by Intimidation (18 U.S.C. § 2113(a)) is a Crime of Violence at §4B1.2

- *U.S. v. Wilson*, 880 F.3d 80 (3d Cir. 2018)
- *U.S. v. McBride*, 826 F.3d 293 (6th Cir. 2016)
- *U.S. v. Campbell*, 865 F.3d 853 (7th Cir. 2017)
- *U.S. v. Harper*, 869 F.3d 624 (8th Cir. 2018)



Hobbs Act Robbery at § 924(c)

Hobbs Act robbery is a crime of violence at § 924(c)

U.S. v. Mathis, 932 F.3d 242 (4th Cir. 2019)

U.S. v. Garcia-Ortiz, 904 F.3d 102 (1st Cir. 2018)

U.S. v. Hill, 890 F.3d 51 (2d Cir. 2018)

In re Fleur, 824 F.3d 1337 (11th Cir. 2016)

Consp. to Commit Hobbs Act robbery is not a COV at § 924(c)

U.S. v. Simms, 914 F.3d 229 (4th Cir. 2019)

Hobbs Act Robbery at §4B1.2

Hobbs Act robbery does not qualify at §4B1.2

U.S. v. Camp, 903 F.3d 594 (6th Cir. 2018)

U.S. v. O'Connor, 874 F.3d 1147 (11th Cir. 2017)

Key Ideas To Remember With Force Clause

Mens Rea (*e.g.*, Negligence, Recklessness)

Realistic Possibility

Don't rely on title of the Statute

Forget common sense

Circuit Split: Reckless Offenses

Reckless conduct can count

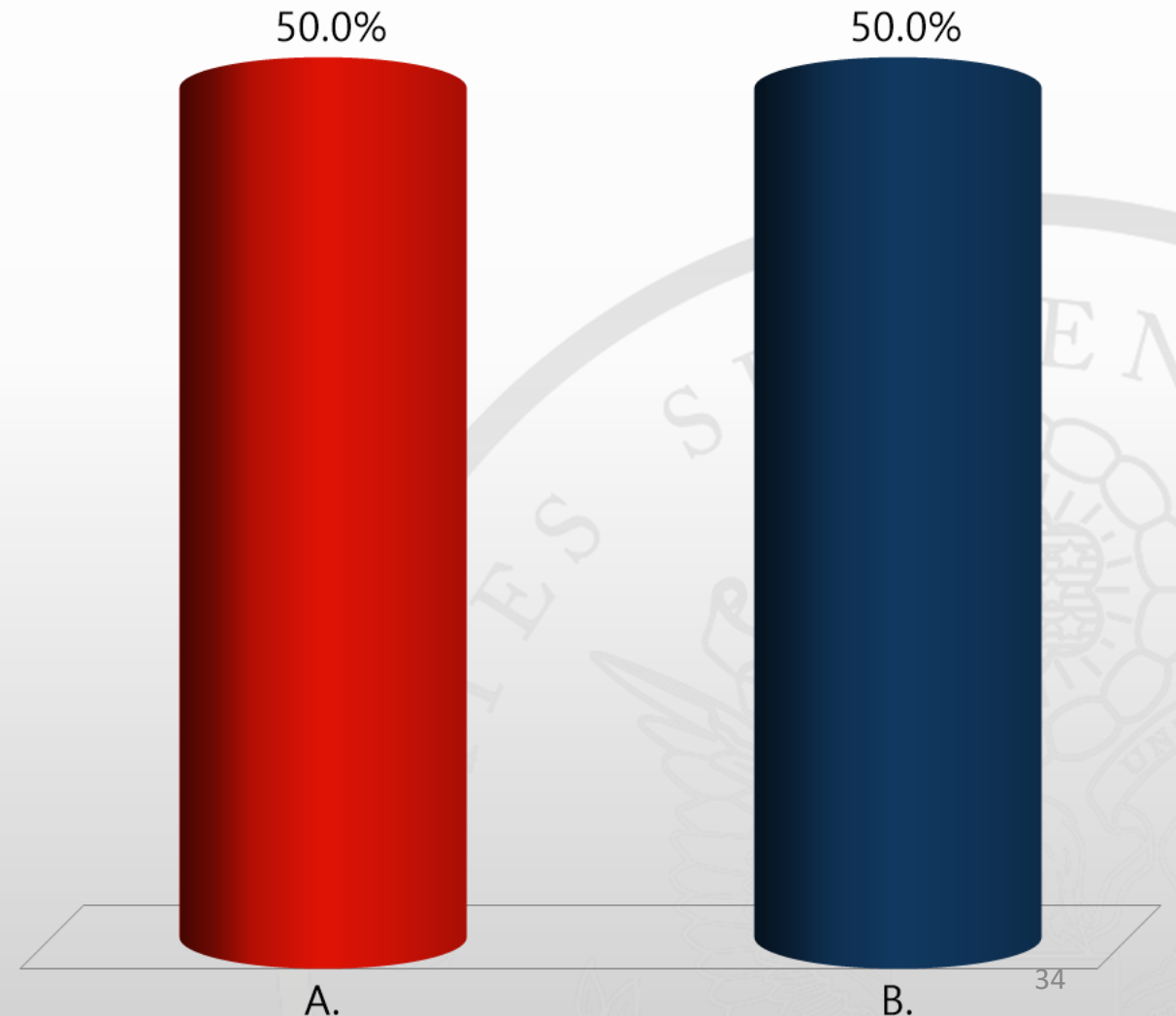
- *U.S. v. Howell*, 838 F.3d 489 (5th Cir. 2016)
- *U.S. v. Verwiebe*, 874 F.3d 258 (6th Cir. 2017)
- *U.S. v. Ramey*, 880 F.3d 447 (8th Cir. 2018)
- *U.S. v. Pam*, 867 F.3d 1191 (10th Cir. 2017)
- *U.S. v. Haight*, 892 F.3d 1271 (D.C. 2018)

Reckless conduct cannot count

- *U.S. v. Windley*, 864 F.3d 36 (1st Cir. 2017)
- *U.S. v. Fields*, 863 F.3d 1012 (8th Cir. 2017)
- *U.S. v. Orona*, 923 F.3d 1197 (9th Cir. 2019)
- *U.S. v. Moss*, 920 F.3d 752 (11th Cir. 2019)

Scenario 3: Is this offense not a crime of violence

- A. The defendant must point to a case where someone was prosecuted under this scenario otherwise it is likely a crime of violence
- B. It is not a crime of violence because of this hypothetical



Realistic Possibility

- *Douglas v. U.S.*, 858 F.3d 1069 (7th Cir. 2017)
 - “Douglas observes that tickling another person entails force. If the tickled person twitches, falls, strikes his head on a coffee table, and suffers a serious injury, Douglas tells us, the tickler could be convicted of Class C felony battery.
 - “Douglas has not located any decision in which Indiana's courts have convicted someone of committing Class C felony battery after a light touch initiates a long causal chain that ends in serious injury.

Realistic Possibility

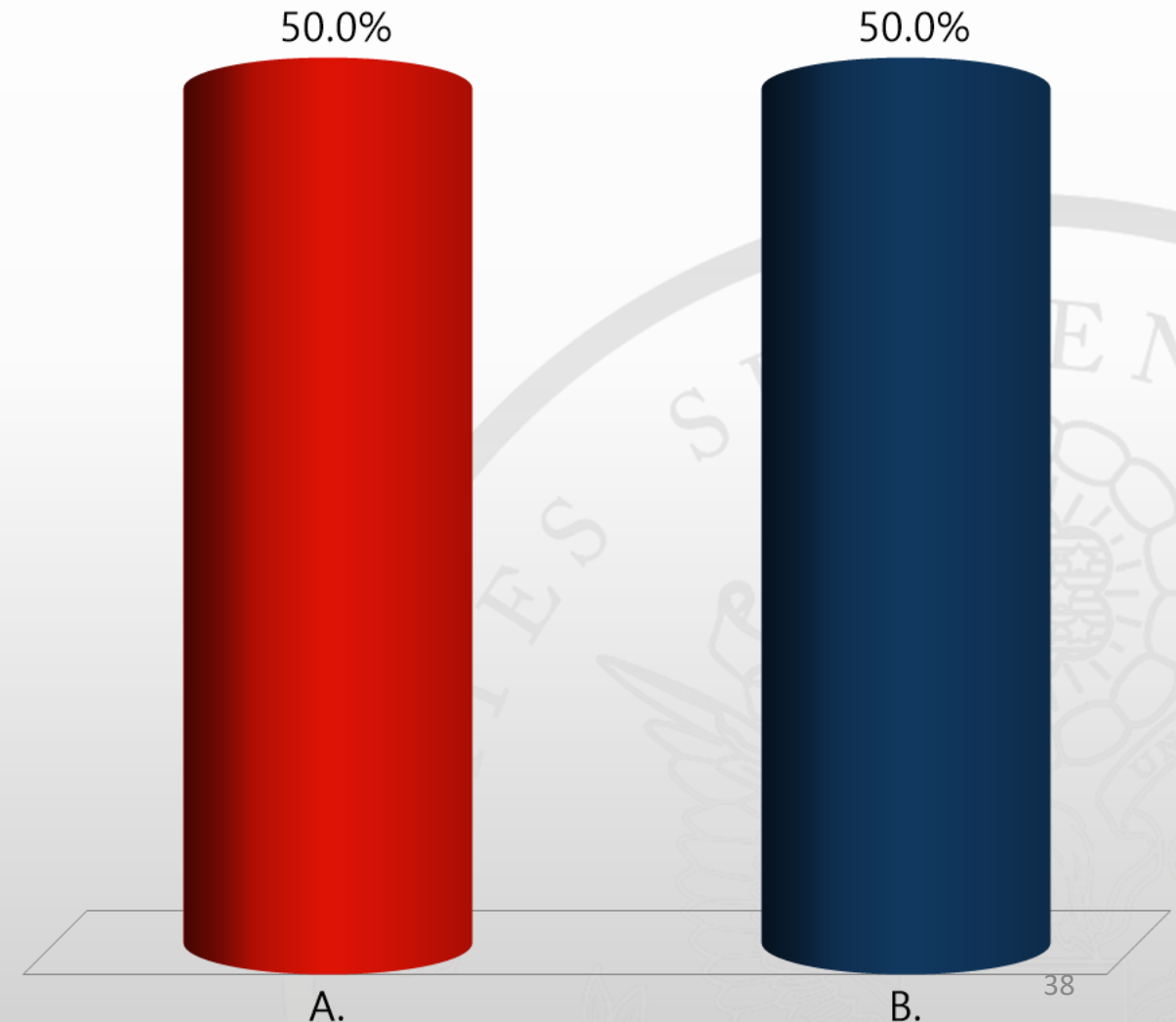
- *U.S. v. Fitzgerald*, -F.3d-, 2019 WL 4008006 (9th Cir. Aug. 26, 2019)
 - The defendant did not show that his hypothetical that someone could be charged under the statute with attempted battery by touching the skin of a person who has suffered third degree burns to show prolonged physical pain had ever been charged

Realistic Probability

- *U.S. v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017)
 - “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. Battle*, 927 F.3d 160 (4th Cir. 2019)
 - “Battle cannot point to any Maryland case to support the notion that Assault with Intent to Murder may be committed by an act of mere omission.”

Scenario 4

- A. The defendant must point to a case
- B. No, the defendant does not need to point to a case



“Realistic Probability” Exception

- “This is not a case where we need to imagine hypothetical non-violent facts to take a statute outside the ACCA's ambit. Section 1289.16 reaches conduct undertaken for purposes of “whimsy, humor or prank” because the statute specifically says so. Where, as here, the statute lists means to commit a crime that would render the crime non-violent under the ACCA's force clause, any conviction under the statute does not count as an ACCA violent felony.”
 - *U.S. v. Titties*, 852 F.3d 1257 (10th Cir. 2017)

Offenses involving Weapons

- Merely being armed with a weapon during a robbery does not automatically make the offense a violent felony
 - *U.S. v. Parnell*, 818 F.3d 974 (9th Cir. 2016)
 - *U.S. v. Bong*, 913 F.3d 1252 (10th Cir. 2010)
- Some circuits have rule that if offense must be committed with a deadly weapon and involves some degree or threat of physical force, it is a crime of violence
 - *U.S. v. Harris*, 853 F.3d 318 (6th Cir. 2019)

Offenses involving Weapons

- SC presenting or pointing at another person a loaded or unloaded firearm is a violent felony
 - *U.S. v. Hataway*, -F.3d-, 2019 WL 3770202 (8th Cir. Aug 12, 2019)
- Even if statute requires discharge or use of a gun, offense might not qualify under force clause
 - *Higdon v. U.S.*, 882 F.3d 605 (6th Cir. 2018) (NC discharge at an occupied building not a crime of violence)

Pointers for Murder Offenses

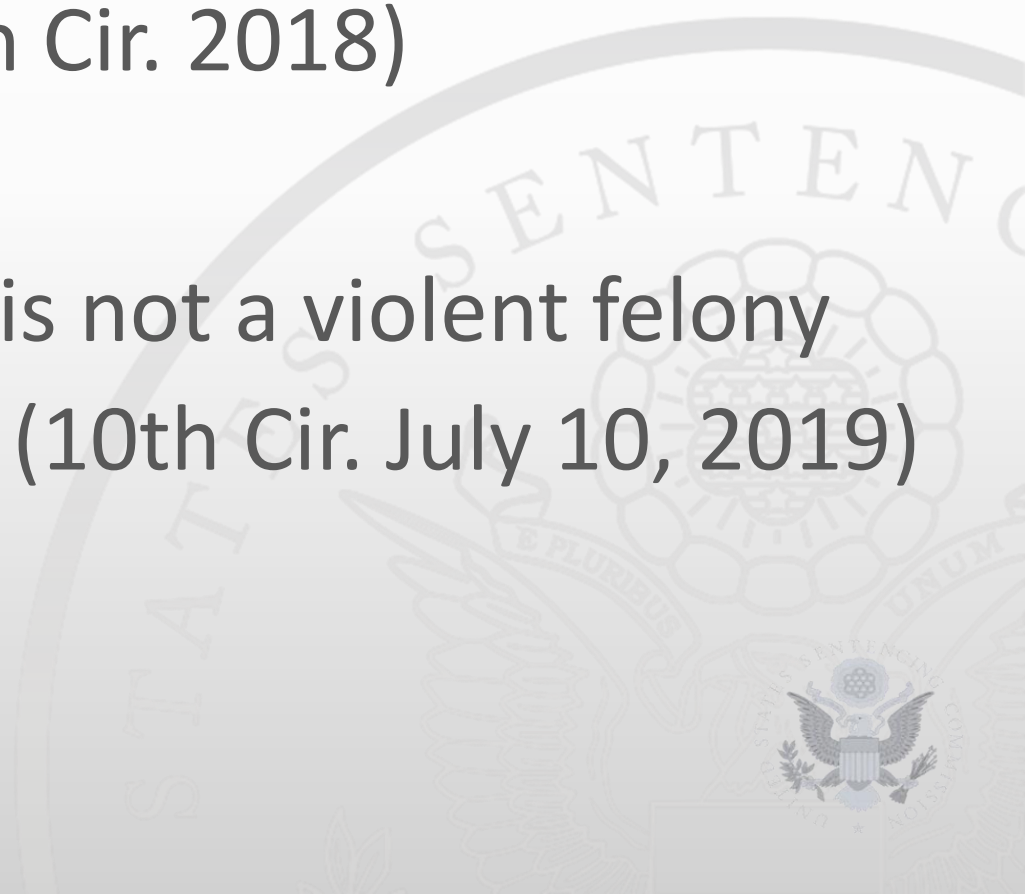
- Wait, I really need pointers to determine if a person was killed to determine if the offense is a violent felony?
- What is the mens rea requirement for the statute? (*e.g.*, negligence, reckless, intentional)?
- Does the offense include conspiracy?

Murder Offenses That **DO NOT** Qualify

- Federal murder in second degree is not a crime of violence under 924(c) (reckless)
 - *U.S. v. Begay*, -F.3d-, 2019 WL 3884261 (9th Cir Aug. 19, 2019)
- Washington second degree murder not a crime of violence under §4B1.2 (negligence)
 - *U.S. v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019)
- Ok 1st degree manslaughter not a serious violent felony
 - *U.S. v. Leaverton*, 895 F.3d 1251 (10th Cir. 2018)
- SC involuntary manslaughter not a violent felony (negligence)
 - *U.S. v. Middleton*, 883 F.3d 485 (4th Cir 2018)

Conspiracy to Commit Murder

- Federal conspiracy to commit murder in aid of racketeering is not a crime of violence at §4B1.2
 - *U.S. v. McCollum*, 885 F.3d 300 (4th Cir. 2018)
- OK consp. to shoot with intent to kill is not a violent felony
 - *U.S. v. Wartson*, 2019 WL 3010282 (10th Cir. July 10, 2019)



Murder Offenses that Qualify

- Florida second-degree murder
 - *U.S. v. Jones*, 906 F.3d 1325 (11th Cir. 2018)
- Illinois second degree murder
 - *U.S. v. LeFlore*, 927 F.3d 472 (7th Cir. 2019)
- North Carolina voluntary manslaughter
 - *U.S. v. Smith*, 882 F.3d 460 (4th Cir 2018)
- Maryland assault with intent to murder
 - *US. v. Battle*, 927 F.3d 160 (4th Cir. 2018)

Pointers for Sex Offenses Under Force Clause

- Examine age of victim and defendant
 - Statutory Rape will likely not qualify under force clause

Examine if offense can be committed by authority and not force

- TN rape (1985 version) is not a violent felony because “rape by coercion” can be committed by use of parental authority

Lowe v. U.S., 920 F.3d 414 (6th Cir. 2019)

Pointers for Sex Offenses Under Force Clause

- Analyze if offense can be committed without force against victim
 - Illinois aggravated sexual battery is not a violent felony because the child could touch the defendant for sexual gratification without force.

Lofton v. U.S., 920 F.3d 572 (8th Cir. 2019)

Pointers for Kidnapping Offenses

- Can offense be committed without force (*e.g.*, deceit)?
- Fed. kidnapping not crime of violence (includes inveiglement)
U.S. v. Walker, -F.3d-, 2019 WL 3756052 (4th Cir. Aug. 9, 2019)
U.S. v. Jenkins, 849 F.3d 390 (7th Cir. 2017)
- AR kidnapping not a violent felony (includes deception)
U.S. v. Coleman, 918 F.3d 592 (8th Cir. 2019)
- VA kidnapping is not a crime of violence (includes deceives)
U.S. v. Mathis, 932 F.3d 242 (4th Cir. 2019)

Pointers for Assault Offenses and Battery Offenses

- Does the offense involve force capable of causing injury and not just “unwanted touching” or touching of an insulting or offensive manner?
- Force can include giving poison to victim (*see Castleman*)
- If statute include negligent conduct won't qualify unless statute is divisible, circuit split on reckless (*See Voisine*)

Examples of Assault Crimes

- Washington 2nd degree assault is not a crime of violence because statute includes touching that is harmful or offensive

U.S. v. Robinson, 917 F.3d 1146 (9th Cir. 2019)

- Missouri 1st Degree is a violent felony

U.S. v. Pryor, 927 F.3d 1042 (8th Cir. 2019)

- Texas Family Violence qualifies as a crime of violence

U.S. v. Gracia-Cantu, 920 F.3d 252 (5th Cir. 2019)

Assaults on Law Enforcement/Government Official

Qualified

- *U.S. v. Darden*, 915 F.3d 579 (8th Cir. 2019) (Missouri 2nd Degree)
- *U.S. v. Winder*, 926 F.3d 1251 (10th Cir. 2019) (Wyoming felony interference with police officer)

Did not Qualify

- *U.S. v. Jones*, 914 F.3d 893 (4th Cir. 2019) (S.C. assault vs. law enforcement officer while resisting arrest doesn't qualify b/c def. can spit at officer)
- *U.S. v. Simmons*, 917 F.3d 312 (4th Cir. 2019) (N.C. assault with a deadly weapon on a gov't official doesn't qualify b/c it includes conduct that could be prosecuted for a culpably negligent act)

Domestic Violence Assault

- South Carolina Criminal Domestic Violence is a violent felony because it requires a threat of physical harm or injury

U.S. v. Drummond, 925 F.3d 681 (4th Cir. 2019)

- Michigan domestic assault is not a crime of violence at §4B1.2 because includes unwatched touching

U.S. v. Morris, 885 F.3d 405 (6th Cir. 2018)

Domestic Battery

- IL domestic battery under 720 ILCS 5/9-2 is a crime of violence.
- IL domestic battery under 720 ILCS 5/12-3.2(a) is not a crime of violence because includes contact of an insulting nature

U.S. v. LeFlore, 927 F.3d 472 (7th Cir. 2019)

Battery

- CA battery resulting in serious bodily injury is a crime of violence under §4B1.2 because the statute criminalizes physical force that results in serious bodily injury
U.S. v. Perez, 932 F.3d 782 (9th Cir. 2019)
- NV attempted battery with substantial bodily harm which requires causing prolonged physical pain qualifies at §4B1.2
U.S. v. Fitzgerald, -F.3d-, 2019 WL 4008006 (9th Cir. Aug. 26, 2019)

Felony Harassment

U.S. v. Door, 917 F.3d 1146 (9th Cir. 2019)

WA felony harassment is a crime of violence because a conviction entails the threatened use of violent physical force

Determining Whether a Statute Meets the Enumerated Clause

Crime of Violence at §4B1.2

- **is** murder, manslaughter, kidnapping, aggravated assault, forcible sex offense, robbery, arson, or extortion, use or unlawful possession of firearm described in 26 U.S.C. § 5845(a) or explosive material

Violent Felony

- **is** burglary, arson, or extortion, or involves use of explosives

Where Do You Find Generic Definitions of Crimes?

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



Generic Definition Example: Aggravated Assault

U.S. v. Fierro-Reyna, 466 F.3d 324 (5th Cir. 2005)

“The generic, contemporary meaning of aggravated assault involves aggravating factors such as use of a deadly weapon and causation of serious bodily injury”

Generic Definition: Burglary

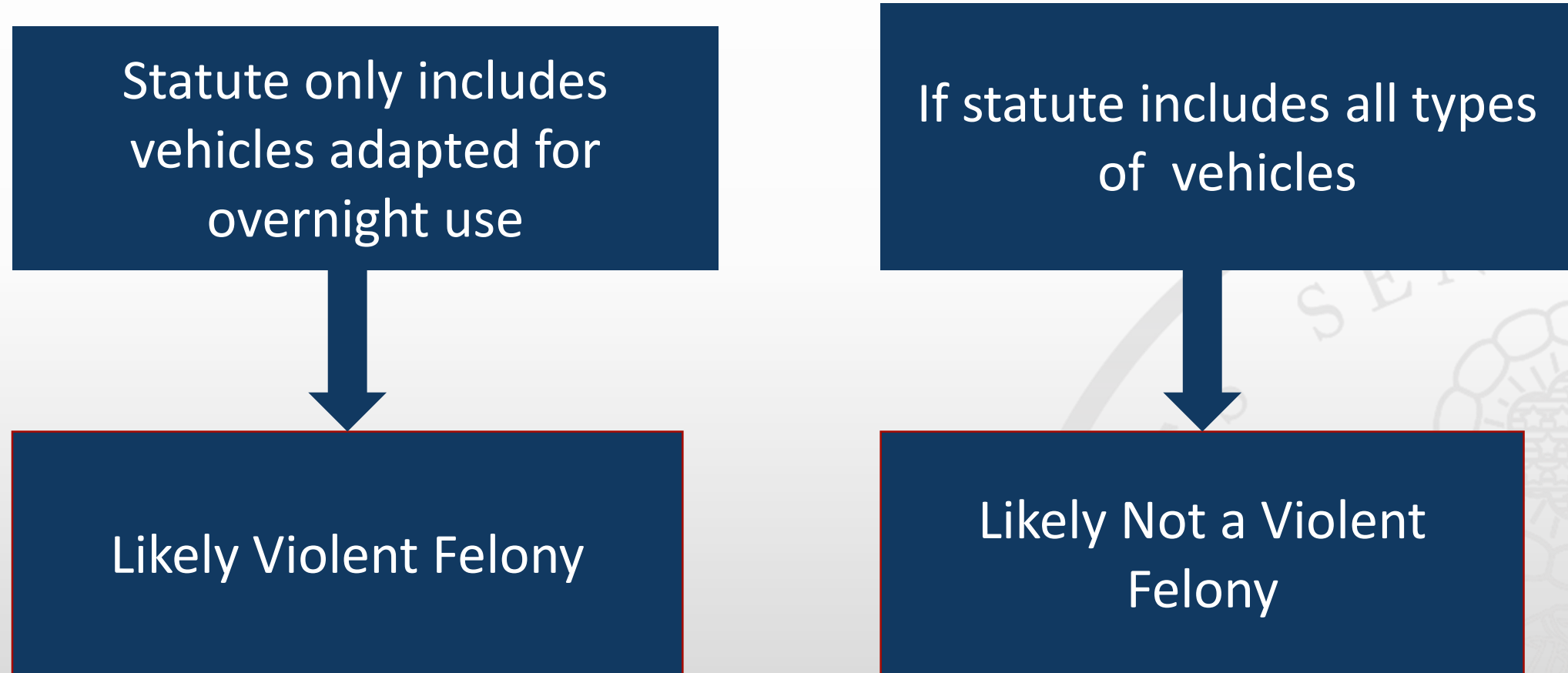
“Unlawful or unprivileged entry in, or remaining in, a building or structure, with intent to commit a crime.”

Taylor v. U.S., 495 F.3d 575 (1990)

Generic burglary, as described in the ACCA, includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight habitation. These include mobile homes, recreational vehicles, trailers, and camping tents.

U.S. v. Stitt, 139 S. Ct. 399 (2018)

Burglary Statutes That Include Vehicles



Burglary Cases After *Stitt*

- *U.S. v. Evans*, 924 F.3d 21 (2d Cir. 2019)

“Following *Stitt*, then, it is clear that second-degree burglary under North Carolina law fits within the generic definition of burglary.”

- *Mutee v. U.S.*, 920 F.3d 624 (9th Cir. 2019)

“Mutee's argument is no longer viable in the wake of *Stitt*.”

- *Brumbach v. U.S.*, 929 F.3d 791 (6th Cir. 2019)

Tennessee burglary is now a violent felony

Pointers for Determining Enumerated Offense

- A state law's exact definition or label does not control
- So long as the state law in question substantially corresponds to (or is narrower than) the offense
- There can be modest state-law deviations

Quarles v. U.S., 139 S. Ct. 1872 (2019)

Determining Whether a Drug Statute Meets an Enumerated Clause

Controlled Substance Offense at §4B1.2

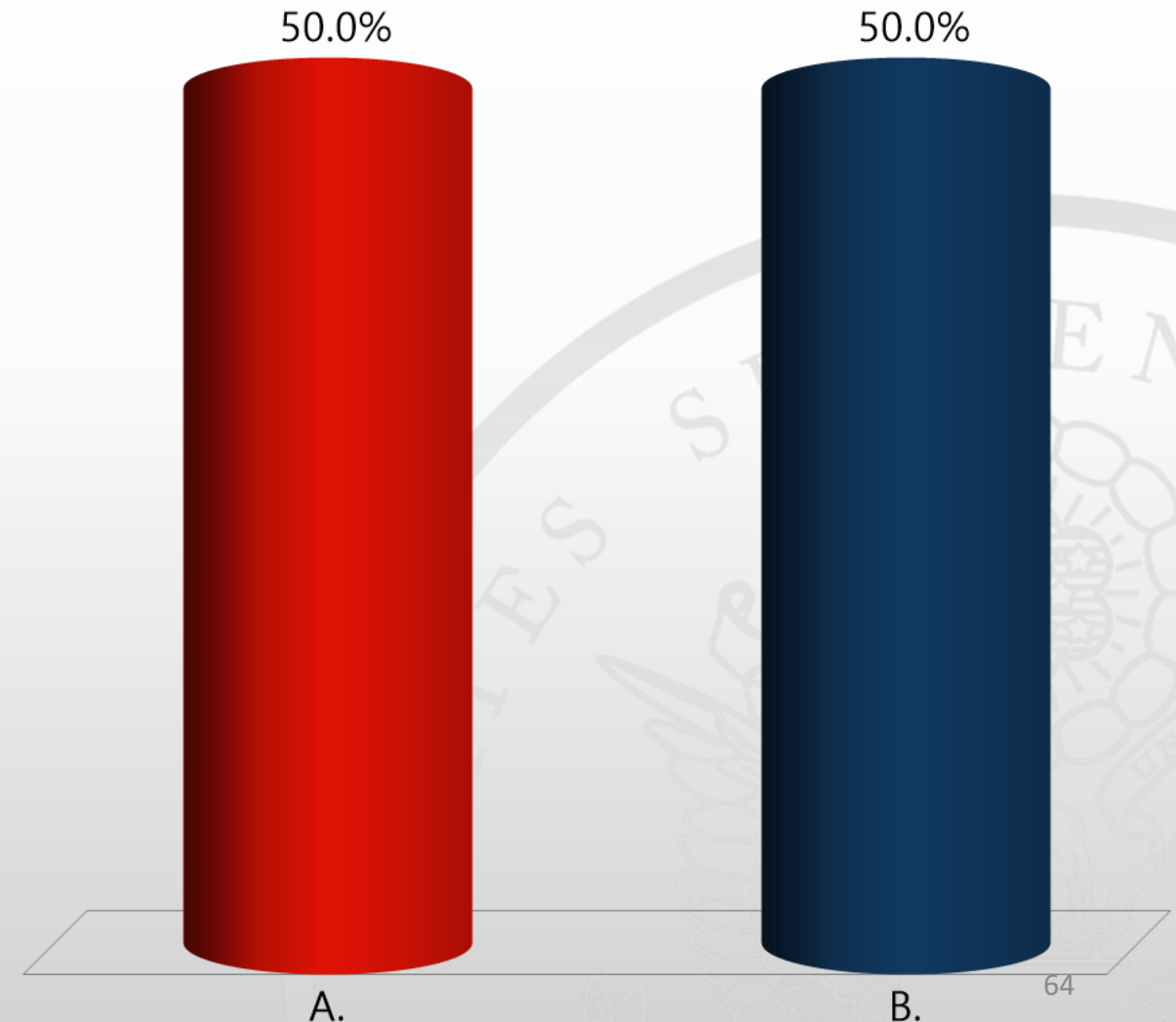
- Manufacture, import, export, distribution, or dispensing of a controlled substance or possession of controlled substance with intent to manufacture, import, export, distribute, or dispense

Serious Drug Offense at ACCA

- involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law

Scenario 5

- A. Yes, this statute is categorically a controlled substance offense
- B. No, this is not categorically a controlled substance offense
- C. Can I get those crazy pills the judge talked about in the opinion



Drug Offense

- *U.S. v. Furlow*, 928 F.3d 311 (4th Cir. 2019)
 - “Because section 44-53-375(B) of the South Carolina Code prohibits the mere ‘purchase[]’ of methamphetamine or crack cocaine, we agree with Furlow that the statute is not a categorical match with the federal definitions of ‘serious drug offense’ and ‘controlled substance offense.’”

Issues for Drug Statutes

- Does the statute include ways to commit the offense that might not be included in federal definition (*e.g.*, offers to sell)?
- Is the offense an inchoate crime (*e.g.*, conspiracy, attempts, solicitation)?
- Does the offense include drugs not included in federal definition?
- To qualify serious drug offense at, ACCA, stat max must be 10 years

Offenses Not Included in Definition

- If offense includes “offers to sell” or “delivery”, then might not qualify under §4B1.2
 - *U.S. v. McKibbon*, 878 F.3d 967 (10th Cir. 2017) (Colorado offense includes “ offer” so doesn’t qualify)
 - *U.S. v. Hinkle*, 832 F.3d 569 (5th Cir. 2016) (Texas delivery statute doesn’t qualify)
 - *But see U.S. v. Hill*, 912 F.3d 1135 (8th Cir. 2019) (MO statute includes offer to sell but still qualifies at ACCA)
 - *But see U.S. v. Smith*, 921 F.3d 708 (7th Cir. 2019) (IN delivery offense counts because of “involving language” at ACCA)

Do Inchoate Offenses Qualify as Controlled Substance Offenses under §4B1.2?

§4B1.2, Application Note 1:

“... and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.”

“The commentary to §4B1.2 makes clear that a controlled substance offense include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.”

U.S. v. Nieves-Borrero, 856 F.3d 5 (1st Cir. 2018)

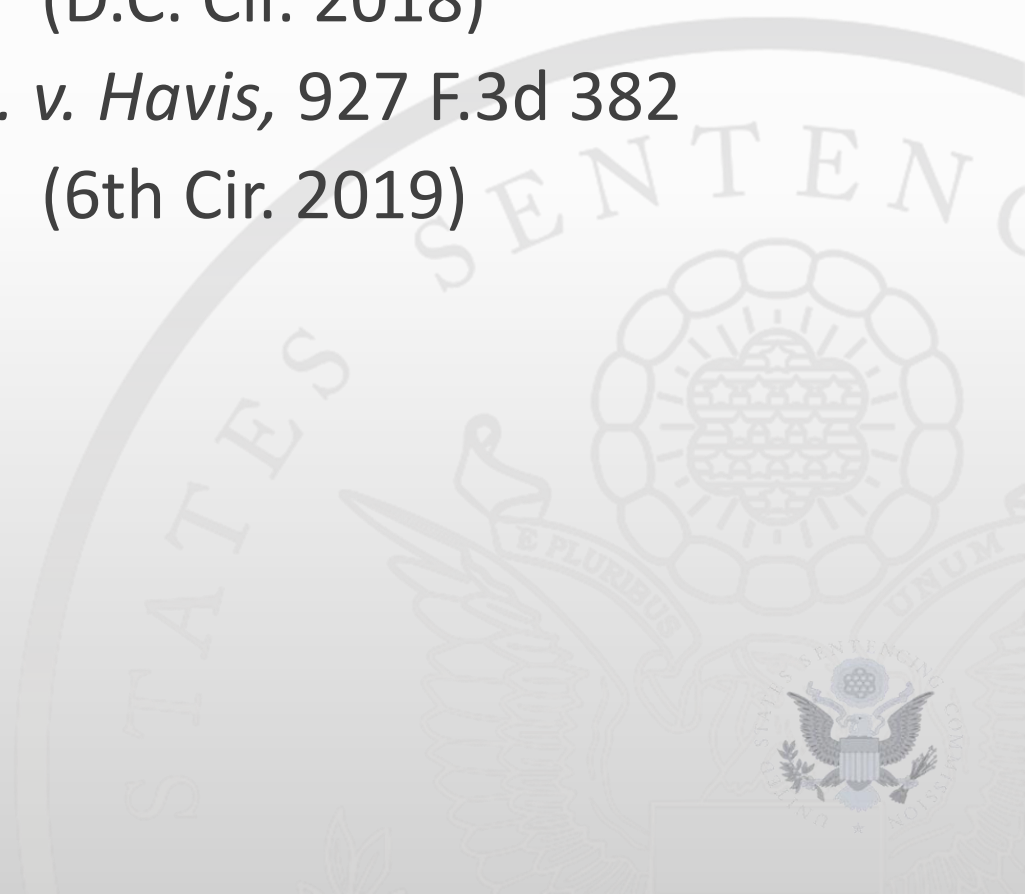
Circuit Split: Does §4B1.2 include inchoate crimes?

Can be Controlled Substance Offense

- *U.S. v. Adams*, 2019 WL 3927514 (7th Cir. Aug. 20, 2019)
- *U.S. v. Nieves-Borrero*, 856 F.3d 5 (1st Cir. 2017)
- *U.S. v. Boleyn*, 929 F.3d 932 (8th Cir. 2019)
- *U.S. v. Crum*, -F.3d-, 2019 WL 3849566 (9th Cir. Aug. 16, 2019)
- *U.S. v. Lange*, 862 F.3d 1290 (11th Cir. 2017)

Not a Controlled Substance

- *U.S. v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018)
- *U.S. v. Havis*, 927 F.3d 382 (6th Cir. 2019)



Does 21 U.S.C. § 846 (Conspiracy) Qualify

Is a Controlled Substance Offense

- *U.S. v. Rivera-Constantino*, 798 F.3d 900 (9th Cir. 2015)
- *U.S. v. Rodriguez-Escareno*, 700 F.3d 751 (5th Cir. 2012)

Not a Controlled Substance

- *U.S. v. Norman*, -F.3d-, 2019 WL 3819341 (4th Cir. Aug. 15, 2019)*****
- *U.S. v. Martinez-Cruz*, 836 F.3d 1305 (10th Cir. 2016) (§2L1.2)



Issues with Drug Offenses

- Does statute includes drugs not listed in the CSA
 - *U.S. v. Townsend*, 897 F.3d 68 (2d Cir. 2018) (NY Sale of drugs is not a controlled substance offense because it criminalizes the sale of a drug (HCG) that is not included in the CSA)
- To qualify at ACCA, stat. max must be 10 years
 - *U.S. v. Cornette*, -F.3d-, 2019 WL 3417272 (4th Cir. 2019)
 - *U.S. v. Rockymore*, 909 F.3d 167 (6th Cir. 2019)
 - *U.S. v. Mayes*, 928 F.3d 502 (6th Cir. 2019)(time of conviction)

What if Statute Contains Multiple Phrases

- IF part of statute might qualify as a crime of violence (or drug offense) and part of the statute does not qualify, determine if statute has multiple elements, because then can use the modified approach
- If not multiple elements, must look at least culpable conduct

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.”
- Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements



Statute: Robbery

- A. No person, in attempting or committing a theft offense or in fleeing immediately after the attempt or offense, shall do any of the following:
1. Have a deadly weapon on or about the offender's person or under the offender's control;
 2. Inflict, attempt to inflict, or threaten to inflict physical harm on another;
 3. Use or threaten the immediate use of force against another.

What is the 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)

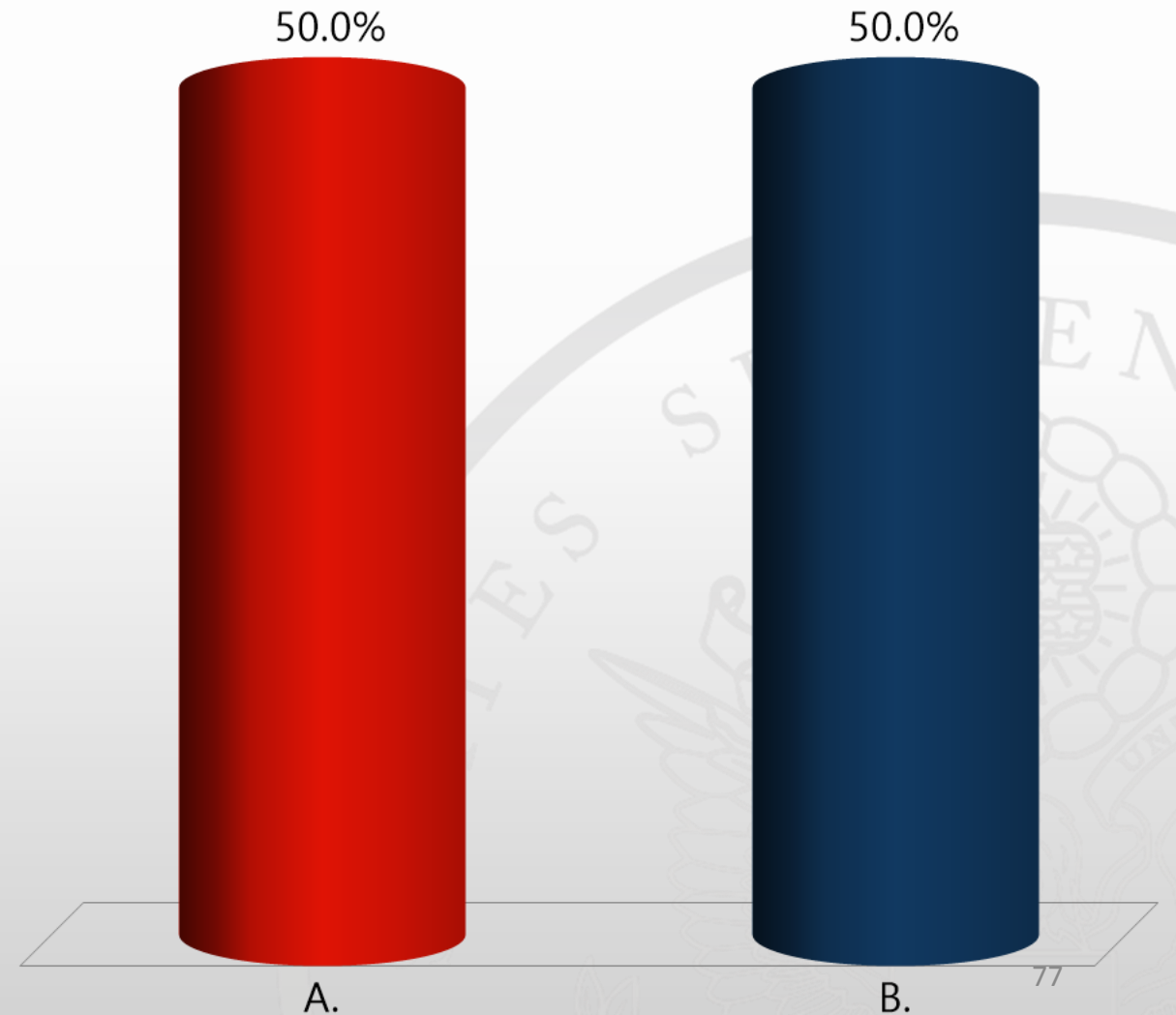
To Tell if Statute is One Crime or Several

- Plain language of the statute (different penalties?)
- State court decisions interpreting the statute
- Jury instructions
- Last resort: “Peek at Record” in some circuits
 - *Mathis v. U.S.*

Scenario 6: Is this offense a divisible statute?

A. Yes

B. No



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.”
- *U.S. v. Ford*, 888 F.3d 922 (8th Cir. 2018)
 - Iowa drug offense is divisible b/c statute requires different drug types and quantities carry different punishments.



Example of Using State Court Decisions

- *U.S. v. Deshazor*, 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.”

Example of Using 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.”



Example of State Court Decisions and Jury Instructions

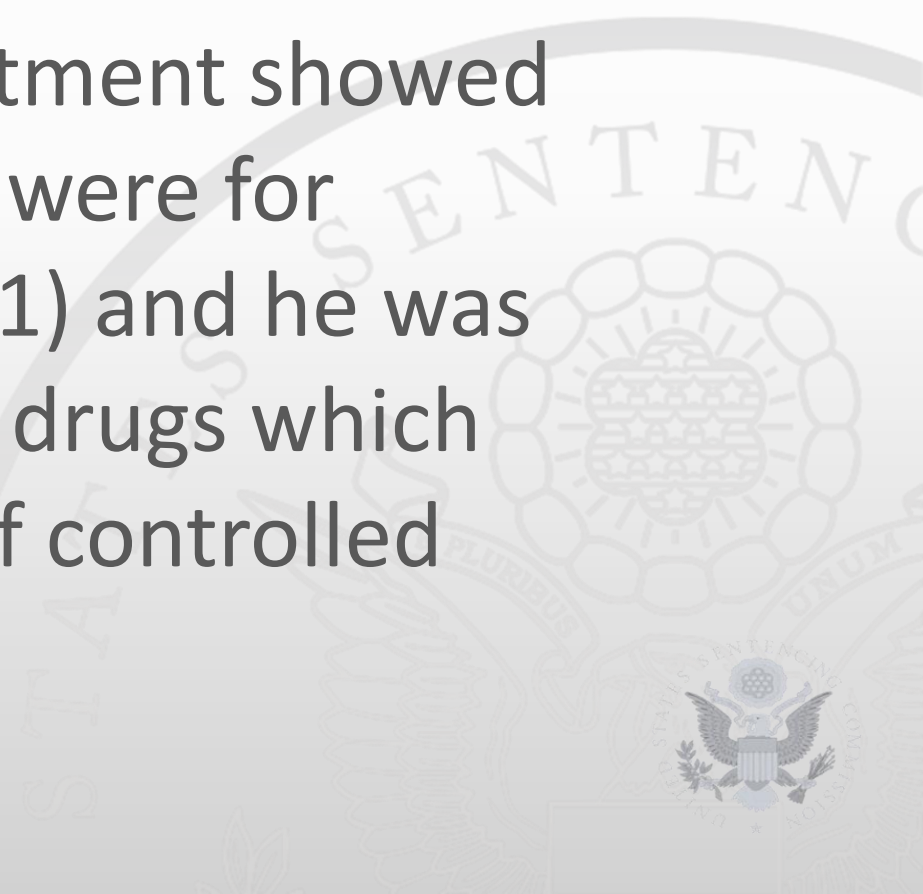
Arkansas kidnapping is not divisible because Arkansas courts treat the nefarious purposes listed in § 5-11-102(a) as means, not elements.

Arkansas's model jury instructions reinforce the treatment of the nefarious purposes as means, not elements.

U.S. v. Coleman, 918 F.3d 592 (8th Cir. 2019)

RICO and Controlled Substance

- *U.S. v. Williams*, 898 F.3d 323 (3d Cir. 2018)
 - RICO is divisible and here, the indictment showed that the defendant's predicate acts were for violations under 21 U.S.C. § 841(a)(1) and he was convicted of manufacturing, selling drugs which matches the guidelines definition of controlled substance offense.



Last Resort: Peek at the Record

- When state law fails to provide a clear answer regarding elements or means, “federal judges have another place to look: the record of a prior conviction itself.”
- Here, the indictments charged Eason with the “purchase [of] an ingredient that could produce methamphetamine
- “Since the indictment lists “purchase” and “ingredient” to the exclusion of their alternative terms, these are elements of crimes.”
 - *U.S. v. Eason*, 919 F.3d 385 (6th Cir. 2019)

Last Resort: Peek at the Record

- “Each indictment references only one of the several alternative locations listed in Georgia's burglary statute. This supports the government's argument that the alternative locations are elements and the statute is divisible as to the locations that can be burglarized.”
 - *Richardson v. U.S.*, 890 F.3d 616 (6th Cir. 2018)

Last Resort: 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.
 - *U.S. v. Kinney*, 888 F.3d 360 (8th Cir. 2018)



Examples of Divisibility Cases

- *U.S. v. Mohamed*, 920 F.3d 94 (1st Cir. 2019)
- *U.S. v. Townsend*, 897 F.3d 66 (2d Cir. 2018)
- *U.S. v. McCants*, 920 F.3d 169 (3d Cir. 2019)
- *U.S. v. Furlow*, 928 F.3d 311 (4th Cir. 2019)
- *U.S. v. Escalante*, -F.3d-, 2019 WL 3521823 (5th Cir. Aug. 2, 2019)
- *Knight v. U.S.*, -F.3d-, 2019 WL 4019860 (6th Cir. Aug 27, 2019)

Examples of Divisibility Cases

- *U.S. v. Smith*, 921 F.3d 708 (7th Cir. 2019)
- *U.S. v. Hataway*, -F.3d-, 2019 WL 3770202 (8th Cir. Aug. 12, 2019)
- *U.S. v. Graves*, 925 F.3d 1036 (9th Cir. 2019)
- *U.S. v. Almanza-Vigil*, 912 F.3d 1310 (10th Cir. 2019)
- *U.S. v. Gandy*, 917 F.3d 1333 (11th Cir. 2019)

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*



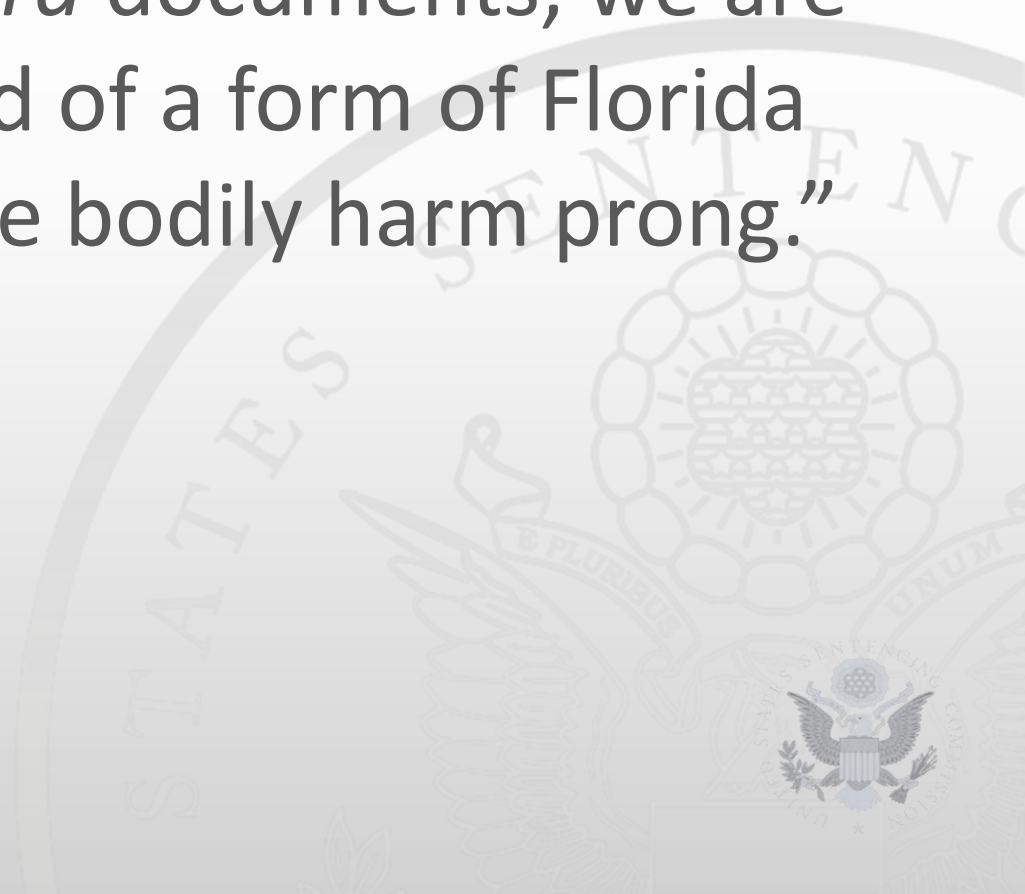
Example of Using *Shepard* Documents

U.S. v. Furlow, 928 F.3d 311 (4th Cir. 2019)

- “Having determined that 44-53-375(B) is divisible and subject to the modified categorical approach, we are entitled to also analyze the relevant *Shepard* documents in the state prosecution.”
- “According to the transcript of Furlow’s plea hearing in Circuit Court for Lexington, he pleaded guilty to distribution of crack.”
- “Comparing those elements with the definitions of ‘serious drug offense’ and ‘controlled substance offense,’ ...there is a match.”⁸⁹

Divisible

- *U.S. v. Vereen*, 920 F.3d 1300 (11th Cir. 2019)
 - “Reviewing these and other *Shepard* documents, we are satisfied that Vereen was convicted of a form of Florida battery that is a violent felony—the bodily harm prong.”



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