



Categorical Approach

2023 National Seminar

August 30, 2023

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Sacramento

1. Press the “**Channel**” button.
2. Press “**55.**”
3. Press the “**Channel**” button again.



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[Online HelpLine Form](#)



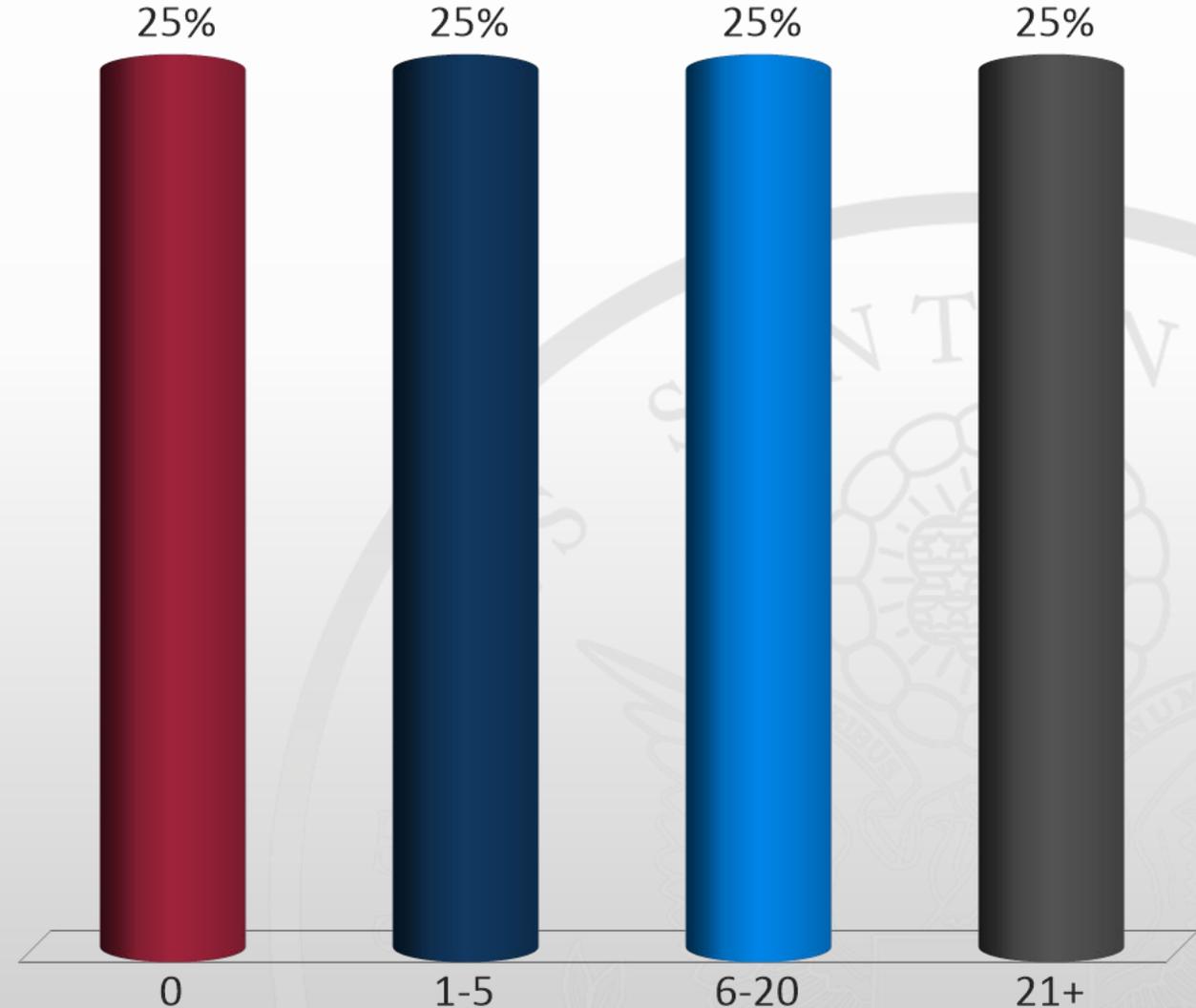
What is your current position?

- A. Judge
- B. Probation Officer
- C. Federal Public Defender
- D. Defense Counsel
- E. AUSA
- F. Law Clerk
- G. Other



How long have you been working in the field of federal sentencing?

- A. Less than 6 months
- B. 6 months to 1 year
- C. 2 to 5 years
- D. 6 to 10 years
- E. 11 years or more



Which of the following options best describes your opinion of the categorical approach?

- A. Confusing
- B. Unfair
- C. Necessary
- D. Easy
- E. I don't even have words!



Learning Objectives

Your active engagement in this session will empower you to:

Describe the categorical approach;

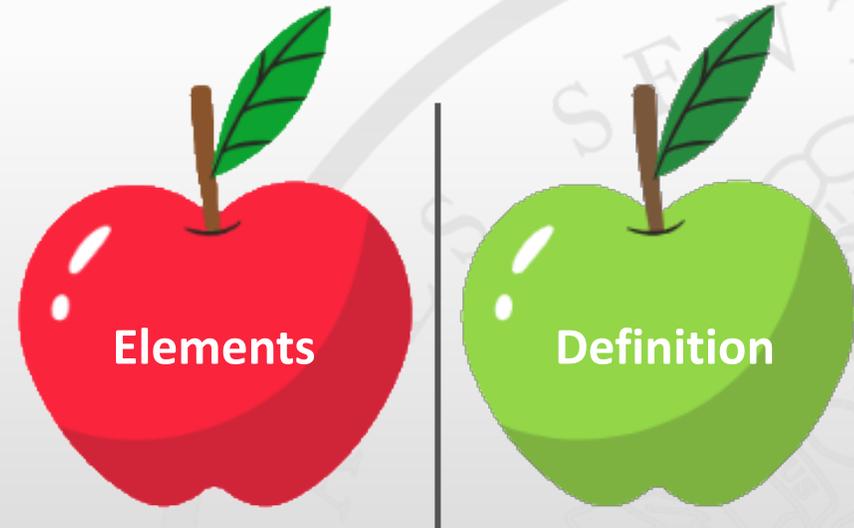
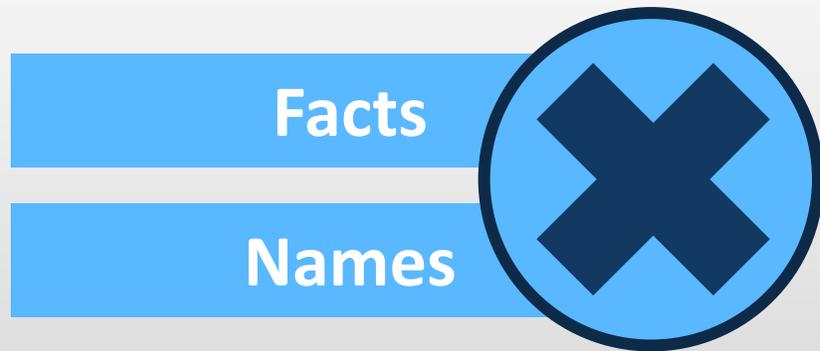
Analyze key issues in the terms “crime of violence” and “violent felony”;

Utilize a four-step process to apply the categorical (and modified) approach; and

Identify advanced categorical approach issues, such as the treatment of drug and inchoate offenses.

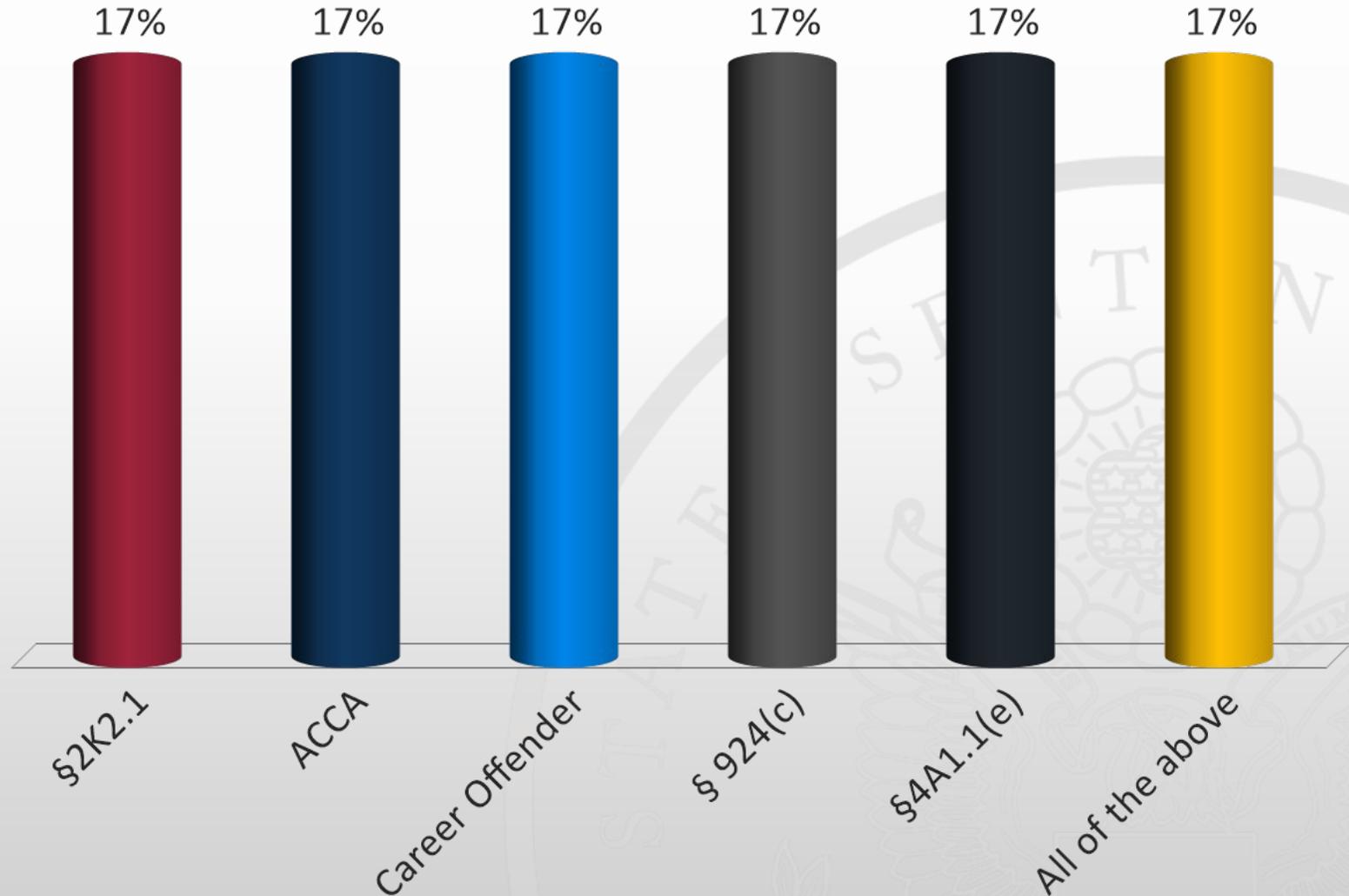
What's the Categorical Approach?

A method for determining whether an offense meets a given definition, such as “crime of violence” or “controlled substance offense.”



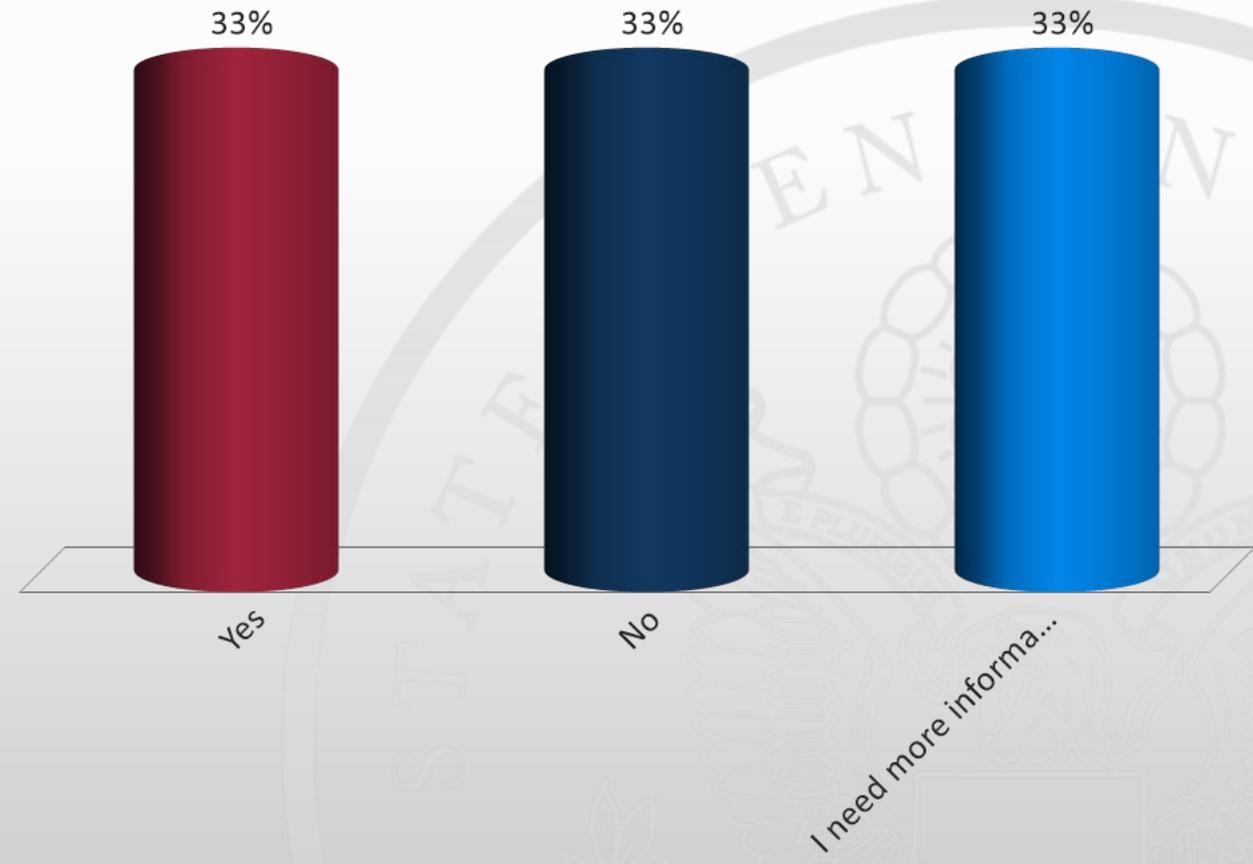
The categorical approach is used to apply which of the following guideline and statutory provisions?

- A. §2K2.1
- B. ACCA
- C. Career Offender
- D. § 924(c)
- E. §4A1.1(e)
- ✓ F. All of the above



The defendant has a prior conviction for North Dakota aggravated assault. Is this a crime of violence under the guidelines?

- A. Yes
- B. No
- ✓ C. I need more information!



Crime of Violence

Section 4B1.2(a) (p. 398)

Any offense under federal or state law punishable by imprisonment for a term exceeding one year, that . . .

Force Clause

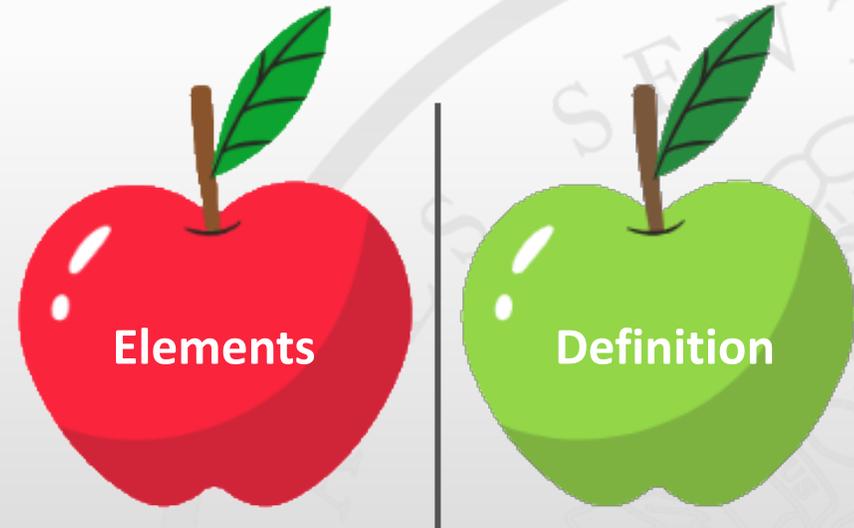
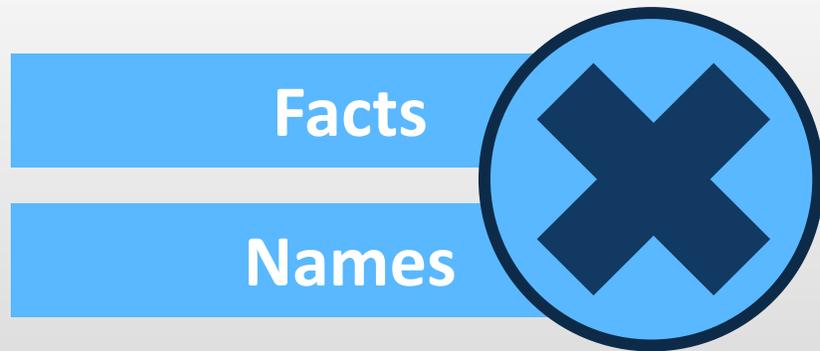
has as an element the use, attempted use, or threatened use of physical force against the person of another, or

Enumerated Clause

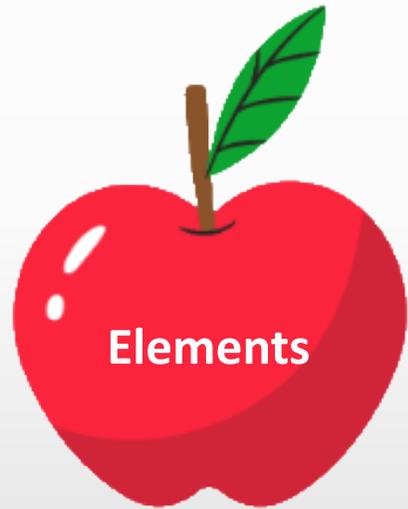
is murder, manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or possession of certain explosive materials or firearms

What's the Categorical Approach?

A method for determining whether an offense meets a given definition, such as “crime of violence” or “controlled substance offense.”



Force Clause: Key Issues



Force Definition

Persons vs. Property

Mental State

What's Physical Force (Generally)?

Johnson v. United States, 559 U.S. 133 (2010)

A substantial degree of force:



**Capable of Causing
Physical Pain or Injury**



De Minimis Force

What's Physical Force (Robbery)?

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



Force sufficient to **overcome a victim's resistance**

Who or What Is Force Directed Against?

ACCA & Guidelines

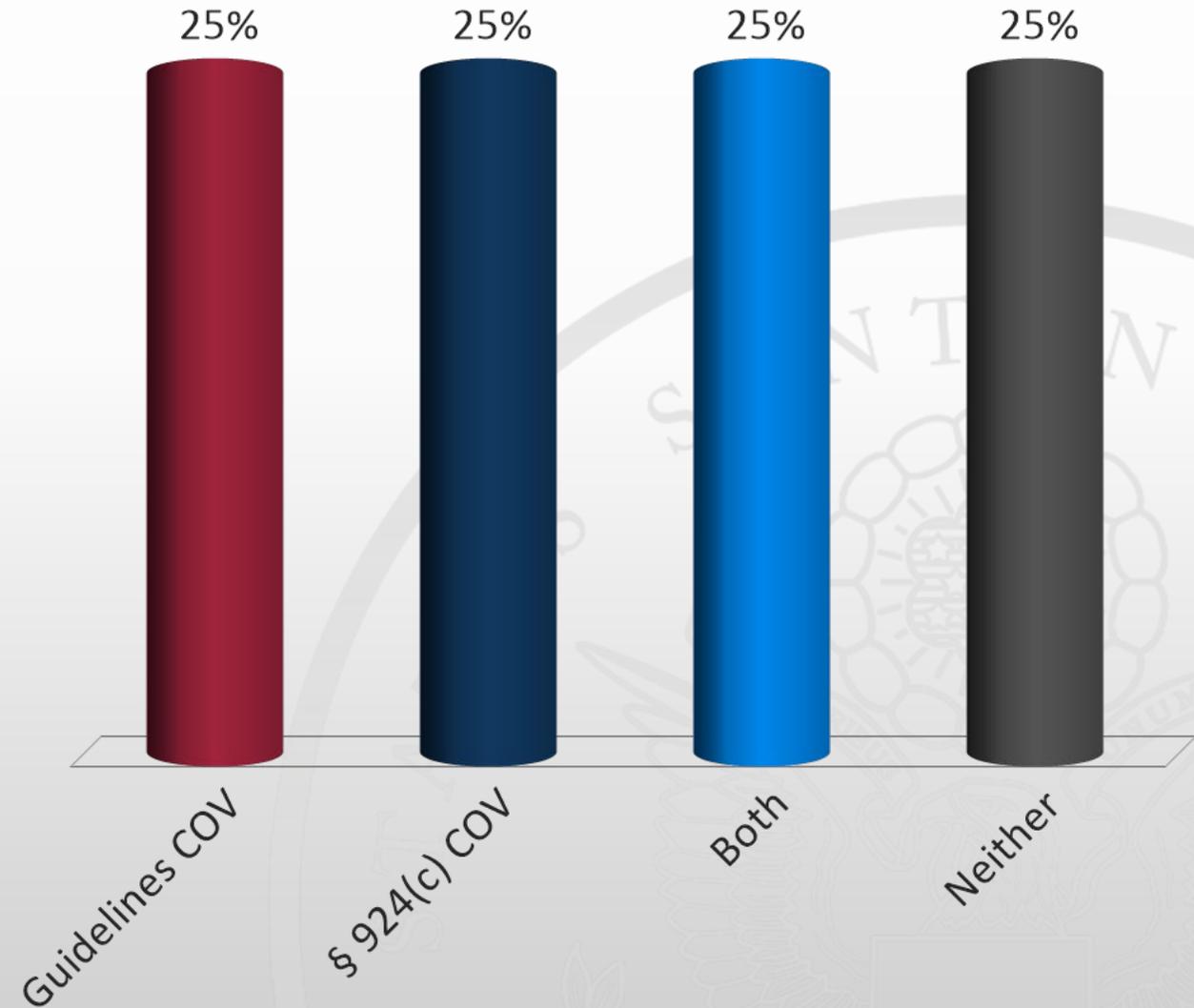
Has as an element the use, attempted use, or threatened use of physical force against **the person of another**

§ 924(c)

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

Hobbs Act robbery, which may be committed against a person or property, is a . . .

- A. Guidelines COV
- ✓ B. § 924(c) COV
- C. Both
- D. Neither



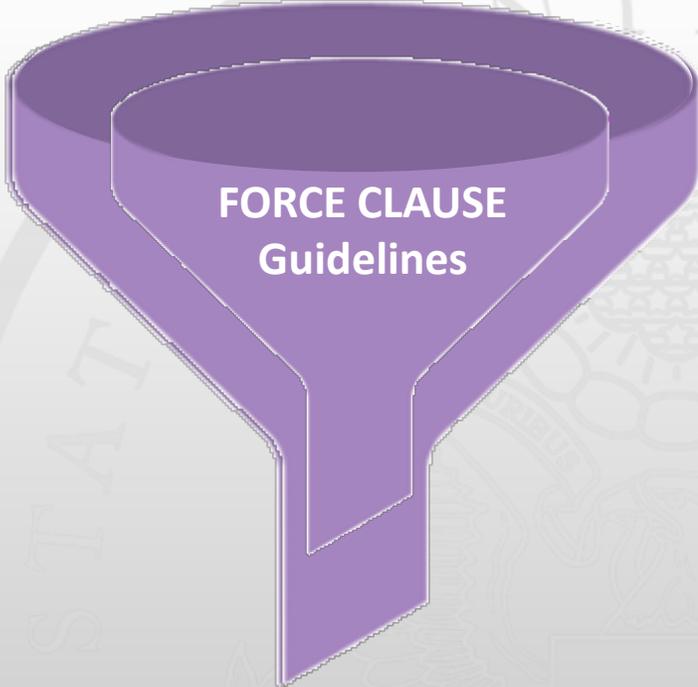
Hobbs Act Robbery



Crime of Violence
§ 924(c)



Crime of Violence
Guidelines



Career Offender Amendments

Proposed §4B1.2(e)(3)

New Robbery Definition

“‘Robbery’ is the unlawful taking or obtaining of personal property from the person . . . by means of actual or threatened force . . . to his person or property. . . .”

(Future) Hobbs Act Robbery

Guidelines Crime of Violence



What Mental State Is Required?



Intentional or Knowing



Negligence / None



Recklessness



United States v. Borden

141 S. Ct. 1817 (2021)



Question Presented:

Does the force clause encompass crimes with a *mens rea* of recklessness?

United States v. Borden

141 S. Ct. 1817 (2021)



Holding:

An offense is **NOT** a violent felony under the ACCA's force clause if it requires a mental state of recklessness.

Borden and Other Force Clauses



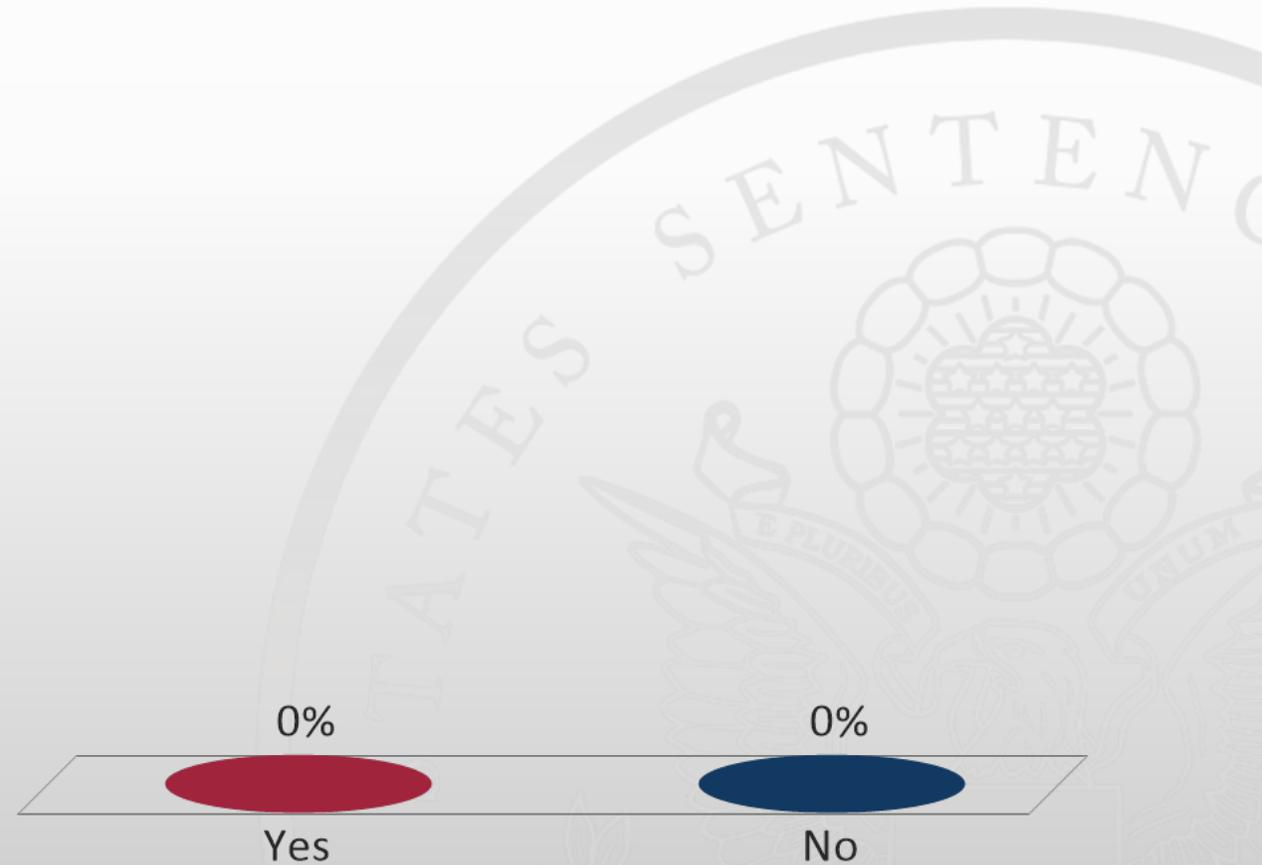
Borden: Additional Implications



Does the ACCA and other similar force clauses encompass crimes with a *mens rea* greater than recklessness but less than knowledge?

Does the ACCA and other similar force clauses encompass crimes with a *mens rea* greater than recklessness but less than knowledge?

- A. Yes
- B. No



Recklessness+

“Depraved heart” or **“Extreme recklessness”** offenses counts under § 924(c).

United States v. Manley, 52 F.4th 143 (4th Cir. 2022)

Janis v. United States, 73 F.4th 628 (8th Cir. 2023)

United States v. Begay, 33 F.4th 1081 (9th Cir. 2022) (en banc)

United States v. Kepler, 74 F.4th 1292 (10th Cir. 2023)

“Extreme indifference to human life” offenses count under § 3559.

United States v. Harrison, 54 F.4th 884 (6th Cir. 2022)

“Implied-malice murder” offenses count under § 924(c).

Alvarado-Linares v. United States, 44 F.4th 1334 (11th Cir. 2022)

Force Clause: Key Issues



Force Definition



Persons vs. Property



Mental State



What about the Enumerated Clause?

Any offense under federal or state law punishable by imprisonment for a term exceeding one year, that . . .

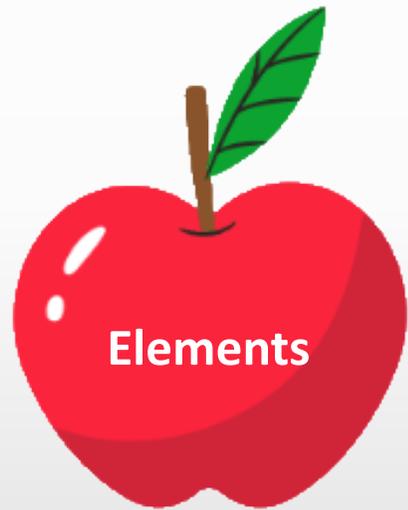
Force Clause

has as an element the use, attempted use, or threatened use of physical force against the person of another, or

Enumerated Clause

is murder, manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or possession of certain explosive materials or firearms

Enumerated Clause Basics

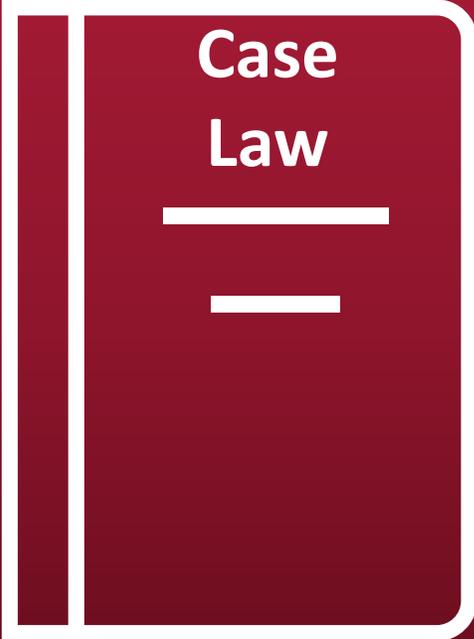


Use definition from statute
or guidelines;

or

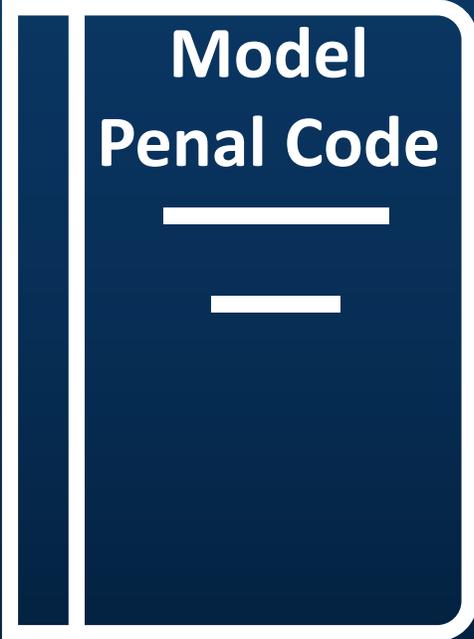
If none, use "generic
definition"

Where do I find generic definitions?



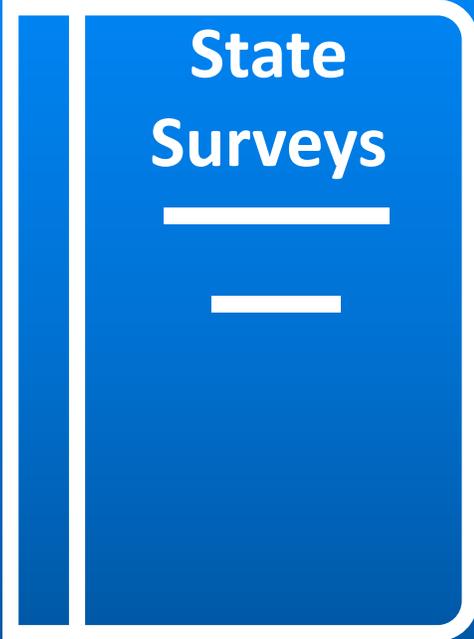
Case
Law

The icon depicts a book with a white spine on the left and a white border. The text 'Case Law' is centered in the upper portion of the book's cover. Below the text are two horizontal white lines of varying lengths, suggesting a page of text.



Model
Penal Code

The icon depicts a book with a white spine on the left and a white border. The text 'Model Penal Code' is centered in the upper portion of the book's cover. Below the text are two horizontal white lines of varying lengths, suggesting a page of text.



State
Surveys

The icon depicts a book with a white spine on the left and a white border. The text 'State Surveys' is centered in the upper portion of the book's cover. Below the text are two horizontal white lines of varying lengths, suggesting a page of text.

Categorical Approach: Four-Step Process

1

Determine

the statute of conviction.

2

List

the elements of the statute of conviction.*

3

Identify

the definition at issue.

4

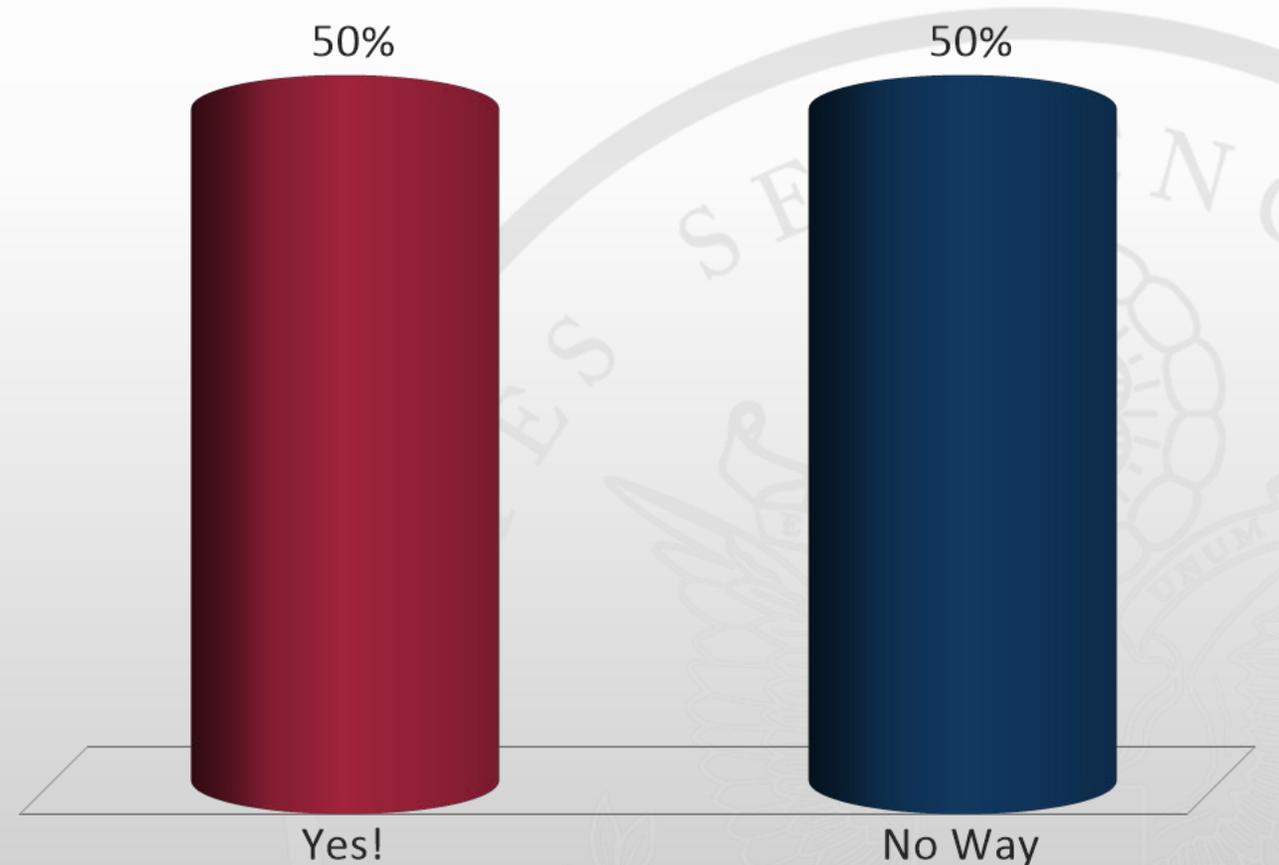
Compare

the elements in the statute of conviction to the definition.

*May Require
Divisibility

The defendant has a prior North Dakota aggravated assault conviction. Are you ready to tackle whether this is a guidelines crime of violence?

- ✓ A. Yes!
- B. No Way



What's Step 1?

1

Determine

the statute of conviction.

12.1-17-02

Aggravated assault

A person is guilty of a class C felony if that person:

- a. Willfully causes serious bodily injury to another human being;

What's Step 2?

2

List

the elements of the statute of conviction.*

*May Require
Divisibility

willfully
cause

serious bodily
injury to
another
person

What Does “Willfully” Mean?



willfully
cause

North Dakota defines “willfully” as acting “intentionally, knowingly, or recklessly.”

What's Step 3?

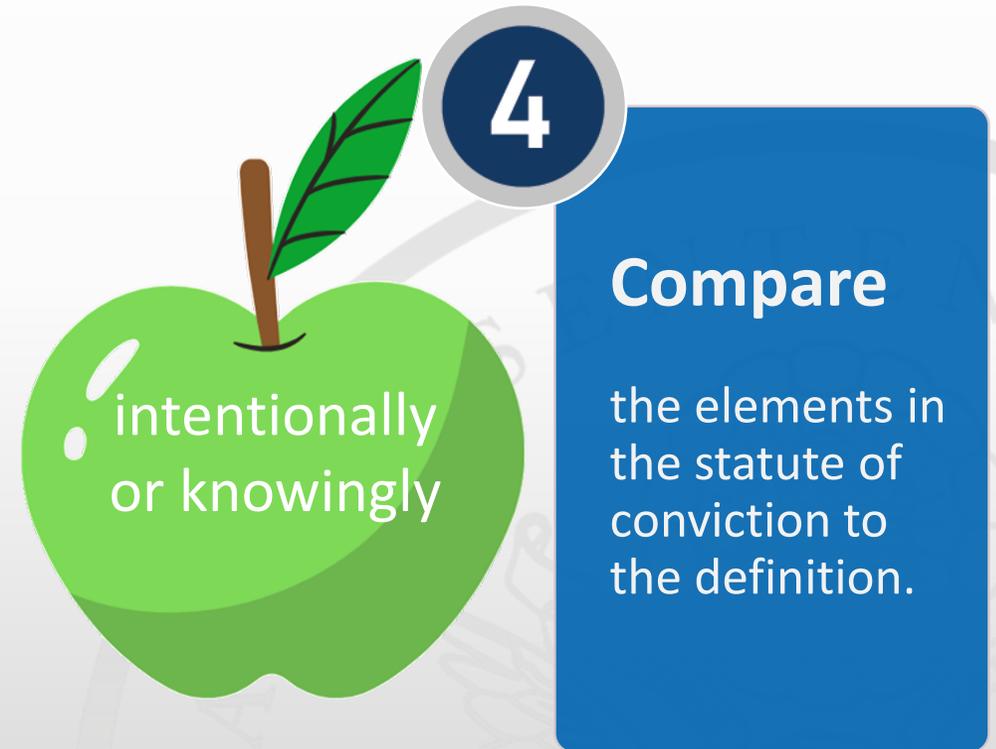
3

Identify

the definition
at issue.

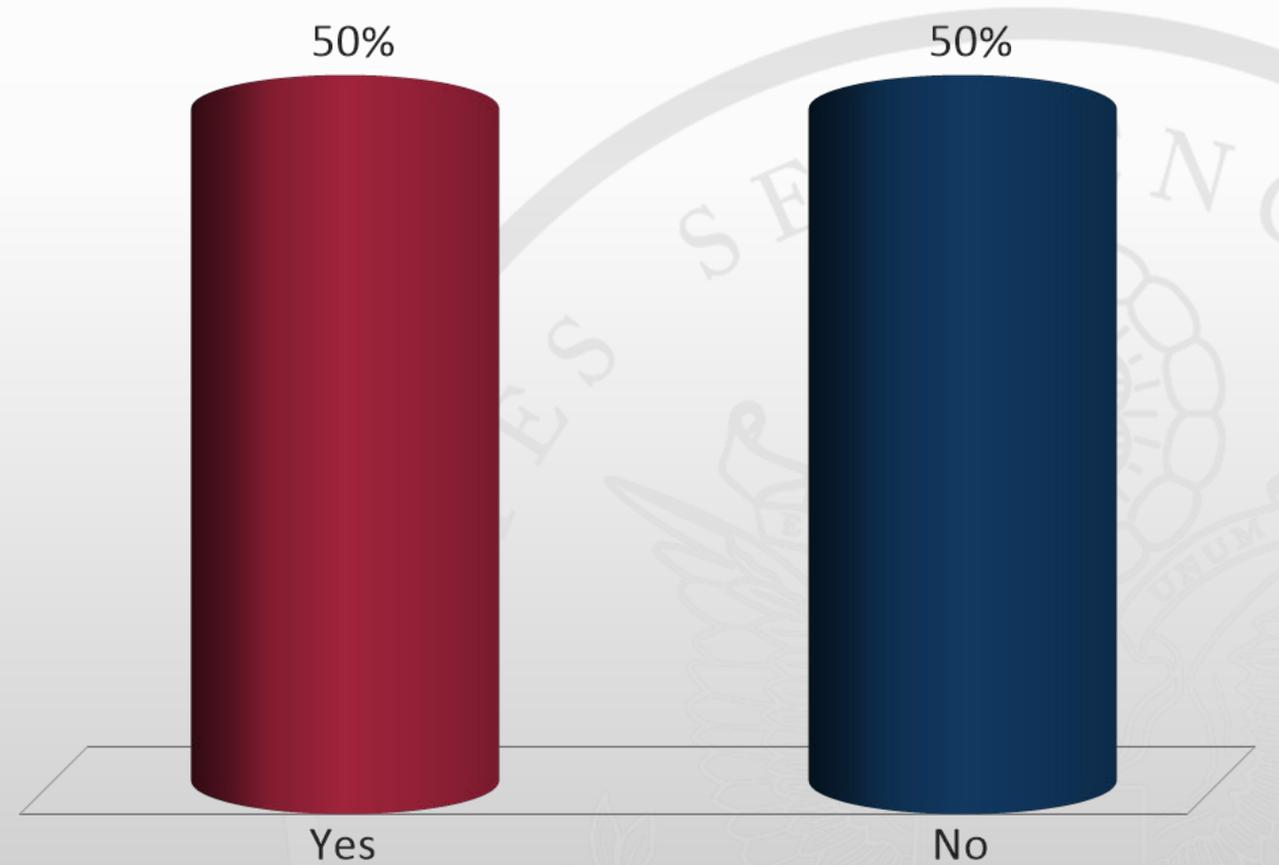


What's Step 4?



Are we done?

- A. Yes
- ✓ B. No



What's Step 3?

3

Identify

the definition
at issue.

Force Clause

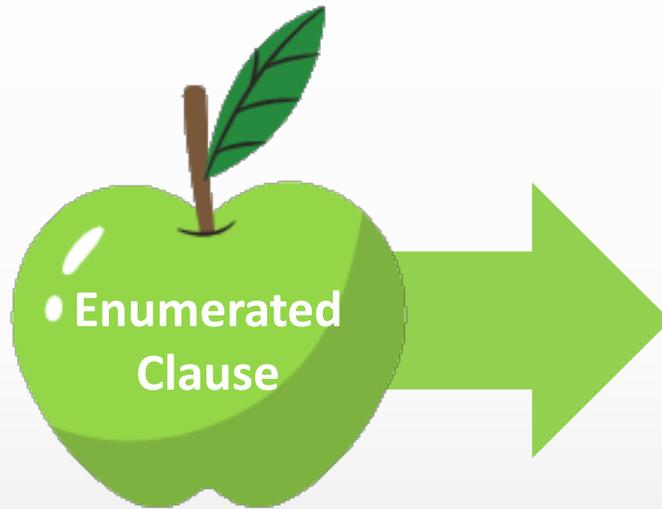
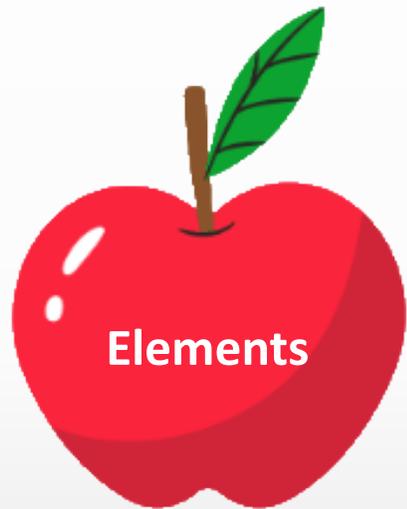
Enumerated
Clause

What's Step 3?

Enumerated Clause

is murder, manslaughter, kidnapping, **aggravated assault**, a forcible sex offense, robbery, arson, extortion, or the use or possession of certain explosive materials or firearms

What is the definition of aggravated assault?



Use definition from statute
or guidelines;

or

If none, use "generic
definition"

The **"generic, contemporary"** meaning of the offense, a "uniform definition independent of the labels employed by the various state codes."

Generic, Contemporary Meaning of Aggravated Assault

The least culpable mental state listed in the Model Penal Code's definition of aggravated assault is **“reckless[ness] under circumstances manifesting extreme indifference to the value of human life.”** Model Penal Code § 211.1(2)(a).

Most jurisdictions draw the line in the same place.

Use definition from statute
or guidelines;

or

If none, use “generic
definition”

What's Step 4?

4

Compare

the elements in the statute of conviction to the definition.



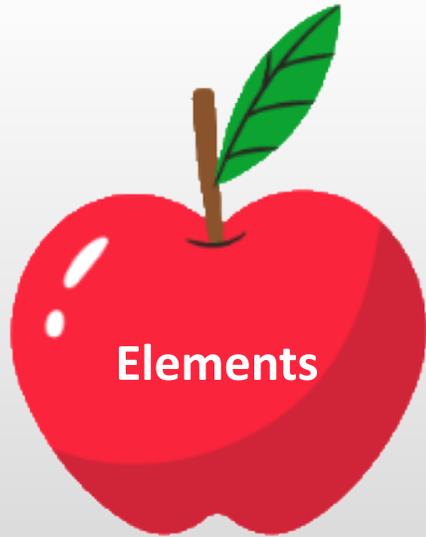
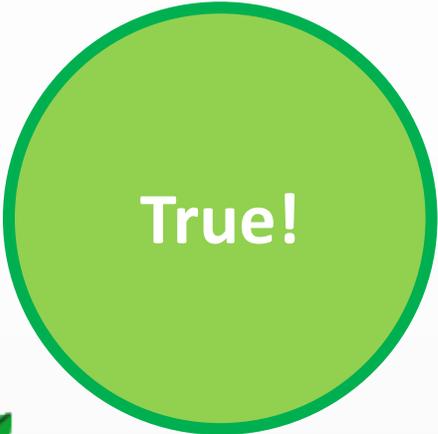
United States v. Schneider

905 F.3d 1088 (8th Cir. 2018)

North Dakota aggravated assault is **NOT** a crime of violence under the Guidelines.



But I Heard You Can Examine Some Documents!



Use Documents
to Discover:

Never:



Facts

Divisibility in a Nutshell

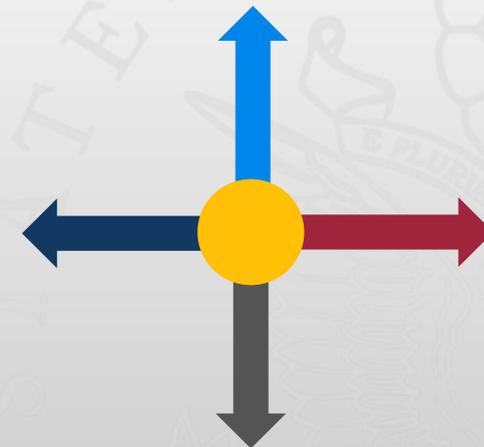
Mathis v. United States, 579 U.S. 500 (2016)

Does the statute list:

multiple crimes?

or

multiple ways to commit
one crime?



Don't Be Fooled!

The word **“or”**

Subsections

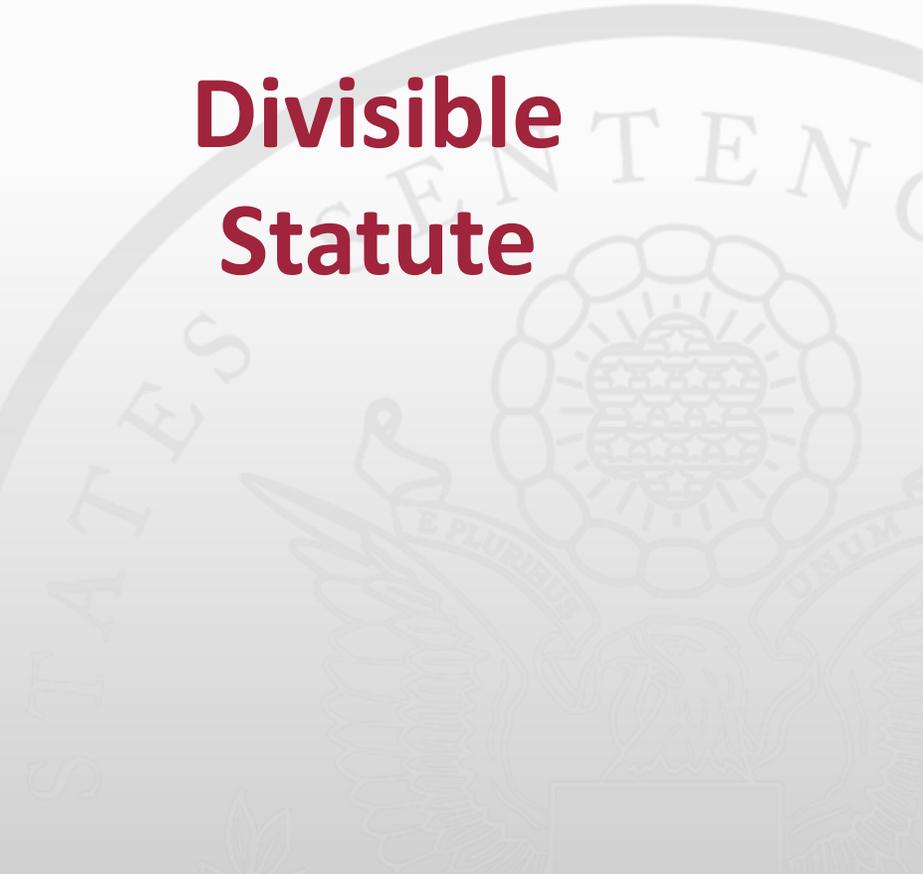
(e.g., “(a), (b), (c)”)



Multiple *mens rea* options

(e.g., “intentionally, recklessly, negligently”)

**Divisible
Statute**





Statutory
Penalties



Jury
Instructions



State Supreme
Court Decisions

Tools to Determine Divisibility

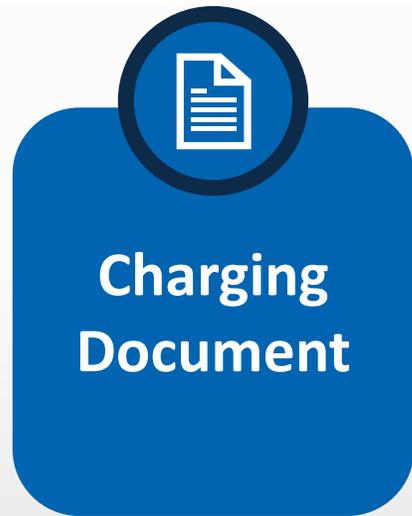
Why Does it Matter if a Statute is Divisible?

If the statute is divisible, then you can use **the modified categorical approach**, that is, you may look at certain documents to determine what crime the defendant was convicted of.



Modified Categorical Approach Documents

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



Hawaii Second-Degree Robbery

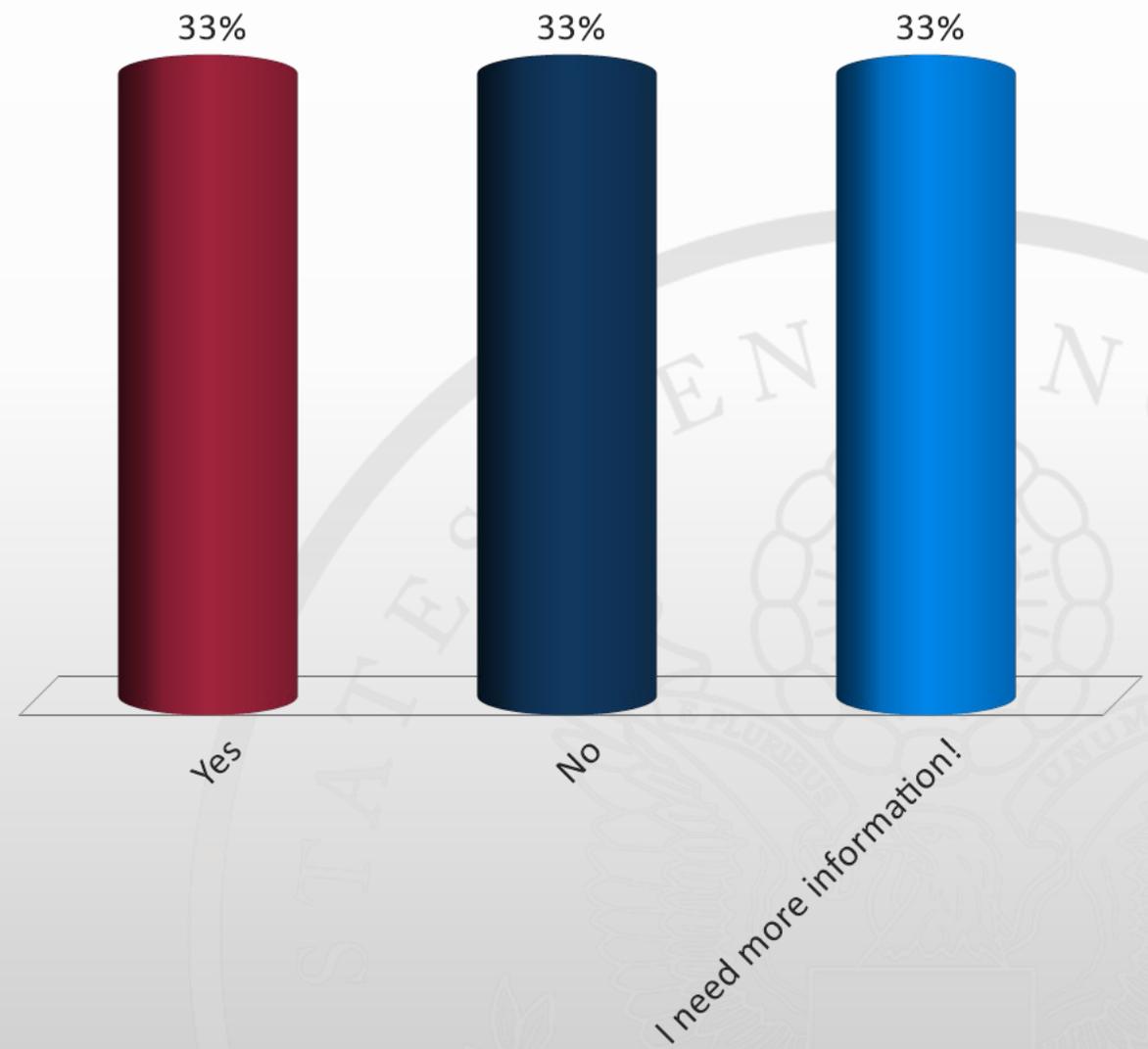
Section 708-841

If during a theft a person . . .

-  (a) uses force against the person . . . with the intent to overcome that person's physical resistance;
-  (b) threatens the imminent use of force against the person . . . with intent to compel acquiescence to the taking of or escaping with the property; or
-  (c) recklessly inflicts serious bodily injury upon another.

Is Hawaii Second-Degree Robbery Divisible?

- A. Yes
- B. No
- C. I need more information!



Tools to Determine Divisibility



**Statutory
Penalties**



**Jury
Instructions**



**State
Supreme
Court
Decisions**

Tools to Determine Divisibility



Statutory Penalties

Subsections (a), (b), and (c) | Class B Felony
HRS § 708–841

Class B Felony | 10 years' imprisonment
HRS § 706–660(1)

Nothing on Divisibility Here

Tools to Determine Divisibility



**Statutory
Penalties**

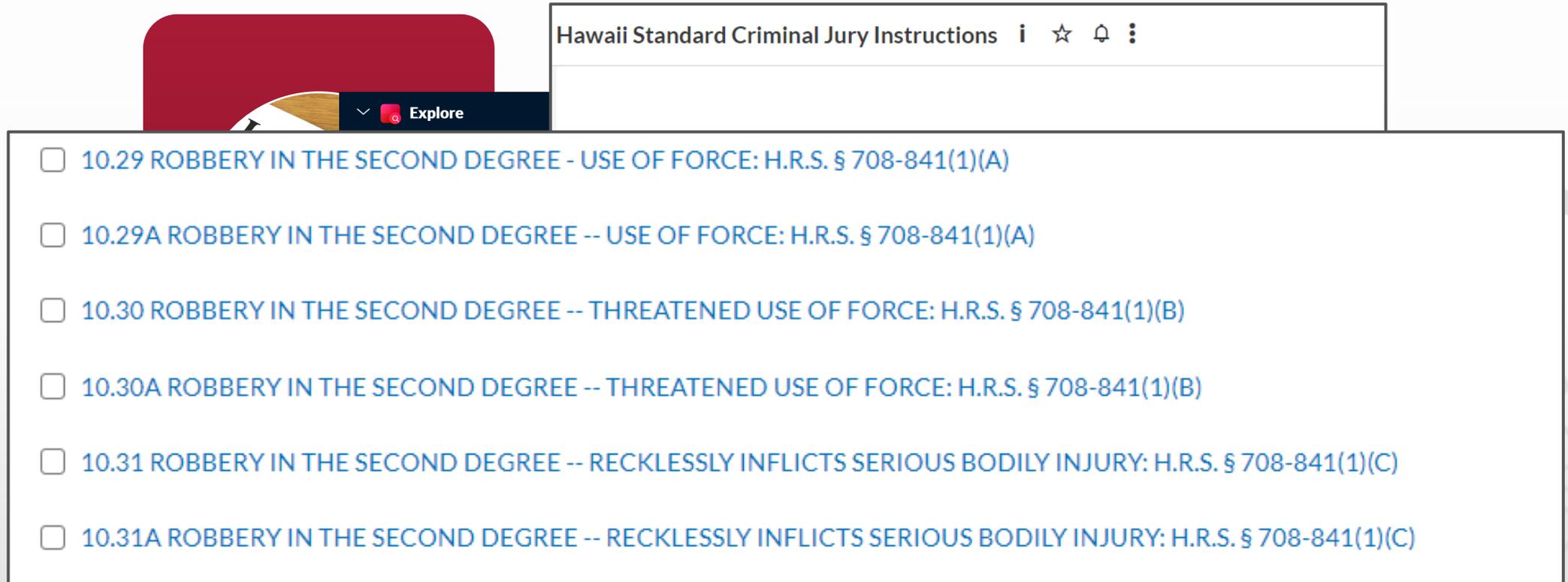


**Jury
Instructions**



**State
Supreme
Court
Decisions**

Tools to Determine Divisibility



The screenshot shows a web browser window with the title "Hawaii Standard Criminal Jury Instructions". The browser's address bar contains a search icon and the text "Explore". Below the browser window, a list of six jury instruction options is displayed, each with a checkbox and a blue link text. The instructions are:

- [10.29 ROBBERY IN THE SECOND DEGREE - USE OF FORCE: H.R.S. § 708-841\(1\)\(A\)](#)
- [10.29A ROBBERY IN THE SECOND DEGREE -- USE OF FORCE: H.R.S. § 708-841\(1\)\(A\)](#)
- [10.30 ROBBERY IN THE SECOND DEGREE -- THREATENED USE OF FORCE: H.R.S. § 708-841\(1\)\(B\)](#)
- [10.30A ROBBERY IN THE SECOND DEGREE -- THREATENED USE OF FORCE: H.R.S. § 708-841\(1\)\(B\)](#)
- [10.31 ROBBERY IN THE SECOND DEGREE -- RECKLESSLY INFLICTS SERIOUS BODILY INJURY: H.R.S. § 708-841\(1\)\(C\)](#)
- [10.31A ROBBERY IN THE SECOND DEGREE -- RECKLESSLY INFLICTS SERIOUS BODILY INJURY: H.R.S. § 708-841\(1\)\(C\)](#)

Different Jury Instructions for Each Subsection

Tools to Determine Divisibility



**Statutory
Penalties**



**Jury
Instructions**



**State
Supreme
Court
Decisions**

Tools to Determine Divisibility



State
Supreme
Court
Decisions

“The material elements of **HRS § 708–841(1)(a)** that the prosecution must prove beyond a reasonable doubt are . . . (2) the conduct (that the defendant used **force against a person** who was present with intent to overcome that person’s physical resistance or physical power of resistance).”

State v. Iuli, 101 Haw. 196, 206 (2003)

Discrete Elements for Each Subsection

United States v. Tagatac

36 F.4th 1000 (9th Cir. 2022)

Hawaii second-degree robbery is a divisible statute, and second-degree robbery by threatened use of force is a crime of violence under the guidelines.



Controlled Substance Offenses

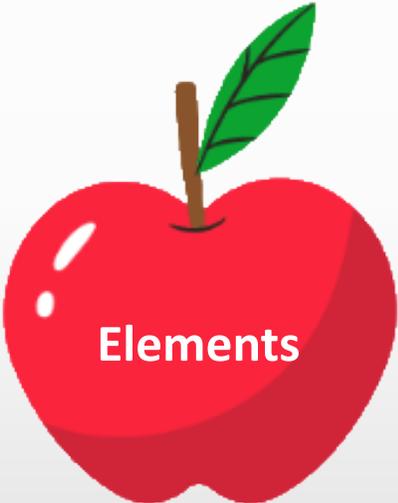
Section 4B1.2(b) (p. 398)

Any offense under federal or state law punishable by imprisonment for a term exceeding one year, that . . .

Controlled Substance Offense

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.

Drug Crime Issues



State or Federal Schedules

Time of Drug Schedules

Guideline Amendments

State or Federal Schedules

Guidelines

an offense . . . 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.

ACCA

an offense . . . 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

Section 4B1.2(b): State or Federal Schedules?

State or Federal Schedules

United States v. Lewis, 58 F.4th 764 (3d Cir. 2023)
United States v. Ward, 972 F.3d 364 (4th Cir. 2020)
United States v. Ruth, 966 F.3d 642 (7th Cir. 2020)
United States v. Henderson, 11 F.4th 713 (8th Cir. 2021)
United States v. Jones, 15 F.4th 1288 (10th Cir. 2021)

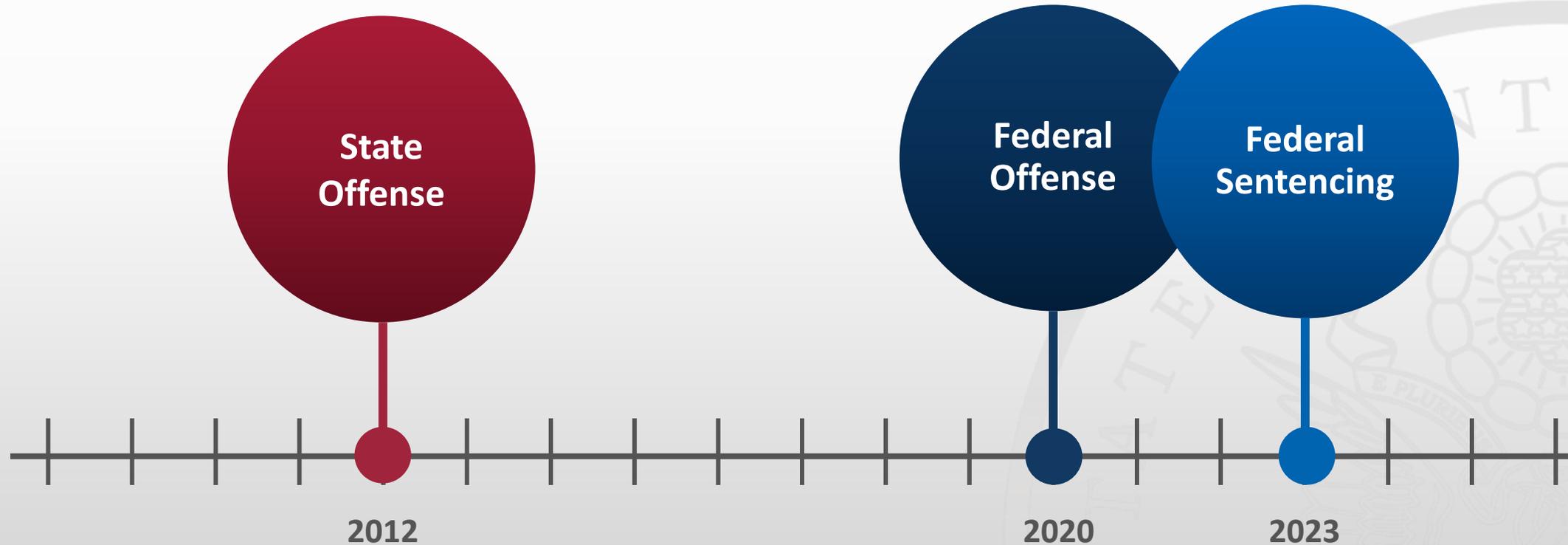
Federal Schedules

United States v. Townsend, 897 F.3d 66 (2d Cir. 2018)
United States v. Bautista, 989 F.3d 698 (9th Cir. 2021)

Likely Federal Schedules

United States v. Crocco, 15 F.4th 20 (1st Cir. 2021)
United States v. Gomez-Alvarez, 781 F.3d 787 (5th Cir. 2015)

Drug Schedules Timing



ACCA: Time of Comparison

Time of State Drug Offense

United States v. Jackson, 55 F.4th 846 (11th Cir. 2022)

Time of Federal Firearms Offense or Sentencing

United States v. Brown, 47 F.4th 147 (3d Cir. 2022)

**United States v. Hope*, 28 F.4th 487 (4th Cir. 2022)

United States v. Perez, 46 F.4th 691 (8th Cir. 2022)

United States v. Williams, 48 F.4th 1125 (10th Cir. 2022)

United States v. Brown

2023 WL 3440566 (2023)

United States v. Jackson

2023 WL 3440568 (2023)



Question Presented:

Does the definition of “serious drug offense” incorporate the federal drug schedules in effect at the time of the prior state drug offense, federal firearm offense, or federal sentencing?

Section 4B1.2(b): Time of Comparison

Time of State Drug Offense

United States v. Lewis, 58 F.4th 764 (3d Cir. 2023)

United States v. Clark, 46 F.4th 404 (6th Cir. 2022)

United States v. Perez, 46 F.4th 691 (8th Cir. 2022)

Time of Federal Offense or Sentencing

United States v. Abdulaziz, 998 F.3d 519 (1st Cir. 2021)

**United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022)

United States v. House, 31 F.4th 745 (9th Cir. 2022)

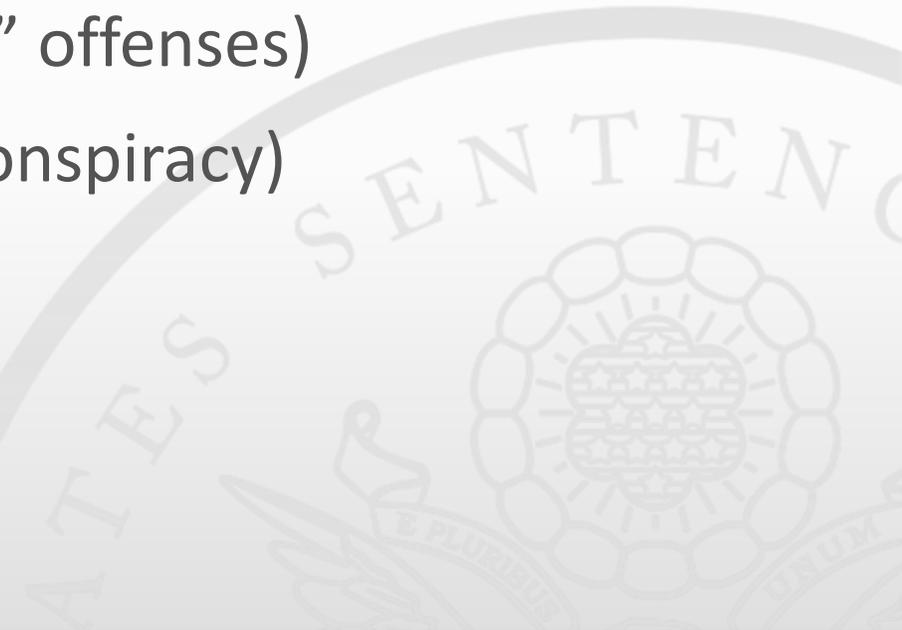
Career Offender Amendments

Proposed §4B1.2(b)(2)

New Controlled Substance Offenses

46 U.S.C. § 70503(a) (“covered vessel” offenses)

46 U.S.C. § 70506(b) (attempts and conspiracy)



Drug Crime Issues



State or Federal Schedules



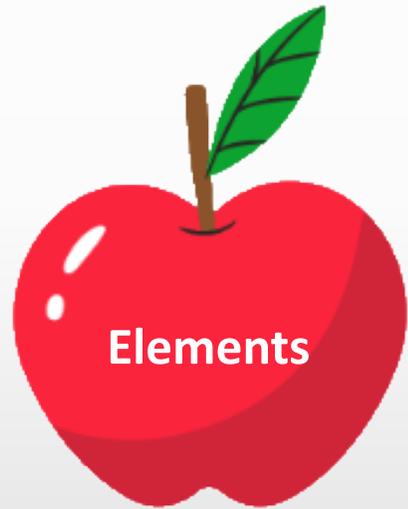
Time of Drug Schedules



Guideline Amendments

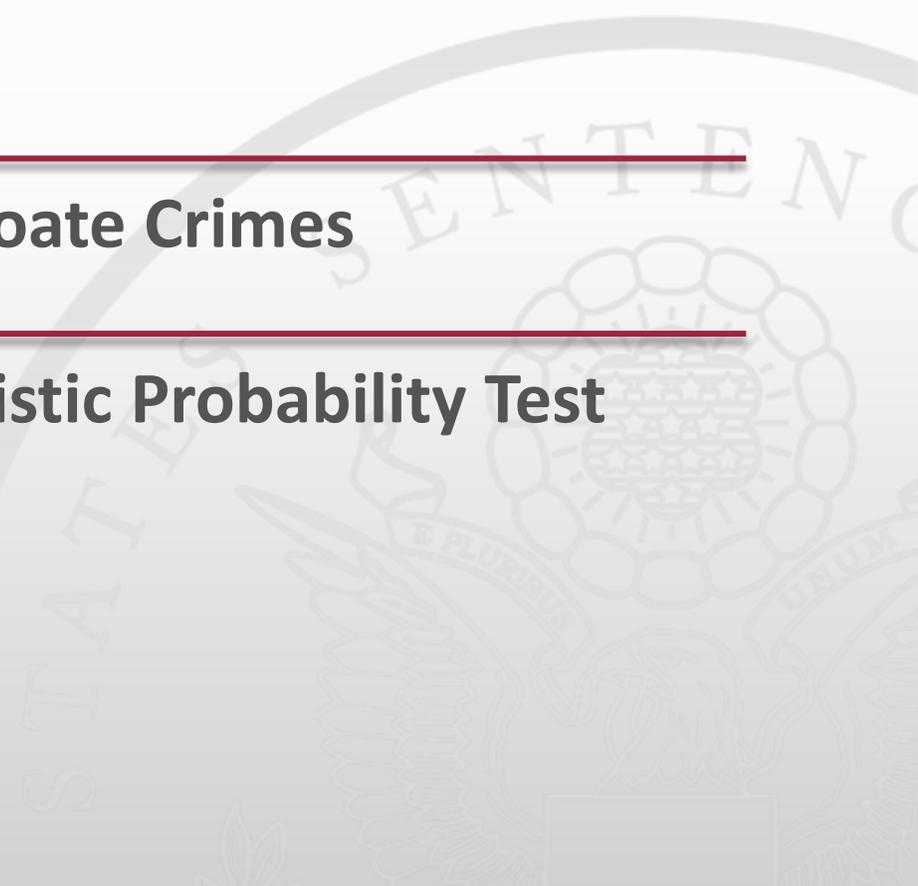


Advanced Issues



Inchoate Crimes

Realistic Probability Test



Inchoate Offenses under the Guidelines

Section 4B1.2, App. Note 1 (p. 399)

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



Is Application Note 1 Valid?

Held Invalid

United States v. Nasir, 982 F.3d 144 (3d Cir. 2020)

United States v. Campbell, 22 F.4th 438 (4th Cir. 2022)

United States v. Havis, 927 F.3d 382 (6th Cir. 2019)

United States v. Castillo, 69 F.4th 648 (9th Cir. 2023)

United States v. Dupree, 57 F.4th 1269 (11th Cir. 2023)

United States v. Winstead, 890 F.3d 1082 (D.C. Cir. 2018)

Held Valid

United States v. Lewis, 963 F.3d 16 (1st Cir. 2020)

United States v. Tabb, 949 F.3d 81 (2d Cir. 2020)

United States v. Vargas, 74 F.4th 673 (5th Cir. 2023) (en banc)

United States v. Smith, 989 F.3d 575 (7th Cir. 2021)

United States v. Maloid, 71 F.4th 795, 813 (10th Cir. 2023)

Career Offender Amendments

Moves Commentary to Guidelines



App. Note 1 (Inchoate Offenses)

§4B1.2(c)

App. Note 1 (Forcible Sex Offense)

§4B1.2(e)(1)

App. Note 1 (Extortion)

§4B1.2(e)(2)

***Resolves Circuit Split**

United States v. Taylor

142 S. Ct. 2015 (2022)

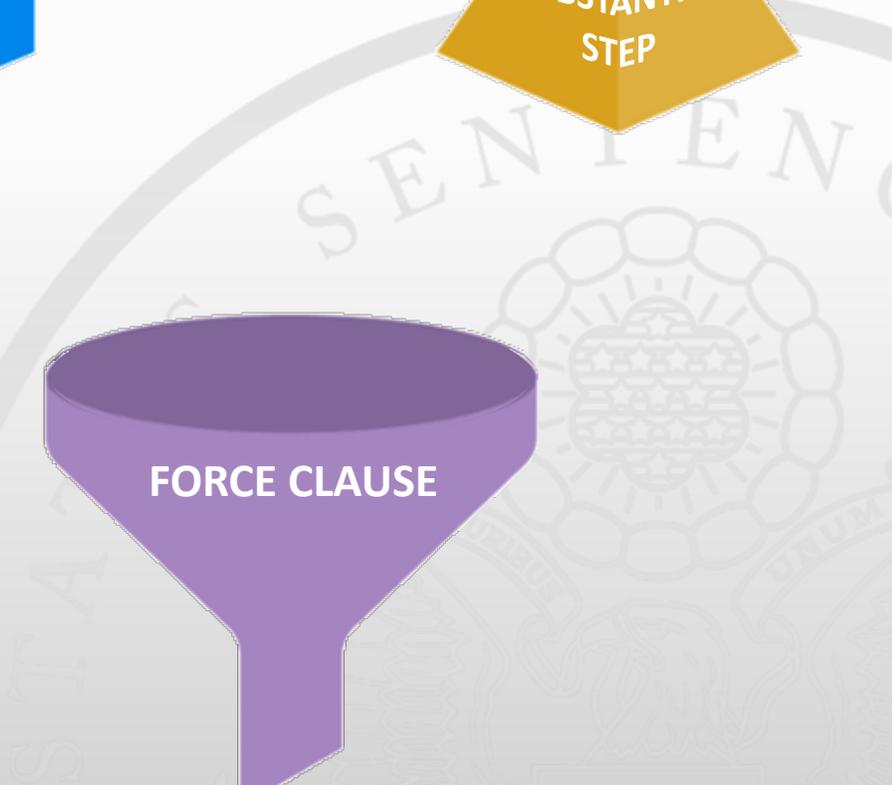
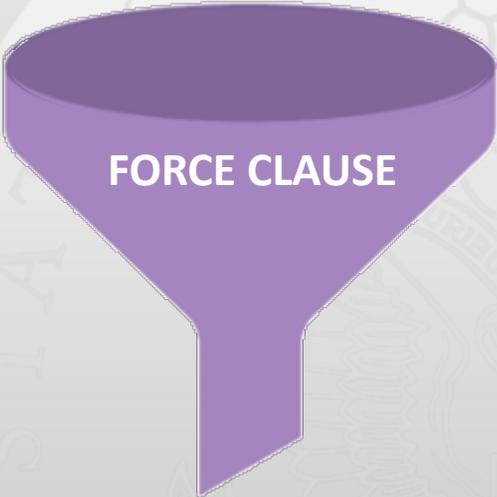
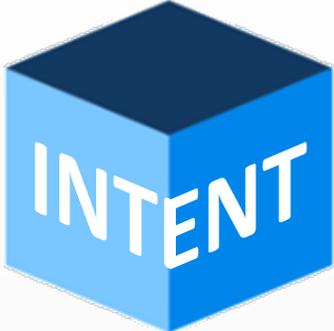


Question Presented:

Is **attempted** Hobbs Act robbery a crime of violence under § 924(c)?

Attempted Hobbs Act Robbery

Crime of Violence
§ 924(c)



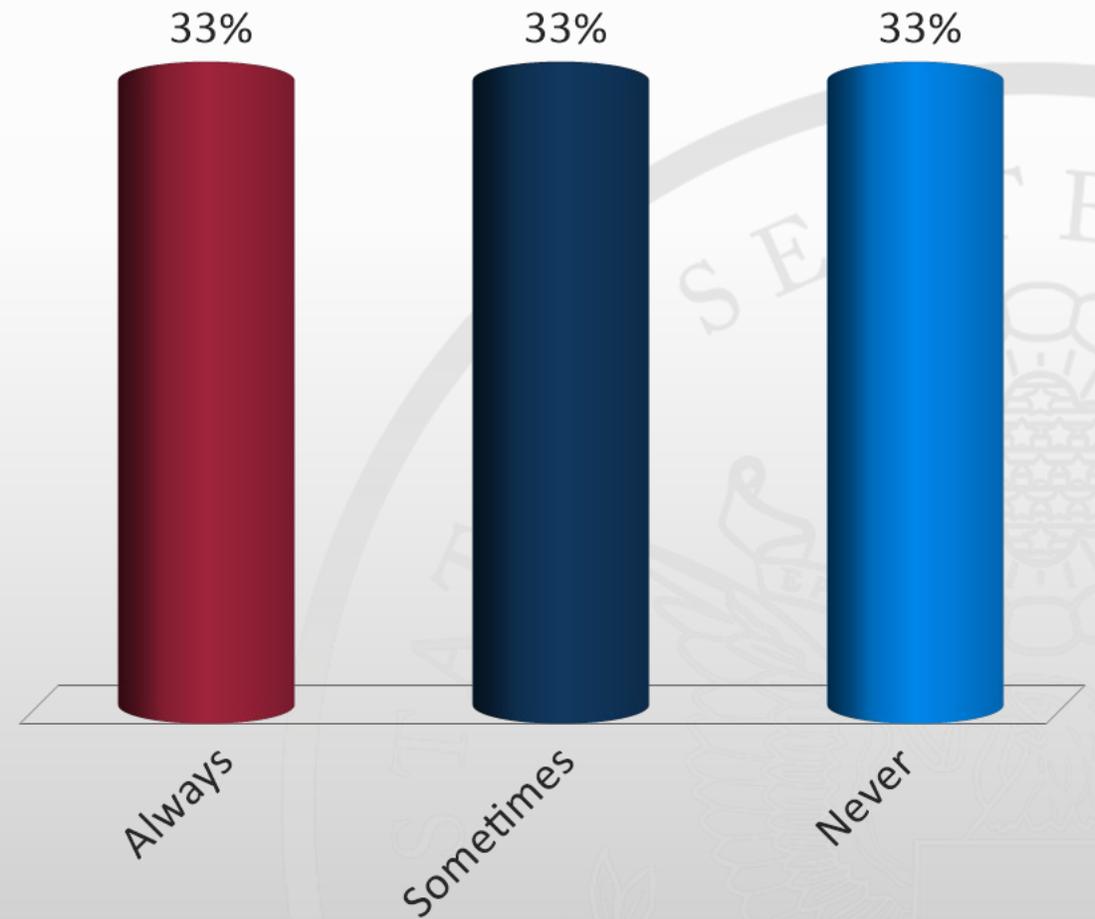
Possible Effects of *Taylor*

**Other
Inchoate Offenses**

**“Realistic Probability”
Test**

Does the realistic probability test survive *Taylor*?

- A. Always
- B. Sometimes
- C. Never



Realistic Probability After *Taylor*

State Burglary | **Enumerated Clause** (ACCA)

United States v. Paulk, 46 F.4th 399 (6th Cir. 2022)

State Robbery | **Force Clause** (ACCA)

United States v. Bragg, 44 F.4th 1067 (8th Cir. 2022)



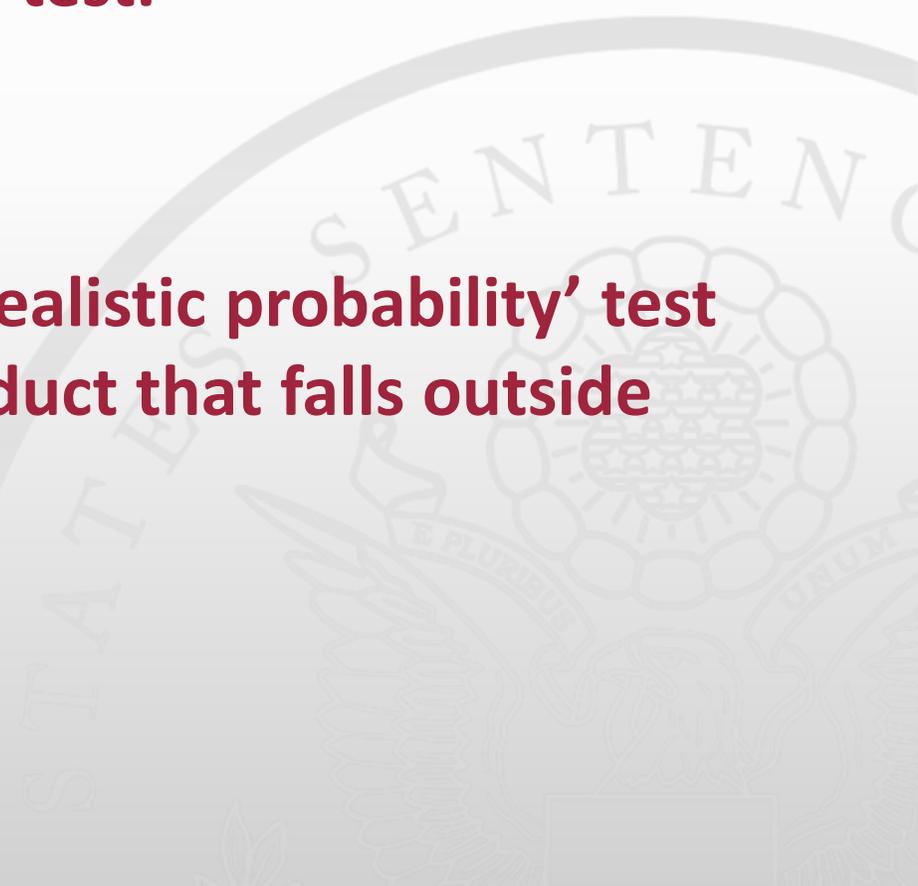
Noting *Taylor*'s Impact on Realistic Probability

“The reasoning in the Supreme Court’s recent decision in *Taylor* could change the contours of the realistic probability test.”

United States v. Turner, 47 F.4th 509 (7th Cir. 2022)

“*Taylor* casts substantial doubt on use of the ‘realistic probability’ test to determine whether a statute applies to conduct that falls outside the force clause.”

United States v. Hari, 67 F.4th 903 (8th Cir. 2023)



Advanced Categorical Approach Issues



Inchoate Crimes



Realistic Probability Test



Learning Outcomes

You should now be able to:

Describe the categorical approach;

Analyze key issues in the terms “crime of violence” and “violent felony”;

Utilize a four-step process to apply the categorical (and modified) approach; and

Identify advanced categorical approach issues, such as the treatment of drug and inchoate offenses.