

PRIMER



# CATEGORICAL APPROACH

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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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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*.<sup>4</sup> 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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<sup>1</sup> See 8 U.S.C. § 1326(b).

<sup>2</sup> See 18 U.S.C. § 924(e).

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

<sup>4</sup> *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.<sup>5</sup>

## II. ORIGIN OF THE CATEGORICAL APPROACH

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

In *Taylor v. United States*,<sup>6</sup> 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”).<sup>7</sup> 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.”<sup>8</sup>

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.<sup>9</sup> 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.<sup>10</sup>

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.”<sup>11</sup> The Court cited three main factors in adopting a statutory-

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

<sup>6</sup> *Taylor*, 495 U.S. 575 (1990).

<sup>7</sup> *See* 18 U.S.C. § 924(e).

<sup>8</sup> *Taylor*, 495. at 577–78.

<sup>9</sup> *Id.* at 582.

<sup>10</sup> “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).

<sup>11</sup> *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.<sup>12</sup>

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.”<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup>

## **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*,<sup>16</sup> years before it answered the first (when courts were permitted to consult additional documents).<sup>17</sup>

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<sup>12</sup> *Id.* at 601.

<sup>13</sup> *Id.* at 602.

<sup>14</sup> *Id.*

<sup>15</sup> “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.*

<sup>16</sup> *Shepard v. United States*, 544 U.S. 13 (2005).

<sup>17</sup> *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,<sup>18</sup> 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.<sup>19</sup> 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.”<sup>20</sup> 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.<sup>21</sup>

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.”<sup>22</sup> 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

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<sup>18</sup> 18 U.S.C. § 922(g)(1).

<sup>19</sup> *Shepard*, 544 U.S. at 17.

<sup>20</sup> *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.

<sup>21</sup> *Id.* at 21 (quoting *Taylor*, 495 U.S. at 602).

<sup>22</sup> *Id.* at 23.

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

### 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)),<sup>24</sup> 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)<sup>25</sup> 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).<sup>26</sup> 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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<sup>23</sup> *Id.* at 22–23.

<sup>24</sup> *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).

<sup>25</sup> *See United States v. Simard*, 731 F.3d 156, 164 (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, 318 (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)).

<sup>26</sup> *See United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) *but see Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (holding a conduct-based approach must be applied in the context of § 924(c) instead of the categorical approach); *United States v. Barrett*, 903 F.3d 166 (2nd Cir. 2018) (same); *United States v. Douglas*, 907 F.3d 1 (1st Cir. 2018) (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.<sup>27</sup> Second, courts are not permitted to consider relevant conduct.<sup>28</sup> Third, courts are not to look at the facts of the specific case, but rather only the elements of the offense of conviction.<sup>29</sup>

## 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

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#### 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.

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<sup>27</sup> 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.).

<sup>28</sup> *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.).

<sup>29</sup> *Id.*



This definition had its origin in Comprehensive Crime Control Act of 1984 (“CCA”),<sup>30</sup> 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.”<sup>31</sup> Section 16(b) was held to be unconstitutional in *Sessions v. Dimaya*.<sup>32</sup> The Supreme Court held that the combination of two aspects of § 16(b) rendered it void for vagueness: (1) “indeterminacy about how to measure the risk posed by a crime;” and (2) “indeterminacy about how much risk it takes for a crime to qualify as a violent felony.”<sup>33</sup> Section 16(a) was not invalidated and continues to require the categorical approach.

Several federal criminal statutes refer to section 16’s definition,<sup>34</sup> and crimes meeting this definition can trigger certain collateral consequences.<sup>35</sup> 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*.<sup>36</sup>

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.”<sup>37</sup>

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<sup>30</sup> Pub. L. 98–473, 98 Stat. 1976, 2136 (1984).

<sup>31</sup> S. Rep. No. 98–225, at 307 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3486.

<sup>32</sup> 138 S. Ct. 1204 (2018),

<sup>33</sup> *Id.* at 1214.

<sup>34</sup> *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).

<sup>35</sup> *See, e.g.*, 8 U.S.C. § 1227(a)(2)(E)(i) (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).

<sup>36</sup> “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).

<sup>37</sup> 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.

### **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<sup>38</sup> by any court referred to in section 922(g)(1) for a “violent felony”<sup>39</sup> or a “serious drug offense,”<sup>40</sup> 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.<sup>41</sup>

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).<sup>42</sup>

### **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.

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<sup>38</sup> Committed on separate occasions.

<sup>39</sup> “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).

<sup>40</sup> “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).

<sup>41</sup> 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.”); *Fish*, 758 F.3d at 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.’”).

<sup>42</sup> See USSG Appendix A (Statutory Index).

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).<sup>43</sup>

**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.<sup>44</sup> 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).<sup>45</sup>

“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.<sup>46</sup>

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.

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<sup>43</sup> See USSG Appendix A (Statutory Index).

<sup>44</sup> USSG §4B1.1(a).

<sup>45</sup> USSG §4B1.2(a).

<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup> 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.”<sup>50</sup> 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.<sup>51</sup> The addition of “crime of violence” to the list of

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<sup>47</sup> 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.

<sup>48</sup> 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.’

<sup>49</sup> See 8 U.S.C. § 1326(b) (Reentry of Removed Aliens).

<sup>50</sup> 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. 104–132, § 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. 108–193, § 4, 117 Stat. 2879 (2003) (adding human trafficking offenses).

<sup>51</sup> 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

aggravated felonies came in the Immigration Act of 1990,<sup>52</sup> 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.<sup>53</sup> 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.”<sup>54</sup> 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.”

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ADA, expressing concern over confusion about whether state drug offenses were covered under the existing 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).

<sup>52</sup> Pub. L. 101–649, § 501, 104 Stat. 5048 (1990).

<sup>53</sup> 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. Finally, the residual clause in 18 U.S.C. § 16(b) was struck down in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). For these reasons, this primer only addresses elements and enumerated clauses.

<sup>54</sup> 18 U.S.C. § 924(e)(2)(B)(i).

As discussed below, the Supreme Court has interpreted “physical force” in reference to its “ordinary meaning.”<sup>55</sup> Some states, however, have interpreted the element of “force” to include a range of conduct from incidental touching to violent battery.<sup>56</sup> 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.”<sup>57</sup> 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.”<sup>58</sup> Most recently, the Court concluded that “the elements clause encompasses robbery offenses that require the criminal to overcome the victim’s resistance.”<sup>59</sup>

### **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<sup>60</sup> 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.”<sup>61</sup>

## **C. STEPS 2 AND 3: DETERMINING THE STATUTE OF CONVICTION AND ITS ELEMENTS**

Once the court has identified the relevant 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

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<sup>55</sup> Johnson v. United States, 559 U.S. 133, 138 (2010).

<sup>56</sup> 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 138 (citations omitted).

<sup>57</sup> *Id.* at 139.

<sup>58</sup> *Id.* at 140.

<sup>59</sup> Stokeling v. United States, 139 S. Ct. 544, 550 (2019).

<sup>60</sup> 8 U.S.C. § 1101(a)(43).

<sup>61</sup> United States v. Pascacio-Rodriguez, 749 F.3d 353, 359 (5th Cir. 2014).

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 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*<sup>62</sup>, 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***

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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 approach 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[.]"<sup>63</sup> In contrast, the Ninth Circuit allowed broad and liberal use of the modified

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<sup>62</sup> 136 S. Ct. 2243 (2016), *see infra* pp. 15–17.

<sup>63</sup> *United States v. Salean*, 583 F.3d 1059, 1061 (8th Cir. 2009).

categorical approach regardless of whether the statute is divisible.<sup>64</sup> This question of when a sentencing court can review the *Shepard* documents was discussed in *Descamps v. United States*.<sup>65</sup> *Descamps* presented the issue of whether a sentencing court may only consult *Shepard* documents when a statute is divisible,<sup>66</sup> or whether it may do so when the statute of conviction is indivisible.<sup>67</sup>

In *Descamps*, the defendant was convicted of being a felon in possession of a firearm,<sup>68</sup> and the Government sought an enhanced sentence under ACCA based upon *Descamps*' prior state convictions for burglary, robbery, and felony harassment.<sup>69</sup> 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*.<sup>70</sup> 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.<sup>71</sup>

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."<sup>72</sup> 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,

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<sup>64</sup> *United States v. Aquilas-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc) (*per curiam*), *abrogated by* *Descamps v. United States*, 133 S. Ct. 2276 (2013).

<sup>65</sup> 133 S. Ct. 2276 (2013).

<sup>66</sup> 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.

<sup>67</sup> An indivisible statute is one that does not contain alternative elements. *Id.*

<sup>68</sup> 18 U.S.C. § 922(g).

<sup>69</sup> *Descamps*, 133 S. Ct. at 2282.

<sup>70</sup> 655 F.3d 915 (9th Cir. 2011) (en banc) (*per curiam*).

<sup>71</sup> *Id.* at 940.

<sup>72</sup> *Descamps*, 133 S. Ct. at 2285.



rather, the conviction simply doesn't count as a predicate offense for ACCA purposes.<sup>73</sup> 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.<sup>74</sup>

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.<sup>75</sup> 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.<sup>76</sup>

## 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.<sup>77</sup> In *Mathis v. United States*,<sup>78</sup> 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)

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<sup>73</sup> *Id.* at 2286.

<sup>74</sup> “Indeed, accepting the Ninth Circuit's contrary reasoning would altogether collapse the distinction between a categorical and a fact-specific approach.” *Id.* at 2290.

<sup>75</sup> *Id.* at 2281.

<sup>76</sup> *Id.* at 2287–89.

<sup>77</sup> *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).

<sup>78</sup> 136 S. Ct 2243 (2016).

of its elements.”<sup>79</sup> 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.<sup>80</sup>

At issue in *Mathis* was whether an Iowa burglary statute<sup>81</sup> counted as a predicate offense for ACCA purposes. The definition at issue listed a broader range of places than the generic definition of burglary, including any building, structure, [or] land, water, or air vehicle.”<sup>82</sup> 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.”<sup>83</sup>

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.”<sup>84</sup> 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.”<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

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<sup>79</sup> *Id.* at 2248.

<sup>80</sup> *Id.*

<sup>81</sup> Iowa Code § 713.1 (2013).

<sup>82</sup> Iowa Code § 702.12 (2013).

<sup>83</sup> 786 F.3d 1068, 1075 (8th Cir. 2015).

<sup>84</sup> *Mathis*, 136 S. Ct at 2248.

<sup>85</sup> *Id.*

<sup>86</sup> *See State v. Duncan*, 312 N.W.2d 519, 523 (Iowa 1981); *State v. Rooney*, 862 N.W.2d 367, 376 (Iowa 2015).

<sup>87</sup> “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.

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.”<sup>88</sup> *Mathis* instructs courts to first look to state law to determine if a statute contains alternative means or alternative elements.<sup>89</sup> If state law fails to provide clear answers, “federal judges have another place to look: the record of a prior conviction itself.”<sup>90</sup> 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.”<sup>91</sup> 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,<sup>92</sup> Michigan’s ‘breaking and entering’ statute,<sup>93</sup> Oklahoma’s ‘assault’ statute,<sup>94</sup> and Massachusetts’ ‘resisting arrest’ statute.<sup>95</sup>

#### **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

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<sup>88</sup> *Id.* at 2256.

<sup>89</sup> *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.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *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.).

<sup>93</sup> *United States v. Ritchey*, 840 F.3d 310 (6th Cir. 2016) (Holding Michigan’s ‘breaking and entering’ statute contains merely alternative means of commission.).

<sup>94</sup> *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.).

<sup>95</sup> *United States v. Faust*, 853 F.3d 39 (1st Cir. 2017) (Holding Massachusetts’ ‘resisting arrest’ statute merely lists alternative means of commission.).

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 the statute of 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.”<sup>96</sup> 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.”<sup>97</sup> 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.”<sup>98</sup>

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<sup>99</sup> or, in some circumstances, recklessly.<sup>100</sup> 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.”<sup>101</sup> 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

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<sup>96</sup> *Johnson*, 559 U.S. at 138.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 140.

<sup>99</sup> *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.).

<sup>100</sup> *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.”).

<sup>101</sup> *Leocal*, 543 U.S. at 11.

touching.”<sup>102</sup> 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 requirement.<sup>103</sup> Generally, the force clause requires the use of force, rather than the mere causation of physical injury. However, the Court 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...”<sup>104</sup> Most recently, the Supreme Court held that the level of force necessary for a robbery offense to qualify as a violent felony under the elements clause of the Armed Career Criminal Act is force sufficient to overcome the victim’s resistance.<sup>105</sup> 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.<sup>106</sup>

## 2. *Enumerated Clauses*

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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,<sup>107</sup> Supreme Court and circuit case law, state surveys,<sup>108</sup> legal dictionaries,<sup>109</sup> or definitions specifically provided in the guidelines.<sup>110</sup>

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<sup>102</sup> Johnson, 559 U.S. at 139.

<sup>103</sup> 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.”).

<sup>104</sup> 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.”).

<sup>105</sup> Stokeling v. United States, 139 S. Ct. 544 (2018).

<sup>106</sup> See, e.g., Johnson, 559 U.S. at 138 (“We are, however, bound by the Florida Supreme Court’s interpretation of state law...”).

<sup>107</sup> 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...”).

<sup>108</sup> See, e.g., United States v. Gonzalez-Ramirez, 477 F.3d 310, 317-18 (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.).

<sup>109</sup> See, e.g., United States v. Iniguez-Barba, 485 F.3d 790, 793 (5th Cir. 2007) (Relying on *Black’s Law Dictionary* along with legislative history.).

<sup>110</sup> USSG §4B1.2, comment. (nt. 1) (Providing definitions for “forcible sex offense” and “extortion.”).

As summarized by the Fifth Circuit,<sup>111</sup> 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.<sup>112</sup>

The plain-language approach looks to the “ordinary, contemporary, [and] common” meaning.<sup>113</sup> 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.”<sup>114</sup> 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.*”<sup>115</sup> 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.<sup>116</sup> If the offense is defined in terms of a common law crime, then the court applies the generic, core meaning.<sup>117</sup> 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.<sup>118</sup>

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.<sup>119</sup> If it is overbroad –

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<sup>111</sup> 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

<sup>112</sup> *United States v. Rodriguez*, 711 F.3d 541, 550–52 & n. 13–15 (5th Cir. 2013) (en banc).

<sup>113</sup> *United States v. Izaguirre-Flores*, 405 F.3d 270, 275 (2005).

<sup>114</sup> *United States v. Zavala-Sustaita*, 214 F.3d 601, 604 (internal citations omitted).

<sup>115</sup> *United States v. De Jesus Ventura*, 565 F.3d 870, 876 (D.C. Cir. 2009) (emphasis added).

<sup>116</sup> *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).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *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.”).

that is, it proscribes a larger sphere of conduct than is targeted by the generic offense – it does not qualify.<sup>120</sup>

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<sup>120</sup> 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.

***Sessions v. Dimaya***, 138 S. Ct. 1204 (2018). The Supreme Court held unconstitutional the residual clause in 18 U.S.C. section 16(b), which is referenced in the Immigration and Nationality Act’s definition of “crime of violence.” That residual clause classifies as a crime of violence any felony “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.” In a 5-4 partial plurality decision, the Court held that section 16’s residual clause possessed the same flaws as the Armed Career Criminal Act’s residual clause, which the Court invalidated in *Johnson*. Four justices in the majority held that the stricter form of void for vagueness analysis used in analyzing criminal statutes equally applies in the context of the INA because of the gravity of the threat of deportation. The majority, thus, rejected the Government’s position that “a less searching form of the void-for-vagueness doctrine applies here than in *Johnson* because this is not a criminal case.” Justice Gorsuch, though joining the bulk of the majority opinion, reasoned that the stricter form of vagueness review is required even when a case does not involve criminal or immigration consequences.

***United States v. Stitt***, 139 S. Ct. 399 (2018). The Supreme Court held that generic burglary, as described in the Armed Career Criminal Act, includes burglary of a structure or vehicle that has been adapted or is customarily used for overnight habitation, like a mobile home, recreational vehicle, trailer, or camping tent. The Court reached this conclusion based on the principle, first articulated in *Taylor*, that the definition of a generic offense under ACCA should reflect the sense in which the offense was understood in the criminal law of most states at the time of the enactment of ACCA. At the time of ACCA’s enactment, most states had adopted definitions of burglary that included vehicles and non-dwelling structures adapted or customarily used for habitation. Additionally, the Court noted that the risk of violent confrontation between intruder and occupant, which is the danger inherent in burglary, is present in the entry of an inhabited vehicle or structure just as it is present in the entry of a residential home. The decision was unanimous.

***Stokeling v. United States***, 139 S. Ct. 544 (2018). The Supreme Court held that the level of force necessary for a robbery offense to qualify as a violent felony under the elements clause of the Armed Career Criminal Act is force sufficient to overcome the victim's resistance. The Court found this conclusion to be consistent with the common law understanding of robbery, with the majority of state law definitions of robbery at the time of the ACCA's enactment, and with the amendment history of the ACCA. The Court deemed this level of force to be higher than that of misdemeanor battery, which the Court held in *Curtis Johnson v. United States*, 559 U.S. 133 (2010), not to qualify as a violent felony under the elements clause. The Court concluded that Florida robbery, at issue in this case, which is defined by Florida law to require force necessary to overcome the victim's resistance, is an ACCA predicate violent felony under the elements clause.