

PRIMER



CATEGORICAL APPROACH

March 2020

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

Disclaimer: This document is intended to assist in understanding and applying the sentencing guidelines. The information in this document should not be considered definitive or comprehensive. In addition, the information in this document does not represent an official Commission position on any particular issue or case, and it is not binding on the Commission, the courts, or the parties in any case. To the extent this document includes unpublished cases, practitioners should be cognizant of Fed. R. App. P. 32.1, as well as any corresponding rules in their jurisdictions.

TABLE OF CONTENTS

I.	INTRODUCTION AND OVERVIEW	1
II.	ORIGIN OF THE CATEGORICAL APPROACH	2
A.	CATEGORICAL APPROACH: <i>TAYLOR V. UNITED STATES</i> , 495 U.S. 575 (1990)	2
B.	MODIFIED CATEGORICAL APPROACH: <i>SHEPARD V. UNITED STATES</i> , 544 U.S. 13 (2005)	3
C.	USE OF THE CATEGORICAL APPROACH	5
III.	APPLYING THE CATEGORICAL APPROACH.....	5
A.	THRESHOLD PRINCIPLES	6
B.	STEP 1: IDENTIFY THE DEFINITION AT ISSUE	6
1.	<i>Common Statutory and Guideline Provisions</i>	6
2.	<i>Different Structures of Definitions</i>	11
C.	STEPS 2 AND 3: DETERMINING THE STATUTE OF CONVICTION AND ITS ELEMENTS	13
1.	<i>Divisibility</i>	13
2.	<i>Elements v. Means</i>	15
D.	STEP 4: COMPARING THE ELEMENTS OF THE STATUTE OF CONVICTION TO THE DEFINITION ...	18
1.	<i>Elements Clauses</i>	18
2.	<i>Enumerated Clauses</i>	20
APPENDIX A	22

This primer is intended to provide a general overview of the statutes, sentencing guidelines, and relevant case law relating to the categorical approach as it relates to the United States Sentencing Guidelines. This primer focuses primarily on application of the categorical approach and related sentencing issues. Although the primer identifies some of the issues and cases related to the categorical approach, it is not a comprehensive compilation of case law and is not intended to be a substitute for independent research and analysis of primary authority.

I. INTRODUCTION AND OVERVIEW

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

The types of prior convictions that are particularly relevant to sentencing, and which, therefore, should result in a longer sentence, are specified in certain statutes and sentencing guidelines. For instance, the ACCA's list of offenses that trigger the 15-year mandatory minimum for being a felon in possession of a firearm 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. For career offenders, the *Guidelines Manual* lists "crimes of violence" and "controlled substance offenses" as the types of prior convictions that increase the sentencing range.

Sentencing and appellate courts have interpreted these terms through application of the "categorical approach" mandated by the Supreme Court in *Taylor v. United States*.⁴ Under the categorical approach, courts must look to the statutory elements of an offense, rather than the defendant's conduct, when determining the nature of a prior conviction.

¹ See 8 U.S.C. § 1326(b).

² See 18 U.S.C. § 924(e).

³ U.S. SENTENCING COMM'N, 2011 REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 269–71 (2011), <https://www.ussc.gov/research/congressional-reports/2011-report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>.

⁴ 495 U.S. 575 (1990).

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

II. ORIGIN OF THE CATEGORICAL APPROACH

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

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

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

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

⁵ For brief summaries of a selection of Supreme Court case law addressing the categorical approach, see Appendix A.

⁶ 495 U.S. 575 (1990).

⁷ See 18 U.S.C. § 924(e).

⁸ *Taylor*, 495 U.S. at 577–78.

⁹ *Id.* at 582.

¹⁰ “We believe that Congress meant by ‘burglary’ the generic sense in which the term is now used in the criminal codes of most States.” *Id.* at 598 (citations omitted).

¹¹ *Id.* at 600. In a conduct-based system, “the trial court would have to determine what [the] conduct was,” in some cases requiring reintroducing “the Government’s actual proof at [the first] trial,” perhaps even by

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

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

B. MODIFIED CATEGORICAL APPROACH: *SHEPARD V. UNITED STATES*, 544 U.S. 13 (2005)

After *Taylor*, two key questions remained regarding the determination of whether a statute of conviction falls within a given definition. The first was *when*—that is, in what types of cases—a court could look to additional documents beyond the fact of conviction and the statutory definition of the prior offense. If a court could look to additional documents, the second question was *which* documents it was allowed to rely on to determine the nature of the defendant’s prior conviction. The Supreme Court answered the second question (which documents could be consulted) in *Shepard v. United States*,¹⁶ years

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.

¹² *Id.* at 601.

¹³ *Id.* at 602.

¹⁴ *Id.*

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

¹⁶ 544 U.S. 13 (2005).

before it answered the first (when courts were permitted to consult additional documents).¹⁷

In *Shepard v. United States*, the defendant had pled guilty to being a felon in possession of a firearm,¹⁸ and had prior convictions for Massachusetts “burglary.” The Court noted that the offenses charged in the prior state cases were “broader than generic burglary” and there were no jury instructions because the cases had not proceeded to trial.¹⁹ At sentencing, the district court rejected the government’s argument, 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, to determine if the convictions fell under the generic definition of burglary, the court could review complaint applications and police reports in place of jury instructions.

In a 4-1-3 plurality opinion authored by Justice Souter, the Supreme Court reversed the First Circuit’s holding directing the sentencing court to apply an ACCA enhancement based on police reports. The *Shepard* plurality concluded that the documents admissible to establish the nature of an ACCA predicate conviction arrived at by guilty plea were “the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis of the plea was confirmed by the defendant, or some comparable judicial record of this information.”²⁰ These are now commonly referred to as “*Shepard* documents.” The Court concluded that 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 the ACCA.²¹

The Court rejected the government’s call to allow sentencing courts to cast a wider evidentiary net because it “amount[ed] to a call to ease away from the *Taylor* conclusion, that respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court approaching the certainty of the record of conviction in a generic crime state.”²² Essentially, by using police records, the district court would turn the inquiry into a factual one, rather than a statutory

¹⁷ *Mathis v. United States*, 136 S. Ct. 2243 (2016).

¹⁸ 18 U.S.C. § 922(g)(1).

¹⁹ *Shepard*, 544 U.S. at 17.

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

²¹ *Id.* at 21 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

²² *Id.* at 23.

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

C. USE OF THE CATEGORICAL APPROACH

As noted, the *Taylor* and *Shepard* decisions have strongly influenced interpretations of similar terms far beyond the ACCA. 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. § 1101(a)(43)),²⁴ and in other federal statutes (*e.g.*, “crime of violence” in 18 U.S.C. § 16 and elsewhere). Courts have applied the categorical approach when deciding whether a prior state conviction triggers a mandatory minimum sentencing enhancement, (*e.g.*, for child pornography defendants)²⁵ and also when deciding whether a coterminous offense is a crime of violence (*e.g.*, when a defendant is charged under 18 U.S.C. § 924(c) with possessing a firearm in furtherance of a crime of violence).²⁶ In each case, unless existing federal case law establishes the nature of the particular state statute of conviction at issue, the court must first determine the modern generic definition of the listed offense, and 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 the 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.

²³ *Id.* at 22–23.

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

²⁵ *See United States v. Cammerto*, 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)).

²⁶ *See United States v. Davis*, 139 S. Ct. 2319 (2019) (holding that the presumption of constitutionality could not support a conduct-based approach, rather than the categorical approach, even for coterminous offenses such as § 924(c)); *see also United States v. Simms*, 914 F.3d 229 (4th Cir. 2019) (holding 18 U.S.C. § 924(c)(3)(B) unconstitutionally vague).

Step 3: List the elements of the statute of conviction.

Step 4: Compare the elements in the statute of conviction to those in the definition.

A. THRESHOLD PRINCIPLES

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

B. STEP 1: IDENTIFY THE DEFINITION AT ISSUE

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

1. Common Statutory and Guideline Provisions

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

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

The term 'crime of violence' means —

- (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another; or

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

²⁸ *Taylor v. United States*, 495 U.S. 575, 600 (1990) (Courts are not permitted to consider the conduct of a defendant when applying the categorical approach, only the elements of the predicate statute of conviction).

²⁹ *Id.*

(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.

This definition had its origin in the Comprehensive Crime Control Act of 1984 (“CCA”),³⁰ which repealed a previous definition of the term “crime of violence.” Legislative history to the CCA observed that while the term “crime of violence” was “occasionally used in present law, it is not defined, and no body of case law has arisen with respect to it.”³¹ Section 16(b) was held to be unconstitutional in *Sessions v. Dimaya*.³² The Supreme Court held that the combination of two aspects of section 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.”³³ Section 16(a) was not invalidated and continues to require the categorical approach.

Several federal criminal statutes continue to refer to the definition in section 16,³⁴ and crimes meeting this definition can still trigger certain collateral consequences.³⁵ 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*.

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.”³⁶

³⁰ Pub. L. No. 98-473, 98 Stat. 1976, 2136.

³¹ S. Rep. No. 98-225, at 307 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3486.

³² 138 S. Ct. 1204 (2018).

³³ *Id.* at 1214.

³⁴ *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).

³⁵ *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).

³⁶ The Sentencing Commission promulgated Amendment 802 (effective Nov. 1, 2016) for Illegal Entry offenses under §2L1.2. 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

Section 924(e) provides that any person who violates 18 U.S.C. 922(g), and who has three previous convictions³⁷ by any court referred to in section 922(g)(1) for a “violent felony”³⁸ or a “serious drug offense,”³⁹ 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.⁴⁰

The guidelines applicable to cases involving section 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).⁴¹

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.

³⁷ Committed on separate occasions. 18 U.S.C. § 924(e)(1).

³⁸ “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).

³⁹ “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, 21 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 prescribed by law.” 18 U.S.C. § 924(e)(2)(A).

⁴⁰ See *Leocal v. Ashcroft*, 543 U.S. 1, 10 n.7 (2004) (under section 16, “[t]he ‘substantial risk’ . . . relates to the use of force, not to the possible effect of a person’s conduct.”); *United States v. Fish*, 758 F.3d 1, 5 (1st Cir. 2014) (“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 the ACCA uses to define the term ‘violent felony.’”).

⁴¹ See USSG App. 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).⁴²

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

Tracking the statutory criteria set forth in 28 U.S.C. § 994(h), §4B1.1 implemented Congress’s directive by classifying a defendant as a career offender if (1) the defendant was at least 18 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.⁴³ 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 guideline 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).⁴⁴

“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.⁴⁵

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

⁴² See USSG App. A (Statutory Index).

⁴³ USSG §4B1.1(a).

⁴⁴ USSG §4B1.2(a).

⁴⁵ 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 802.⁴⁶ 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.⁴⁷

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.⁴⁸ 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.”⁴⁹ 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.⁵⁰ The addition of “crime of violence” to the list of

⁴⁶ USSG App. C, amend 802 (effective 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.

⁴⁷ 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 ten 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.’

⁴⁸ See 8 U.S.C. § 1326(b) (Reentry of Removed Aliens).

⁴⁹ See, e.g., Pub. L. No. 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. No. 103–416, § 222, 108 Stat. 4320–22 (1994) (significantly expanding the definition); Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, § 440(e), 110 Stat. 1277(1996) (substantially expanding the definition to near its current form); Pub. L. No. 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. No. 108–193, § 4, 117 Stat. 2879 (2003) (adding human trafficking offenses).

⁵⁰ 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., 130 (1989) (prepared statement of John W. Fried,

aggravated felonies came in the Immigration Act of 1990,⁵¹ 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.*, the ACCA’s violent felony “has as an element the use, attempted use, or threatened use of physical force against another”); “enumerated offenses” clauses (*e.g.*, the ACCA’s violent felony “is burglary, arson, or extortion, involves the use of explosives”); and “residual” clauses.⁵² 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 offenses clauses. In addition, the definition of “crime of violence” in the illegal reentry guideline (USSG §2L1.2) contains an enumerated offenses clause (“means . . . murder, voluntary 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. Elements 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.”⁵³ 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.”

Manhattan ADA, expressing concern over confusion about whether state drug offenses were covered under the existing definition of “aggravated felony”), *reprinted in* Igor I. Kavass & Bernard D. Reams, *The Immigration Act of 1990: A Legislative History of Pub. L. No. 101–649* 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).

⁵¹ Pub. L. No. 101–649, § 501, 104 Stat. 5048.

⁵² 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 promulgated an Amendment that removed a residual clause from its “career offender” definition located at §§4B1.1 and 4B1.2. Moreover, the residual clause in 18 U.S.C. § 16(b) was struck down in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018). Finally, the residual clause found in 18 U.S.C. § 924(c)(3)(B) was struck down in *United States v. Davis*, 139 S. Ct. 2319 (2019). For these reasons, this primer only addresses the elements and enumerated offense clauses.

⁵³ 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.”⁵⁴ Some states, however, have interpreted the element of “force” to include a range of conduct from incidental touching to violent battery.⁵⁵ Relying on 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.”⁵⁶ 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.”⁵⁷ Most recently, the Court concluded that “the elements clause encompasses robbery offenses that require the criminal to overcome the victim’s resistance.”⁵⁸

b. Enumerated Offenses Clauses

Most definitions to which the categorical approach is applied also contain an enumerated offenses clause. An enumerated offenses clause includes a specific list of offenses to which the prior offense must be compared. For example, both the 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 lists about 20 offenses that constitute aggravated felonies.⁵⁹ Enumerated offenses statutes 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 the generic contemporary definition, courts “look to a number of sources, including federal law, the Model Penal Code, treatises, and modern state codes.”⁶⁰ At least one circuit has concluded that when comparing elements of prior convictions with the elements of crimes under federal law, the categorical approach requires comparison with only the “most similar” federal crime rather than any possible federal crime.⁶¹

⁵⁴ *Johnson v. United States*, 559 U.S. 133, 138 (2010).

⁵⁵ 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 as “satisfied by *any* intentional physical contact, ‘no matter how slight.’” *Johnson*, 559 U.S. at 138 (citations omitted).

⁵⁶ *Id.* at 139.

⁵⁷ *Id.* at 140.

⁵⁸ *Stokeling v. United States*, 139 S. Ct. 544, 550 (2019).

⁵⁹ 8 U.S.C. § 1101(a)(43).

⁶⁰ *United States v. Pascacio-Rodriguez*, 749 F.3d 353, 359 (5th Cir. 2014).

⁶¹ *Rosa v. Attorney Gen.*, 950 F.3d 67 (3d Cir. 2020).

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

First, the court should determine if the judgment makes clear under which subsection or provision the defendant was convicted. In some instances, the specific statute of conviction is readily identifiable from the judgment 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 under 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*⁶², a statute is divisible only when it contains different crimes with alternative elements, allowing courts to use the modified categorical approach to determine if the additional documents clarify the defendant's specific offense of conviction. If the statute is not divisible, then the modified categorical approach is not permitted. When a statute is divisible and the modified categorical approach is applied, the "*Shepard* documents" can only be used to determine which specific statutory subsection or provision formed the basis of conviction. Courts cannot use the documents to investigate the underlying conduct of the prior offense. Only after the court has determined the statute (or specific subsection or provision of a divisible statute) of conviction can the court identify the elements to compare to the relevant element clause or enumerated offenses.

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

1. Divisibility

Questions remained after *Shepard* about precisely which cases appropriately permitted review of the *Shepard* documents. A deep circuit split over that question eventually led the Supreme 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

⁶² 136 S. Ct. 2243 (2016).

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[.]”⁶³ In contrast, the Ninth Circuit allowed broad and liberal use of the modified categorical approach regardless of whether the statute is divisible.⁶⁴ This question of when a sentencing court can review the *Shepard* documents was discussed in *Descamps v. United States*.⁶⁵ *Descamps* presented the issue of whether a sentencing court may only consult *Shepard* documents when a statute is divisible,⁶⁶ or whether it may do so when the statute of conviction is indivisible.⁶⁷

In *Descamps*, the defendant was convicted of being a felon in possession of a firearm,⁶⁸ and the government sought an enhanced sentence under the ACCA based on *Descamps*’ prior state convictions for burglary, robbery, and felony harassment.⁶⁹ 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 the ACCA because it covers individuals who enter a store during business hours, and it 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*.⁷⁰ 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.⁷¹

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 that “the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible

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

⁶⁴ *United States v. Aguila-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).

⁶⁵ 133 S. Ct. 2276 (2013).

⁶⁶ 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.

⁶⁷ An indivisible statute is one that does not contain alternative elements. *Id.*

⁶⁸ 18 U.S.C. § 922(g).

⁶⁹ *Descamps*, 133 S. Ct. at 2282.

⁷⁰ 655 F.3d 915 (9th Cir. 2011) (en banc) (per curiam).

⁷¹ *Id.* at 940.

statute.”⁷² 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, the conviction simply does not count as a predicate offense for the ACCA purposes.⁷³ 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.⁷⁴

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 that prohibit 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.⁷⁵ 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.⁷⁶

2. Elements v. Means

While *Descamps* brought needed clarity to the application of the modified categorical approach, new issues have emerged in its wake, as courts have expressed disagreement about how to determine whether a statute is “divisible” within the meaning

⁷² *Descamps*, 133 S. Ct. at 2285.

⁷³ *Id.* at 2286.

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

⁷⁵ *Id.* at 2281.

⁷⁶ *Id.* at 2287–89.

of the Court's decision.⁷⁷ In *Mathis v. United States*,⁷⁸ the Supreme Court addressed the issue of whether the ACCA "makes an exception to [the rule that a prior conviction counts as an ACCA predicate if its elements match the generic offense] when a defendant is convicted under a statute that lists multiple, alternative means of satisfying one (or more) of its elements."⁷⁹ 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 purposes of applying the modified categorical approach.⁸⁰

At issue in *Mathis* was whether an Iowa burglary statute⁸¹ counted as a predicate offense for purposes of the ACCA. 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."⁸² 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."⁸³

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 "elements versus 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 [elements] 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

⁷⁷ 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).

⁷⁸ 136 S. Ct. 2243 (2016).

⁷⁹ *Id.* at 2248.

⁸⁰ *Id.*

⁸¹ Iowa Code § 713.1 (2013).

⁸² Iowa Code § 702.12 (2013).

⁸³ *United States v. Mathis*, 786 F.3d 1068, 1075 (8th Cir. 2015).

guilty.”⁸⁴ 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.”⁸⁵ In *Mathis*, the alternative locations formed different “means of commission” that could be used to fulfill 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.⁸⁶ The Eighth Circuit permitting the categorical approach based on “alternative means of commission” simply mistakes “alternative means of commission” to create a divisible statute. That is, such a statute is merely overbroad for purposes of the ACCA and cannot count as a predicate for an enhancement.⁸⁷

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.”⁸⁸ *Mathis* instructs courts to first look to state law to determine if a statute contains alternative means or alternative elements.⁸⁹ If state law fails to provide clear answers, “federal judges have another place to look: the record of a prior conviction itself.”⁹⁰ 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.”⁹¹ 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

⁸⁴ *Mathis*, 136 S. Ct at 2248.

⁸⁵ *Id.*

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

⁸⁷ “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.” *Mathis*, 136 S. Ct. at 2250.

⁸⁸ *Id.* at 2256.

⁸⁹ *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.

⁹⁰ *Id.*

⁹¹ *Id.*

‘burglary’ statute,⁹² Michigan’s ‘breaking and entering’ statute,⁹³ Oklahoma’s ‘assault’ statute,⁹⁴ and Massachusetts’ ‘resisting arrest’ statute.⁹⁵

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 the elements to determine whether the statute of conviction meets the statutory or guideline definition at issue. The court must always limit its analysis to comparing the elements of the predicate offense to the applicable definition. The court may not look to the underlying conduct, even where the parties have access to the allegations, or even to uncontroverted proof, about the predicate offense. Even where courts are authorized to review the documents authorized by *Shepard* to determine the elements of 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.”⁹⁶ 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.”⁹⁷ The Supreme Court concluded that “[u]ltimately, context determines meaning[,]” and “in

⁹² United States v. Gundy, 842 F.3d 1156 (11th Cir. 2016) (holding Georgia’s ‘burglary’ statute contains alternative elements rather than a single locational element with alternative means of commission).

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

⁹⁴ United States v. Taylor, 843 F.3d 1215 (10th Cir. 2016) (holding Oklahoma’s ‘assault, battery, or assault and battery with dangerous weapon’ statute provides for alternative elements rather than alternative means of commission.).

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

⁹⁶ Johnson v. United States, 559 U.S. 133, 138 (2010).

⁹⁷ *Id.*

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.”⁹⁸

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 intentionally⁹⁹ or, in some circumstances, recklessly.¹⁰⁰ 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.”¹⁰¹ Additionally, physical force generally requires “violent force,” and will not be satisfied by “unwanted touching.” In *Johnson v. United States*, the Court held “[a]ll of these definitions suggest a degree of power that would not be satisfied by the merest touching.”¹⁰² 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.¹⁰³ 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...”¹⁰⁴ 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 ACCA is force sufficient to overcome the victim’s resistance.¹⁰⁵ 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.¹⁰⁶

⁹⁸ *Id.* at 140.

⁹⁹ *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).

¹⁰⁰ *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”).

¹⁰¹ *Leocal*, 543 U.S. at 11.

¹⁰² *Johnson*, 559 U.S. at 139.

¹⁰³ *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”).

¹⁰⁴ *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).

¹⁰⁵ *Stokeling v. United States*, 139 S. Ct. 544 (2018).

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

2. Enumerated Offense Clauses

As noted above, the Supreme Court in *Taylor* decided that when Congress listed offenses, it must have meant the contemporary, generic understanding of those offenses. Thus, in comparing the elements of the prior offense to an enumerated offense, the court must first determine the enumerated offense’s contemporary, generic definition. In establishing the contemporary, generic definition, courts look to numerous sources, including the Model Penal Code,¹⁰⁷ Supreme Court and circuit case law, state surveys,¹⁰⁸ legal dictionaries,¹⁰⁹ or definitions specifically provided in the guidelines.¹¹⁰

As summarized by the Fifth Circuit,¹¹¹ 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.¹¹²

The plain-language approach looks to the “ordinary, contemporary, [and] common” meaning.¹¹³ 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.”¹¹⁴ 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*

¹⁰⁷ 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...”).

¹⁰⁸ 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.).

¹⁰⁹ 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).

¹¹⁰ USSG §4B1.2, comment. (n.1) (providing definitions for “forcible sex offense” and “extortion”).

¹¹¹ 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.

¹¹² *United States v. Rodriguez*, 711 F.3d 541, 550–52 & n. 13–15 (5th Cir. 2013) (en banc) *abrogated on other grounds by* *United States v. Escalante*, 933 F.3d 395, 404 (5th Cir. 2019).

¹¹³ *United States v. Izaguirre-Flores*, 405 F.3d 270, 275 (5th Cir. 2005).

¹¹⁴ *United States v. Zavala-Sustaita*, 214 F.3d 601, 604 (5th Cir. 2000) (internal citations omitted).

codes.”¹¹⁵ 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.¹¹⁶ If the offense is defined in terms of a common law crime, then the court applies the generic, core meaning.¹¹⁷ 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.¹¹⁸

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.¹¹⁹ If it is overbroad—that is, it proscribes a larger sphere of conduct than is targeted by the generic offense—it does not qualify.¹²⁰

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

¹¹⁶ *United States v. Corona-Sanchez*, 291 F.3d 1201, 1204 (9th Cir. 2002) *superseded by statute as stated in* *Mairena v. Barr*, 917 F.3d 1119, 1124–25 (9th Cir. 2019), *superseded on other grounds by* USSG §2L1.2 comment. (n.4).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013) (“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.”).

¹²⁰ *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016). (“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 ACCA, 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 (INA). 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 the 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 the 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 ACCA, but the “aggravated felony” statute in the INA, while resembling the 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 the 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 court 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 the 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 the 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 the ACCA’s violent force requirement.

Johnson v. United States, 135 S. Ct. 2551 (2015). The Court held that the 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 courts 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. § 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 ACCA’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 ACCA, 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 the 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 the ACCA. At the time of the 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 (2019). 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 ACCA 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 *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.

Quarles v. United States, 139 S. Ct. 1872 (2019). The Supreme Court held that the definition of burglary, as an enumerated violent felony predicate offense under the ACCA, includes circumstances where the defendant forms the intent to commit a crime after the initial unlawful entry or remaining in the building or structure. The traditional burglary requirement that the intent to commit a crime be contemporaneous with the unlawful entry or remaining is satisfied when the defendant forms the intent at any time during the unlawful remaining. The intent need not be present at the exact time of the initial unlawful entry or the exact time when the defendant's remaining becomes unlawful. The Court found this conclusion consistent with the underlying purpose of the specification of burglary as an enumerated offense in the ACCA, which was to punish the creation of the danger of a violent confrontation between the offender and those lawfully on the property. That danger, the Court reasoned, is no less present where the criminal intent forms after the initial unlawful entry or remaining.

United States v. Davis, 139 S. Ct. 2319 (2019). The Court struck down the residual clause of 18 U.S.C. § 924(c)(3)(B) as unconstitutionally vague, just as similar clauses in the ACCA and in 18 U.S.C. § 16 were struck down in *Johnson* and *Dimaya*, respectively. The Court read section 924(c)(3)(B) to require the use of a categorical approach to determine whether an offense qualifies as a crime of violence or drug trafficking crime. A sentencing court would thus impose criminal punishment based on its estimation of the degree of risk posed by a hypothetical "ordinary case" of an offense. This created the same vagueness problem that had required the abrogation of the residual clauses of the ACCA and section 16. The Court rejected the government's argument that, pursuant to the canon of constitutional avoidance, section 924(c)(3)(B) could and should have been read to permit a conduct-based approach rather than the categorical approach. Such a reading, the Court stated, would have been a less natural interpretation of the statutory text, and would have created unwarranted inconsistencies in the interpretation of closely related federal statutes enacted with similar purposes. The Court rejected the use of constitutional avoidance to expand the reach of section 924(c) to include felonies that are not categorically violent but are committed in violent ways, reasoning that the judicial expansion of the scope of a criminal statute via constitutional avoidance would be contrary to the principles of due process and separation of powers that underlie the vagueness doctrine.