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I. INTRODUCTION

Various statutes and guidelines subject defendants to enhanced punishment if such defendants have applicable instant and/or prior convictions for a violent crime or a serious drug offense. Courts employ the categorical approach and the modified categorical approach to determine whether a conviction qualifies as a predicate offense for purposes of such enhanced penalties. This primer provides a general overview of selected statutes, sentencing guidelines, and case law involving application of the categorical approach. Although this primer identifies some of the key cases and concepts related to the categorical approach, it is not a comprehensive compilation of authority nor intended to be a substitute for independent research and analysis of primary sources.

II. THE CATEGORICAL APPROACH: ORIGIN AND APPLICATION

In 1990, the Supreme Court established the "categorical approach" in *Taylor v. United States*,[1] and subsequently created the "modified categorical approach" in *Shepard v. United States*,[2] to determine whether a prior conviction qualifies as a "violent felony" or a "serious drug offense" for purposes of a sentencing enhancement under the Armed Career Criminal Act ("ACCA").[3] Since then, courts have applied the categorical approach and modified categorical approach to other statutes to determine whether an instant or prior offense qualifies as a predicate offense for purposes of establishing criminal liability or applying certain sentencing enhancements.[4] Although the guidelines do not require use of the categorical approach, courts also have applied the categorical approach and modified categorical approach to determine whether an instant and/or prior conviction is a "crime of violence" or a "controlled substance offense" for purposes of the career offender enhancement at §§4B1.1 (Career Offender) and 4B1.2 (Definitions of Terms Used in Section 4B1.1) and other guidelines discussed herein.[5]

The categorical approach is an analysis that looks to the statutory elements of an offense, rather than the facts of a defendant's conduct in the underlying case, when determining the nature of a predicate conviction. To do so, courts evaluate the text of the

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1 495 U.S. 575 (1990).

2 544 U.S. 13 (2005).

3 18 U.S.C. § 924(e). The ACCA imposes a 15-year mandatory *minimum* penalty on defendants convicted of a violation of 18 U.S.C. § 922(g) who have three or more prior felony convictions, committed on different occasions, for a "violent felony" or a "serious drug offense," rather than the 15-year *maximum* penalty that would otherwise apply. *See* 18 U.S.C. § 924(a)(2), (e).

4 *See* 18 U.S.C. §§ 16(a) (defining "crime of violence"), 924(c) (defining "crime of violence" and "drug trafficking offense"); *see also* 8 U.S.C. § 1101(a)(43) (defining "aggravated felony" for purposes of deportation and removal pursuant to federal immigration law).

5 While *Taylor* and subsequent Supreme Court cases regarding the categorical approach apply only to statutory provisions, shortly after *Taylor*, circuits began applying the categorical approach to the guidelines even though the guidelines do not require such an analysis.

statute of conviction with the aid of case law. When statutes criminalize multiple offenses, courts review a limited class of judicial documents for the sole purpose of determining a defendant's particular offense of conviction.

The following sections summarize the origin of the categorical approach and modified categorial approach and describe the basic steps and principles used in applying the categorical approach.

A. ORIGIN OF THE CATEGORICAL APPROACH AND MODIFIED CATEGORICAL APPROACH

The Supreme Court established the categorical approach in *Taylor v. United States*. In *Taylor*, the Court held that the categorical approach requires courts to look only to the statute of conviction, rather than the particular facts underlying the conviction, to determine whether the offense meets the definition of a "violent felony" in the ACCA.[6] To make this determination, courts compare the elements of the offense described in the statute of conviction to the definition in the ACCA to determine if the offense criminalizes the same or a narrower range of conduct than the definition, as required to serve as a predicate offense.[7]

In *Shepard v. United States*, the Court held that courts may use a "modified categorical approach" in cases where the statute of conviction describes both conduct that fits within the applicable definition and conduct that does not.[8] In applying the modified categorical approach, courts look not only to the statute of conviction but also may look to a limited list of judicial sources to determine the elements of the offense of conviction: "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."[9] These documents are commonly referred to as "*Shepard* documents."

Subsequently, in *Descamps v. United States* and *Mathis v. United States*, the Supreme Court held that courts may only apply the modified categorical approach if the court first determines that the statute of conviction is "divisible."[10] For this threshold inquiry, courts must inquire if the statute lists alternative elements or, instead, lists alternative means of committing the offense.[11]

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6 *Taylor*, 495 U.S. at 600.

7 *Id.* at 599.

8 544 U.S. 13, 17–18 (2005).

9 *Id*. at 26.

10 *See* Mathis v. United States, 579 U.S. 500, 517 (2016); Descamps v. United States, 570 U.S. 254, 258 (2013).

11 *Mathis*, 579 U.S. at 517.

If the statute of conviction describes multiple crimes with alternative elements, the statute is "divisible," and courts may use the modified categorical approach and *Shepard* documents to identify which of the alternative elements formed the basis of the defendant's conviction. Courts may then determine whether the conviction meets the applicable definition.[12] In contrast, if the statute describes a single crime and enumerates alternative means of committing that crime, the statute is "indivisible" and courts may not apply the modified categorical approach to determine if the means by which the defendant committed the crime meets the applicable definition.[13]

Because the categorical approach looks to the statutory elements of an offense, rather than the facts in the underlying case, courts may not look behind the "elements" of a statute of conviction to identify the "means" by which the defendant committed an offense.[14] Instead, courts must look to the least serious conduct encompassed by the statutory elements to determine if an overbroad, indivisible statute qualifies as a predicate offense.[15] Therefore, under *Descamps* and *Mathis*, if a statute of conviction is indivisible and criminalizes a broader range of conduct than the applicable definition requires, the entire statute is categorically disqualified as a predicate offense, even if reliable records show that the conduct that formed the basis of the defendant's conviction otherwise would fall within such definition.[16]

B. Basic Application Steps

Applying the categorical approach can be best described as a three-step procedure, including identifying the relevant federal definition; identifying the elements of the prior conviction; and comparing the prior conviction to the federal definition.

1. Identify the Relevant Federal Definition

First, courts identify the definition of the statutory or guideline provision that triggers a higher penalty or enhanced sentence for a defendant's instant offense of

12 *Descamps*, 570 U.S. at 278.

13 *Id*. at 258 ("[W]e hold that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.").

14 *Mathis,* 579 U.S. at 519 (Courts "may not ask whether the defendant's conduct—his particular means of committing the crime—falls within the generic definition."); *Descamps*, 570 U.S. at 278 ("The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one.").

15 *See* Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013) ("Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." (internal citations omitted)).

16 *See Descamps*, 570 U.S. at 261 ("But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form.").

conviction. For example, the ACCA provides for higher penalties for firearms offenses if the defendant was previously convicted of three or more "violent felonies" or "serious drug offenses."[17] The career offender guideline at §4B1.1 provides for higher offense levels and a higher criminal history category for defendants who have two or more prior convictions for a "crime of violence" or a "controlled substance offense."[18]

As discussed below, many federal statutes and guidelines contain definitions that use similar terms. Because courts typically interpret similar terms in the same way, courts have used the categorical approach and case law interpreting a clause in one definition to also interpret the same category of clause in another definition.[19]

a. "Force" or "elements" clauses

A "force clause," sometimes referred to as an "elements clause," requires that the offense have an element of physical force against a person. For example, the ACCA defines a "violent felony" in part as a prior conviction that "*has as an element* the use, attempted use, or threatened use of *physical force* against the person of another."[20] Section 4B1.2(a)(1) likewise defines a "crime of violence" as a felony offense that "*has as an element* the use, attempted use, or threatened use of *physical force* against the person of another."[21]

In the context of the ACCA, the Supreme Court has held "physical force against another" means that the crime necessarily must involve violent force—that is, "force capable of causing physical pain or injury to another person."[22] In so holding, the Court rejected the common law definition of "force," which could be satisfied by even the slightest

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17 18 U.S.C. § 924(e).

18 U.S. SENT'G COMM'N, *Guidelines Manual*, §§4B1.1, 4B1.2 (Nov. 2021) [hereinafter USSG]. Other guidelines in the *Guidelines Manual* reference §§4B1.1 and 4B1.2 and their commentary to define these terms. *See, e.g.*, USSG §§2K1.3 (Unlawful Receipt, Possession, or Transportation of Explosive Materials; Prohibited Transactions Involving Explosive Materials), 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunitions), 2S1.1 (Laundering of Monetary Instruments; Engaging in Monetary Transactions in Property Derived from Unlawful Activity), 7B1.1 (Classification of Violations (Policy Statement)).

19 *E.g.*, United States v. Harris, 853 F.3d 318, 320 (6th Cir. 2017) ("This provision [§4B1.2(a)(1)], often called the 'elements clause,' mirrors the elements clause in the Armed Career Criminal Act, and we typically interpret them the same way."); United States v. Fritts, 841 F.3d 937, 940–42 n.4 (11th Cir. 2016) (because §4B1.2's force clause for a "crime of violence" and the ACCA's force clause for a "violent felony" are identical, "this Court often considers cases interpreting the language in the Sentencing Guidelines as authority in cases interpreting the language in the ACCA"); United States v. Smith, 775 F.3d 1262, 1267 (11th Cir. 2014) (interpreting the ACCA's definition of "serious drug offense" and §4B1.2's definition of "controlled substance offense" similarly); United States v. Woods, 576 F.3d 400, 403–04 (7th Cir. 2009) (because the language is identical in the ACCA's "violent felony" and §4B1.2's "crime of violence" definitions, "we therefore refer to the ACCA and the career offender provisions of the Guidelines interchangeably").

20 18 U.S.C. § 924(e)(2)(B)(i) (emphasis added).

21 USSG §4B1.2(a)(1) (emphasis added).

22 Johnson v. United States, 559 U.S. 133, 140 (2010).

offensive touching, because it did not fit the context of the ACCA.[23] The Supreme Court has since further clarified that in the ACCA, " 'force capable of causing pain or injury,' includes the amount of force necessary to overcome a victim's resistance."[24] However, the Court previously held that a "misdemeanor crime of domestic violence," as defined by a force clause in 18 U.S.C. § 921(a)(33)(A), could be supported by "the degree of force that supports a common-law battery conviction."[25]

In the context of 18 U.S.C. § 16(a), a statute providing that a "crime of violence" means an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, the Supreme Court has held in *Leocal v. Ashcroft* that accidental or negligent conduct does not constitute the "use" of force in section 16(a).[26] The Court explained that the word "use" joined in context with the phrase "against the person or property of another" requires "active employment."[27] Subsequently, in *Voisine v. United States*, the Court determined that a "misdemeanor crime of domestic violence," as defined in the force clause in 18 U.S.C. § 921(a)(33)(A), could involve the use of force, even with a mens rea of recklessness, finding that that section does not require the force be employed against the person or property of another.[28] Thereafter, circuit courts split as to whether recklessness could satisfy the ACCA's force clause.[29] In 2021, in *Borden v. United States*, the Supreme Court resolved this circuit split and determined that the ACCA's force clause requires purposeful or knowing conduct, not mere recklessness.[30] Circuit courts subsequently have applied *Borden* to the materially identical force clauses in 18 U.S.C. § 16(a), 18 U.S.C. § 924(c)(3)(A), 18 U.S.C. § 3559(c)(2)(F)(ii), and the career offender guideline definition at §4B1.2(a).[31]

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[23] *Id.* at 139; *see also id*. at 141 ("It is significant, moreover, that the meaning of 'physical force' the Government would seek to import into this definition of 'violent felony' is a meaning derived from a common-law *misdemeanor*.").

[24] Stokeling v. United States, 139 S. Ct. 544, 552, 555 (2019) (internal citation omitted). *See also* Johnson v. United States, 24 F.4th 1110, 1119 (7th Cir. 2022) (discussing the definition of "physical force" as provided for in *Johnson* and *Stokeling)*

[25] United States v. Castleman, 572 U.S. 157, 168 (2014).

[26] 543 U.S. 1, 9 (2004).

[27] *Id*.

[28] 579 U.S. 686, 692 (2016).

[29] Borden v. United States, 141 S. Ct. 1817, 1823 (2021) (plurality opinion) (discussing the circuit split).

[30] *Id.* at 1825; *see also id.* at 1835 (Thomas, J., concurring in the judgment). The plurality explained that "*Voisine* thus focused exclusively on the word 'use' " because the statute at issue in that case "lacks the ensuing phrase 'against the person of another.' " *Id.* at 1833. And it is the phrase " 'against the person of another,' when modifying the 'use of physical force,' [which] introduces that action's conscious object," and thus excludes reckless conduct. *Id.*

[31] *See, e.g.,* United States v. Begay, 33 F.4th 1081, 1093 (9th Cir. 2022) (section 924(c)(3)(A)); United States v. Stoglin, 34 F.4th 415, 418–19 (5th Cir. 2022) (section 3559(c)(2)(F)(ii)); United States v. Gomez, 23 F.4th 575, 577 (5th Cir. 2022) (section 16(a)); United States v. Quinnones, 16 F.4th 414, 420 (3d Cir. 2021) (guidelines); United States v. Martin, 15 F.4th 878, 883 (8th Cir. 2021) (guidelines); United States v. Ash, 7 F.4th 962, 963 (10th Cir. 2021) (guidelines).

Although force clauses are similar across different statutes and guidelines (and thus courts often discuss them interchangeably), one notable difference among some force clause definitions is the inclusion of physical force against a person *or* against property, instead of solely against a person. For instance, 18 U.S.C. § 924(c)(3)(A) includes a force clause requiring the force be used "against the person or property of another," while §4B1.2(a)(1) includes a force clause requiring the force be used "against the person of another."[32] As a result, a statute of conviction criminalizing force against property qualifies as a predicate offense under section 924(c) but does not qualify under §4B1.2(a)(1).[33]

b. "Enumerated offenses" clauses

Terms like "violent felony" or "crime of violence" also can be defined by a list of specific offenses whose generic elements qualify as a predicate offense.[34] For example, the

[32] 18 U.S.C. § 924(c)(3)(A).

[33] For example, Hobbs Act robbery, 18 U.S.C. § 1951, can be committed through force or threats of force against property as well as against a person. As a result, eight circuits have held that Hobbs Act robbery is not a categorical match with the force clause at §4B1.2. United States v. Chappelle, 41 F.4th 102, 109–12 (2d Cir. 2022); United States v. Prigan, 9 F.4th 1115, 1117 (9th Cir. 2021) (collecting cases); United States v. Green, 996 F.3d 176, 184 (4th Cir. 2021); Bridges v. United States, 991 F.3d 793, 801–02 (7th Cir. 2021); United States v. Scott, 14 F.4th 190, 198 n.7 (3d Cir. 2021); United States v. Eason, 953 F.3d 1184, 1194–95 (11th Cir. 2020); United States v. Camp, 903 F.3d 594, 604 (6th Cir. 2018); United States v. O'Connor, 874 F.3d 1147, 1158 (10th Cir. 2017). By contrast, every circuit but the D.C. Circuit (which has not yet addressed the issue) has held that Hobbs Act robbery categorically qualifies as a "crime of violence" under 18 U.S.C. § 924(c) because that provision includes force against property or a person. United States v. Garcia-Ortiz, 904 F.3d 102, 107–09 (1st Cir. 2018); United States v. Hill, 890 F.3d 51, 60 (2d Cir. 2018); United States v. Walker, 990 F.3d 316, 325–26 (3d Cir. 2021), *vacated on other grounds*, 142 S. Ct. 2858 (2022); United States v. Mathis, 932 F.3d 242, 266 (4th Cir. 2019); United States v. Buck, 847 F.3d 267, 275 (5th Cir. 2017); United States v. Gooch, 850 F.3d 285, 291–92 (6th Cir. 2017); United States v. Fox, 878 F.3d 574, 579 (7th Cir. 2017); United States v. Jones, 919 F.3d 1064, 1072 (8th Cir. 2019); United States v. Dominguez, 954 F.3d 1251, 1260–61 (9th Cir. 2020) (citing United States v. Mendez, 992 F.2d 1488, 1491 (9th Cir. 1993)), *vacated on other grounds,* 142 S. Ct. 2857 (2022); United States v. Melgar-Cabrera, 892 F.3d 1053, 1066 (10th Cir. 2018); United States v. St. Hubert, 909 F.3d 335, 345 (11th Cir. 2018), *abrogated on other grounds by* United States v. Taylor, 142 S. Ct. 2015 (2022).

[34] Many statutory provisions also include or included now-defunct residual clauses, which were catchall provisions—*i.e.*, "or otherwise involves conduct that presents a serious potential risk of physical injury to another" in 18 U.S.C. § 924(e)(2)(B)(ii)—to define applicable terms. In *Johnson v. United States*, 576 U.S. 591 (2015), the Supreme Court invalidated the residual clause in 18 U.S.C. § 924(e) as unconstitutionally vague. However, Congress has not yet altered section 924(e) in response to *Johnson*. The Supreme Court also invalidated the residual clause in 18 U.S.C. § 16(b) in *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and the residual clause in 18 U.S.C. § 924(c)(3)(B) in *United States v. Davis*, 139 S. Ct. 2319 (2019).

Separately, in 2016, the Commission promulgated an amendment that removed the residual clause from the "career offender" definition of a "crime of violence" at §4B1.2(a)(2). USSG App. C, amend. 798 (effective Aug. 1, 2016) (amending §4B1.2(a)(2) to, among other things, remove the residual clause in the definition of "crime of violence"). Before 2016, §4B1.2(a)(2) alternatively defined a "crime of violence" as an offense that is one of the enumerated offenses or "otherwise involves conduct that presents a serious potential risk of physical injury to another." *See* USSG §4B1.2(a)(2) (effective Nov. 1, 2015).

Although the Commission removed the §4B1.2 residual clause, the Supreme Court upheld the validity of §4B1.2's residual clause, holding that the guidelines are not subject to a vagueness challenge due to their

ACCA alternatively defines "violent felony" to include a felony which "*is* burglary, arson, or extortion, [or] involves the use of explosives."[35] Section 4B1.2(a)(2) also provides an alternative definition of "crime of violence" by listing specific offenses: "*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)."[36]

To determine what constitutes the "generic" version of an offense, courts have looked to a number of factors, including state penal codes and Congressional intent,[37] related federal statutes,[38] the Model Penal Code,[39] Supreme Court and circuit case law,[40] criminal law treatises and legal dictionaries,[41] and definitions specifically provided in the guidelines.[42] For offenses not developed in the common law, courts have looked at the plain, ordinary meaning of the statutory language,[43] including examining regular

advisory nature. Beckles v. United States, 137 S. Ct. 886, 894–95 (2017). As a result, the now-excised residual clause in the career offender guideline remains valid for those defendants sentenced under the guidelines prior to August 2016. *See* United States v. Smith, 881 F.3d 954, 956 (6th Cir. 2018) (reaffirming a prior decision that a state robbery statute is a crime of violence under §4B1.2's residual clause in light of *Beckles*); United States v. Jones, 878 F.3d 10, 14 (2d Cir. 2017) (holding, post-*Beckles*, that a state robbery statute qualified as a crime of violence under the career offender guideline's residual clause). However, *Beckles* may not apply to sentences imposed when the guidelines were mandatory. *See* Shea v. United States, 976 F.3d 63, 81–82 (1st Cir. 2020); Cross v. United States, 892 F.3d 288, 291 (7th Cir. 2018). *But see* United States v. Carr, 946 F.3d 598, 600 n.3 (D.C. Cir. 2020) (discussing a circuit conflict regarding defendants' ability to bring post-conviction challenges on a mandatory guidelines vagueness theory). Because residual clauses are no longer in effect, this primer does not address them further.

35 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added).

36 USSG §4B1.2(a)(2) (emphasis added).

37 *See* Quarles v. United States, 139 S. Ct. 1872, 1878 (2019) (a majority of state burglary laws proscribed remaining-in burglary when ACCA was enacted, showing that Congress likely intended generic burglary to include burglars who formed intent to commit a crime at any time while unlawfully remaining in a building or structure); United States v. Stitt, 139 S. Ct. 399, 406 (2018) (the majority of state burglary laws at the time of ACCA's enactment covered vehicles adapted or customarily used for lodging); Esquivel-Quintana v. Sessions, 137 S. Ct. 1562, 1571–72 (2017) (at the time of the definition's addition to the Immigration and Nationality Act, a significant majority of states set the age of consent at 16-years-old, supporting a generic definition of statutory rape where the victim is younger than 16).

38 *Esquivel-Quintana*, 137 S. Ct. at 1570.

39 *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.").

40 *See Quarles*, 139 S. Ct. at 1877.

41 *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).

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

43 *See, e.g.*, United States v. Alfaro, 835 F.3d 470, 474–75 (4th Cir. 2016) (looking at the plain and ordinary meaning of the guidelines' language to determine whether a Maryland conviction is a "forcible sex offense" under §2L1.2); United States v. Ramirez-Garcia, 646 F.3d 778, 783 (11th Cir. 2011) (courts define a generic

dictionaries.[44] Thus, whether the offense of conviction has the same title as an enumerated offense does not dispose of the issue.[45]

c. Drug offense provisions

Terms such as "serious drug offense" in the ACCA and "controlled substance offense" in §4B1.2(b) target controlled substance offenses more serious than mere possession, such as distribution, manufacturing, and possession with intent to distribute or manufacture.[46] The ACCA, for instance, defines a serious drug offense as an offense under specific federal statutes or "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance" with a sentence of at least ten years.[47] Section 4B1.2(b) defines a "controlled substance offense" as a federal or state offense with a maximum term of more than one year of imprisonment "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."[48]

Notably, the ACCA's serious drug offense provision differs from §4B1.2(b)'s "controlled substance offense" definition in several important respects. These differences include: (1) the ACCA's requirement that state offenses have at least a ten-year statutory maximum, whereas §4B1.2 requires only that predicates be punishable by more than a year of imprisonment; (2) the ACCA's explicit inclusion of federal offenses under the Controlled Substances Act (21 U.S.C. § 801); and (3) the ACCA's inclusion of state offenses *involving* the enumerated acts, whereas §4B1.2(b) requires the offense of conviction *prohibits* the enumerated acts, listed in each definition.[49] Notably, in *Shular v. United States*, the Supreme Court held the ACCA's definition of a "serious drug offense" under section 924(e)(2)(A)(ii) lists unlawful conduct (akin to a force clause), not generic offenses (akin to an enumerated offense clause).[50]

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offense based on "the ordinary, contemporary, and common meaning of the statutory words" for offenses not developed in the common law (quoting United States v. Padilla-Reyes, 247 F.3d 1158, 1163 (11th Cir. 2001))).

44 *See, e.g.*, *Padilla-Reyes*, 247 F.3d 1163 (looking at Webster's Third New International Dictionary, in addition to Black's Law Dictionary, in order to define "sexual abuse of a minor" under its plain meaning that comports with common usage).

45 Taylor v. United States, 495 U.S. 575, 599 (1990).

46 *See* 18 U.S.C. § 924(e)(2)(A) (definition of "serious drug offense"); USSG §4B1.2(b).

47 18 U.S.C. § 924(e)(2)(A)(i)–(ii).

48 USSG §4B1.2(b).

49 *Compare* 18 U.S.C. § 924(e)(2)(A), *with* USSG §4B1.2(b). *See also* United States v. Jones, 15 F.4th 1288, 1293–94 (10th Cir. 2021) (noting textual differences between section 924(e)(2)(A) and §4B1.2(b)).

50 140 S. Ct. 779, 782 (2020) ("The 'serious drug offense' definition requires only that the state offense involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses.").

2. Identify the Elements of the Defendant's Prior Conviction

Next, courts identify the elements of the state or federal statute underlying the defendant's prior conviction. The key for this step is determining the *crime of which the defendant was convicted*. To determine the defendant's crime, courts look only to the elements of the statute of conviction—that is, what necessarily is required to be proven for the defendant to be convicted of the crime.[51] Thus, courts examine only the text of the statute of conviction and case law interpreting the meaning of such statute at the time of the defendant's conviction, as prior convictions may be decades-old and the statute or case law interpreting the statute may have changed.[52] The statute's title is not determinative.[53]

a. Divisible and indivisible statutes

If the statute of conviction is alternatively phrased, the court must determine whether the statute is divisible (listing multiple crimes comprised of different elements) or indivisible (listing one crime comprised of various factual means of commission). An element must be proven for conviction, establishing a distinct crime, while a means is a method of committing a crime that does not necessarily need to be proven for conviction under the statute.[54]

When a statute is divisible, courts are permitted to use the modified categorical approach and examine select judicial documents, *i.e.*, the *Shepard* documents, to determine which crime the defendant was convicted of committing. For example, the Fourth Circuit has held that 18 U.S.C. § 1513(b)(1), which criminalizes retaliating against a witness, is divisible because it has alternative elements: engaging in or threatening bodily injury, and engaging in or threatening damage to property.[55] Therefore, where the *Shepard* documents

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[51] *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).

[52] McNeill v. United States, 563 U.S. 816, 821 (2011) ("[W]hen determining whether a defendant was convicted of a 'violent felony,' we have turned to the version of state law that the defendant was actually convicted of violating.").

[53] *See* United States v. Montanez, 442 F.3d 485, 492 (6th Cir. 2006) ("How a state titles its statutory provisions, however, is not determinative of what actual statute a defendant was convicted under for federal sentencing purposes."); *see also*, *e.g.*, In re Sealed Case, 548 F.3d 1085, 1089–90 (D.C. Cir. 2008) (comparing D.C. "robbery" definition with the generic definition).

[54] Mathis v. United States, 579 U.S. 500, 504 (2016). The Court stressed that at a trial, 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 guilty." *Id*. (internal citations omitted). The Court explained that 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." *Id.* (quoting *Fact*, Black's Law Dictionary (10th ed. 2014)).

[55] United States v. Allred, 942 F.3d 641, 649–52 (4th Cir. 2019).

revealed a defendant was convicted of the "bodily injury" variant, the Fourth Circuit examined only whether that variant met the applicable definition.[56]

In contrast, when a statute is indivisible, courts may not use the modified categorical approach and therefore may not examine *Shepard* documents to determine whether the defendant's offense of conviction is a predicate offense. For example, in *Mathis v. United States*, the Supreme Court held that Iowa's burglary statute was indivisible despite setting out disjunctively "building, other structure, or vehicle" as possible sites of burglaries, because the Iowa Supreme Court had held these alternatives were different methods of committing one offense, rather than alternative elements of different offenses.[57] Thus, a lower court's resort to the modified categorical approach was erroneous—the facts underlying the defendant's conviction (*i.e.*, whether what he burgled was a building, a structure, or a vehicle) were irrelevant.[58]

b. Determining divisibility

The line between divisibility and indivisibility, however, is not always clear.[59] A statute's listing of verbs or phrases in the disjunctive does not necessarily mean it lists elements.[60] The Supreme Court has set forth several tools to help determine what constitutes means or elements. The first is whether the court presiding over the statute's jurisdiction (*e.g.*, the presiding state court, if a state statute is at issue) has held whether the statute comprises elements or means.[61] Second, the statutory text may resolve the inquiry, either by directly stating that the alternatives must be charged as elements or are illustrative means, or by imposing different punishments for the different alternatives, necessitating unanimous jury agreement as a matter of constitutional law.[62]

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56 *Id.* at 652.

57 *Mathis*, 579 U.S. at 517.

58 *Id.* at 512–13.

59 Descamps v. United States, 570 U.S. 254, 279 (2013) (Kennedy, J., concurring) ("[T]he dichotomy between divisible and indivisible state criminal statutes is not all that clear.").

60 *Mathis*, 579 U.S. at 506–07.

61 *Id.* at 517 (noting that the Iowa Supreme Court had held that the Iowa statute in question comprises alternative methods of committing one offense, so that a jury need not agree on which method the defendant used to convict him).

62 *Id.* In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Court held that, aside from the fact of a prior conviction, any fact increasing the statutory maximum for a penalty is constitutionally required to be submitted to a jury and proved beyond a reasonable doubt. Importantly, while alternatives being subject to different penalties demonstrates they are elements rather than means, *Apprendi* does not demand that alternatives carrying the same penalty are necessarily means. The District of Columbia Circuit has stated that two statutory alternatives are distinct offenses if each has a different punishment, yet those two statutory alternatives also can be distinct offenses even if they do not have different punishments. United States v. Abukhatallah, 41 F.4th 608, 633 (D.C. Cir. 2022) (citing *Mathis*, 579 U.S. at 518). The Third Circuit has stated that identical punishments for the alternatives "could indicate that the alternatives are means." United States v. Aviles, 938 F.3d 503, 513 (3d Cir. 2019), *cert. denied*, 141 S. Ct. 2776 (2021). The Second Circuit, while having previously noted that alternatives carrying the same penalty is in line with indivisibility, in Harbin v.

If neither a presiding court decision nor the statutory text provides a clear answer, sentencing courts may "peek" at the record of the conviction itself for the limited purpose of determining whether the listed items are elements.[63] For example, if one count of an indictment and the corresponding jury instructions both charge a defendant with burgling a "building, structure, or vehicle," then those documents indicate that each term is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt.[64] Notably, the Supreme Court has cautioned that record materials will not always clearly answer the divisibility question, and if they do not "speak plainly," then they cannot satisfy "*Taylor*'s demand for certainty."[65]

c. Remaining uncertainty

Even if a statute is determined to be divisible, the *Shepard* documents still may not make clear which element the defendant was convicted of if, for example, the charging document lists multiple elements and the judgment offers no further clarification.[66] When *Shepard* documents are ambiguous as to which element supported the conviction, the ambiguity is decided in the defendant's favor—thus, the court must assume the defendant committed the least culpable element (and the least culpable means of committing that element).[67]

Sessions, 860 F.3d 58, 65 (2d Cir. 2017), also has more recently held a statute divisible where the penalties for the alternatives were the same, in Chery v. Garland, 16 F.4th 980, 985–86 (2d Cir. 2021). The Sixth and Tenth Circuits, albeit in unpublished opinions, also have rejected the argument that alternatives must be means due to carrying the same punishment. United States v. Mjoness, No. 20-8029, 2021 WL 4078002, at *7 (10th Cir. July 13, 2021); Banks v. United States, 773 F. App'x 814, 820 (6th Cir. 2019); United States v. Burtons, 696 F. App'x 372, 378 (10th Cir. 2017); *see also* United States v. Degeare, 884 F.3d 1241, 1253 (10th Cir. 2018) (noting that a set of alternatives did not carry different penalties but stating this did not resolve the question).

63 *Mathis,* 579 U.S. at 518–19 (internal citations omitted).

64 *Id.* at 517–18. The Court noted that conversely, an indictment and jury instruction that only reference one alternative term to the exclusion of others could indicate that the statute contains a list of elements, each one of which must be proven to a jury. *Id.* at 519.

65 *Id.* (quoting *Shepard*, 544 U.S. at 21). In *Taylor v. United States*, the Supreme Court cited three main factors in adopting a statutory-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." 495 U.S. 575, 600–01 (1990).

66 Johnson v. United States, 559 U.S. 133, 137 (2010).

67 *Id.* (assuming that the defendant's Florida battery conviction was for an unwanted "touch" because the *Shepard* documents were ambiguous). In most contexts that use the categorical approach, such as the ACCA in *Johnson*, the burden is on the government to prove that the defendant has a certain number of qualifying convictions and thus, ambiguities are decided in favor of the defendant. In contexts in which the burden is on the defendant to prove the absence of a qualifying conviction under the categorical approach, ambiguous *Shepard* documents may lead to the opposite result. *See* Pereida v. Wilkinson, 141 S. Ct. 754, 767 (2021) (in the cancellation-of-removal context under the INA, ambiguous *Shepard* documents mean that the movant

3. Compare the Prior Conviction to the Federal Definition

After identifying the relevant federal definition and the elements of the defendant's statute of conviction, the final step is to determine whether the statute of conviction categorically "matches" the definition at issue. Courts must assume, for purposes of comparison with the federal definition, that the defendant committed the least culpable conduct necessary to sustain a conviction under that statute.[68] A categorical match means that the least culpable method of violating the statute is no broader than (in other words, is narrower than or equivalent to) the relevant definition. If a statute reaches more conduct than the definition, then it is overbroad and categorically does not qualify.

As explained above, this analysis is limited to comparing the applicable definition to only what a jury necessarily found (or needed to find in the case of a plea) in reaching the prior conviction or to which a defendant necessarily pleaded guilty (*i.e.*, the least culpable act that violates the statute of conviction). As a result, the court may not consider the defendant's actual underlying conduct. Further, even when the court is permitted to review *Shepard* documents under the modified categorical approach, the focus of the court's inquiry remains only on determining the statute of conviction and not the underlying conduct.

Although the court must consider the least culpable conduct necessary for a conviction under the statute, there still must be a "realistic probability, not a theoretical possibility" that a state would apply its statute to that conduct.[69] Courts generally have held that such a realistic probability exists where the statute "explicitly defines a crime more broadly than the generic definition" or where the defendant points to a case "in which the state courts did in fact apply the statute in the special (non-generic) manner for which he argues."[70]

Most circuits have held that the plain language of a statute can make clear that it applies to conduct not covered by a federal definition, regardless of the lack of any example case applying the statute to those exact facts.[71] For example, the Tenth Circuit held that an

loses under the modified categorical approach because the individual has the burden of proving he or she does not have prior convictions for crimes involving moral turpitude).

[68] Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013); *see also Johnson*, 559 U.S. at 137 (district court had to assume that the defendant's state conviction rested on nothing more than the "least of these acts"). 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. Rosa v. Att'y Gen. U.S., 950 F.3d 67, 76 (3d Cir. 2020).

[69] Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).

[70] United States v. Baldon, 956 F.3d 1115, 1124 (9th Cir. 2020) (first quoting *Duenas-Alvarez*, 549 U.S. at 193, then quoting Chavez-Solis v. Lynch, 803 F.3d 1004, 1009 (9th Cir. 2015)); *see also* United States v. Coats, 8 F.4th 1228, 1247 (11th Cir. 2021).

[71] *See, e.g.*, United States v. Proctor, 28 F.4th 538, 552–53 (4th Cir. 2022); Gonzalez v. Wilson, 990 F.3d 654, 660–61 (8th Cir. 2021); United States v. Cantu, 964 F.3d 924, 934 (10th Cir. 2020) ("[W]e have held that a defendant need not come forward with instances of actual prosecution when the 'plain language' of the

Oklahoma statute forbidding pointing a firearm at another was not a violent felony under the ACCA's force clause where the statute included purposes of "whimsy, humor or prank" in addition to violent purposes such as threats of physical injury.[72] Although the defendant had not presented a case where Oklahoma prosecuted someone for pointing a firearm for purposes of whimsy, humor, or prank, the Tenth Circuit explained "no legal imagination is required to see that the threatened use of physical force is not necessary for a conviction" because "the statute lists means to commit [the] crime that would render the crime non-violent under the ACCA's force clause."[73]

Absent such clarity, courts have required a showing that a state actually has applied its statute to specific conduct for there to be a realistic probability that it applies to broader conduct than the federal definition.[74] For example, the Fourth Circuit held that a South Carolina statute prohibiting assaulting, beating, or wounding a police officer did not meet the ACCA's force clause because in a prior South Carolina case, a defendant was convicted of that offense for "spitting blood on an officer's boot," providing a realistic probability that the offense could be premised upon rude or angry contact rather than violent contact.[75]

III. WHERE THE CATEGORICAL APPROACH IS APPLIED

As noted above, courts use the categorical approach to interpret definitions found throughout federal statutes and the guidelines in provisions that enhance punishment for those who have committed acts of violence or certain drug offenses. This section discusses several common statutes and guidelines where courts have applied the categorical approach.

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statute proscribes the conduct at issue."); Portee v. United States, 941 F.3d 263, 273 (7th Cir. 2019); Hylton v. Sessions, 897 F.3d 57, 63–64 (2d Cir. 2018); United States v. Vail-Bailon, 868 F.3d 1293, 1303 (11th Cir. 2017); Swaby v. Yates, 847 F.3d 62, 66 (1st Cir. 2017); *Chavez-Solis*, 803 F.3d at 1009–10; United States v. Lara, 590 F. App'x 574, 584 (6th Cir. 2014); Jean-Louis v. Att'y Gen. of U.S., 582 F.3d 462, 481 (3d Cir. 2009). *But see* United States v. Castillo-Rivera, 853 F.3d 218, 222 (5th Cir. 2017) (en banc) ("It is telling that, despite these many evident opportunities, Castillo-Rivera does not point to any case in which Texas courts actually applied [the Texas statute] . . . to a defendant who could not also be covered by [the generic federal statute].").

72 United States v. Titties, 852 F.3d 1257, 1274–75 (10th Cir. 2017).

73 *Id.*

74 *See, e.g.*, United States v. Scott, 990 F.3d 94, 106 (2d Cir. 2021); United States v. Burghardt, 939 F.3d 397, 408 (1st Cir. 2019); United States v. Mendez, 924 F.3d 1122, 1126 (10th Cir. 2019); United States v. Jones, 914 F.3d 893, 903 (4th Cir. 2019); United States v. Maldonado, 864 F.3d 893, 900 (8th Cir. 2017); United States v. Jennings, 860 F.3d 450, 460 (7th Cir. 2017); United States v. Castillo-Rivera, 853 F.3d 218, 222 (5th Cir. 2017) (en banc); United States v. Quarles, 850 F.3d 836, 837 (6th Cir. 2017), *aff'd* 139 S. Ct. 1872 (2019) (regarding a different issue); United States v. Acevedo-De La Cruz, 844 F.3d 1147, 1152 (9th Cir. 2017); United States v. White, 837 F.3d 1225, 1230 (11th Cir. 2016).

75 *Jones*, 914 F.3d at 903 (discussing State v. Burton, 356 S.C. 259 (2003)).

A. Statutes Where Courts Have Applied the Categorical Approach

The Supreme Court has held that the categorical approach applies to the definition of "violent felony" in 18 U.S.C. § 924(e)(2);[76] the definition of "misdemeanor crime of domestic violence" in 18 U.S.C. § 921(a)(33)(A);[77] the definition of "crime of violence" in 18 U.S.C. § 924(c)(3);[78] and the definition of "crime of violence" in 18 U.S.C. § 16.[79] Although the Supreme Court has not addressed the issue, circuit courts also have applied the categorical approach to determine if a defendant qualifies for an enhancement for having committed a prior enumerated sexual offense under 18 U.S.C. § 2252,[80] and one circuit has found the categorical approach does not apply to whether an offense qualifies as an enumerated offense in 18 U.S.C. § 1959, the "violent crimes in aid of racketeering activity" statute. Additionally, circuits have applied the categorical approach to determine the presence of prior convictions for 21 U.S.C. § 841(b)(1)(B), providing for heightened penalties if the instant offense followed convictions for a "serious drug felony" or "serious violent felony."

1. 18 U.S.C. § 924(e) (Armed Career Criminal Act)

Section 922(g) of title 18, United States Code, makes it a crime for certain classes of person (such as those who previously have been convicted of a felony or are fugitives from justice) to possess or transport a firearm and typically carries a maximum penalty of fifteen years' imprisonment.[81] Section 924(e) provides that any person who violates section 922(g) and who has three previous convictions committed on separate occasions[82] for a "violent felony" or a "serious drug offense," or both, is subject to a mandatory minimum of fifteen years' imprisonment.

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76 Taylor v. United States, 495 U.S. 575, 600 (1990).

77 United States v. Castleman, 572 U.S. 157, 168 (2014).

78 United States v. Davis, 139 S. Ct. 2319, 2327–31 (2019).

79 Sessions v. Dimaya, 138 S. Ct. 1204, 1211 (2018).

80 *See infra* section III.A.4.

81 18 U.S.C. §§ 922(g), 924(a)(2). The maximum penalty for section 922(g) offenses was ten years prior to the Bipartisan Safer Communities Act, Pub. L. No. 117–159, 136 Stat. 1313 (2022).

82 18 U.S.C. § 924(e)(1) (ACCA predicates must have been "committed on occasions different from one another" to count as separate predicates). Recently, the Supreme Court held that multiple crimes committed sequentially in a spree constitute one "occasion" for purposes of the ACCA. Wooden v. United States, 142 S. Ct. 1063 (2022) ("[The defendant's] one-after-another-after-another burglary of ten units in a single storage facility occurred on one 'occasion,' under a natural construction of that term and consistent with the reason it became part of ACCA."). Historically, circuit courts determined if offenses were committed on "separate occasions" for purposes of the ACCA by focusing on factors like whether it is possible to discern the point at which one offense was completed and another offense began, whether it would have been possible for an offender to cease criminal conduct after the first offense without committing the second offense, and whether the offenses are committed in different locations. *See, e.g.*, United States v. Hennessee, 932 F.3d 437, 444 (6th Cir. 2019).

A "violent felony" must satisfy either: (1) a force clause ("has as an element the use, attempted use, or threatened use of physical force against the person of another"); or (2) an enumerated offenses clause ("is burglary, arson, or extortion, or involves use of explosives").[83] A "serious drug offense" must either be: (1) an offense under certain federal statutes like the Controlled Substances Act; or (2) a state offense with a statutory maximum of ten years or more that "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance."[84] In *Shular v. United States*, the Supreme Court determined that the state offense provision requires using a categorical approach that compares the elements of a state statute with the *conduct* described; the Court rejected the argument that the state offense provision creates a definition premised on generic offenses.[85]

Appendix A in the *Guidelines Manual* references section 924(e) offenses to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions involving Firearms or Ammunition) and §4B1.4 (Armed Career Criminal).[86] Section 2K2.1 provides for higher base offense levels if a defendant has sustained one or more prior felony convictions for either a "crime of violence" or a "controlled substance offense."[87] Section 4B1.4 provides that a defendant who is subject to an enhanced sentence under the provisions of section 924(e) is an armed career criminal.[88] The terms "violent felony" and "serious drug offense" in section 924(e)(2) are not identical to the definitions of "crime of violence" and "controlled substance offense" used in §4B1.1, and the time periods for the counting of prior sentences under §4A1.2 (Definitions and Instructions for Computing Criminal History) do not apply to the determination of whether a defendant is subject to an enhanced sentence under section 924(e).[89]

2. 18 U.S.C. §§ 921(a)(33)(A) (Misdemeanor Crime of Domestic Violence) and 922(g)(9) (Unlawful Possession of a Firearm)

Section 922(g)(9) of title 18, United States Code, makes it a crime for a person who previously has been convicted of a misdemeanor crime of domestic violence to possess or transport a firearm and typically carries a maximum penalty of fifteen years'

83 18 U.S.C. § 924(e)(2)(B).

84 18 U.S.C. § 924(e)(2)(A)(i)–(ii) (A "serious drug offense" must be an offense under the Controlled Substances Act, the Controlled Substances Import and Export Act, 21 U.S.C. § 951, 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).

85 140 S. Ct. 779, 782 (2020).

86 *See* USSG App. A (Statutory Index).

87 *See* USSG §2K2.1(a)(1)–(4).

88 *See* USSG §4B1.4(a). Section 4B1.4 also provides for the greater of alternative offense levels and criminal history category based upon certain circumstances. USSG §4B1.4(b), (c).

89 USSG §4B1.4, comment. (n.1).

imprisonment.[90] Section 921(a)(33)(A) defines "misdemeanor crime of domestic violence" as a misdemeanor which

> has, as an element, the use or attempted use of physical force, or the threatened use of a deadly weapon, committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim, or by a person who has a current or recent former dating relationship with the victim.[91]

The Supreme Court has held that in a section 922(g)(9) prosecution, the predicate-offense statute need not require, as an element, the existence of a domestic relationship between the offender and the victim; however, the prosecution must prove the existence of a domestic relationship beyond a reasonable doubt.[92] The force clause, however, is interpreted under the categorical approach.[93] Precedent regarding section 921(a)(33)(A)'s force clause also does not always apply to other force clauses; twice, the Supreme Court has treated section 921(a)(33)(A) differently from the ACCA's "violent felony" definition due to differences in wording and purpose of the statutes.[94]

Appendix A in the *Guidelines Manual* references section 922(g)(9) offenses to §2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions involving Firearms or Ammunition).[95] Section 2K2.1 provides for higher base offense levels if a defendant has sustained one or more prior felony convictions for either a "crime of violence" or a "controlled substance offense."[96]

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90 *See* 18 U.S.C. §§ 922(g)(9), 924(a)(2).

91 18 U.S.C. § 921(a)(33)(A)(ii).

92 United States v. Hayes, 555 U.S. 415, 426 (2009).

93 United States v. Castleman, 572 U.S. 157, 168 (2014).

94 *Compare Castleman*, 572 U.S. at 163–68 (the term "physical force" in section 921(a)(33)(A) is satisfied by the common-law battery definition), *with* Johnson v. United States, 559 U.S. 133, 139–40 (2010) (rejecting the common-law definition of battery for the term "violent felony" in the ACCA), *and* Stokeling v. United States, 139 S. Ct. 544, 553 (2019) (same). *Compare* Voisine v. United States, 136 S. Ct. 2272, 2280 (2016) (crimes with a mens rea of recklessness may constitute a misdemeanor crime of domestic violence), *with* Leocal v. Ashcroft, 543 U.S. 1, 9 (2004) (18 U.S.C. § 16(a)'s force clause requires "a higher degree of intent than negligent or merely accidental conduct"), *and* Borden v. United States, 141 S. Ct. 1817, 1825 (2021) (plurality opinion) (recklessness does not satisfy the ACCA's force clause, and stating in dicta it would not satisfy 18 U.S.C. § 16(a)). *But see Borden*, 141 S. Ct. at 1835 (Thomas, J., concurring in the judgment) (providing the necessary fifth vote in *Borden* but reasoning that *Voisine* was wrongly decided).

95 *See* USSG App. A.

96 *See* USSG §2K2.1(a)(1)–(4).

3. 18 U.S.C. § 924(c) (Use of a Firearm During a Crime of Violence or Drug Trafficking Offense)

Section 924(c) makes it unlawful for an individual to possess, brandish, or discharge a firearm "during and in relation to any crime of violence or drug trafficking crime;" this crime carries mandatory consecutive penalties between five years and life depending on the type of firearm possessed, how the firearm was used, and whether the defendant was previously convicted of an offense under section 924(c).[97] A drug trafficking crime is a felony "punishable 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."[98] A "crime of violence" is defined in section 924(c) as a felony which "has as an element the use, attempted use, or threatened use of physical force against the person or property of another."[99]

Appendix A in the *Guidelines Manual* references section 924(c) offenses to §2K2.4 (Use of Firearm, Armor-Piercing Ammunition, or Explosive During or in Relation to Certain Crimes).[100]

4. 18 U.S.C. § 2252 (Prior Sex Offense Convictions)

Section 2252(a) makes it unlawful for an individual to knowingly transport, ship, transmit, distribute, receive, reproduce, sell, or possess child pornography. Typically, offenses under section 2252(a) receive penalties of between five and twenty years' imprisonment for transporting, shipping, transmitting, receiving, reproducing, or selling child pornography, and up to ten years' imprisonment for possessing child pornography.[101] However, section 2252(b) contains recidivist enhancements providing for a mandatory minimum term of imprisonment of fifteen years and maximum term of imprisonment of forty years for distribution of child pornography and a mandatory minimum term of ten years and maximum term of imprisonment of twenty years for possessing child pornography if a defendant has a prior conviction for certain federal sexual offenses[102] or a prior conviction under any state law "relating to" a list of enumerated sexual offenses.[103]

The categorical approach is used to determine whether state convictions "relating to" enumerated sexual offenses qualify as predicates for the purposes of these enhancements.

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97 18 U.S.C. § 924(c)(1)(A)–(C).

98 18 U.S.C. § 924(c)(2).

99 18 U.S.C. § 924(c)(3)(A).

100 *See* USSG App. A.

101 18 U.S.C. § 2252(b).

102 *See id.*

103 This provision includes state offenses "relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." *Id.*

The wording in section 2252 implicates the way the categorical analysis is applied for these convictions. For example, the Fourth Circuit held that the use of the phrase "relating to" in section 2252 calls for a different application of the categorical approach where "the match need not be perfect" and the conduct only needs to "stand in some relation" to the enumerated offenses in the list.[104]

Appendix A in the *Guidelines Manual* references section 2252 offenses 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).[105]

5. 18 U.S.C. § 16 (Crime of Violence Defined)

Numerous criminal statutes in the United States Code reference the "crime of violence" definition found in 18 U.S.C. § 16(a), which provides:[106]

> The term 'crime of violence' means an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.[107]

Notably, the "safety valve" provision at 18 U.S.C. § 3553(f), which allows a court to impose a sentence below the mandatory minimum for certain controlled substance offenses, now requires that a defendant seeking such relief must not have a prior 2-point "violent offense"

[104] United States v. Hardin, 998 F.3d 582, 588 (4th Cir. 2021) (Stating, "[a] different way of saying this is that the inclusion of 'relating to' means we apply the categorical approach 'and then some' " and collecting cases similarly interpreting such terminology).

[105] *See* USSG App. A.

[106] *See, e.g.*, 18 U.S.C. §§ 25 (use of minors in crimes of violence), 119 (release of personal information of certain people with the intent to incite the commission of a crime of violence), 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). In addition to criminal law, section 16 also is referenced in the immigration and bankruptcy contexts. *See, e.g.*, 8 U.S.C. §§ 1101(a)(43), 1227(a)(2)(A)(iii), (E)(i) (Grounds for deportation); 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). In *Sessions v. Dimaya*, the Supreme Court held section 16(b), which contains a residual clause, is unconstitutionally void for vagueness. 138 S. Ct. 1204 (2018); *see supra* note 34. Section 16(a) remains in effect and is analyzed using the categorical approach.

[107] This definition had its origin in the Comprehensive Crime Control Act of 1984 (CCA), which repealed a previous definition of the term "crime of violence." Pub. L. No. 98–473, 98 Stat. 1976, 2136. The legislative history to the CCA states 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." Rep. No. 98-225, at 307 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3486.

under the guidelines.[108] Pursuant to such statute, the phrase "violent offense," in turn, means a "crime of violence" as defined in section 16(a).[109]

6. Violent Crimes in Aid of Racketeering Activity (VICAR)

At least one circuit has held that the categorical approach does not apply to determining whether an offense qualifies as the enumerated federal offense of assault with a dangerous weapon in the "violent crimes in aid of racketeering activity" (VICAR) statute, 18 U.S.C. § 1959.[110] However, the court cautioned that it was not considering whether the categorical approach would apply in analyzing the rest of the VICAR statute, specifically the portion prohibiting the act of threatening to commit a "crime of violence."[111]

7. Drug Offenses

Circuits also have applied the categorical approach to the determination of whether the defendant has applicable prior convictions for purposes of 21 U.S.C. § 841(b)(1)(B), which provides for heightened penalties if the instant offense followed convictions for a "serious drug felony" or "serious violent felony."[112] The Second, Seventh, and Eighth Circuits have explicitly held that the categorical approach applies to section 841(b)(1)(B).[113] The First, Third, and Ninth Circuits also have applied the categorical approach to the "felony drug offense" definition, though without explanation.[114] However, the Sixth Circuit, in an unpublished opinion and without explanation, did not apply the categorical approach to felony drug offenses.[115]

B. Guidelines Where Courts Have Applied the Categorical Approach

Although the guidelines do not call for use of the categorical approach, and the Supreme Court has not held that the categorical approach applies to the guidelines, every circuit has, by analogy, applied the categorical approach to several guideline provisions.[116]

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[108] 18 U.S.C. § 3553(f)(1)(C).

[109] *Id.* § 3553(g); *see also* First Step Act of 2018, Pub. L. No. 115–391, § 402, 132 Stat. 5194, 5221.

[110] United States v. Keene, 955 F.3d 391, 393 (4th Cir. 2020).

[111] *Id.* at 396–97.

[112] 21 U.S.C. § 841(b)(1)(B). Section 960, title 21 of the United States Code uses the same penalty structure as section 841. Although courts have not yet considered the issue, the logic behind applying the categorical approach to section 841 would suggest it applies to section 960 as well.

[113] United States v. Thompson, 961 F.3d 545, 549–52 (2d Cir. 2020); United States v. Elder, 900 F.3d 491, 501 (7th Cir. 2018); United States v. Brown, 598 F.3d 1013, 1017 (8th Cir. 2010).

[114] United States v. Aviles, 938 F.3d 503, 511 (3d Cir. 2019); United States v. Ocampo-Estrada, 873 F.3d 661, 667 (9th Cir. 2017); United States v. Brown, 500 F.3d 48, 59 (1st Cir. 2007).

[115] United States v. Soto, 8 F. App'x 535, 541 (6th Cir. 2001).

[116] *E.g.*, United States v. Rabb, 942 F.3d 1, 3 (1st Cir. 2019); United States v. Scott, 990 F.3d 94, 104 (2d Cir.) (en banc), *cert. denied,* 142 S. Ct. 397 (2021); United States v. Bullock, 970 F.3d 210, 214–15 (3d Cir. 2020);

1. Sections 4B1.1 and 4B1.2 (Career Offender Guideline and Definitions)

Section 4B1.1 provides for an enhanced offense level and criminal history category if: (1) the defendant was at least 18 years old at the time the defendant 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."[117] The terms "crime of violence" and "controlled substance offense" are defined 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).[118]

"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.[119]

Courts have used the categorical approach to determine whether a defendant's instant conviction and prior convictions fall under either of the definitions in §4B1.2. These definitions also are referenced in other guidelines, most notably in §2K2.1, which increases the guideline range for defendants who commit firearms offenses after a prior conviction for a "crime of violence" or "controlled substance offense."[120]

United States v. Carthorne, 726 F.3d 503, 511 (4th Cir. 2013); United States v. Zuniga, 860 F.3d 276, 284 (5th Cir. 2017); United States v. Camp, 903 F.3d 594, 599 (6th Cir. 2018); Adams v. United States, 911 F.3d 397, 405 (7th Cir. 2018); United States v. Brown, 1 F.4th 617, 619–20 (8th Cir. 2021); United States v. Barragan, 871 F.3d 689, 713–14 (9th Cir. 2017); United States v. Ontiveros, 875 F.3d 533, 535 (10th Cir. 2017); United States v. Gandy, 917 F.3d 1333, 1339 (11th Cir. 2019); United States v. Sheffield, 832 F.3d 296, 314 (D.C. Cir. 2016), *overruled on other grounds by* Beckles v. United States, 137 S. Ct. 886 (2017).

[117] USSG §4B1.1(a). The career offender guidelines implement Congress' directive found at 28 U.S.C. § 994(h). *See* USSG §4B1.1, comment. (backg'd.).

[118] USSG §4B1.2(a).

[119] USSG §4B1.2(b).

[120] USSG §2K2.1(a)(1)–(4).

The Commentary to §4B1.2, Application Note 1, provides that the definitions of "crime of violence" and "controlled substance offense" include the offenses of conspiring, aiding and abetting, and attempting to commit such offenses.[121] As discussed *infra*, circuit courts are split regarding the validity of Application Note 1, namely, whether §4B1.2(b)'s definition of "controlled substance offense" includes inchoate offenses that are not listed in the guideline text.[122]

2. Section 2L1.2 (Illegal Reentry)

Courts, based on circuit precedent, could use the categorical approach for §2L1.2(b)(2)(E) and (b)(3)(E), which provide for a 2-level enhancement if, before or after a defendant was ordered deported or removed from the United States for the first time, the defendant engaged in criminal conduct that resulted in three or more convictions for misdemeanors that are "crimes of violence or drug trafficking offenses."[123] Similar to the definition of "crime of violence" in §4B1.2,[124] the Commentary to §2L1.2 explains that "crime of violence":

> means any of the following offenses under federal, state, or local law: murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, 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), or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

Similar to the definition of "controlled substance offense" in §4B1.2, the commentary to §2L1.2 explains that "drug trafficking offense":

> means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or counterfeit substance) or the possession of a

[121] USSG §4B1.2, comment. (n.1).

[122] *Compare, e.g.*, United States v. Havis, 927 F.3d 382, 385–87 (6th Cir. 2019) (en banc) (Application Note 1 is invalid), *with* United States v. Adams, 934 F.3d 720, 729 (7th Cir. 2019) (Application Note 1 is valid). *See infra* note 138 (contains further cases on either side of the circuit split).

[123] USSG §2L1.2(b)(2)(E), (3)(E). Before 2016, §2L1.2 also provided for an increase to a defendant's base offense level if the defendant was previously deported or remained in the United States after sustaining certain types of prior convictions, including "crimes of violence" and "drug trafficking offenses." Courts applied the categorical approach to determine whether a prior offense fell within one of those definitions. In 2016, the Commission promulgated a comprehensive amendment to §2L1.2 that eliminated, with very limited exceptions, the categorical approach for determining whether a prior conviction qualifies for a particular enhancement under that guideline. *See* USSG App. C, amend. 802 (effective Nov. 1, 2016) (explaining in its Reason for Amendment that "[i]nstead of the categorical approach, the amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions").

[124] While the career offender definitions describe convictions punishable by over a year of imprisonment, these enhancements are specifically targeted at prior misdemeanors.

controlled substance (or counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.[125]

3. Section 7B1.1 (Grade of Violations)

Chapter Seven, Part B (Violations of Probation and Supervised Release) sets forth procedures for determining whether a defendant has violated supervised release or probation and, if so, for imposing sentence. Courts disagree on whether the categorical approach applies to the definition of "Grade A Violations" under §7B1.1.[126] Under §7B1.1(a)(1), Grade A violations—the most serious grade—are defined, among other things, as "*conduct constituting* (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, or (ii) is a controlled substance offense."[127] The commentary defines "crime of violence" and "controlled substance offense" by reference to the definitions in §4B1.2.[128]

The circuits disagree about whether the "crime of violence" and "controlled substance offense" determination for §7B1.1 should be evaluated using the categorical approach, given the reference to §4B1.2 (which courts analyze using the categorical approach), or a conduct-based approach, given the presence of the phrase "conduct constituting."

The Fourth Circuit has stated that the "familiar" categorical approach applies to the "crime of violence" determination under §7B1.1(a), holding that a defendant's North Carolina assault conviction was not categorically a "crime of violence" for purposes of his supervised release violation.[129] The First, Third, and Ninth Circuits have adopted a "hybrid" approach to §7B1.1(a).[130] Under this approach, the government must take two steps to demonstrate a Grade A violation.[131] First, the government must identify some qualifying offense that is a crime of violence or a controlled substance offense under the categorical approach (but not necessarily a statute that the defendant was convicted under).[132] Second, the government then need only show that the defendant actually committed (*i.e.*, his

125 USSG §2L1.2, comment. (n.2).

126 *See* USSG §7B1.1(a) (providing three grades of probation and supervised release violations in descending tiers of seriousness, from Grade A to Grade C).

127 *Id.* (emphasis added).

128 USSG §7B1.1, comment. (n.2, 3).

129 *See* United States v. Simmons, 917 F.3d 312, 316–17, 320–21 (4th Cir. 2019).

130 United States v. Garcia-Cartagena, 953 F.3d 14, 22 (1st Cir. 2020) (citing United States v. Willis, 795 F.3d 986, 992–94 (9th Cir. 2015) and United States v. Carter, 730 F.3d 187, 192–93 (3d Cir. 2013)). Although the *Carter* court stated that the categorical approach "does not apply" in the revocation context, its statement, in context, was explaining why uncharged conduct can form the basis of a supervised release violation and its analysis used the same hybrid approach of the First and Ninth Circuits. *See Carter*, 730 F.3d at 192.

131 *Garcia-Cartagena*, 953 F.3d at 21.

132 *Id.* at 22–24.

"conduct constituted") that crime's elements, regardless of whether he was convicted of that offense.[133] In making this assessment, the court may look beyond *Shepard* documents and may consider any evidence admissible in revocation hearings.[134] As the Ninth Circuit explained, the court in a supervised release context only needs "to identify a statutory offense for which the defendant *could have been* convicted," though the categorical analysis of whether that offense qualifies is the same.[135]

By contrast, the Second, Seventh, and Eighth Circuits have held that the categorical approach does not apply to §7B1.1(a), evaluating whether the defendant's conduct alone meets the definitions in the career offender guideline.[136]

IV. CIRCUIT ISSUES

The categorical approach has been the subject of much litigation over the years. This section highlights selected issues involving application of the categorical approach.

A. INCHOATE OFFENSES

Even if a substantive offense meets a given federal definition under the categorical approach, difficulties may arise where a defendant was convicted of attempting or conspiring to violate the substantive offense.[137] This section discusses circuit conflicts that have developed surrounding inchoate offenses.

1. Application Note 1 to USSG §4B1.2

The Commentary to §4B1.2, Application Note 1, provides that "crime of violence" and "controlled substance offense" include the offenses of conspiring, aiding and abetting,

[133] *Id.* at 24–25.

[134] *Id.*

[135] *Willis*, 795 F.3d at 993.

[136] United States v. Golden, 843 F.3d 1162, 1166–67 (7th Cir. 2016) (defendant committed a Grade A violation because his conduct involved "physical force"); United States v. Schwab, 85 F.3d 326, 327 (8th Cir. 1996) (the district court properly looked to the defendant's conduct to determine the grade of his supervised release violation); United States v. Cawley, 48 F.3d 90, 93 (2d Cir. 1995) (defendant's conduct constituted the "threatened use of physical force"); *see also* United States v. Pitts, 739 F. App'x 353, 354–55 (8th Cir. 2018) (citing *Schwab* in rejecting defendant's argument that the categorical approach applies to §7B1.1(a)). The Sixth Circuit, in an unpublished case, upheld the district court's determination of a Grade B violation based on the defendant's actual conduct rather than the offense of conviction. United States v. Cox, No. 21-5222, 2021 WL 5710128 at *2 (6th Cir. 2021) (unpublished) (citing Application Note 1).

[137] An exception to this general issue is the ACCA's drug offense provision, which includes offenses "involving" certain conduct relating to controlled substances. Courts have held that the word "involving" broadens the ACCA to include inchoate crimes. *See, e.g.*, United States v. Ojeda, 951 F.3d 66, 75 (2d Cir. 2020) (" 'involving' reasonably identifies inchoate as well as substantive drug crimes").

and attempting to commit such offenses. Circuits are split regarding whether Application Note 1's inclusion of inchoate crimes in the definition of "controlled substance offense" is an invalid expansion of the career offender definition in the text.[138] The Third, Sixth, and D.C. Circuits have held that because the main text of the guideline does not explicitly mention "attempt" offenses in defining "controlled substance offense," Application Note 1 cannot add attempt offenses to the definition via the commentary.[139] The First, Second, Seventh, Eighth, and Ninth Circuits, however, have held that Application Note 1 is binding.[140] The Seventh Circuit, for example, explained that Application Note 1 did not conflict with the main guideline text "because the text of §4B1.2(a) does not tell us, one [way] or another, whether inchoate offense[s] are included or excluded."[141]

2. Conspiracy and Attempt Offenses

Courts apply the categorical approach to determine whether an instant or prior conviction for a substantive offense qualifies as a "crime of violence" or "controlled substance offense" under §4B1.2. The circuits are split, however, on whether the categorical approach applies to determine whether the inchoate offense of conspiracy qualify separately as predicate offenses under §4B1.2. The circuit also had split on whether

[138] *Compare* United States v. Campbell, 22 F.4th 438, 447 (4th Cir. 2022) (plain text of guideline is inconsistent with commentary; Application Note 1 disregarded) United States v. Nasir, 17 F.4th 459, 469–72 (3d Cir. 2021) (en banc) (inchoate crimes are not included in the guideline; Application Note 1 was not binding), United States v. Havis, 927 F.3d 382, 385–87 (6th Cir. 2019) (en banc) (Application Note 1 is invalid), *and* United States v. Winstead, 890 F.3d 1082, 1091 (D.C. Cir. 2018) (same), *with* United States v. Jefferson, 975 F.3d 700, 708 (8th Cir. 2020) (upholding Application Note 1 based on prior precedent), *cert. denied,* 141 S. Ct. 2820 (2021), United States v. Lewis, 963 F.3d 16, 23–25 (1st Cir. 2020) (holding "that the case for finding the prior panels would have reached a different result today" about the validity of Application Note 1 "is not so obviously correct as to allow this panel to decree that the prior precedent is no longer good law in this circuit"), *cert. denied,* 141 S. Ct. 2826 (2021), United States v. Richardson, 958 F.3d 151, 154–55 (2d Cir.) (Application Note 1 is valid and consistent with the guideline text of §4B1.2), *cert. denied*, 141 S. Ct. 423 (2020), United States v. Adams, 934 F.3d 720, 729 (7th Cir. 2019) (same), *and* United States v. Crum, 934 F.3d 963, 966 (9th Cir. 2019) (upholding Application Note 1 based on prior precedent). *But see* United States v. Moses, 23 F.4th 347, 349 (4th Cir. 2022) ("Upon consideration of the unique role served by the Sentencing Commission and its Guidelines Manual and a careful reading of both *Stinson* and *Kisor*, we conclude that *Kisor* did not overrule *Stinson's* standard for the deference owed to Guidelines commentary."). Thus, sentencing courts in the circuits applying the reasoning in *Nasir, Havis*, and *Winstead* should be aware that inchoate versions of career offender predicates will not qualify under that commentary and can only qualify under the main text in the guideline. *See* United States v. Cavazos, 950 F.3d 329, 336–37 (6th Cir. 2020) (applying *Havis* to hold that a state statute that amounted to attempted distribution does not qualify as a "controlled substance offense").

[139] *Nasir*, 17 F.4th 469–72; *Havis*, 927 F.3d at 385–87; *Winstead*, 890 F.3d at 1090–92. No circuit called into doubt the inclusion of attempt offenses in §4B1.2's definition of "crime of violence"; the attempt definition appears in the main guideline text. *Nasir*, 17 F.4th at 471; *Havis*, 927 F.3d at 386; *Winstead*, 890 F.3d at 1091 n.12.

[140] *Jefferson*, 975 F.3d at 708; *Lewis*, 963 F.3d at 23–25; *Richardson*, 958 F.3d at 154–55; *Adams*, 934 F.3d at 729; *Crum*, 934 F.3d at 966.

[141] *Adams*, 934 F.3d at 729 (quoting United States v. Raupp, 677 F.3d 756, 759 (7th Cir. 2012), *overruled on other grounds by* United States v. Rollins, 836 F.3d 737, 743 (7th Cir. 2016)).

Hobbs Act robbery attempt offenses meet the force clause under section 924(c) until the Supreme Court resolved that question in 2022.

a. Conspiracy

Courts have applied the categorical approach to determine whether conspiracy offenses qualify as predicate offenses under §4B1.2. Some, but not all, courts have held that the generic definition of conspiracy requires proof of an overt act and, therefore, conspiracy statutes that do not contain an "overt act" requirement are categorically excluded from qualifying as a "crime of violence" or a "controlled substance offense," even though the substantive crime is a crime of violence or a controlled substance offense.[142] As a result, there is a circuit split regarding whether conspiracy offenses, such as conspiracy to murder in aid of racketeering, require an "overt act" as an element of the offense to qualify as a predicate offense under §4B1.2.[143]

Additionally, several circuits have held that conspiracy to commit Hobbs Act robbery under 18 U.S.C. § 1951 does not satisfy the force clause of section 924(c) because it only requires an agreement to commit Hobbs Act robbery.[144] For the same reason, the Eleventh Circuit also held that RICO conspiracy does not meet the force clause.[145]

However, the Fourth Circuit held that federal conspiracy to use facilities of commerce with intent that a murder would be committed for hire (18 U.S.C. § 1958(a))

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[142] *See* United States v. McCollum, 885 F.3d 300, 308 (4th Cir. 2018) ("An overt act is an element of the generic definition of conspiracy" (quoting United States v. Garcia-Santana, 774 F.3d 528, 537 (9th Cir. 2014))). *But see* United States v. Rodriguez-Rivera, 989 F.3d 183, 187 (1st Cir. 2021) (rejecting the argument that "conspiring" under Application Note 1 requires adopting a generic version of conspiracy).

[143] *Compare* United States v. Norman, 935 F.3d 232, 237–39 (4th Cir. 2019) (conspiracy to possess cocaine and cocaine base with intent to distribute, in violation of 21 U.S.C. § 846, is not a "controlled substance offense" under §4B1.2(b) because there is no overt act requirement), *McCollum*, 885 F.3d at 307–08 (conspiracy to murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5), is not a "crime of violence" for career offender because the statute does not require an overt act), United States v. Martinez-Cruz, 836 F.3d 1305, 1314 (10th Cir. 2016) (conspiracy to possess with intent to distribute fifty kilograms or more of marijuana, in violation of 21 U.S.C. § 846, is not an "aggravated felony" drug trafficking offense for purposes of §2L1.2), *with* United States v. Lewis, 963 F.3d 16, 26–27 (1st Cir. 2020) (recognizing circuit split, but concluding that district court did not plainly err in finding that conspiracy to distribute cocaine under 21 U.S.C. § 846 is a "controlled substance offense" under §4B1.2(b)), *and* United States v. Tabb, 949 F.3d 81, 86–89 (2d Cir. 2020) (disagreeing with the Fourth Circuit and concluding that conspiracy to distribute and possess with intent to distribute crack cocaine in violation of 21 U.S.C. § 846 is a "controlled substance offense" under §4B1.2(b)).

[144] *See* Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019); United States v. Barrett, 937 F.3d 126, 127 (2d Cir. 2019); United States v. Simms, 914 F.3d 229, 233 (4th Cir. 2019) (en banc); United States v. Lewis, 907 F.3d 891, 894 (5th Cir. 2018).

[145] United States v. Green, 981 F.3d 945, 952 (11th Cir. 2020) (RICO conspiracy is not a "crime of violence" under section 924(c)'s force clause); *see also* United States v. Perry, 35 F.4th 293, 342 (5th Cir. 2022) (district court committed plain error by allowing jury to convict under 18 U.S.C. §§ 924(c), (j), and (o) based on a conspiracy to violate RICO as a "crime of violence" predicate); United States v. Khweis, 971 F.3d 453, 464 (4th Cir. 2020) (conspiracy to provide material support to ISIL does not satisfy § 924(c)'s force clause).

necessarily requires the use of physical force even if conspiracy alone does not implicate the use of force.[146] The court reasoned that conspiracy in the context of a section 1958 offense "is different because it has heightened mens rea elements [the intent to join the conspiracy and the specific intent that a murder be committed for hire], as well as the element that 'death results.' "[147] The court explained that the death resulting from a conspiracy to commit murder for hire meets the necessary mens rea requirement and noted that it had previously held that an act that results in death "obviously" requires physical force.[148] Similarly, the First Circuit held that while conspiracies ordinarily are not violent felonies, the presence of a "death results" element in the offense that is the object of the conspiracy can bring a federal conspiracy under the purview of the force clause.[149]

b. Attempt

Some courts have held that generic attempt requires a substantial step towards commission of the substantive offense.[150] Even when a statute encompasses attempt with a substantial step requirement, *i.e.*, requires specific intent to commit the substantive offense and a substantial step towards the commission of that offense, such as Hobbs Act robbery under section 1591,[151] circuits were split on whether attempted Hobbs Act robbery offenses meet the force clause under section 924(c).[152] In 2022, in *United States v. Taylor*, the Supreme Court resolved this split by holding that attempted Hobbs Act robbery does not satisfy the force clause because such an attempt offense does not require the use, attempted use, or threatened use of force.[153] The Court explained that while some cases can involve the defendant threatening the use of force during the attempted robbery, no element of the robbery offense *requires* that the government prove the defendant used,

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146 United States v. Runyon, 994 F.3d 192, 203 (4th Cir. 2021).

147 *Id.*

148 *Id*. (while the "mens rea elements are not explicitly tied to the resulting-in-death element, in any realistic case, they must nonetheless carry forward" to that element).

149 United States v. Tsarnaev, 968 F.3d 24, 104 (1st Cir. 2020), *overruled on other grounds*, 142 S. Ct. 1024 (2022).

150 *E.g.*, United States v. Tabb, 949 F.3d 81, 86 (2d Cir. 2020) (generic attempt comprises criminal intent and completion of a substantial step); United States v. Dozier, 848 F.3d 180, 186 (4th Cir. 2017) (same).

151 18 U.S.C. §§ 1951(a) and 2; *see also* United States v. Taylor, 142 S. Ct. 2015 (2022) (for attempted Hobbs Act robbery, the government must prove the defendant "intended to unlawfully take or obtain personal property by means of actual or threatened force," and that the defendant "completed a 'substantial step' toward that end.") (citing United States v. Resendiz-Ponce, 549 U. S. 102, 107 (2007)).

152 *Taylor*, 142 S. Ct. at 2021 (explaining the majority of circuits had held the force clause in section 924(c) "encompasses not only any offense that qualifies as a 'crime of violence' but also any attempt to commit such a crime," a "syllogism [that] rests on a false premise," and finding the Fourth Circuit, as the outlier, was correct in holding attempted Hobbs Act robbery does not qualify as a crime of violence.).

153 142 S. Ct. 2015 (2022). ("The elements clause does not ask whether the defendant committed a crime of violence *or* attempted to commit one. It asks whether the defendant *did* commit a crime of violence—and it proceeds to define a crime of violence as a felony that includes as an element the use, attempted use, or threatened use of force.")

attempted to use, or threatened to use force.[154] The Court further explained that a "substantial step" toward the commission of the offense can include actions that do not involve the use, attempted use, or threatened use of physical force.

B. Differences in Breadth of the ACCA's and §4B1.2's Drug Offense Provisions

Although the ACCA's definition of "serious drug offense" and §4B1.2's definition of "controlled substance offense" are similar and often have been analyzed interchangeably, differences in key terms have given rise to circuit conflicts. The ACCA defines a "serious drug offense" as a violation of specific federal statutes or state offenses "*involving* manufacturing, distributing, or possessing with intent to manufacture or distribute a controlled substance" carrying a maximum term of imprisonment of ten years or greater,[155] while §4B1.2(b) defines a "controlled substance offense" as "an offense under federal or state law" carrying a maximum term of more than one year's imprisonment "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."[156] This section discusses three specific issues regarding these definitions.

1. "Involving" v. "Prohibits"

Some courts have held that the ACCA's use of the word "involving" generally broadens its scope beyond the substantive terms that follow.[157] Courts have not clarified the extent of that broadening effect, though some have cautioned that the plain meaning of "involving" still requires a relationship to its substantive terms that is not too "remote or tangential."[158] Courts have not applied the same broadening effect to §4B1.2's definition of "controlled substance offense."[159] For instance, the Fifth Circuit has held that a Texas drug statute qualifies as a "serious drug offense" under the ACCA, citing specifically to the word "involving" in the ACCA, while also noting that circuit precedent held that it did not qualify as a "drug trafficking offense" under the then-illegal reentry guideline at §2L1.2, which used the word "prohibits."[160]

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[154] *Id*. at 2022.

[155] 18 U.S.C § 924(e)(2)(A).

[156] USSG §4B1.2(b).

[157] *See, e.g.*, United States v. White, 837 F.3d 1225, 1235 (11th Cir. 2016); United States v. Vickers, 540 F.3d 356, 364–65 (5th Cir. 2008); United States v. McKenney, 450 F.3d 39, 42–44 (1st Cir. 2006).

[158] *See, e.g.*, United States v. Gibbs, 656 F.3d 180, 185 (3d Cir. 2011) (quoting *McKenney*, 450 F.3d at 45).

[159] *See White*, 837 F.3d at 1235 ("[T]here is general agreement among the circuits that the ACCA's definition of a serious drug offense is broader than the guidelines definition of a drug trafficking . . . offense because of the ACCA's use of the term 'involving.'").

[160] *Vickers*, 540 F.3d at 364–65 (citing and quoting United States v. Gonzales, 484 F.3d 712 (5th Cir. 2007)).

2. Conduct or Generic Offenses

Before 2020, circuit courts disagreed about whether the ACCA's definition of "serious drug offense" required comparing state statutes to a generic offense (as with burglary in the ACCA's enumerated offense clause) or conduct (as with force in the ACCA's force clause).[161] In *Shular v. United States*,[162] the Supreme Court resolved this split as to the ACCA, holding that section 924(e)(2)(A)(ii)'s definition of "serious drug offense" requires only that "the state offenses involve the conduct specified in the federal statute; it does not require that the state offense match certain generic offenses."[163] The Court relied on two features of the ACCA's text in reaching this conclusion: (1) the terms used were "unlikely names for generic offenses"; and (2) the ACCA used the term "involves" rather than the term "is" in defining the offenses covered.[164] Because *Shular* applied to the ACCA, and because the guidelines text is different, *Shular* does not necessarily resolve this issue with regard to the guidelines.

The Eleventh Circuit previously had held that the guidelines, like the ACCA, require a conduct-based comparison.[165] The Eleventh Circuit subsequently held in unpublished decisions that *Shular* did not alter this conclusion, and it has applied *Shular* to the guidelines in at least one published opinion.[166] Also post-*Shular*, the Fourth Circuit concluded that *Shular* required §4B1.2's drug offense provision be read as a conduct-based definition.[167] In a concurring opinion, however, one judge on that panel determined that *Shular*'s reasoning compelled the opposite conclusion in the guidelines context—that §4B1.2's drug offense provision requires "match[ing] the elements of state drug offenses to their federal counterpart."[168] The Fifth Circuit previously distinguished between a drug offense provision in the guidelines materially identical to that in §4B1.2 and the ACCA, stating the guidelines provision "lists specific convictions (*e.g.*, manufacture, import)" while the ACCA applied only to convictions involving certain conduct.[169]

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[161] *Compare* United States v. Franklin, 904 F.3d 793, 800 (9th Cir. 2018) (requiring comparison to a generic crime), *with* United States v. Smith, 775 F.3d 1262, 1267 (11th Cir. 2014) ("We need not search for the elements of 'generic' definitions of 'serious drug offense' and 'controlled substance offense' because these terms are defined by a federal statute and the Sentencing Guidelines, respectively.").

[162] 140 S. Ct. 779 (2020).

[163] *Id.* at 782.

[164] *Id.* at 785.

[165] *Smith*, 775 F.3d at 1267.

[166] United States v. Bates, 960 F.3d 1278, 1293 (11th Cir. 2020) (applying *Shular* to the guidelines); United States v. Hunter, 823 F. App'x 824, 828 (11th Cir. 2020) (*Smith* remains good law after *Shular*); United States v. Miller, 806 F. App'x 963, 964–65 (11th Cir. 2020) (same); United States v. Campbell, 816 F. App'x 384, 386–87 (11th Cir. 2020) (same).

[167] United States v. Ward, 972 F.3d 364, 365 n.2 (4th Cir. 2020).

[168] *Id.* at 376 n.2 (Gregory, C.J., concurring in the judgment).

[169] *See* United States v. Vickers, 540 F.3d 356, 365 (5th 2008) (referring to the definition of "drug trafficking offense" in the Commentary to §2L1.2 that mirrors the definition of "controlled substance offense"

3. Offers to Sell a Controlled Substance

The difference in circuits' interpretation of "involving" (ACCA) and "prohibits" (§4B1.2(b)) has also resulted in a circuit conflict specifically related to whether a statute that encompasses an "offer to sell" a controlled substance qualifies as a "controlled substance offense" under the guidelines. The First, Fifth, and Eighth Circuits have held that state statutes that criminalize "offers to sell" qualify under the expansive language of "involving" in the ACCA's definition of a "serious drug offense."[170] On the other hand, the Second, Fifth, Sixth, and Tenth Circuits have held that because §4B1.2(b)'s definition of a "controlled substance offense" does not include "offers to sell," state statutes that criminalize "offers to sell" sweep more broadly than the guidelines definition and are not "controlled substance offenses" under the guidelines.[171]

in §4B1.2(b)); *see also* United States v. Bass, 996 F.3d 729, 742 (5th Cir. 2021) (upholding predicates under ACCA based on prior precedent and *Shular*).

[170] *See, e.g.*, United States v. Block, 935 F.3d 655, 656 (8th Cir. 2019) (prior conviction for delivery of a controlled substance under Texas drug statute, which defines "deliver" to include offering to sell a controlled substance, is "related to or connected with" manufacturing, distributing, or possessing with intent to manufacture or distribute in the ACCA's definition of a "serious drug offense"); United States v. Whindleton, 797 F.3d 105, 111 (1st Cir. 2015) (New York drug statute that encompasses an offer to sell drugs is sufficiently related to distribution to qualify as a "serious drug offense" under the ACCA based on the expansive language of "involving," even if the defendant never possesses the drugs and the offer is not accepted); United States v. Bynum, 669 F.3d 880, 886 (8th Cir. 2012) (the term "involving" is an expansive term that requires only that the prior Minnesota conviction be "related to or connected with" drug manufacture, distribution, or possession; concluding that "knowingly offering to sell drugs is a 'serious drug offense' under the ACCA"); *Vickers*, 540 F.3d at 364–66 (Texas drug statute that defines "deliver" to include offering to sell a controlled substance is sufficiently "related to or connected with" drug distribution to qualify as a "serious drug offense" under the ACCA).

[171] *See, e.g.,* United States v. Cavazos, 950 F.3d 329, 334–37 (6th Cir. 2020) (prior conviction for possession with intent to deliver a controlled substance under Texas's drug statute not a "controlled substance offense" under §4B1.2(b), because "offering to sell" a controlled substance constitutes an "attempt," and "attempt" does not qualify as a "controlled substances offense" under §4B1.2(b) because the commentary impermissibly adds to the guidelines' definition); United States v. McKibbon, 878 F.3d 967, 971–72 (10th Cir. 2017) (prior state conviction for distribution of a controlled substance not a "controlled substance offense" because Colorado drug statute defines "sale" of a controlled substance to encompass an "offer to sell"); United States v. Madkins, 866 F.3d 1136, 1145 (10th Cir. 2017) (prior conviction for possession with intent to sell cocaine and marijuana is not a "controlled substance offense" because Kansas drug statute criminalizes "offer to sell" a controlled substance); United States v. Tanksley, 848 F.3d 347, 352 (5th Cir. 2017) (prior conviction for possession with intent to distribute a controlled substance is not a "controlled substance offense" for purposes of enhanced base offense level under §2K2.1 because Texas drug statute encompasses "offer to sell"); United States v. Hinkle, 832 F.3d 569, 571–72 (5th Cir. 2016) (prior conviction for delivery of heroin does not qualify as a "controlled substance offense" because Texas statute criminalizes conduct that include "offer to sell"); *see also* United States v. Savage, 542 F.3d 959, 964–66 (2d Cir. 2008) (prior conviction for drug sales does not qualify as a "controlled substance offense" because Connecticut statute criminalizes "offer to sell" a controlled substance), *superseded as stated in* Chery v. Garland, 16 F.4th 980, 984–85 (2d Cir. 2021) (explaining the Connecticut Supreme Court clarified, subsequent to *Savage*, that an offer requires constructive or attempted transfer).