The Categorical Approach: a step-by-step guide to success

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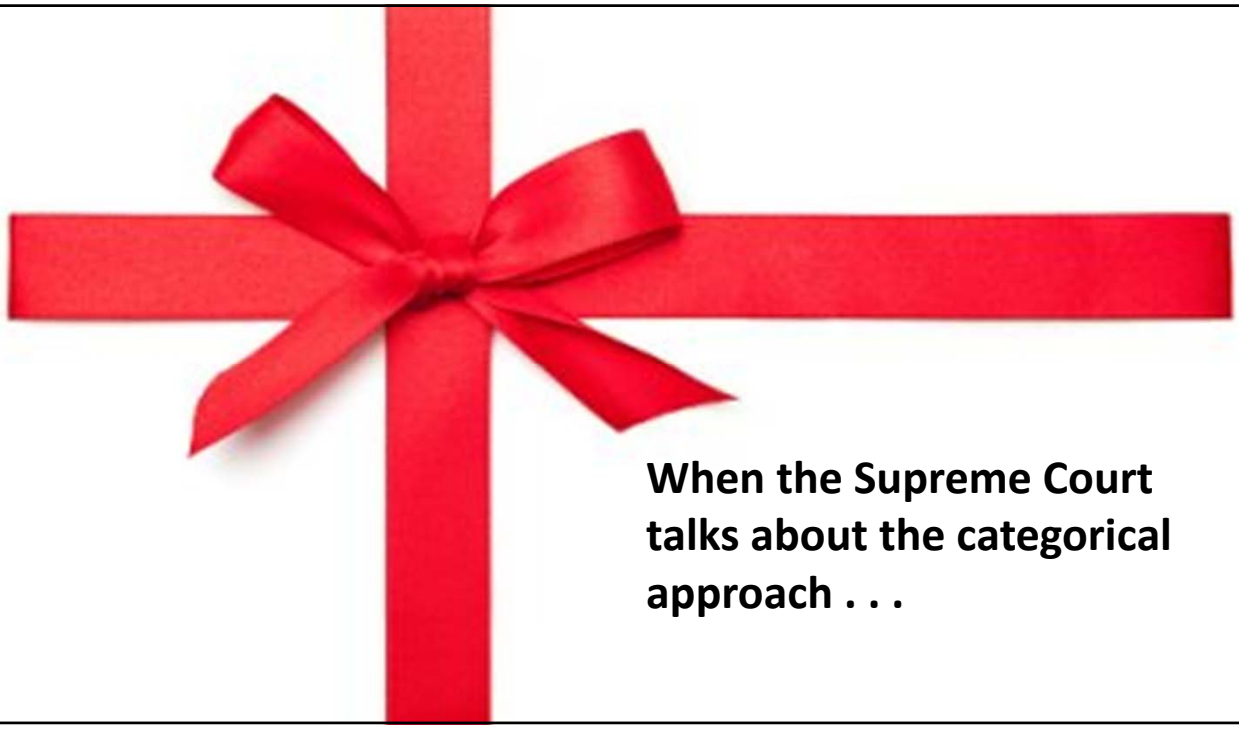
". . . And for all of these reasons, Your Honor, assault with intent to kill is not a violent felony"



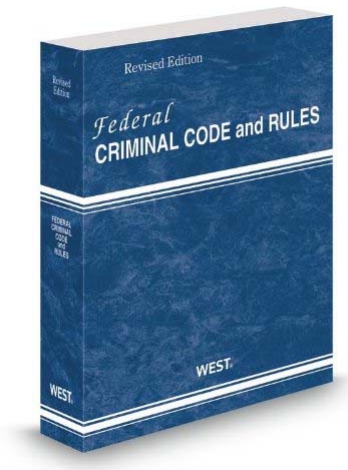
When the Supreme Court talks about the categorical approach . . .

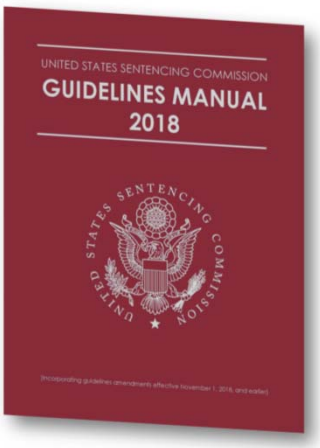

1. The applicable statutes & guidelines
2. The legal landscape
3. The steps to success

Part I

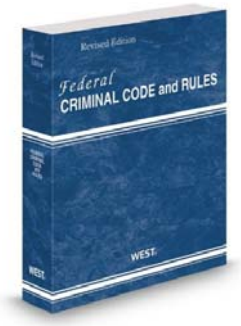
The Applicable Statutes & Guidelines

When do I use the categorical approach?



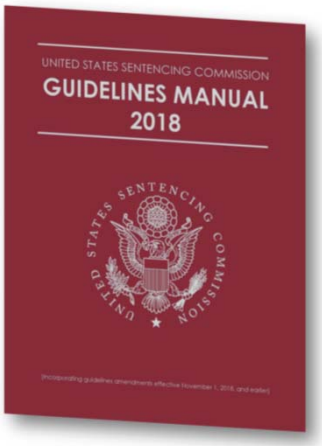


EXAMPLE STATUTES:



- **Armed Career Criminal Act: 18 U.S.C. § 924(e)**
- **Firearm in Furtherance: 18 U.S.C. § 924(c)**
- **Drug Trafficking MMs: 21 U.S.C. §§ 841, 960**
- **3 Strikes: 18 U.S.C. § 3559(c)**
- **Sex Exploitation/Child Pornography: 18 U.S.C. §§ 2252, 2252A**
- **"Crime of Violence" (and offenses that incorporate § 16): 18 U.S.C. § 16**

SENTENCING GUIDELINES:



- **Career Offender: U.S.S.G. § § 4B1.1, 4B1.2**
- **Firearms Guideline: U.S.S.G. § 2K2.1**
- **Supervised Release Guideline: U.S.S.G. § 7B1.1**
- **Unlawful Reentry Guideline: U.S.S.G. § 2L1.2(b)(2)(E)**

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

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

1. Instant offense is felon in possession of firearm, 18 U.S.C. § 922(g)

and

2. Defendant must have 3 qualifying prior convictions

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

3 prior convictions that are either:

A. "violent felony" (punishable by term of 1 year or more); OR

B. "serious drug offense" (punishable by a max. sentence of 10 years or more)

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

VIOLENT FELONY

1. has as an element the use, attempted use, or threatened use of physical force against the person of another [force clause]; or

2. is burglary, arson, or extortion, involves use of explosives [enumerated offense clause],

3. ~~or otherwise involves conduct that presents a serious potential risk of physical injury to another~~ [residual clause]

Invalidated by
Johnson v. United States

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

VIOLENT FELONY – Force Clause

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

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

VIOLENT FELONY – Enumerated Offenses

is burglary, arson, or extortion, involves use of explosives [enumerated offense clause],

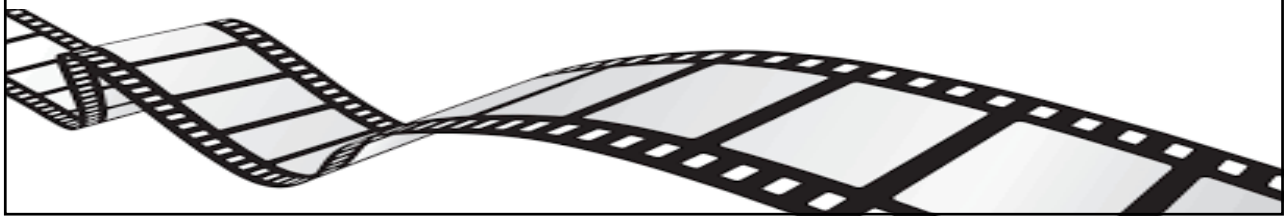
Armed Career Criminal Act
18 U.S.C. § 924(e)

"SERIOUS DRUG OFFENSE"

1. **an offense under the Federal Controlled Substances Act; or**

2. **an offense under state law "involving manufacturing, distributing, possessing with intent to manufacture or distribute, a controlled substance."**

Career Offender Guideline
U.S.S.G. § § 4B1.1, 4B1.2



Career Offender Guideline
U.S.S.G. § § 4B1.1, 4B1.2

1. **The instant federal offense is a "crime of violence" or "controlled substance offense" AND**

2. **Defendant must have two prior convictions that are either a:**

"crimes of violence"

or

"controlled substance offense"

Career Offender Guideline
U.S.S.G. § § 4B1.1, 4B1.2

1. The instant federal offense is a "crime of violence" or "controlled substance offense" AND
2. Defendant must have two prior convictions that are either a:

Prior convictions must count for criminal history points!

Prior convictions must be punishable by term exceeding one year!

"crimes of violence"

or

"controlled substance offense"

Career Offender Guideline
U.S.S.G. § § 4B1.1, 4B1.2

A "crime of violence" is an offense that:

1. has as an element the use, attempted use, or threatened use of physical force against the person of another [force clause]; or
2. Is murder, voluntary manslaughter, kidnapping, aggravated assault, robbery, forcible sex offense, arson, extortion, or 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) [enumerated offense clause].

Career Offender Guideline
U.S.S.G. § § 4B1.1, 4B1.2

A controlled substance offense is:

An offense that "prohibits the manufacture, import, export, distribution, or dispensing of controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with the intent to manufacture, import, export, distribute, or dispense."

18 U.S.C. § 924(c)

18 U.S.C. § 924(c)

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime - [be sentenced to a certain number of years depending on the facts of the crime] . . . .

18 U.S.C. § 924(c)(2)
"Drug Trafficking Crime"

A "drug trafficking crime" means any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or Maritime drug offenses

18 U.S.C. § 924(c)(3)(A)
"Crime of Violence" FORCE CLAUSE

An offense that is a felony that –

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

18 U.S.C. § 924(c)(3)(B)
"Crime of Violence" RESIDUAL CLAUSE

An offense that is a felony that –

(b) by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 924(c)(3)(B)
"Crime of Violence" RESIDUAL CLAUSE

An offense th[illegible]-

(b) h[illegible]s na[illegible]involves a
s[illegible]tantial r[illegible]at phy[illegible]l force
ag[illegible]st the pers[illegible]erty of
ano[illegible]the course
of comm[illegible]offense.

Part II

The Legal Landscape

THE CASES

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

Descamps v. United States
133 S. Ct. 2776 (2013)

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

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

THE CASES

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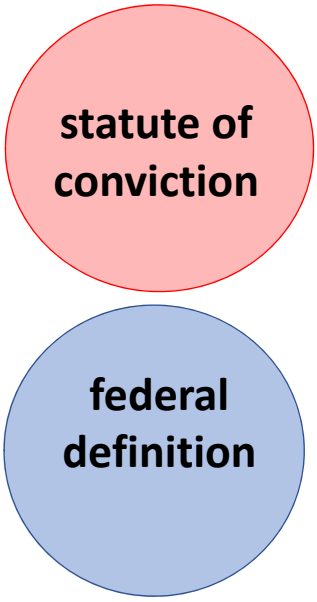
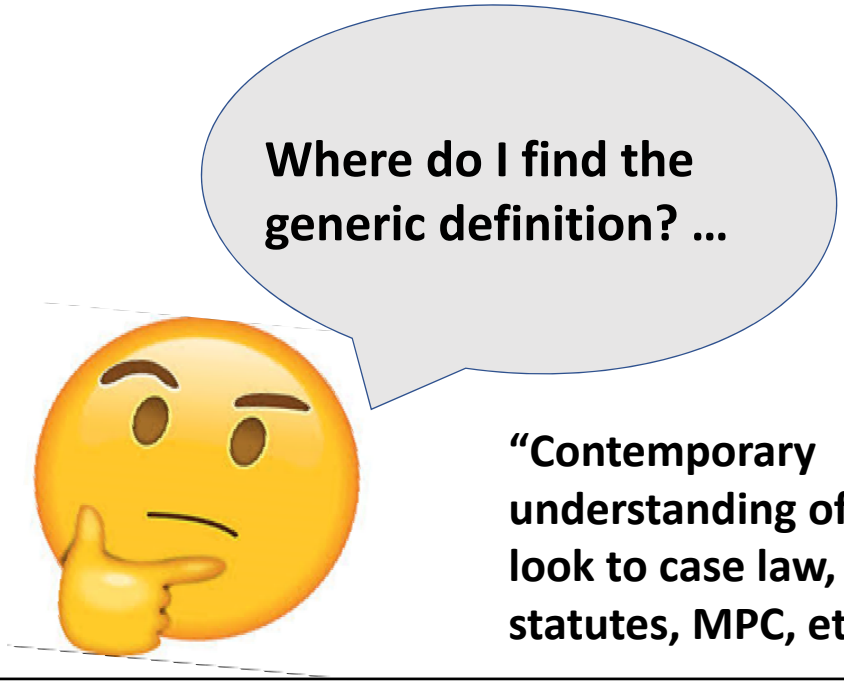


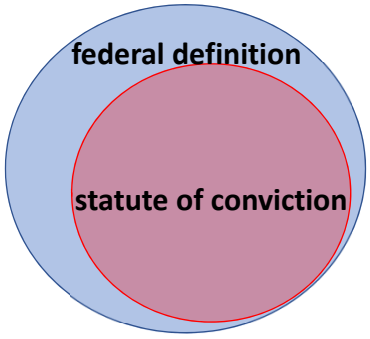
The "categorical approach" is an analytical framework used to determine whether a conviction can serve as a predicate offense for federal sentence enhancements.

This approach looks only to necessary elements of the statute of conviction to determine whether they are identical to or narrower than the relevant federal/generic definition.

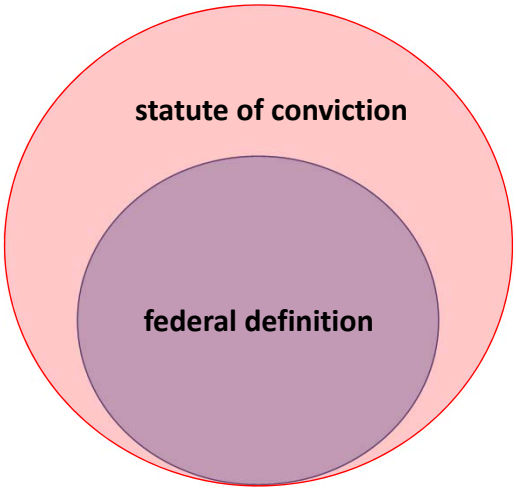
The facts of the underlying crime may not be considered.



"Contemporary understanding of the term" – look to case law, federal statutes, MPC, etc.



If a statute of conviction is identical to, or narrower than the relevant federal/generic definition, the conviction qualifies.



But, if statute is broader, that is if it criminalizes *any* conduct that does not fall within the relevant federal/generic definition, the conviction cannot qualify

The **modified categorical approach** is a variant of the categorical approach framework that allows the Court to look beyond the statutory elements to **specified judicial records** to ascertain under what part of the statute Defendant was convicted.

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

THE CASES

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

Descamps v. United States
133 S. Ct. 2776 (2013)

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

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

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

When using the modified categorical approach, the documents the court can look at are limited.

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

- **Charging document**
- **Plea agreement**
- **Transcript of plea colloquy**
- **Jury instructions**
- **Judge's findings in bench trial**
- **Other comparable judicial record**

- Police reports
- Complainant applications
- 302s
- Arrest reports
- PSRs*

THE CASES

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

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136 S. Ct. 2243 (2016)

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

Descamps v. United States
133 S. Ct. 2776 (2013)

Clarifies when and how the modified categorical approach applies.

MCA applies only to divisible statutes with alternative elements.

Does California burglary qualify as generic burglary?

Descamps v. United States
133 S. Ct. 2776 (2013)

ACCA's generic burglary requires:

(1) unlawful entry (trespass)

(2) into a building or structure

(3) with intent to commit a crime.

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

Descamps v. United States
133 S. Ct. 2776 (2013)

CALIFORNIA BURGLARY

1) Entry
2) Into a building
3) With intent to commit a crime

Descamps v. United States
133 S. Ct. 2776 (2013)

CALIFORNIA BURGLARY

1) Entry
2) Into a building
3) With intent to commit a crime

No UNLAWFUL entry = missing element!!

Descamps v. United States
133 S. Ct. 2776 (2013)

LESSON 1

The modified categorical approach only applies to divisible statutes with alternative elements, some which match the federal definition, and some which do not.

Descamps v. United States
133 S. Ct. 2776 (2013)

LESSON 2

The modified categorical approach only applies to determine which of the elements the defendant was convicted of – NOT underlying facts.

Overbroad element that fails to satisfy the federal definition is the same as a "missing element" – the prior offence can never qualify as a sentencing predicate.

Descamps v. United States
133 S. Ct. 2776 (2013)

LESSON 3

Descamps Rationale

1. It is Congress' intent to focus on the elements of the statute of conviction.
2. Prevents impermissible fact-finding under the Sixth Amendment.
3. Prevents unfairness by focusing only on the elemental facts of which Defendant was convicted.

THE CASES

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

Descamps v. United States
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544 U.S. 13 (2005)

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

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

Reinforced Descamps – the modified categorical approach only applies when a statute has alternative elements not alternative means

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

Element: something the jury has to unanimously select or something the defendant must necessarily admit to be found guilty of the offense.

Means: factual manner of satisfying element that jury does not have to unanimously find or defendant does not have to necessarily admit.

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

Bottom line. . .

If a jury doesn't need to unanimously find it, it's not an element, and statute is not divisible

Does Iowa burglary, which criminalizes unlawful entry into "any building, structure, or land, water or air vehicle," qualify as generic burglary?

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

ACCA's generic burglary requires:

(1) unlawful entry (trespass)

(2) into a building or structure (not typical car, boat, plane etc.)

(3) with intent to commit a crime.

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

IOWA BURGLARY STATUTE	
any person, having the intent to commit a felony, who unlawfully enters a building, structure, or land, water, or air vehicle, commits burglary.	Is this statute divisible?

IOWA BURGLARY STATUTE	
any person, having the intent to commit a felony, who unlawfully enters a building, structure, or land, water, or air vehicle, commits burglary.	Is this statute divisible? **NO!**

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

The alternate phrases in the Iowa burglary statute are means, not elements.

- Land, water, or air vehicle are all alternative means for satisfying a single indivisible element – the location.
- Jury is not required to unanimously select one of these phrases to the exclusions of the other.

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

Where do I look to determine if a statute is divisible (has alternative elements) or not?

- **Case law**
- **Pattern jury instructions**
- **Statute's penalty sections**

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

So what?

The modified categorical approach cannot apply to this indivisible statute.

The statute is simply OVERBROAD and will never qualify.

The Takeaway:

Disjunctive phrases (“or” phrases) in a statute do **not always** mean **alternative elements**.

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

Part 3

Steps to Success

4 STEPS TO SUCCESS

STEP 1: identify federal definition

STEP 2: identify the predicate's definition

STEP 3: Compare the elements

STEP 4: Modified Categorical Approach (if needed)

STEP 1: identify federal definition

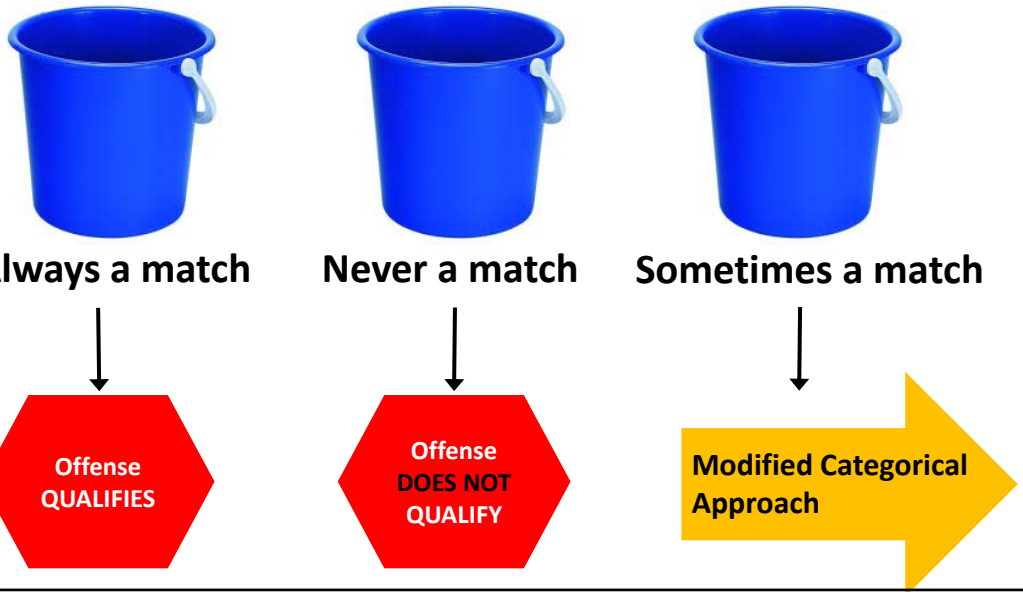
Example: 922(g) client with 3 burglary priors.

Federal definition: ACCA VF → enumerated offense clause → generic burglary

STEP 2: identify the predicate's definition

- Face of the statute
- Jury instructions
- State case law
- Federal law interpreting state case law

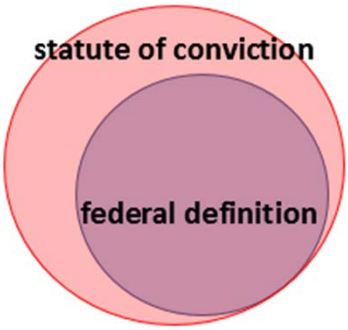
STEP 3: compare the elements



STEP 3: compare the elements of the predicate offense to the federal definition

GENERIC BURGLARY	STATE BURGLARY STATUTE
(a) Unlawful entry	(a) Unlawful entry
(b) Into a building	(b) Into a building
(c) with intent to commit a crime therein	(c) With intent to commit a crime therein

STEP 3: compare the elements of the predicate offense to the federal definition



Predicates fall into the NEVER bucket when they contain an overbroad, and indivisible element that does not match the federal definition.

STEP 3: compare the elements of the predicate offense to the federal definition

But many statutes look like they may be divisible and have alternative elements

BE CAREFUL … LOOKS ARE DECEIVING!

EXAMPLE

Does Maryland assault 2nd qualify as an ACCA predicate?

STEP 1: ACCA → "violent felony" → force clause (has as an element the use, attempted use, or threatened use of physical force against the person of another")

"force capable of causing injury or pain"

EXAMPLE

Does Maryland assault 2nd qualify as an ACCA predicate?

STEP 2: Maryland Assault 2nd: prohibits "offensive physical contact with" *or* causing "physical harm" to another.

STEP 3: compare the elements of the predicate offense to the federal definition

Under Maryland law, the jury is not required to unanimously find one of these phrases to the exclusion of the other; both terms go the jury as a single indivisible element.

EXAMPLE

Does Illinois Pointing-a-Firearm qualify under the ACCA's force clause?

Step 1: does it have as an element the use/attempted/threatened use of physical force against another person?

STEP 2: identify the predicate definition

Illinois Pointing-A-Firearm: A person who knowingly or intentionally points a firearm at another person commits a felony

STEP 3: compare the elements of the predicate offense to the federal definition

Includes conduct that would constitute a threat of physical force and nonthreatening conduct

- Joking
- Demonstration
- Acting
- Knowingly unloaded firearm

EXAMPLE

Does New York's CSCS 5th qualify as "controlled substance offense" under U.S.S.G § 4B1.2(b)?

STEP 1: § 4B1.2's "controlled substance offense" refers only to drugs criminalized under federal law. Federal law does not criminalize HCG.

EXAMPLE

Step 2: New York defines "controlled substance" as a list of various drugs including HCG.

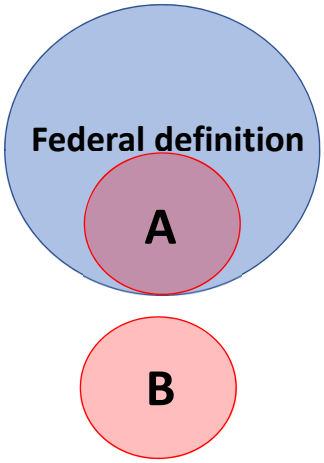
STEP 3: compare the elements of the predicate offense to the federal definition

Under New York law, the jury is not required to unanimously select one type of drug to the exclusion of another drug. This list of drugs sets forth alternative means for satisfying a single element.

STEP 3: compare the elements of the predicate offense to the federal definition

Predicates fall into the SOMETIMES bucket *only if* they contain divisible alternative elements, requiring you to move onto STEP 4: the modified categorical approach to determine which alternative element defendant's conviction was based on.

STEP 4: the modified categorical approach



EXAMPLE

Does a conviction under State X's arson statute qualify as an ACCA predicate?

Step 1: Identify federal definition

ACCA → "violent felony" → enumerated offense clause → generic arson

Generic arson in your State X's Circuit defined as: "Malicious burning of real or personal property of another"

STEP 2: Identify the statute of conviction

Subsection (a) (Class A Felony) requires:
(1) Malicious burning
(2) Real or personal property
(3) of another.

Subsection (b) (Class B Felony) requires:
(1) Burning
(2) Real property
(3) While manufacturing or attempting to manufacture a controlled substance

STEP 3: Compare the definitions

Subsection (a) (Class A Felony) requires:
(1) Malicious burning
(2) Real or personal property
(3) of another.

Subsection (b) (Class B Felony) requires:
(1) Burning
(2) Real property
(3) While manufacturing or attempting to manufacture a controlled substance

STEP 3: Compare the definitions

Subsection (a) (Class A Felony) requires:

(1) Malicious burning
(2) Real or personal property
(3) of another.

This alternative matches generic arson

Subsection (b) (Class B Felony) requires:

(1) [illegible]urning
(2) R[illegible]erty
([illegible]facturing or attempting to manufacture a controlled substance

STEP 4: the modified categorical approach

Government's burden:
Shepard-approved documents must *necessarily* establish that the predicate qualifies.

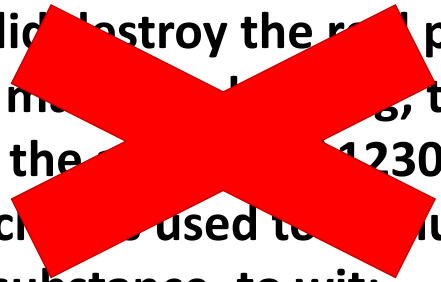
STEP 4: the modified categorical approach

Indictment

Mr. Smith did destroy the real property of another by malicious burning, to wit: a house with the address of 1230 Biltmore Street, which was used to manufacture a controlled substance, to wit: methamphetamine.

STEP 4: the modified categorical approach

Indictment



Mr. Smith did destroy the real property of another by malicious burning, to wit: a house with the address of 1230 Biltmore Street, which was used to manufacture a controlled substance, to wit: methamphetamine.