CRIME OF VIOLENCE SCENARIOS
N.D. Ohio, October 29, 2021

Scenario #1

The defendant has a prior conviction for West Virginia Code § 61-2-9(a) which provides:

> If any person maliciously shoots, stabs, cuts or wounds any person, or by any means causes him or her bodily injury with intent to maim, disfigure, disable or kill, he or she … is guilty of a felony and shall be punished by confinement in a state correctional facility not less than two nor more than ten years.
>
> If the act is done unlawfully, but not maliciously, with the intent aforesaid, the offender is guilty of a felony and shall either be imprisoned in a state correctional facility not less than one nor more than five years, or be confined in jail not exceeding twelve months and fined not exceeding $500.

Is this a divisible statute?

A. Yes
B. No

Scenario #2

Defendant is convicted of Indiana battery. The statute requires that the defendant intentionally use force that causes serious injury to a person. The defendant claims a light touch such as tickling another person entails force because if the tickled person twitches, falls, and strikes his head on a coffee table, the victim could suffer a serious injury.

Now that the defendant has described a scenario under the statute that does not involve "the amount of force" required under Johnson, is this offense no longer a crime of violence under the force clause at §4B1.2?

A. Yes
B. No

CRIME OF VIOLENCE SCENARIOS, Cont.

Scenario #3

The defendant has a prior conviction for Oklahoma Pointing a Firearm which provides:

> It shall be unlawful for any person to willfully or without lawful cause point a shotgun, rifle or pistol, or any deadly weapon, whether loaded or not, at any person or persons for the purpose of threatening or with the intention of discharging the firearm or with any malice or for any purpose of injuring, either through physical injury or mental or emotional intimidation, or for purposes of whimsy, humor or prank....

Both the government and defendant agree that the statute is not divisible. The defendant argues that pointing a firearm at a person for the purposes of "whimsy, humor, or prank" does not involve the use of force and is not a crime of violence under §4B1.2.

The government argues that the defendant has not located one case where someone was convicted under the "whimsy, humor, or prank" part of the statute, and because the rest of the statute requires threatening the use of force or causing injury, the statute is a crime of violence.

Is the government correct that the defendant must point to a case to show that someone was convicted of pointing a firearm at a person for purposes of whimsy, humor, or prank for the offense to be a crime of violence?

A. Yes
B. No

Scenario #4

If the conduct in the video is the least culpable means of committing an offense under a robbery statute, is the statute a violent felony or crime of violence under the force clause?

A. Yes
B. No

CRIME OF VIOLENCE SCENARIOS, Cont.

Scenario #5

If the conduct in the video is the least culpable means of committing an offense under a robbery statute, is the statute a violent felony or crime of violence under the force clause?

A. Yes
B. No

Scenario #6

The defendant has a prior conviction for California Burglary for which the statute § 459 provides:

> Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, . . . floating home, . . . railroad car, locked or sealed cargo container, whether or not mounted on a vehicle, trailer coach, . . . any house car, . . . inhabited camper, . . . vehicle . . . when the doors are locked, aircraft . . . or mine or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary. As used in this chapter, "inhabited" means currently being used for dwelling purposes, whether occupied or not. A house, trailer, vessel designed for habitation, or portion of a building is currently being used for dwelling purposes if, at the time of the burglary, it was not occupied solely because a natural or other disaster caused the occupants to leave the premises.

Is the offense a violent felony under the ACCA?

A. Yes
B. No

CRIME OF VIOLENCE SCENARIOS, Cont.

Scenario #7

The defendant has a prior conviction for Tennessee Criminal Responsibility of Attempted Aggravated Robbery.

The Aggravated Robbery statute § 39-13-402 provides:

> Aggravated robbery is robbery as defined in § 39-13-401:
>
> (1) Accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it to be a deadly weapon; or
>
> (2) Where the victim suffers serious bodily injury.

The Robbery statute § 39-13-401 provides:

> Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.

The Attempt statute § 39-12-101 provides:

> (a) A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:
>
> (1) Intentionally engages in action or causes a result that would constitute an offense, if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.
>
> (b) Conduct does not constitute a substantial step under subdivision (a)(3), unless the person's entire course of action is corroborative of the intent to commit the offense.
>
> (c) It is no defense to prosecution for criminal attempt that the offense attempted was actually committed.

CRIME OF VIOLENCE SCENARIOS, Cont.

And, the Criminal Responsibility statute § 39-11-402 provides:

> A person is criminally responsible for an offense committed by the conduct of another, if:
>
> (1) Acting with the culpability required for the offense, the person causes or aids an innocent or irresponsible person to engage in conduct prohibited by the definition of the offense;
>
> (2) Acting with intent to promote or assist the commission of the offense, or to benefit in the proceeds or results of the offense, the person solicits, directs, aids, or attempts to aid another person to commit the offense; or
>
> (3) Having a duty imposed by law or voluntarily undertaken to prevent commission of the offense and acting with intent to benefit in the proceeds or results of the offense, or to promote or assist its commission, the person fails to make a reasonable effort to prevent commission of the offense.

#7-A

Does the prior conviction qualify as a crime of violence or violent felony under the force clause?

A. Yes
B. No
C. No one really knows

#7-B

Does the prior conviction qualify as a crime of violence under the enumerated clause of § 4B1.2?

A. Yes
B. No
C. No one really knows

CRIME OF VIOLENCE SCENARIOS, Cont.

Scenario #8

The defendant was found guilty of armed robbery, in violation of 18 U.S.C. § 2113(a). The applicable guideline is §2B3.1. The robbery occurred on March 7, 2018.

The defendant's criminal history is as follows:

Arrest Date	Conviction/Court	Date Sentence Imposed/Disposition	Guideline	Points
12/05/2004	Distribution of Cocaine (felony) Kenton County Circuit Court Covington, KY Case number: 2004-CR-856	4/27/2005: 2 years' probation 01/12/2007: Probation revoked; 15 months custody	§4A1.1(a), §4A1.2(k)	3
1/29/2005	Distribution of Cocaine (felony) Kenton County Circuit Court Covington, KY Case number: 2005-CR-125	04/27/2005: 2 years' probation 01/12/2007: Probation revoked; 15 months custody concurrent with case number 2004-CR-856	§4A1.2(e)(2),	0
12/07/2006	Robbery (felony) Kenton County Circuit Court Covington, KY	01/12/2007: 15 months custody concurrent with revocation time imposed in case numbers 2004-CR-856 and 2005-CR-125	§4A1.1(a)	3

CRIME OF VIOLENCE SCENARIOS, Cont.

#8-A

Is the defendant's criminal history scored correctly?

A. Yes
B. No

#8-B

Assume that Kentucky Distribution of Cocaine qualifies as a controlled substances offense under 4B1.2.

The Kentucky Second Degree Robbery statute provides:

(1) A person is guilty of robbery in the second degree when, in the course of committing theft, he uses or threatens the immediate use of physical force upon another person with intent to accomplish the theft.

Will the defendant be a career offender?

A. Yes
B. No
C. We cannot tell

Violent Convictions

	21 U.S.C. § 851 **(enhancements for 21 U.S.C. § 841 convictions)**	**Career Offender § 4B1.2** **(and referencing guideline sections)**	**18 U.S.C. § 924(c)** **(using firearm during offense)**	**18 U.S.C. § 924(e)** **(Armed Career Criminal)**
Name	"serious violent felony"	"crime of violence"	"crime of violence"	"violent felony"
Description	various named offenses including murder and manslaughter, assaults, arson, carjacking, robbery, firearms use, and "any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another"	(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 or explosive material	"has as an element the use, attempted use, or threatened use of physical force against the person or property of another"	Any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment if committed by an adult; has as an element the use, attempted use, or threatened use of physical force against the person of another; OR is burglary, arson, or extortion, or involves the use of explosives
Statutory Citations	21 U.S.C. § 802(58) 18 U.S.C. § 113 18 U.S.C. § 1111, 1112 18 U.S.C. § 2241, 2242, 2244 18 U.S.C. § 2111, 2113, 2118, 2119 18 U.S.C. § 3559(c)(2)	U.S.S.G. § 4B1.2(a) U.S.S.G. § 4B1.2, App. Note 1	18 U.S.C. § 924(c)(2)(3)	18 U.S.C. § 924(e)(2)(B)
Inchoate Offenses?	Explicitly for some under 3559(c)(2) (attempt, conspiracy, solicitation)	Yes (aiding and abetting, conspiracy, and attempting)	Not explicitly	Not explicitly
Punishment	Must have served more than 12 months	Punishable by imprisonment for a term exceeding one year	Any felony	Punishable by imprisonment for a term exceeding one year

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Categorical Approach:
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After the Supreme Court's decision in Mathis v. United States, 136 S. Ct. 2242 (2016), courts continue to grapple with the categorical approach, including the means vs. elements test. This document outlines the four steps in the categorical approach and defines key term frequently used in the analysis.

Steps in the categorical approach:

Step 1 Identify the definition at issue (for example: "violent felony" in ACCA, "crime of violence" in Career Offender)

Step 2 Determine the statute of conviction. If the statute contains multiple crimes and is divisible into separate crimes, use the "modified" approach to determine the defendant's statute of conviction

Step 3 List the elements of the statute of conviction

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

Glossary of Key Terms

Categorical Approach - the method for determining whether an offense (generally a prior conviction) fits within a given definition, such as for "crime of violence" "drug trafficking offense" "violent felony" or other similar terms. To do so, the court must compare the elements of the prior offense to the relevant definition. Under the categorical approach, courts are not permitted to look to the conduct underlying the prior the conviction, only to the statute of conviction, to determine the elements of the prior offense.

Divisible Statute - a statute that sets out different offenses within one statute. For example, a statute with subsections (a) through (d) that sets out burglary of: (a) a habitation, (b) a motor vehicle, (c) and air or water craft, or (d) a coin-operated vending machine or parking meter, is a divisible statute because it sets out four separate burglary crimes. The Supreme Court currently has before it a case in which the Court will decide whether a statute is divisible when it sets out different means of committing an offense (for example kidnapping by force, fear, coercion or fraud) or whether the statute must set out distinct elements in order to be divisible.

Elements Clause ("Force Clause") - that part of a definition that requires that a prior conviction have as an element the use, attempted, or threatened use of physical force against a person [or property]. Although in theory an elements

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Glossary of Key Terms, Cont'd.

clause could require that any specific element be present, as a practical matter the only element that is part of commonly used definitions is the element of the use of force. For this reason, the elements clause is often referred to as the "force clause."

Enumerated Offenses – those offenses that are specifically listed in a definition. For example, both ACCA and the career offender guideline define violent felony and crime of violence, respectively, to include "arson" and "extortion" specifically. The "aggravated felony" definition in Title 8 lists about 20 offenses that constitute aggravated felonies.

Generic Contemporary Definition – the common, modern-day understanding of one of the enumerated offenses. The Supreme Court in *Taylor*, decided that when Congress listed "burglary, arson, extortion" as violent felonies, Congress must have meant the contemporary, generic understanding of those offenses. So, for example, under common law the government would have to prove that a breaking and entering took place "in the nighttime" for the offense to constitute burglary. "In the nighttime" was an element of the offense. But, our modern conception of burglary does not include "in the nighttime" as a modern burglary in most states does not require that the breaking and entering occur at night.

Modified Categorical Approach – similar to the categorical approach, the modified categorical approach is used to determine whether an offense (generally a prior conviction) fits within a given definition, such as for "crime of violence" "violent felony" or similar term. The court must compare the elements of the offense of conviction to the relevant definition. Under the modified approach, the court may use certain additional documents, such as a charging document or plea agreement from the prior conviction, to determine the elements of the offense of conviction.

Overbroad Statutes – a statute that proscribes a larger sphere of conduct than is targeted by the generic offense. For example, a burglary statute that includes habitations, watercraft, aircraft, and coin-operated vending machines, is overbroad compared to generic burglary, which is focused on structures (buildings and homes).

***Shepard* Documents** – the narrow class of additional documents the court is permitted to consult when using the modified categorical approach to determine the elements of the prior conviction. In the Shepard case, the Supreme Court specifically mentioned charging documents (indictments, for instance), transcripts of plea colloquies, and written plea agreements, jury instructions, and comparable judicial records. Similar document may be consulted, but circuit courts have provided further guidance on permissible documents, as state courts produce different kinds of documents depending upon the criminal procedures in that state.

The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop a national sentencing policy for the federal courts. The resulting sentencing guidelines provide structure for the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.

Divisibility in the Categorical Approach:
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When Can I Look at *Shepard* Documents?

Does the statute outline multiple ways to commit one crime or multiple crimes? (Elements v. Means)

The statute outlines multiple crimes / different elements and is *divisible*.

Do all the versions of the offense make up a crime of violence or violent felony?

SOME DO & SOME DON'T

Some sections of the statute make up Crime of Violence or Violent Felony. Some do not.

You may look at the *Shepard* documents only to determine which section of the statute the defendant was convicted of.

YES

All the sections of the offense make up a Crime of Violence or Violent Felony and the statute can count as a predicate.

NO

None of the sections of the offense make up a Crime of Violence or Violent Felony and the statute can never count as a predicate.

The statute outlines one crime (or multiple ways to commit one crime) and is *indivisible*.

You may NOT look at the *Shepard* Documents