

Career Offender, ACCA, and Crime Of Violence

Career Offender

4B1.1 & 4B1.2

- Does not impact statutory exposure
- No enhancement notice required (as required in 21 U.S.C. § 851)
- Prior offenses must be counted in criminal history
- Congressional directive at 28 U.S.C. § 994(h)

§4B1.1 Career Offender Criteria

- Defendant at least 18 at time of instant offense
- Instant offense of conviction is a felony for a “crime of violence” or a “controlled substance offense”
- At least two prior felony convictions for a “crime of violence” or “controlled substance offense”

“Two prior felony convictions”

§4B1.2(c)

- Defendant must have committed the instant offense of conviction subsequent to sustaining at least two predicate offense convictions

And

- The sentences for the two predicates must be counted separately under criminal history (See amndt. #709)

“Crime of Violence”

§4B1.2(a)

- Any offense under federal or state law punishable by imprisonment for a term exceeding one year, that:
 - Has as an element the use, attempted use, or threatened use of physical force against the person of another,

OR

“Crime of Violence” (cont.)

§4B1.2(a)

- Is burglary of a dwelling, arson, extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another (see application notes for specific offenses)
- **Note:** This definition differs from 18 U.S.C. §§ 16, 924(c), 924(e), §2L1.2, and §4B1.4. (but many courts treat § 924(e) and §4B1.2 the same)

“Controlled Substance Offense”

§4B1.2(b)

- 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

“Controlled Substance Offense” (cont.)

§4B1.2(b)

- the possession of a controlled substance **with intent** to do any of the above
- **Note**: This definition is the **same** as in §2L1.2
- **Note**: This definition **differs** from 18 U.S.C. §§ 924(c), 924(e), and §4B1.4.

Career Offender

- Criminal History Category VI
- Offense level determined by a table based on statutory maximum
 - Unless the offense level from Chapters Two and Three is greater.

<u>Statutory Maximum</u>	<u>Offense Level</u> *
Life	37
25 years +	34
20 years +	32
15 years +	29
10 years +	24
5 years +	17
More than 1 year	12

* Decrease by number of levels applicable at §3E1.1
(Acceptance of Responsibility)

Armed Career Criminal Act (ACCA)

- 18 U.S.C. § 924(e)– conviction under 18 U.S.C. § 922(g)
- Requires three prior convictions for “violent felonies” or “serious drug offenses” committed on **different occasions.**

ACCA

- 18 U.S.C. § 924(e) – conviction under 18 U.S.C. § 922(g) : 15 year mandatory minimum
- Requires three prior convictions for “violent felonies” or “serious drug offenses” committed on different occasions – see statute for guidance.
- §4B1.4
 - CHC at least IV, offense level at least 33
- No time limit on priors!!!!
- Circuit split: on “juvenile convictions” as a prior, *Compare U.S. v. Welch*, 608 F.3d 408(7th Cir. 2010) with *U.S. v. Tighe*, 266 F.3d 1187 (9th Cir. 2001).

“Serious drug offense” – 18 USC 924(e)(2)(A)

- (i) An offense under the C.S.A. (21 U.S.C. 801 et seq.), the Controlled Substance Import and Export Act (21 U.S.C. 951 et seq.) or chapter 705 for which a maximum term of imprisonment of ten years or more is prescribed; or
- (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to distribute, a controlled substance as defined in the C.S.A. (21 U.S.C. 802) for which a maximum term of imprisonment of ten years or more is prescribed.
- *See U.S. v. Rodriguez*, 128 S. Ct. 1783 (2008), maximum *includes* recidivist enhancements

“Violent Felony” 18 USC 924 e(1)(2)(B)

- Any crime punishable by a term exceeding one year or any act of juvenile delinquency involving the use or carrying of a firearm or a destructive device that would be punishable by imprisonment for such term if committed by an adult.

“Violent Felony” – 18 USC 924(e)(2)(B)(i-ii)

- (i) Any felony that has an element the use, threatened use, or attempted use of physical force against the person of another; or
- (ii) is burglary, arson, or extortion, involves use of explosives or **otherwise involves conduct that presents a serious potential risk of physical injury to another.**

ACCA and “Violent Felony”

Sykes v. U.S., 2011 WL 2224437 (U.S. 2010)

State crime of felony vehicle flight qualifies as a violent felony under the residual clause of the Armed Career Criminal Act

A risk comparable to that posed by its closest analog among listed offenses

“The Categorical Approach”

The Process for Determining If
Certain Convictions Qualify
for Enhancements

Discussion Outline

- What is “the categorical approach”?
- Statutes and guidelines most commonly requiring use of the categorical approach
- Supreme Court cases in the categorical approach
- Structure of a categorical definition
- Analysis in the categorical approach
 - Documents allowed in the categorical approach
- Scenarios demonstrating the categorical approach

“Categorical Approach Tips ”

Conducting a Categorical Approach Analysis

1. Obtain and review statute of prior conviction

By examining the elements of the conviction, determine if ALL sections under the statute meet the definition in question

NOTE: Do not rely on title of statute of conviction alone!

Conducting a Categorical Approach Analysis (cont.)

2. If the statute has certain subsections that do not meet the definition in question, the court may look to appropriate court records to determine the subsection of the statute of which the defendant was convicted

NOTE: Examine mental states closely (*e.g.*, negligent, reckless)

Conducting a Categorical Approach Analysis (cont.)

3. To determine if the subsection of which the defendant was convicted meets the definition in question, the court will look to certain documents using the modified categorical approach

These documents include:
charging instrument, jury instructions,
plea agreements, or any judicially ruled
documents

Examples of Statutes Where the Categorical Approach Is Used

- 18 USC § 924(e) (Armed Career Criminal Act: ACCA)
- 18 USC § 924(c) (use, carry, possession of firearm in crime of violence or drug trafficking)
- 18 USC § 16 (used for “aggravated felony” determination for illegal entry)

Examples of Guidelines Where the Categorical Approach Is Used

- §2K2.1 (Firearms)
- §2L1.2 (Illegal entry)
- §§4B1.1 & 4B1.2 (Career Offender)
- §4B1.4 (Armed Career Criminal)

Key Supreme Court Cases Regarding the Categorical Approach

- *Taylor v. United States*, 495 U.S. 575 (1990)
- *Shepard v. United States*, 544 U.S. 13 (2005)
- *James v. United States*, 550 U.S. 192 (2007)

Key Supreme Court Cases Regarding the Categorical Approach (cont.)

- *Begay v. United States*, 128 S. Ct. 1581 (2008)
- *United States v. Chambers*, 129 S. Ct. 687 (2009)
- *Johnson v. United States*, 130 S. Ct. 1265 (2010)
- *Sykes v. United States*, 131 S. Ct. 2267 (2011)

Analysis Used in the Categorical Approach

Limited Considerations in the Categorical Approach

James v. U.S., 127 S. Ct. 1586, 1593-94 (2007)

“Under [the categorical approach], we look only to the fact of conviction and the statutory definition of the prior offense, and do not generally consider the particular facts disclosed by the record of conviction....”

Limited Considerations in the Categorical Approach (cont.)

James v. U.S., 127 S. Ct. 1586, 1593-94 (2007)

“....That is, we consider whether the *elements of the offense* are of the type that would justify its inclusion within the [category at issue], without inquiring into the specific conduct of this particular offender.”

Ninth Circuit Categorical Approach

- *U.S. v. Aguila-Mones De Oca*, 655 F.3d 915 (9th Cir. 2012)
 - To determine whether a prior conviction qualifies as a “crime of violence” under the Guidelines, we use the two-part analytical approach outlined by the Supreme Court in *Taylor*.”

Ninth Circuit Categorical Approach

- *U.S. v. Aguila-Mones De Oca*, 655 F.3d 915 (9th Cir. 2012)
 - In any case requiring the application of *Taylor's* categorical approach, in the event that we determine that the statute under which the defendant or alien was previously convicted is categorically broader than the generic offense, we may apply the modified categorical approach.

Ninth Circuit Categorical Approach

- *U.S. v. Aguila-Mones De Oca*, 655 F.3d 915 (9th Cir. 2012)
 - Under the modified categorical approach, we determine, in light of the facts in the judicially noticeable documents, (1) what facts the conviction necessarily rested on (that is, what facts the trier of fact was actually required to find); and (2) whether these facts satisfy the elements of the generic offense.

The Use of Documents in the Modified Categorical Approach

- Documents can be used only if the statute for the offense of conviction alone does not establish whether the offense of conviction falls within the category in question
- When documents are used (sometimes referred to as the “modified categorical approach”), only limited documents are permitted

Limited Documents Allowed in the Modified Categorical Approach

- Statute of conviction
- Charging documents (*e.g.*, indictment)
- Plea agreement
- Plea colloquy in which the defendant confirmed the factual basis for the plea
- Jury instructions
- Comparable judicial record
- Judicially-ruled documents

Examples of Documents Generally NOT Allowed in the Modified Categorical Approach

- Police reports
- Abstracts of judgment
- Presentence reports
- Rap sheets

Typical Structure of a Definition Subject to the Categorical Approach

Three Potential Sections

- Elements section
 - List of the elements that will include an offense in the category
- Enumerated section
 - List of offenses included in the category
- Residual clause section
 - “Otherwise involves conduct” section
 - Describes conduct of an offense that will be included in the category

EXAMPLE: Career Offender Guideline

Definition for “Crime of Violence”

§4B1.2(a)

- *has as an element* the use, attempted use, or threatened use of physical force against the person of another, or
- *is* burglary **of a dwelling**, arson, or extortion, involves use of explosives, or
- *otherwise involves conduct* that presents a serious potential risk of physical injury to another

EXAMPLE: ACCA

Definition for “Violent Felony”

18 USC § 924(e)(2)(B)4B1.2(a)

- *....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, involves use of explosives, or
- *otherwise involves conduct* that presents a serious potential risk of physical injury to another....

EXAMPLE: Illegal Entry Guideline

Definition for “Crime of Violence”

§2L1.2

- *means* murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses..., statutory rape, sex abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or
- any other offensethat *has as an element* the use, attempted use, or threatened use of physical force against the person of another

Different Definitions

- *Lopez-Cardona v. Holder*, 662 F.3d 1110 (9th Cir. 2011)

What may be a predicate offense under one approach is not necessarily a predicate offense under another approach.” (footnotes omitted). For example, *Becker* itself recognized that the California crime of burglary might not be a “crime of violence” under a federal statute defining the term by reference to the generic crime, even though it is a “crime of violence” under the risk-focused text of § 16(b).”

Analysis:
Whether a Conviction Meets
the *Elements Section*
of a Categorical Definition

EXAMPLE: Illegal Entry Guideline

Definition for “Crime of Violence”

§2L1.2

- *means* murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses..., statutory rape, sex abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or
- any other offensethat *has as an element* the use, attempted use, or threatened use of physical force against the person of another

Analysis: *Elements Section* (cont.)

- Examine the statute for the offense of conviction and determine if the statute contains the elements to meet the required definition
 - Note: Do not rely on the title of the statute alone

Supreme Court Case Involving *Elements Section* of “Violent Felony”

U.S. v. Johnson, 130 S. Ct. 1265 (2010)

- Florida’s battery conviction not a violent felony under “force” component because the statute did not require physical force of a violent nature
- “The term violent...connotes a substantial degree of force.”
- Need force capable of causing physical pain or injury to another

Analysis: *Elements Section* (cont.)

- If the statute for the offense of conviction covers both offenses that meet the required definition and those that do not, determine whether the offense of conviction meets the required definition (*e.g.* “use of force”) under the modified categorical approach

Analysis:
Whether a Conviction Meets
the *Enumerated Section*
of a Categorical Definition

EXAMPLE: Illegal Entry Guideline

Definition for “Crime of Violence”

§2L1.2

- *means* murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses..., statutory rape, sex abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or
- any other offensethat *has as an element* the use, attempted use, or threatened use of physical force against the person of another

Analysis: *Enumerated Section* (cont.)

- Requires a determination of whether the elements of the offense of conviction meet the definition for the enumerated offense
 - The elements of the offense of conviction must meet the elements of the enumerated offense in its generic, contemporary definition
 - It is not sufficient that the offense of conviction has the same title as an enumerated offense

Analysis: *Enumerated Section* (cont.)

- Generic form of burglary based on Supreme Ct:
 - Unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime
- Illinois burglary:
 - Knowingly enters or without authority remains within a building, house-trailer, watercraft, aircraft, motor vehicle, railroad with intent to commit a felony or theft

Analysis:
**Whether a Conviction Meets
the *Residual Clause Section*
of a Categorical Definition**

EXAMPLE: Career Offender Guideline

Definition for “Crime of Violence”

§4B1.2(a)

- *has as an element* the use, attempted use, or threatened use of physical force against the person of another, or
- *is* burglary **of a dwelling**, arson, or extortion, involves use of explosives, or
- *otherwise involves conduct* that presents a serious potential risk of physical injury to another

Analysis: *Residual Clause Section* (cont.)

- This is the “otherwise involves conduct” section of a definition
 - *E.g.*, “crime of violence” at §4B1.2: Any felony that has an element the use, threatened use, or attempted use of physical force against the person of another; or is burglary of a dwelling, arson, or extortion, involves use of explosives **or otherwise involves conduct that presents a serious potential risk of physical injury to another**
 - Requires a determination whether elements of offense of conviction meet the conduct requirement

**Supreme Court Cases Involving the
Residual Clause Section of the
Armed Career Criminal Act (ACCA)
Definition of “Violent Felony”**

Recent Supreme Court Cases Involving “Violent Felony” (cont.)

- *Sykes v. U.S.* 131 S. Ct. 2267 (2011)
 - Indiana felony vehicle flight which involved intentional fleeing is a violent felony
 - For crimes involving **intentional** conduct, the only relevant inquiry is whether the crime presents a serious potential risk of physical injury to another
 - Limits *Begay*’s additional requirement of “purposeful, violent, and aggressive conduct” to strict liability, negligent, or reckless crimes

Supreme Court Cases Involving the *Residual Clause Section* of “Violent Felony”

Begay v. U.S., 128 S. Ct. 1581 (2008)

- New Mexico DUI not a “violent felony”
- The offense in question must involve both **purposeful, violent, and aggressive conduct** and serious potential risk of physical injury to another

Supreme Court Cases Involving the *Residual Clause Section* of “Violent Felony” (cont.)

- *Chambers v. U.S.*, 129 S. Ct. 687 (2009)
 - Illinois offense of “failure to report for service of a sentence” is not a “violent felony” under the residual clause because not purposeful, violent and aggressive
- *U.S. v. James*, 127 S. Ct. 1586 (2007)
 - Florida’s attempted burglary is a violent felony under “otherwise clause”

Key Points Regarding *Sykes* and *Begay*

- *Sykes* and *Begay*'s analysis only applies to a determination of a violent offense under the *residual clause section*
 - Does NOT apply if the violent offense falls under the *elements section* (the “use of physical force” part of the definition)
 - Does NOT apply if the violent offense falls under the *enumerated section*

Conducting an Analysis under the Residual Clause

Threshold Question: *Mens Rea* Requirement

- Must first determine if the crime involves strict liability, negligent, reckless, or intentional conduct because there are different tests based on whether the crime is intentional
- This inquiry might involve using the categorical approach to determine which section of a statute the defendant was convicted

Intentional Crimes

- If crime has a mens rea requirement of intentional conduct, the only question is whether the offense involves a serious potential risk of physical injury to another
- To decide if the crime has a serious potential risk of physical injury to another the court must determine in the typical case if the crime is roughly similar in kind and similar in degree of risk to the enumerated offenses (*e.g.* the ACCA lists burglary, arson, extortion, or use of explosives)
- Statistical information might be helpful (*Sykes*)

Reckless, Negligent, or Strict Liability Crimes

- If the offense has a mens rea requirement of reckless, negligent, or strict liability, the court must determine both whether the offense involves a serious potential risk of physical injury to another and *Begay's* requirement of purposeful, violent, and aggressive conduct

Reckless, Negligent, or Strict Liability Crimes

- Under *Begay's* requirement of purposeful, violent, and aggressive conduct, it is unlikely that strict liability and negligent crime will meet the purposeful requirement; questionable whether a reckless crime will meet the purposeful requirement

Analysis in the Categorical Approach

As Demonstrated by Scenario

Scenario

- Defendant's instant conviction is bank robbery
- Defendant has three prior felony convictions
 - Assault on a law enforcement officer
 - Causing injury to child
 - Failure to stop for blue light

Scenario (cont.)

- Do the defendant's instant offense of conviction and prior convictions fall into the category of a "crime of violence" under the Career Offender guideline?

Career Offender Guideline Definition for “Crime of Violence”

§4B1.2(a)

- *has as an element* the use, attempted use, or threatened use of physical force against the person of another, or
- *is* burglary of a dwelling, arson, or extortion, involves use of explosives, or
- *otherwise involves conduct* that presents a serious potential risk of physical injury to another

Robbery

- A review of the federal statute for the offense of conviction for robbery has the elements of using physical force and intimidation to take property from another
- The instant offense of conviction has the required elements to meet the Career Offender definition under the *elements section*

Assault on a Law Enforcement Officer

- A review of the state statute for the offense of conviction for assault on a law enforcement officer has the elements of using physical force or a dangerous weapon to attempt to cause bodily injury to an individual known to the defendant to be a law enforcement officer
- The prior offense of conviction has the elements to meet the Career Offender definition under the *elements section*

Causing Injury to a Child

- A review of the state statute shows that the offense of causing injury to a child can occur in one of two ways: Using physical force with intent to cause the child bodily injury; or negligently placing the child in an unsafe environment which results in the child suffering bodily injury. Thus, the court will have to use the modified categorical approach to determine which section of the statute the defendant was convicted of

Causing Injury to a Child (cont.)

- The indictment only cites the statutory code which includes both ways in which the statute can be violated
- A review of the plea agreement and plea colloquy does not confirm that the factual basis for the plea was that he had physically assaulted a child with intent to injure the child

Causing Injury to a Child (cont.)

- Because it is not clear that the prior offense of conviction is one that has the elements of physical force against the person of another, it does not meet the Career Offender definition under the *elements section*

Causing Injury to a Child (cont.)

- Because the offense of negligently placing the child in an unsafe environment which results in the child suffering bodily injury is not specifically listed in the Career Offender definition, the prior does not meet the Career Offender definition under the *enumerated section*

Causing Injury to a Child (cont.)

- Because the offense of negligently placing the child in an unsafe environment which results in the child suffering bodily injury does not meet the *Begay* requirement of purposeful, violent, and aggressive conduct, it does not meet the Career Offender definition under the *residual clause section*

Failure to Stop for Blue Light

- A review of the state statute shows the offense of failure to stop for a blue light has the elements of a driver of a motor vehicle willfully failing to stop the vehicle upon notification by a blue light operated by an authorized law enforcement officer

Failure to Stop for Blue Light (cont.)

- Because the prior offense of conviction is not one that has the elements of physical force against the person of another, it does not meet the Career Offender definition under the *elements section*

Failure to Stop for Blue Light (cont.)

- Because the offense of failure to stop for blue light is not specifically listed in the Career Offender definition, the prior does not meet the Career Offender definition under the *enumerated section*

Failure to Stop for Blue Light (cont.)

- Because the offense of failure to stop for blue light is an intentional crime the only test is whether it the offense has a serious potential risk of physical injury to another (*See Sykes*). As the Supreme Court found in *Sykes*, flight in a vehicle from a law enforcement officer meets this test, thus, this offense is a crime of violence