

A PEACEful Guide to “Crimes of Violence”

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A “crimes of violence” analysis often proves counterintuitive, to say the least. After all, who would have thought that discharging a weapon into occupied property, second-degree rape, and aggravated assault with a deadly weapon would *not* qualify as crimes of violence? See, respectively, *United States v. Parral-Dominguez*, 794 F.3d 440 (4th Cir. 2015); *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015); *United States v. Barcenas-Yanez*, 826 F.3d 752 (4th Cir. 2016).

To gain “peace of mind” in this ever-evolving area of the law, follow the five “PEACE” steps outlined below to determine whether your client can be held responsible for a federal “crime of violence.”

Predicates: identify the two predicates—what are you comparing?

Elements: know the elements of both predicates—what does each predicate require?

Analyze: analyze the elements—how do courts define and apply them?

Categorical Comparison: compare the predicates categorically

Evaluate: Does the offense at issue categorically fit within the federal predicate?

STEP ONE

Identify the predicate offenses.

PREDICATES: First, identify the predicate offenses at issue. After all, you can’t make a comparison until you know what you are comparing. What offense has your client been convicted of/charged with? Is it a state offense or a federal offense? Keep in mind that when we talk about “predicate offenses,” we are not limited to comparing prior convictions; we’re also talking about contemporaneous offenses, such as the contemporaneous offenses used to support a 924(c) enhancement.

After identifying the predicate offense, you must also identify the federal definition that you will be applying. Which definition of “crime of violence” are you dealing with? The phrase “crime of violence” used to be relatively synonymous across the federal statutes and Guidelines, but with the elimination of the residual clause, this is no longer the case.

Four main federal definitions for “crime of violence”:

(1) **ACCA: 18 U.S.C. § 924(e)(2)(B):**

the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that

- (i) has as an element the use, attempted use, or threatened 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*[.]

The italicized language, known as the “residual clause,” still technically exists in the statute but has been declared void for vagueness under the Supreme Court’s decision in *Johnson v. United States*, 135 S. Ct. 2551 (2015). This means that a predicate offense will only qualify as an ACCA “violent felony” if the predicate has “physical force against the person of another” as an element *or* “is burglary, arson, or extortion, [or] involves use of explosives.”

(2) **U.S.S.G. § 4B1.2:**

(a) The term “crime of violence” means 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).

Note that, effective August 1, 2016, the Sentencing Commission removed the residual clause but added additional offenses to the enumerated list of crimes that qualify. To qualify as a “crime of violence” under § 4B1.2, then, the predicate must either include physical force against a person as an element of the crime, *or* must be “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).”

(3) **18 U.S.C. § 16:**

The term “crime of violence” means—

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

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

This is the general “crime of violence” definition provided under Title 18 of the United States Code. Whether § 16(b)’s residual clause (highlighted above) remains valid in the wake of *Johnson* is the question currently pending before the Supreme Court in *Sessions v. Dimaya*, No. 15-1498 (argued Oct. 2, 2017). A decision in *Dimaya* is expected by June 30, 2018.

Notice that the force clause of § 16(b), unlike the ACCA’s force clause or the force clause of § 4B1.2., specifically includes force directed against property. For this reason, some predicate offenses may qualify as “crimes of violence” under one force clause but not another. For example, Hobbs Act robbery includes threats of force against property. Thus, Hobbs Act robbery may qualify as a crime of violence under § 16(b), but not under ACCA or the Guidelines.

(4) 18 U.S.C. § 924(c)(3):

For purposes of this subsection the term “crime of violence” means an offense that is a felony and—

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

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

Notice that the italicized residual clause language of § 924(c)(3) is identical to § 16(b)’s residual clause. For this reason, the decision in *Dimaya* will implicate § 924(c)’s residual clause.

In analyzing the residual clause of 924(c), the Fourth Circuit has instructed that “the relevant inquiry in determining whether an offense qualifies as a crime of violence is not simply whether there is a substantial risk of physical injury. Rather, the relevant inquiry is whether there is a substantial risk that the defendant will use physical force against the victim in completing the crime.” *United States v. Fuertes*, 805 F.3d 485, 500 (4th Cir. 2015). Accordingly, a generalized risk of harm is insufficient under 924(c)’s residual clause. *Id.* (holding that sex trafficking by force, fraud or coercion is not a crime of violence for purposes of 924(c)). The reasoning of *Fuertes* is helpful in cases where there the offense may present a generalized risk of physical injury, but not necessarily a substantial risk that the defendant will use physical force. For example, kidnapping by means of fraud or coercion may present a risk of injury to the victim, but not necessarily a substantial risk that the defendant will use physical force.

STEP TWO

Identify the elements of both predicates.

ELEMENTS: In identifying both predicates, you must identify the elements of each offense. Remember, the label given to the offense is not determinative. *Taylor v.*

United States, 495 U.S. 575, 591-92 (1990). In other words, just because the offense is called “burglary” doesn’t necessarily mean that the offense qualifies as federal “burglary.” To determine the elements, you must pull the statute. If it’s a common law offense, jury instructions are often a good resource. Just make sure that the statute/jury instructions have not changed over time, and that the statute/jury instructions you review are the same ones in effect at the time your client committed/was convicted of the predicate offense.

When determining the elements, don’t forget about the intent element of the crime. A mismatch between the *mens rea* elements may disqualify a predicate offense from being a crime of violence. *See, e.g., United States v. Barcenas-Yanez*, 826 F.3d 752 (4th Cir. 2016)(Texas aggravated assault with a deadly weapon not a crime of violence because the offense could be committed recklessly).

STEP THREE

Analyze the elements to understand how they have been defined and applied.

ANALYZE the elements of the predicate offense and the federal definition. Make sure you know how the courts have defined and applied the elements of both the predicate and the federal definition. For example, the term “physical force” as used in the ACCA means “violent force--that is, force capable of causing physical pain or injury to another person.” *Johnson v. United States*, 559 U.S. 133, 140 (2010). This construction of violent force specifically excludes from consideration “the slightest offensive touching.” *Id.* Thus, if the predicate offense can be committed by such offensive touching, without physical force, the offense may not qualify as a crime of violence. The Fourth Circuit has extended this definition of physical force to the Guidelines, *see United States v. Aparicio-Soria*, 740 F.3d 152, 155 (4th Cir. 2014)(en banc), as well as to 18 U.S.C. § 924(c)’s force clause, *United States v. Evans*, 848 F.3d 242, 245 (4th Cir. 2017), and 18 U.S.C. § 16(a)’s force clause, *Karimi v. Holder*, 715 F.3d 561, 566 (4th Cir. 2013). Thus, the same definition of “physical force” applies to these four federal definitions for “crimes of violence.”

For federal predicates, federal court decisions control how the elements are defined and applied. But for state predicates, federal courts are bound by state court decisions interpreting the elements of the state offense. *See Johnson*, 559 U.S. at 138 (“We are, however, bound by the Florida Supreme Court’s interpretation of state law, including its determination of the elements of [Florida battery].”). Hence the importance of understanding how a state court has interpreted and applied the elements of the offense in question.

STEP FOUR

Categorically compare the predicate offense to the federal definition.

CATEGORICAL COMPARISON. Categorically compare the elements of the predicate offense to the elements of the federal definition using the categorical approach or, where applicable, its off-shoot, the modified categorical approach.

The Categorical Approach: Facts Don't Matter

Under the categorical approach, the court compares the elements of the offense in question with the elements of the federal definition. *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013); *Taylor v. United States*, 495 U.S. 575, 599-600 (1990).

Under this elements-based approach, the actual facts of the prior conviction do not matter. The prior conviction serves as a predicate if it is defined more narrowly than, or has the same elements as, the federal definition. *Taylor*, 495 U.S. at 599. In such cases, the prior conviction “necessarily implies” that the individual is “guilty of all the elements” of the federal offense. *Id.* If, however, the statute defining the prior offense “sweeps more broadly than the generic crime,” the resulting mismatch in elements will prevent the prior conviction from fitting within the federal definition. *Id.*

Again, the “key” to this comparison is “elements, not facts.” *Descamps*, 133 S. Ct. at 2283. A sentencing court may not consult “extra-statutory materials,” *id.* at 2287, “even if [the materials show that] the defendant actually committed the [predicate] offense in its generic form,” *id.* at 2283. “What matters for the categorical approach is how the law defines the offense generically, and not the particulars of how an individual might have committed the offense on a given occasion.” *Shell*, 789 F.3d at 338.

The “elements” of an offense “are the ‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction.’” *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). At a trial, the 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.*

If you are having difficulty determining the elements of an offense, jury instructions often provide helpful guidance.

Remember that the categorical approach controls even when comparing contemporaneous offenses, such as the contemporaneous offenses used to support a 924(c) enhancement. *See, e.g., United States v. Faulls*, 821 F.3d 502, 514 n.5 (4th Cir. 2016) (noting that the categorical approach applies to both prior convictions and instant offenses); *United States v. Fuertes*, 805 F.3d 485 (4th Cir. 2015) (applying categorical approach to contemporaneous offense).

Divisible Offenses

Occasionally, an offense may encompass different versions of a crime, some of which may be violent, some of which may be non-violent. For example, sex trafficking by force fraud or coercion, 18 U.S.C. § 1591(a), encompasses both non-violent sex trafficking (by fraud or coercion) and violent sex trafficking (by force). Similarly, kidnapping can be committed through fraud (non-violent) or force (violent).

The question then becomes whether the offense is “divisible.”

An offense is divisible when it has “multiple alternative elements.” *United States v. Covington*, 880 F.3d 129, 132 (4th Cir. 2018). Remember, elements are those essential parts of the crime that the jury must find beyond a reasonable doubt. If the jury is never asked to determine whether the crime is violent or non-violent, then the offense is not divisible. See *Fuertes*, 805 F.3d at 498 (“A statute is indivisible when the jury need not agree on anything past the fact that the statute was violated.”). Instead, whether the offense is committed violently or non-violently are simply different factual means by which the offense can be committed. *Mathis*, 136 S. Ct. at 2249. For example, in *Fuertes*, the Fourth Circuit determined that sex trafficking by force, fraud or coercion is an indivisible offense because jurors are never asked to unanimously agree on whether the defendant used force or fraud to commit sex trafficking. Instead, force or fraud are simply different means by which sex trafficking can be committed. Because the offense does not contain alternative elements, sex trafficking by force, fraud or coercion is not divisible.

Watch out for the word “or” when determining divisibility. The use of disjunctive language does not mean that a statute is divisible. *Omargharib v. Holder*, 775 F.3d 192, 194 (4th Cir. 2014) (“[M]ere use of the disjunctive ‘or’ in the definition of a crime does not automatically render it divisible.”). “Any statutory phrase that—explicitly or implicitly—refers to multiple, alternative means of commission must still be regarded as indivisible if the jurors need not agree on which method of committing the offense the defendant used.” *Fuertes*, 805 F.3d at 498. Rather, if a statute merely contains alternative means of satisfying a single element, and not alternative elements, the statute is not divisible. See, e.g., *United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013) (finding that “offensive physical contact” and “physical harm” were not alternative elements but were merely alternative means of determining the first element of assault under Maryland state law and therefore did not render the offense divisible). If the statute is indivisible, the categorical approach is used. *Descamps*, 133 S.Ct. at 2281.

Once again, jury instructions are helpful when determining divisibility. Another good clue for determining divisibility is whether different punishments apply. If the offense carries different levels of punishment, the offense will probably be divisible. See *Mathis*, 136 S.Ct. at 2256 (“If statutory alternatives carry different punishments, then under *Apprendi* they must be elements.”).

The Modified Categorical Approach: Facts Still Don't Matter

If the offense is divisible, courts apply the “modified categorical approach” to determine whether the defendant was convicted of a crime that corresponds to the federal predicate at issue.

Like the categorical approach, the modified categorical approach “focuses on elements rather than facts.” *United States v. Price*, 777 F.3d 700, 705 (4th Cir. 2015). “The modified approach comes into play if the defendant was previously convicted under a divisible statute, meaning that the offense contains a set of alternative elements.” *Id.* (citing *Descamps*, 133 S. Ct. at 2281). In such circumstances, the court may consult “limited” documents from the underlying case to learn “which alternative element formed the basis of conviction.” *Id.* (citing *Shepard v. United States*, 544 U.S. 13, 19-20 (2005)). These documents, known as “*Shepard* documents” include: “the indictment or information; the plea agreement or transcript of the plea colloquy; the court’s formal legal rulings and factual findings of a bench trial; and jury instructions.” *Id.* (citing *Shepard*, 544 U.S. at 20, 26). However, the court may *not* consult police reports or other investigative material. *United States v. Flores-Granados*, 783 F.3d 487, 491 (4th Cir. 2015) (cautioning that “[a] police report, untested and unproven, is not a legitimate source of factual information for courts to rely on even under the modified categorical approach of *Taylor* and *Shepard*”). Instead, “[t]he focus of the modified categorical approach remains squarely on the elements of the prior conviction . . . and the reviewing court is not entitled to assess whether the defendant’s actual conduct matches the federal statute.” *Price*, 777 F.3d at 705.

If the *Shepard* documents do not conclusively establish that the defendant was convicted of the version of the offense that corresponds to the federal predicate, the conviction cannot serve as a crime of violence. *United States v. McLeod*, 808 F.3d 972, 977 (4th Cir. 2015) (because *Shepard* documents did not reveal whether defendant pleaded guilty to generic or nongeneric burglary, the conviction could not qualify as ACCA predicate).

STEP FIVE

Evaluate to determine whether the predicate fits within the federal definition.

EVALUATE to determine whether predicate offense is broader than the federal definition. If the predicate offense encompasses more conduct than included within the federal definition, the predicate offense does not “categorically” match, i.e., the offense is overbroad and will not qualify under the federal crime of violence definition.

For example, the Fourth Circuit recently held that conspiracy to commit murder in aid of racketeering, 18 U.S.C. § 1959(a)(5), is not a crime of violence under § 4B1.2. See *United States v. McCollum*, No. 17-4296, __ F.3d __, 2018 WL 1386159 (4th Cir. Mar. 20, 2018). How did the Court reach such a counterintuitive result? The Court determined that generic conspiracy under § 4B1.2 requires proof of an overt act as an element of the offense. A conspiracy under § 1959(a)(5), however, does not require an

overt act. The Court reasoned: “Because § 1959(a)(5) does not require an overt act, it criminalizes a broader range of conduct than that covered by generic conspiracy. McCollum’s § 1959(a)(5) conviction therefore cannot support his enhanced sentence because it is not categorically a crime of violence.”

Notably, like § 1959(a)(5), North Carolina conspiracy does not require an overt act. *See, e.g., State v. Bindyke*, 288 N.C. 608, 616, 220 S.E.2d 521, 526 (1975); *State v. Horton*, 275 N.C. 651, 170 S.E. 2d 651 (1969); *State v. Shelly*, 176 N.C. App. 575, 627 S.E.2d 287 (2006). For this reason, under the reasoning of *McCollum*, North Carolina conspiracy offenses will not qualify as “crimes of violence” under § 4B1.2.

CONCLUSION

Finally, don’t despair if this analysis leaves you scratching your head—the categorical analysis is not easy for anyone, including appellate judges. Witness Judge Traxler’s concurring opinion in *McCollum*:

TRAXLER, Circuit Judge, concurring:

The dissent ends with the dramatic lament, “Heaven help us.” Frankly, I would be satisfied if Congress or the Supreme Court would help us. The law in this area, which Judge Duncan faithfully follows, leads to some seemingly odd results with which I do not think any of us are particularly happy. But until help comes from some higher level in the form of substantive changes, this decision, in my judgment, is what the law requires.

The takeaway? Make sure you understand what the law requires before accepting that your client has committed a “crime of violence.”