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**Categorical Approach**

*This monograph is current as of April 12, 2025, and is updated periodically. Please direct comments and suggestions to AUSA Bob Zauzmer, Chief of Appeals, EDPA, [bob.zauzmer@usdoj.gov](mailto:bob.zauzmer@usdoj.gov), 215–861–8568.*

*The monograph catalogues pertinent precedential decisions announced since the Supreme Court’s June 2016 decision in Mathis, which significantly affected the application of the categorical approach. If you believe earlier decisions remain binding and significant, please forward those references to AUSA Zauzmer, along with any other comments and suggestions.*

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## I.      Overview of the Categorical Approach

Under a number of recidivist sentencing provisions, most prominently the Armed Career Criminal Act (ACCA), [18 U.S.C. § 924\(e\)](#), and the career offender provision, [U.S.S.G. § 4B1.1](#), the court must determine whether the defendant incurred a prior conviction for the type of offense described in the sentencing provision. For instance, the application of ACCA requires a determination of whether the defendant has prior convictions for a “violent felony” or a “serious drug offense,” and each of these terms is defined in the statute. In other statutes, that the instant offense occurred in relation to a “crime of violence” must be proven, most notably in [18 U.S.C. § 924\(c\)](#), which bars the possession, use, or carrying of a firearm in relation to a “crime of violence”; or that the instant offense was a “crime of violence” must be established, *see, e.g.*, [18 U.S.C. § 25](#) (use of a minor to commit a crime of violence).

With respect to many such provisions, including those cited in the preceding paragraph, in determining whether a defendant’s crime meets the pertinent definition, the court must apply a “categorical approach.” Under this approach, the facts of the offense at issue do not matter; what matters is whether the statute at issue in either the previous conviction or the instant offense categorically meets the pertinent federal definition. For instance, part of the definition of “violent felony” in ACCA provides that a prior offense qualifies if it “has as an element the use, attempted use, or threatened use of physical force against the person of another” (this is referred to as the “elements clause” or “force clause”). Under the categorical approach, a prior conviction will qualify if the statute of conviction at issue categorically requires, in every instance, proof of the use, attempted use, or threatened use of physical force against the person of another.

If the statute of conviction at issue is overbroad, that is, it applies to conduct that both falls within and outside the federal definition, then a conviction under the statute will not qualify. To repeat the previous example, a crime will not count as a “violent felony” under the “elements clause” of ACCA quoted above if the statute may be violated without proof of physical force. That the defendant may have earned his prior conviction by actually using physical force against another person is irrelevant under the categorical approach. Application of the elements clause “does not require—in fact, it precludes—an inquiry into how any particular defendant may commit the crime. The only relevant question is whether the federal felony at issue always requires the government to prove—beyond a reasonable doubt, as an element of its case—the use, attempted use, or threatened use of force.” [\*United States v. Taylor\*, 596 U.S. 845, 850 \(2022\).](#)

The question is “whether the least serious conduct that the offense’s elements encompass” satisfies the pertinent federal definition. *United States v. Ellison*, 866 F.3d 32, 35 (1st Cir. 2017). The Supreme Court stated: “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.” *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010), brackets in original). See *United States v. Starks*, 861 F.3d 306, 324 (1st Cir. 2017) (“Thus, if a crime involves a taking of \$1 to \$1000, we must assume that a conviction was for taking \$1.”).

In the 2022 decision in *Taylor*, for instance, the Supreme Court concluded that attempted Hobbs Act robbery does not categorically qualify as a “crime of violence” under 18 U.S.C. § 924(c), because one may imagine an attempt offense in which the defendant did not actually use or threaten force. The Court set forth a hypothetical, in which a person named “Adam” planned to rob a business, researched its security measures and business practices, drafted a demand note, and bought supplies and planned his escape, all to be arrested as he crossed the threshold into the store. *Taylor*, 596 U.S. at 851–52. Based on the possibility of such a prosecution for attempted Hobbs Act robbery, that did not reach a moment at which actual force was applied or threatened, the Court held that no such offense qualifies as a “crime of violence” – even though in the *Taylor* case itself, the defendant, during an aborted robbery, actually killed the victim. See also *Wallace v. United States*, 43 F.4th 595 (6th Cir. 2022) (necessarily vacating 924(j) conviction based on attempted Hobbs Act robbery, under *Taylor*, even though the attempted robbery left one robber dead and a store employee shot and profoundly injured).

If a statute is “divisible,” that is, it presents alternative elements, the court may apply a “modified categorical approach” to determine whether the defendant was convicted of a divisible portion of the statute which meets the pertinent federal definition. In conducting this inquiry, the court remains barred from considering the actual facts, and is instead limited to review of a specific set of judicial documents (so-called “Shepard documents,” see *Shepard v. United States*, 544 U.S. 13 (2005)) to decide whether the defendant was convicted of the divisible part that meets the federal definition. “The key,” the Supreme Court stated, “is elements, not facts.” *Descamps v. United States*, 570 U.S. 254, 261 (2013). “Facts . . . are mere real-world things—extraneous to the crime’s legal requirements. . . . And ACCA, as we have always understood it, cares not a whit about them.” *Mathis v. United States*, 579 U.S. 500, 504 (2016). “How a given defendant actually perpetrated the crime—what we have referred to as the ‘underlying brute facts or means’ of commission, [*Richardson v. United States*, 526 U.S. 813, 817 (1999)]—makes no difference; even if his conduct fits within the generic offense, the mismatch of elements saves the defendant from an ACCA

sentence.” *Mathis*, 579 U.S. at 509. *United States v. Davis*, 875 F.3d 592, 604 (11th Cir. 2017) (“the true facts matter little, if at all, in this odd area of the law”).

The categorical approach also applies where a federal statute “enumerates” specific crimes that qualify for a sentencing enhancement. For instance, ACCA specifies that “burglary,” “arson,” “extortion,” and “use of explosives” are “violent felonies.” In these instances, the label given to a statute of conviction by a legislature is irrelevant. Rather, the federal sentencing court must first define the “generic” version of the offense, based on the consensus of states. Then, it must apply the categorical approach to determine if the particular statute of conviction meets that generic determination. Again, the facts of the defendant’s earlier crime are irrelevant.

In *Quarles v. United States*, 587 U.S. 645 (2019), addressing the generic definition of “burglary” under the ACCA, the Supreme Court suggested a little give in the categorical approach, at the least with regard to enumerated offenses. It cautioned that statutes should not be interpreted in a manner that would eliminate most state crimes of the same type from the generic definition selected by Congress, stating, “That result not only would defy common sense, but also would defeat Congress’ stated objective of imposing enhanced punishment on armed career criminals who have three prior convictions for burglary or other violent felonies. We should not lightly conclude that Congress enacted a self-defeating statute.” *Id.* at 654. The Court added that in *Taylor v. United States*, 495 U.S. 575 (1990), which adopted the categorical approach, the Court “cautioned courts against seizing on modest state-law deviations from the generic definition of burglary. A state law’s ‘exact definition or label’ does not control. *Id.* at 599. As the Court stated in *Taylor*, so long as the state law in question ‘substantially corresponds’ to (or is narrower than) generic burglary, the conviction qualifies under § 924(e). *Id.* at 602.” *Quarles*, 587 U.S. at 654–55.

All circuits explain the categorical approach similarly. See, e.g., *United States v. Faust*, 853 F.3d 39, 50–53 (1st Cir. 2017); *United States v. Bordeaux*, 886 F.3d 189, 193 (2d Cir. 2018); *United States v. Dahl*, 833 F.3d 345, 350 (3d Cir. 2016); *United States v. Covington*, 880 F.3d 129, 132 (4th Cir. 2018); *United States v. Enrique-Ascencio*, 857 F.3d 668, 676 (5th Cir. 2017); *Richardson v. United States*, 890 F.3d 616, 619–24 (6th Cir. 2018); *Van Cannon v. United States*, 890 F.3d 656, 662–63 (7th Cir. 2018); *United States v. Naylor*, 887 F.3d 397, 399–400 (8th Cir. 2018) (en banc); *United States v. Walton*, 881 F.3d 768, 771 (9th Cir. 2018) (“Counterintuitive though it may seem, to determine whether a defendant’s conviction under a state criminal statute qualifies as a violent felony under the force clause, we do not look to the underlying facts of the defendant’s actual conviction.”); *United States v. Kendall*, 876 F.3d 1264, 1267–69 (10th Cir. 2017); *United States v. Vail-Bailon*, 868 F.3d 1293, 1296–97 (11th Cir. 2017) (en banc); *United States v. Haight*, 892 F.3d 1271, 1279 (D.C. Cir. 2018) (Kavanaugh, J.).

The application of the categorical approach requires an analysis of myriad state as well as federal statutes that may satisfy a federal recidivist sentencing provision. The Department instructs that prosecutors should consult with the district or districts in the state from which a conviction arises, both to vet arguments and to obtain sample briefs. Here are [lists](#) of Appellate Chiefs and Criminal Chiefs who may be consulted.

“[D]eciding whether a crime is a ‘crime of violence’ under § 924(c) is largely a matter of statutory interpretation, a legal task for the judge, not a factual one for the jury.” *United States v. Jefferson*, 911 F.3d 1290, 1296 (10th Cir. 2018).

In *Shular v. United States*, 589 U.S. 154 (2020), the Court stated that there are different categorical approaches that apply to the different types of predicates (“violent felony” and “serious drug offense”) in ACCA. The type of categorical approach applied to a “violent felony,” that is seen most commonly and is the subject of the bulk of this monograph, seeks to identify whether the elements of the offense at issue match or are narrower than the elements of the prior crime described in the pertinent federal law. In contrast, to determine whether a person incurred a previous “serious drug offense” subject to ACCA, the question is whether the elements of the offense at issue necessarily entail one of the types of conduct described in the statute. This less frequently applied categorical approach is discussed in Part VIII.

As discussed below, in light of the fact that the actual facts of a defendant’s conduct are irrelevant to the application of the categorical approach, there may be anomalous results, as where a defendant who committed an exceedingly violent act might not be held accountable under a recidivism statute meant to incapacitate such offenders, if others could violate the same statute of conviction in a manner that does not satisfy the federal requirement. In those circumstances, a prosecutor may consider requesting an upward departure or variance, if within the statutory maximum for all counts of conviction, to obtain a more appropriate sentence in line with Congressional intent.

In *United States v. Carter*, 961 F.3d 953 (7th Cir. 2020), while finding that a particular offense qualified as a crime of violence under the categorical approach, the court went out of its way to explain at length that courts should consider variances based on a defendant’s actual conduct in those cases where application of the categorical approach, which focuses on hypothetical conduct of other people, would produce an odd result. Judge Hamilton wrote in part: “we also remind district courts that the classification of prior convictions under the Sentencing Guidelines can produce abstract disputes that bear little connection to the purposes of sentencing. As the Sentencing Commission itself has recognized since the Sentencing Guidelines were first adopted, district judges may and should use their sound discretion to sentence under 18 U.S.C. § 3553(a) on the basis of reliable information about the defendant’s criminal history even where strict categorical classification of a prior conviction might

produce a different guideline sentencing range.” *Id.* at 954. In a dissenting opinion in an immigration case, Justice Breyer, while explaining the categorical approach at length, made the same point: “in the ACCA context, a sentencing judge, even where ACCA is inapplicable, has some discretion in determining the length of a sentence. If he finds that the present defendant in fact burgled, say, a dwelling and not a boat, he can take that into account even if the sentencing enhancement does not apply.” *Pereida v. Wilkinson*, 592 U.S. 224, 250 (2021). See also *United States v. Graham*, 67 F.4th 218, 226-29 (4th Cir. 2023) (Wilkinson, J., concurring) (presenting a lengthy statement encouraging district courts to consider actual facts both in setting guideline ranges and then granting upward departures or variances as necessary to correct the impact of application of the categorical approach, as “[t]here are limits to the miles that sentencing practice can travel beyond common sense.”); *United States v. Dennis*, 81 F.4th 764, 769-70 (8th Cir. 2023) (stating that where 924(c) sentence was vacated under *Taylor*, the court could increase the sentence on the remaining counts, but to a term no longer than the original aggregate sentence). Cf. *United States v. Fulks*, 120 F.4th 146, 163 (4th Cir. 2024) (rejecting challenge to 924(c) application to a carjacking resulting in rape and murder, stating, “At a certain point in time, however, reality has a way of breaking through.”).

Thus, in *United States v. Fuentes-Canales*, 902 F.3d 468 (5th Cir. 2018), the court held that Texas burglary of a habitation, in violation of Tex. Penal Code § 30.02(a) and (d), is broader than and does not qualify as burglary of a dwelling under the former § 2L1.2. But the court affirmed the sentence on the basis of the fourth prong of plain error review, given that the jury in the previous case actually found generic burglary or aggravated assault, and the undisputed facts in the PSR also demonstrated that the crime was violent. The court added: “While courts cannot consider the factual means by which a defendant committed a prior offense for purposes of arriving upon the correct Guidelines sentencing range, the defendant’s actual commission of a ‘crime of violence’ or other evidence regarding the defendant—if sufficiently supported by the record—may be considered in imposing a sentence well outside the advisory Guidelines range.” *Id.* at 477. See also *United States v. Gardner*, 939 F.3d 887, 891 (7th Cir. 2019) (the district court did not err, after accurately calculating the guideline range, in varying upward to the range that would have applied when burglary was deemed a crime of violence under the Guidelines, given the violent nature of the defendant’s prior burglary). See also *United States v. Mills*, 917 F.3d 324 (4th Cir. 2019) (the court need not resolve whether a particular offense qualified as a crime of violence where the sentencing court stated that it would impose the same sentence regardless of the guideline range, and that was reasonable); *United States v. Abed*, 3 F.4th 104 (4th Cir. 2021) (the defendant was originally sentenced to 570 months, including 360 months for a 924(c) destructive device charge that was later vacated due to *Davis*; on remand, the court granted an upward variance from the range of 188–235 months to a term of 360 months; the Court of Appeals rejects challenges premised on the Ex Post Facto Clause, due process, and the law of the case doctrine); *United States v. Davis*, 932 F.3d 1150

(8th Cir. 2019) (same); *United States v. Marin*, 31 F.4th 1049, 1056–58 (8th Cir. 2022) (affirming a sentence regardless of whether a prior conviction qualified as a “crime of violence” under the Guidelines, as the district court made clear that it would have imposed the same sentence as an upward variance); *United States v. Door*, 996 F.3d 606, 622–23 (9th Cir. 2021) (after sentences were vacated based on application of the categorical approach to prior convictions, the district court reimposed the same 276-month sentence, as a variance from the current range of 140–175 months; the sentence is affirmed as substantively reasonable); *United States v. Lassiter*, 1 F.4th 25, 31 (D.C. Cir. 2021) (where a 924(c) sentence is vacated, the court may adjust the sentences on other counts if the original sentence was part of a package; “it is appropriate to presume that a district judge intended a sentencing package. Logically, this should be especially true when the judge imposed a below-guidelines sentence for the violent felony.”); *United States v. Mink*, 9 F.4th 590, 614 (8th Cir. 2021) (upon vacating a 924(c) conviction, the court vacates the entire sentence under the sentencing package doctrine, as the total sentence otherwise would be reduced from 600 months to 240 months).

In *United States v. Valdez-Lopez*, 4 F.3d 886 (9th Cir. 2021), the court affirmed a new sentence that was *higher* than the original sentence. In that case, after the court vacated a 924(c) conviction on the basis that hostage-taking is no longer a 924(c) predicate, it increased the overall sentence. The Court of Appeals observed that the new sentence was imposed by a different judge, there was no showing of vindictiveness, and “a court conducting a resentencing may exercise its independent judgment, and nothing in the Due Process Clause or the Sentencing Reform Act suggests that the court must be constrained by the prior sentencer’s choices.” *Id.* at \*4.

In *United States v. Augustin*, 16 F.4th 227 (6th Cir. 2021), the Court held that where a district court vacates a 924(c) conviction following *Davis*, it has “broad discretion” to choose to either vacate the entire sentence, and conduct a full resentencing proceeding, or simply vacate the 924(c) conviction and consecutive term and leave the remainder of the original sentence intact. In the latter circumstance, there is no right to counsel. In *Augustin*, the appellate court concluded that the district court did not abuse its discretion in simply vacating a 924(c) conviction and sentence (that had been predicated on kidnapping), where the guideline range remained unchanged and the 924(c) term did not affect the calculation of the remaining sentence. *See also Clark v. United States*, 76 F.4th 206 (3d Cir. 2023) (a certificate of appealability is required to challenge the district court’s decision not to hold a full resentencing proceeding when vacating the conviction and sentence on an invalid 924(c) charge; here, the Court denies a COA as reasonable judges would not disagree that the district court did not err in denying resentencing on a count that produced a life sentence independent of the 924(c) charge).

*See also* [United States v. Capers](#), 20 F.4th 105, 128 (2d Cir. 2021) (where a 924(c) conviction possibly rested on an invalid predicate and thus must be vacated, the district court need not necessarily hold a new trial; it may reassess the sentence on the remaining counts, which may be appropriate given the appearance that the court determined the proper total sentence and then simply imposed five years of that to run consecutively on the 924(c) count as required by law); [United States v. Pena](#), 58 F.4th 613, 623 (2d Cir. 2023) (where the defendant faced mandatory life sentences on other counts, the district court did not abuse its discretion in declining to engage in a “strictly ministerial” de novo resentencing.); [Hall v. United States](#), 58 F.4th 55, 63 (2d Cir. 2023) (where a 924(c) count is vacated, the court may consider whether to revise the sentence on remaining counts “to fulfill the purposes of sentencing”).

Another option where a previous count of conviction or sentence is vacated due to application of the categorical approach may be to seek reinstatement of other charges that were dismissed as part of a plea agreement, or to convert the defendant’s conviction for an aggravated offense to one for a lesser included offense that does not rest on the invalid predicate. *But see* [United States v. Petties](#), 42 F.4th 388 (4th Cir. 2022) (where the defendant pled guilty to committing a crime of violence – kidnapping – while having failed to register as a sex offender, in violation of 18 U.S.C. § 2250(d), and that predicate is now invalid, the government then sought to reinstate a dismissed, lesser-included charge of failure to register as a sex offender; the court deemed this impermissible because this option was not preserved in the plea agreement).

## **II. Provisions to Which the Categorical Approach Applies**

### **A. Armed Career Criminal Act (ACCA)**

The Armed Career Criminal Act (ACCA), codified at 18 U.S.C. § 924(e), increases the mandatory minimum sentence for a defendant convicted of 18 U.S.C. § 922(g) (prohibited person in possession of a firearm) to 15 years’ imprisonment if he or she has three previous convictions for either a “violent felony” or a “serious drug offense.” Absent this enhancement, the maximum term for a 922(g) offense is 10 years. The categorical approach requires that a previous statutory offense categorically match the definition of “violent felony” or “serious drug offense” stated in ACCA. The requirements are discussed in great detail below.

ACCA states:

(A) the term “serious drug offense” means—

(i) an offense 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 for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act ([21 U.S.C. § 802](#))), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(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 [this is referred to as the “elements clause” or “force clause” of the definition of “violent felony”]; or

(ii) is burglary, arson, or extortion, involves use of explosives [this is the “enumerated clause”], or otherwise involves conduct that presents a serious potential risk of physical injury to another [this is the “residual clause”].

In *Johnson v. United States*, 576 U.S. 591 (2015), the Court struck down the residual clause (the final passage beginning “or otherwise . . .”) as unconstitutionally vague. Therefore, any violent felony under ACCA must qualify under either the elements clause or the enumerated clause set forth above.

## B. [18 U.S.C. § 16](#)

This statute defines the term “crime of violence,” and the categorical approach applies in determining whether an offense meets this definition. The statute provides:

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.

Subsection (a) is the “elements” or “force” clause. Subsection (b) is the “residual clause,” In *Sessions v. Dimaya*, 584 U.S. 148 (2018), the Supreme Court invalidated the residual clause as unconstitutionally vague. Thus, only the “elements clause” of § 16(a) remains.

The § 16 definition is applied in dozens of federal statutes, notably including:

- 8 U.S.C. § 1101(a)(43)(F) (part of definition of “aggravated felony” in immigration law)—this definition is then imported into the penalty enhancement provision of 8 U.S.C. § 1326 (illegal reentry)
- 18 U.S.C. § 25 (use a minor to commit a federal crime of violence)
- 18 U.S.C. § 931 (possession of body armor by person convicted of crime of violence)
- 18 U.S.C. § 1952(a)(2) (travel to commit crime of violence to further unlawful activity)
- 18 U.S.C. § 1956(c)(7)(B)(ii) (part of definition of “specified unlawful activity” in money laundering statute)
- 18 U.S.C. § 1959 (violent crime in aid of racketeering)
- 18 U.S.C. § 2250 (person who fails to register under SORNA and commits crime of violence)
- 18 U.S.C. § 2261 (interstate domestic violence)
- 18 U.S.C. §§ 3142, 3156(a)(4) (pretrial detention statute)
- 18 U.S.C. § 3553(f) (as amended and applicable to convictions entered after Dec. 21, 2018) (safety valve provision)
- 18 U.S.C. § 3663A (mandatory restitution)
- 18 U.S.C. § 5032 (juvenile delinquency proceedings)
- 21 U.S.C. § 841(b)(7)(A) (distribution of drugs with intent to commit a crime of violence)

A list of other less frequently applied statutes appears [here](#).

Specifically, with regard to the safety valve, Section 402 of the First Step Act, effective December 21, 2018, expands eligibility for safety valve relief from a statutory mandatory minimum sentence. The Act amended [18 U.S.C. § 3553\(f\)](#), which previously limited the safety valve to an offender with no more than one criminal history point under the Guidelines (who also met other criteria), to now allow relief to a person with no more than four criminal history points. However, under the Act, a person is not eligible if he has any prior three-point offense, or any two-point “violent offense.”

Safety valve relief requires complete disclosure by the defendant of all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan. The First Step Act added: “Information disclosed by a defendant under this subsection may not be used to enhance the sentence of the defendant unless the information relates to a violent offense.”

The Act added [18 U.S.C. § 3553\(g\)](#), which states that “the term ‘violent offense’ means a crime of violence, as defined in section 16, that is punishable by imprisonment.” The categorical approach will apply in determining whether a prior conviction was for such a “violent offense.” That determination will be relevant in determining the nature of a previous two-point offense, and in applying the proffer protection added in the Act.

### C. [18 U.S.C. § 924\(c\)](#)

Section [924\(c\)](#) addresses, the possession, use, or carrying of a firearm in relation to a “crime of violence” or “drug trafficking crime.”

The definition of “drug trafficking crime” is straightforward, limited to a set of federal offenses: “any 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.](#)” [18 U.S.C. § 924\(c\)\(2\).](#)

Like section 16, this statute defines “crime of violence” in an “elements clause” and a “residual clause,” stating:

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.

#### [18 U.S.C. § 924\(c\)\(3\)](#).

In *United States v. Davis*, 588 U.S. 445 (2019), the Court invalidated the residual clause in section 924(c) as unconstitutionally vague. This issue is discussed in detail below. [See Part IX\(B\) \(§ 16\(b\) and § 924\(c\) Residual Clauses\)](#). Thus, a crime may qualify under the “crime of violence” definition in section 924(c) only under the elements clause.

The [924\(c\)](#) definition is also applied in other statutes, including:

- [18 U.S.C. § 844\(o\)](#) (transfer of explosive materials for use in a crime of violence or drug trafficking crime)
- [18 U.S.C. § 1028](#) (identity theft in connection with a crime of violence)

In *United States v. Gillis*, 938 F.3d 1181, 1199–1203 (11th Cir. 2019), the court held that the offense of solicitation of a violent crime, [18 U.S.C. § 373](#), is similar to [Section 924\(c\)](#) and likewise requires application of the categorical approach.

#### **D. Three Strikes Statute**

The “three strikes” statute, [18 U.S.C. § 3559\(c\)](#), imposes a mandatory life sentence on a person who commits a “serious violent felony” following conviction for two or more “serious violent felonies,” or one or more “serious violent felonies” and one or more “serious drug offenses.”

The definition of “serious violent felony” includes an elements clause and residual clause identical to those in [§ 924\(c\)\(3\)](#), as well as a description of enumerated offenses that does not appear in [§ 16](#) or [§ 924\(c\)\(3\)](#), and which is much more detailed than the enumerated clause in ACCA. [See also the Three Strikes topic page](#).

In the first reported appellate decision addressing the statute since *Johnson*, the Tenth Circuit applied the categorical approach and held that Oklahoma’s first degree manslaughter statute did not meet the generic definition of “manslaughter” in the statute and therefore did not qualify. *United States v. Leaverton*, 895 F.3d 1251(10th Cir. 2018).

In *United States v. Ruska*, 926 F.3d 309 (6th Cir. 2019), the court held that the “use of force” clause in the definition of “serious violent felony” in the three-strikes

statute, [18 U.S.C. § 3559\(c\)\(2\)\(F\)\(ii\)](#), is interpreted just like the Armed Career Criminal Act's use of force clause. *See also Langford v. United States*, 993 F.3d 633 (8th Cir. 2021) (discussion of three-strikes statute and the categorical approach; holds that a 1975 conviction for aggravated robbery, Iowa Code §§ 711.1, 711.2, and a 1989 conviction for first-degree robbery under § 711.2, were each a “serious violent felony” under § 3559).

The definition of “serious violent felony” in the three strikes statute also applies to defendants who are sentenced under [21 U.S.C. § 841\(b\)\(1\)\(A\), \(B\)](#), in sentencing proceedings that take place after the enactment of the [First Step Act](#) on December 21, 2018. Under the statute as amended by the First Step Act, those who commit drug trafficking offenses are subject to higher mandatory minimum sentences depending on the type and quantity of drug, if they had one or more prior convictions for a “serious drug felony” or a “serious violent felony.” “Serious violent felony” is described in [21 U.S.C. § 802\(58\)](#) (effective Dec. 21, 2018) as an offense described in [18 U.S.C. § 3559\(c\)\(2\)](#), for which the offender served a term of imprisonment of more than one year (that limitation is not present in the three strikes statute).

## E. Aggravated Felony

Under [8 U.S.C. § 1101\(a\)\(43\)](#), part of the Immigration and Nationality Act (INA), the term “aggravated felony” is defined for purposes of federal immigration law to encompass numerous offenses. The provision includes 21 subparts, describing myriad offenses from murder to fraud to perjury and much more. A prior conviction for an “aggravated felony” can be a basis for removal, bar eligibility for many forms of relief from deportation, and require expedited procedures and mandatory detention.

When the government alleges that a conviction qualifies as an “aggravated felony” under the INA, “we generally employ a ‘categorical approach’ to determine whether the state offense is comparable to an offense listed in the INA.” *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). The Supreme Court has held that some parts of the definition, however, refer to case-specific circumstances to which the categorical approach does not apply. *Nijhawan v. Holder*, 557 U.S. 29, 37–38 (2009). *See also* the [Aggravated Felony](#) topic page.

For an exhaustive collection of case notes regarding the application of the categorical approach to aggravated felonies and crimes involving moral turpitude (CIMTs) supporting removal in immigration cases, *see* ICE attorney Donald W. Cassidy, [Removal and Inadmissibility § 4.2](#). In addition, with respect to issues presented due to the *Dimaya* decision (which invalidated part of the definition of “crime of violence” that appears in [§ 1101\(a\)\(43\)\(F\)](#)), please contact Bryan Beier, Senior Litigation Counsel for the Office of Immigration Litigation, at [bbeier@civ.usdoj.gov](mailto:bbeier@civ.usdoj.gov).

The definition of “aggravated felony” has minimal relevance to criminal prosecutions, which is the focus on this monograph. Specifically, if removal follows a conviction for an aggravated felony, as defined in the INA, the maximum term for the offense of illegal reentry is raised to 20 years. [8 U.S.C. § 1326\(b\)\(2\)](#). However, that provision does not have a notable impact on sentencing under current law. The maximum term is 10 years if removal followed conviction for any felony, and nearly all illegal reentry sentences are less than 10 years. Thus, it may be argued, any previous incorrect finding of an aggravated felony is harmless in sentencing for an illegal reentry crime. *See Larios–Villatoro v. United States*, 2017 WL 3845689, at \*1–\*2 (arguing harmlessness in Supreme Court brief opposing certiorari).

On May 7, 2018, the Fifth Circuit appellate chiefs shared a [model brief](#) making the argument that an increase in the statutory maximum sentence from 10 years to 20 years, based on a finding of an aggravated felony called into question by *Dimaya*, was harmless where the defendant was sentenced to less than 10 years and there is no indication that the increase in the statutory maximum had any impact on the sentence.

As for the Guidelines, the provision for illegal reentry, [§ 2L1.2](#), as of November 1, 2016, does not refer to “aggravated felony,” and while portions pertain to a previous conviction for a “crime of violence,” the definition provided does not depend on the definition of “crime of violence” incorporated in [§ 1101\(a\)\(43\)\(F\)](#), but on a different definition stated in the guideline itself, addressed at length elsewhere in this monograph. *See part II(F)(2)*. The term “aggravated felony” currently appears only in [U.S.S.G. § 2L1.1\(a\)\(2\)](#), which provides for an enhancement for alien smuggling if the defendant was convicted under [8 U.S.C. § 1327](#) of a violation involving an alien who previously was deported after a conviction for an aggravated felony, as defined in [8 U.S.C. § 1101\(a\)\(43\)](#).

Whether a previous offense qualifies as an aggravated felony may also arise in an illegal reentry prosecution where the defendant collaterally challenges his prior removal as incorrectly resting on a determination that he incurred an “aggravated felony” under the INA. As noted in the Department’s preliminary guidance memo regarding *Dimaya*, most collateral attacks on removal orders are prohibited by statute or other procedural limitations. *See Preliminary Guidance on Sessions v. Dimaya*, No. 15–1498, at pages 4–5 (April 17, 2018).

## F. Sentencing Guidelines

### 1. Career offender

### a. Current provision

Under § 4B1.1, a person is a “career offender” if he was at least 18 years old at the time he committed the instant offense of conviction; the instant offense of conviction is a felony that is either a “crime of violence” or a “controlled substance offense”; and he has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

The terms “crime of violence” and “controlled substance offense” are defined as follows in § 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).
- (b) The term “controlled substance offense” means 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.

Section 4B1.2(d) adds: “The terms ‘crime of violence’ and ‘controlled substance offense’ include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.” (This provision was moved to the text of the guideline effective November 1, 2023, to abrogate decisions in some Circuits that the previous presentation of this rule was ineffective because stated only in an application note.)

The categorical approach applies in determining whether the instant or a prior offense qualifies as a “crime of violence” under the “elements clause” of § 4B1.2(a)(1) or the “enumerated clause” of § 4B1.2(a)(2); or as a “controlled substance offense” under § 4B1.2(b).

The commentary to § 4B1.2, as of August 1, 2016, adds these particular rules:

Unlawfully possessing a listed chemical with intent to manufacture a controlled substance ([21 U.S.C. § 841\(c\)\(1\)](#)) is a “controlled substance offense.”

Unlawfully possessing a prohibited flask or equipment with intent to manufacture a controlled substance ([21 U.S.C. § 843\(a\)\(6\)](#)) is a “controlled substance offense.”

Maintaining any place for the purpose of facilitating a drug offense ([21 U.S.C. § 856](#)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense facilitated) was a “controlled substance offense.”

Using a communications facility in committing, causing, or facilitating a drug offense ([21 U.S.C. § 843\(b\)](#)) is a “controlled substance offense” if the offense of conviction established that the underlying offense (the offense committed, caused, or facilitated) was a “controlled substance offense.”

A violation of [18 U.S.C. § 924\(c\)](#) or [§ 929\(a\)](#) is a “crime of violence” or a “controlled substance offense” if the offense of conviction established that the underlying offense was a “crime of violence” or a “controlled substance offense.”

The definition of “crime of violence” in [§ 4B1.2](#) applies in numerous other guideline provisions as well, which increase the pertinent offense level or criminal history score where a crime of violence is involved, including:

- [2K1.3](#) (explosive materials)
- [2K2.1](#) (firearm offenses)
- [2S1.1](#) (money laundering)
- [4A1.1\(e\)](#) (criminal history calculation for certain crimes of violence)
- [4B1.4\(b\)\(3\)\(A\)](#) (armed career criminal)
- [5K2.17](#) (upward departure for possession of semiautomatic firearm in connection with crime of violence or controlled substance offense (also incorporating the [4B1.2](#) definition of “controlled substance offense”))

When adopting a new, uniform definition of “crime of violence” in the Guidelines in 2016, presenting an elements clause and a revised list of enumerated offenses, the Sentencing Commission recommended that Congress use this definition as a model for creating a single, consistent definition of “crime of violence” in federal criminal law. [Report to the Congress: Career Offender Sentencing Enhancements, August 2016, at 48](#). That has not yet occurred.

#### **b. Prior to August 1, 2016**

Prior to Amendment 798, which was effective August 1, 2016, the offenses that were enumerated as crimes of violence appeared in § 4B1.2(a)(2) and in an application note. With regard to the definition of “crime of violence,” the list included the offenses stated in the current version of § 4B1.2(a)(2), and also included burglary of a dwelling, involuntary manslaughter, and extortionate extension of credit, all of which were removed by Amendment 798. Section 4B1.2(a)(2) also included a residual clause (“or otherwise involves conduct that presents a serious potential risk of physical injury to another”), which was removed by Amendment 798. However, this amendment does not apply retroactively, and thus the former guideline applied in sentencing that occurred before August 1, 2016, which may presently be on appeal.

### **2. Illegal reentry**

Prior to November 1, 2016, in § 2L1.2 (related to illegal reentry), various provisions increased the offense level if the defendant was removed from the United States following a conviction for a “drug trafficking offense,” “crime of violence,” “firearms offense,” “child pornography offense,” “national security or terrorism offense,” “human trafficking offense,” “alien smuggling offense,” or “aggravated felony.” In Amendment 802, effective November 1, 2016, these provisions were removed, largely replaced with offense-level-increase provisions that turn on the length of the sentence imposed for prior felony convictions, and not the nature of those convictions. In this manner, the Sentencing Commission mostly removed the application of the categorical approach in § 2L1.2; the Commission stated in the commentary that it responded to “significant comment over several years from courts and stakeholders that the ‘categorical approach’ used to determine the particular level of enhancement under the existing guideline is overly complex and resource-intensive and often leads to litigation and uncertainty. . . . Instead of the categorical approach, the amendment adopts a much simpler sentence-imposed model for determining the applicability of predicate convictions. The level of the sentencing enhancement for a prior conviction generally will be determined by the length of the sentence imposed for the prior offense, not by the type of offense for which the defendant had been convicted.”

The only remaining relevance of the categorical approach with regard to § 2L1.2 is in the application of current §§ 2L1.2(b)(2)(E) and (3)(E), which modestly increase the offense level for a person who had “three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses.” The application note provides definitions of “crime of violence” and “drug trafficking offense” that are now identical to the current definitions of “crime of violence” and “controlled substance offense,” respectively, in § 4B1.2. In the commentary to Amendment 802, the Commission stated, “Uniformity and ease of application weigh in favor of using a consistent definition for the same term throughout the Guidelines Manual.”

Amendment 802 does not apply retroactively, and thus the old version of § 2L1.2 applies in sentencing that occurred before November 1, 2016, and are presently on appeal. The old version included definitions, now deleted, of “child pornography offense,” “national security or terrorism offense,” “human trafficking offense,” “alien smuggling offense,” and “aggravated felony,” to which the categorical approach often applied. The definition of “drug trafficking offense” was the same as appears presently, with the exception that it also included an “offer to sell” a controlled substance. The definition of “crime of violence” included additional enumerated offenses—burglary of a dwelling, involuntary manslaughter, extortionate extension of credit—which were removed by Amendment 802, consistent with the same deletions in the definition of “crime of violence” in § 4B1.2 effective August 1, 2016. The earlier version of § 2L1.2 also enumerated “statutory rape” and “sexual abuse of a minor” as crimes of violence; the new version, like § 4B1.2, now addresses those matters through a new definition of “forcible sex offense.”

### **3. Supervised release violation**

The Guidelines set forth three grades of supervised release violations, for purposes of calculating a guideline range. A Grade A violation, the most serious, is defined as follows:

Grade A Violations—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, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years.

U.S.S.G. § 7B1.1(a)(1).

The courts to address this issue are in general agreement that a court should employ the categorical approach to determine whether a new offense committed by a defendant is a “crime of violence” or “controlled substance offense.” *See, e.g., United*

*States v. Doctor*, 958 F.3d 226, 237–38 (4th Cir. 2020). But critically, it is not further required that the defendant was actually convicted of such a crime. Rather, the court may rely on “any reliable evidence” to determine whether the defendant committed the qualifying crime. See *United States v. Garcia-Cartagena*, 953 F.3d 14 (1st Cir. 2020) (lengthy explanation); *United States v. Carter*, 730 F.3d 187, 192 (3d Cir. 2013); *United States v. Willis*, 795 F.3d 986, 993 (9th Cir. 2015). This is consistent with application note 1 to § 7B1.1, which states: “A violation of this condition may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct. The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant’s actual conduct.”

See also *United States v. Jones*, 833 F.3d 341 (3d Cir. 2016) (defendant may not use violation of supervised release proceeding as a forum for collaterally attacking under *Johnson* the length of his original sentence).

#### G. Drug Trafficking Statute, 21 U.S.C. § 841(b)(1)

The drug trafficking statute, 21 U.S.C. § 841, applies mandatory minimum penalties based on the type and quantity of drug, and in § 841(b)(1)(A) and (B) those mandatory penalties are increased if the defendant had one or more prior convictions for certain offenses.

Prior to the passage of the First Step Act on December 21, 2018, a mandatory minimum penalty under these subsections was increased if the defendant had a prior conviction for a “felony drug offense.” The pertinent definition of “felony drug offense” appeared at 21 U.S.C. § 802(44). Generally, courts simply compared the provisions of a statute at issue to the broad definition provided in Section 802(44) (“an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.”), and many of these decisions do not reference the “categorical approach,” though the method is similar. See generally *Brock-Miller v. United States*, 887 F.3d 298, 306–07 (7th Cir. 2018) (citing cases).

In *United States v. Elder*, 900 F.3d 491 (7th Cir. 2018), the court examined the issue at length and held that the categorical approach applies in determining whether a prior conviction qualifies as a “felony drug offense” under 21 U.S.C. § 841(b)(1). It further concluded that an Arizona conviction for possession of equipment or chemicals for manufacture of dangerous drugs, Ariz. Rev. Stat. § 13–3407, covers a broader list of drugs than that covered by the federal definition of “felony drug offense” in 21 U.S.C. §§ 841(b)(1) and 802(44), and therefore the defendant’s prior conviction did not

qualify. *Accord United States v. Graves*, 925 F.3d 1036 (9th Cir. 2019) (holding that California statute barring inmate drug possession, Cal. Penal Code § 4573.6, was not divisible and was overbroad because it criminalized controlled substances that are not regulated by federal law; therefore, the conviction is not a categorical “felony drug offense” under 21 U.S.C. § 841(b)(1)(A)). *See also United States v. Wysinger*, 64 F.3d 207, 216 (4th Cir. 2023) (a “felony drug offense” is defined in 21 U.S.C. § 802(44), and a state crime may be overbroad in relation to the definitions provided there).

Under the First Step Act, in any sentencing that takes place after December 21, 2018, the description of qualifying convictions has changed. The enhanced penalties now apply based on a prior “serious drug felony” or “serious violent felony.”

A “serious drug felony” is much narrower than the former “felony drug offense.” It is defined in 21 U.S.C. § 802(57) as an offense described in 18 U.S.C. § 924(e)(2) for which “(A) the offender served a term of imprisonment of more than 12 months; and “(B) the offender’s release from any term of imprisonment was within 15 years of the commencement of the instant offense.” This narrows things quite a bit, as “felony drug offense” used to include any felony drug crime regardless of imprisonment. Now, it has to be a felony with a maximum of 10 years or more, as explained in Section 924(e)(2)(A), for which the person served more than 12 months, and was released within the previous 15 years. The definition provided by Section 924(e)(2)(A) is addressed in part VIII below.

A “serious violent felony” is defined in 21 U.S.C. § 802(58) as an offense described in 18 U.S.C. § 3559(c)(2) (the “three strikes” statute), or any offense that would be a felony violation of 18 U.S.C. § 113 (assault) if the offense were committed in the special maritime and territorial jurisdiction of the United States, for either of which the offender served a term of imprisonment of more than 12 months. The categorical approach will apply; the three strikes statute is discussed in subpart D above.

(The term “felony drug offense,” as defined in 21 U.S.C. § 802(44), continues to apply in some provisions, including 21 U.S.C. § 841(b)(1)(C), where the maximum sentence is increased from 20 years to 30 years if there was a prior conviction for a felony drug offense.)

## H. Other

Various child exploitation offenses result in a mandatory minimum sentence for defendants previously convicted of offenses “related to” various sexual crimes. There is a Circuit split regarding whether a strict categorical approach applies to these provisions, as discussed at length in *United States v. Portanova*, 961 F.3d 252 (3d Cir. 2020). That is not further addressed in this monograph.

### **III. Department Guidance**

The Appellate Section of the Criminal Division has issued the following guidance memoranda, which are discussed further throughout this topic page:

[Guidance Regarding the Application of \*Descamps v. United States\*, 133 S. Ct. 2276 \(2013\), to Pending Cases \(July 26, 2013\)](#) - [*Descamps* held that the modified categorical approach may not be applied to sentencing under ACCA when the crime of which the defendant was convicted has a single, indivisible set of elements; the subject is further addressed in *Mathis* (2016)]

[Guidance Regarding the Availability of Collateral Relief Based on \*Descamps v. United States\*, 133 S. Ct. 2276 \(2013\) \(Aug. 1, 2013\)](#)

[Preliminary Guidance Concerning \*Johnson v. United States\* \(June 26, 2015\)](#) [*Johnson* held that the “residual clause” in the definition of “violent felony” in ACCA is unconstitutionally vague]

[Guidance Concerning the Application of \*Johnson v. United States\*, 135 S. Ct. 2551 \(2015\) \(Aug. 10, 2015, amended Sept. 8, 2015\)](#)

[Guidance Regarding the Application of \*Mathis v. United States\*, 136 S. Ct. 2243 \(2016\), and Related Issues \(Sept. 7, 2016\)](#) [*Mathis* held that the modified categorical approach only applies where a statute presents alternative elements, not means of committing an offense]

[Guidance Regarding \*Beckles v. United States\* \(Mar. 22, 2017\)](#) [*Beckles*, 580 U.S. 256, held that the Guidelines, and in particular the “residual clause” in the pre-August 2016 definition of “crime of violence” in § 4B1.2, are not subject to challenge for vagueness]

[Guidance Regarding the Imposition of a “Time Served” Sentence at Resentencing When a Defendant Has Already Served More Than the Correct Statutory Maximum \(Feb. 12, 2018\)](#)

[Preliminary Guidance on \*Sessions v. Dimaya\*, No. 15–1498 \(Apr. 17, 2018\), included with other materials on a dedicated \*Dimaya\* webpage.](#) [*Dimaya*, 584 U.S. 158, held that the “residual clause” in the definition of “crime of violence” in 18 U.S.C. § 16 is unconstitutionally vague]

[Guidance on \*United States v. Davis\*, 139 S. Ct. 2319 \(June 24, 2019\)](#) [*Davis* held that the “residual clause” in the definition of “violent felony” in § 924(c) is

unconstitutionally vague]

Guidance Regarding the Application of *Borden v. United States*, 141 S. Ct. 1817 (Oct. 13, 2021) [*Borden* held that a crime that may be committed with mens rea of recklessness does not qualify under the elements clause in the definition of “violent felony” in ACCA]

Guidance Regarding the Application of *United States v. Taylor*, 142 S. Ct. 2015 (2022) [*Taylor* held that attempted Hobbs Act robbery does not categorically qualify as a “crime of violence” under § 924(c)]

Guidance Regarding Attempted Bank Robbery under 18 U.S.C. § 2113(a) (March 9, 2023) [advising that attempted bank robbery should be treated as a “crime of violence” under § 924(c)]

## IV. Background of the Categorical Approach

### A. Rationale for the Categorical Approach

The Supreme Court adopted the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990). That case presented the question whether two of the defendant’s previous state convictions for burglary qualified as “burglary” under the “enumerated offenses” clause of ACCA, § 924(e)(2)(B)(ii). The Court held, first, that “burglary” in ACCA refers to a generic offense, defined as “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” *Id.* at 598. The Court then held that in deciding whether a prior conviction met this definition, “§ 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.” *Id.* at 600. In reaching this result, the Court stressed the statutory language of ACCA, the legislative history, and the “daunting” challenges that a fact-finding process would entail. *Id.* at 600–01. The Court has repeatedly observed that “respect for congressional intent and avoidance of collateral trials require that evidence of generic conviction be confined to records of the convicting court . . . .” *Shepard v. United States*, 544 U.S. 13, 23 (2005).

In *Mathis v. United States*, 579 U.S. 500 (2016), the Court summarized, “Our decisions have given three basic reasons for adhering to an elements-only inquiry.” *Id.* at 510. First, the Court stated, ACCA’s text favors that approach, in referring to “previous convictions” instead of previous acts. *Id.* at 511. “Second, a construction of ACCA allowing a sentencing judge to go any further would raise serious Sixth Amendment concerns.” *Id.* “And third, an elements-focus avoids unfairness to defendants. Statements of ‘non-elemental fact’ in the records of prior convictions are prone to error precisely because their proof is unnecessary. . . . At trial, and still more at

plea hearings, a defendant may have no incentive to contest what does not matter under the law; to the contrary, he ‘may have good reason not to’—or even be precluded from doing so by the court. *Ibid.* When that is true, a prosecutor’s or judge’s mistake as to means, reflected in the record, is likely to go uncorrected. . . . Such inaccuracies should not come back to haunt the defendant many years down the road by triggering a lengthy mandatory sentence.” *Id.* at 512.

## B. Criticism of the Categorical Approach

Critics observe that the “categorical approach” is a strange method for determining the proper application for a recidivism provision such as ACCA; it produces anomalous and inconsistent results, and on top of that fosters extensive and complex litigation in numerous cases. *See Mathis v. United States*, 579 U.S. 500, 521 (2016) (Kennedy, J., concurring) (calling on Congress to address “the arbitrary and inequitable results produced by applying an elements based approach to this sentencing scheme. It could not have been Congress’ intent for a career offender to escape his statutorily mandated punishment ‘when the record makes it clear beyond any possible doubt that [he] committed’” an ACCA predicate offense; “Congress also could not have intended vast sentencing disparities for defendants convicted of identical criminal conduct in different jurisdictions.”) (citation omitted); *id.* at 536–38 (Alito, J., dissenting, analogizing the development of the categorical approach to the tale of a Belgian woman who misprogrammed her GPS device for a 38-mile drive and proceeded to drive 900 miles and across several countries before realizing her error, and concluding, “Programmed in this way, the Court set out on a course that has increasingly led to results that Congress could not have intended.”); *Quarles v. United States*, 587 U.S. 645, 655–57 (2019) (Thomas, J., concurring) (suggesting that the categorical approach be abandoned in favor of jury determinations of whether the offender’s conduct fit the generic crime at issue).

In dissent in the recent *Taylor* decision, Justice Thomas described the exercise as a “30-year excursion into the absurd,” *United States v. Taylor*, 596 U.S. 845, 861 (2022), observing, “In case after case, our precedents have compelled courts to hold that heinous crimes are not ‘crimes of violence’ just because someone, somewhere, *might* commit that crime without using force.” *Id.* at 867 (emphasis in original). He stated, “It is hard to fathom why this makes sense or why any rational Congress would countenance such an outcome so divorced from reality,” *id.* at 863, as “[n]o rational legislature would have implicitly imposed this byzantine and resource-depleting legal doctrine that so encumbers federal courts and threatens public safety,” *id.* at 872. Justice Alito added, “I agree with Justice THOMAS that our cases involving § 924(c) (3)(A) have veered off into fantasy land.” *Id.* at 874. *See United States v. Graham*, 67 F. 4th 218, 226-29 (4th Cir. 2023) (Wilkinson, J., concurring) (“the chief beneficiaries of the categorical approach are so often the most violent offenders whose own conduct

escapes examination because someone else's far less culpable conduct may theoretically be subject to prosecution some other day.”).

The en banc Fifth Circuit stated: “The well-intentioned experiment that launched fifteen years ago has crashed and burned.” *United States v. Reyes-Contreras*, 910 F.3d 169, 186 (5th Cir. 2018). In *United States v. Battle*, 927 F.3d 160 (4th Cir. 2019), after explaining the method for applying the categorical approach to a statute addressing assault with intent to murder, focusing on elements rather than facts, the Court stated, “As absurd as this sounds, it is what we are bound to do under current precedent.” *Id.* at 163 n.2. The same court stated in another case, “we must resolve this issue using the ‘categorical approach,’ not common sense.” *United States v. Rice*, 36 F.4th 578, 579 (4th Cir. 2022).

In a dissenting opinion in *United States v. Scott*, 14 F.4th 190, 200–02 & nn.6–24 (3d Cir. 2021), Judge Phipps provided a lengthy compendium of the unflattering descriptions and pejorative labels justices and judges have assigned to the doctrine.

In *United States v. Doctor*, 842 F.3d 306, 313–15 (4th Cir. 2016), Judge Wilkinson, concurring, presents an extensive exegesis on the shortcomings of the approach, stating that it “can serve as a protracted ruse for paradoxically finding even the worst and most violent offenses not to constitute crimes of violence,” that, “too aggressively applied, eviscerates Congress’s attempt to enhance penalties for violent recidivist behavior,” creating “a criminal sentencing regime so frankly and explicitly at odds with reality.” *See also United States v. Faust*, 853 F.3d 39, 61 (1st Cir. 2017) (Lynch, J., concurring) (“My concern is that use of these tests can lead courts to reach counterintuitive results, and ones which are not what Congress intended.”); *but see id.* at 61 (Judge Barron, concurring, questions the premise of “the growing sentiment that Congress could not have intended for us to apply the increasingly complicated framework that the Supreme Court now requires us to apply in order to determine the scope of the Armed Career Criminal Act (ACCA).”); *Amador v. Garland*, 28 F.4th 72, 86 (9th Cir. 2022) (Graber, J.) (the defendant strives to show that his crime does not qualify “in some theoretical way that bears no relationship to the real world,” utilizing an approach that “often produces absurd results that lack any connection to what really occurred.”).

Most significantly, the method assesses whether a person is subject to a recidivism provision not based on his actual history of violence or drug distribution, but based on the drafting of state statutes under which he was convicted. The inquiry becomes not whether the defendant engaged in violent conduct or narcotics distribution in the past, but whether *some other* hypothetical defendant might be convicted under the same statute for *not* engaging in violence or drug distribution, such that the defendant’s crime may then not qualify under ACCA. *See United States v. Doctor*, 842 F.3d 306, 313 (4th Cir. 2016) (Wilkinson, J., concurring) (the approach “involves an

exhaustive review of state law as courts search for a non-violent needle in a haystack or conjure up some hypothetical situation to demonstrate that the predicate state crime just might conceivably reach some presumably less culpable behavior outside the federal generic.”).

In an egregious example of this problem, in *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc), the court concluded that assault statutes requiring proof of “serious physical harm” did not qualify as crimes of violence under the Guidelines, because state law held that such harm may be psychological and not involve the use of “physical force.” Yet the only examples the court located in state law of prosecutions based on “psychological harm” involved shocking conduct that could hardly be described as non-physical. In the three cases on which the court relied: a person murdered his wife and then allowed his six-year-old son to see his mother’s body lying in a pool of blood; a mother allowed her boyfriend to rape her daughter, herself digitally penetrated her daughter’s vagina and placed her hand on her son’s penis, and participated to some extent in the sexual abuse of two other children; and a priest who counseled a parishioner, who had a history of psychiatric illnesses, about her sexually abusive husband, engaged in sexual acts with her, including oral sex and sexual intercourse, despite her telling him, “No, this is wrong.” *Id.* at 398–99. On the basis of these rulings, the court held that no one committing the “serious physical harm” variant of assault in Ohio is liable for a “crime of violence.”

*United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017), provides another dramatic example of the problem. It held that the Washington second-degree assault statute, Wash. Rev. Code § A.36.021(1), is indivisible, and because one provision may not require the use of physical force, no provision of it qualifies as a crime of violence under § 4B1.2. The statute applies to one who: “(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or (c) Assaults another with a deadly weapon; or (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or (e) With intent to commit a felony, assaults another; or (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or (g) Assaults another by strangulation or suffocation.” The court speculated that subsection (e) might be violated by a sexual assault in which the defendant touches a minor. Thus, no one in Washington who commits second-degree assault with a deadly weapon, or tortures someone, or assaults a pregnant woman, or endeavors to poison, suffocate, or strangle somebody, has committed a crime of violence under the career offender guideline, because some other hypothetical person, who is not before the court, could commit the same assault crime by sexually touching a minor.

Another example of a bizarre result: In *United States v. Adams*, 40 F.4th 1162 (10th Cir. 2022), the court held that aggravated battery in Kansas, in violation of Kan. Stat. § 21-5413(b)(1)(C), is not a “crime of violence” under the Guidelines. The court concluded that the statute applies too broadly, in that under state law it applies to battery of a fetus as well as a living person, while the guideline applies only to force against a “person,” which means an individual born alive. And thus, no one who commits this aggravated battery offense in Kansas – that is, physical contact with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, or death can be inflicted – has committed a “crime of violence” under the current Guidelines.

This odd approach then produces varying, indeed unjust results depending on the drafting of the state statute at issue. Two people who commit exactly the same violent offense—burglary of an occupied residence, for example—will be treated differently (one subject to ACCA and the other not) if the first committed his crime in a state with a statute narrowly drawn to address only this conduct, while the other committed his crime in a state presenting a statute that covers both his conduct and additional conduct outside the generic definition of burglary. The modified categorical approach often does not help, either because the statute is not in fact “divisible” under applicable law, or because *Shepard* documents are either unclear or entirely unavailable in specifying what part of a statute supported the conviction. See *Descamps v. United States*, 570 U.S. 254, 293 (2013) (Alito, J., dissenting) (“The Court’s holding will hamper the achievement of [ACCA’s] objectives by artificially limiting ACCA’s reach and treating similar convictions differently based solely on the vagaries of state law. Defendants convicted of the elements of generic burglary in California will not be subject to ACCA, but defendants who engage in exactly the same behavior in, say, Virginia, will fall within ACCA’s reach.”); *United States v. Chapman*, 866 F.3d 129, 136–37 (3d Cir. 2017) (Judge Jordan, concurring and writing separately “to express dismay at the ever-expanding application of the categorical approach,” observes that “two defendants who, in their past, independently committed identical criminal acts in two different states and have essentially the same criminal history will find that the applicability of the ACCA to their current cases depends not on their past criminal conduct but on the phrasing of the different state criminal statutes.”).

In a concurring opinion in *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc), citing many of these opinions of fellow judges, Judge Thapar, joined by four other judges, declared, “The time has come to dispose of the long—baffling categorical approach.” *Id.* at 407. He explained that the categorical approach leads to arbitrary results, that vary depending on statutory drafting, the place where the defendant committed the offense, and the Circuit that adjudicated the instant offense. *Id.* at 408. He further explained the difficulty of administering the categorical approach: “Each categorical—approach case (and there is no shortage of them) instead requires the judge to (1) mull through any number of hypothetical ways to commit a crime that have nothing to do with the facts of the prior conviction; (2) mine electronic databases for

state court cases (precedential or not) depicting non-violent ways of commission; and (3) scrutinize those state court cases, some of which are old and predate the categorical approach, to determine their import.” *Id.* at 409. He concluded: “In light of these problems, I join others in proposing an alternative approach. That approach would permit judges to deem a prior conviction a crime of violence if the underlying criminal conduct was actually violent. If the government can prove that the state court record establishes violent conduct, end the inquiry there.” *Id.* He added: “whatever the difficulty of those problems under the ACCA, the Sixth Amendment presents no obstacle under the advisory Sentencing Guidelines.” *Id.* at 410.

Similarly, in *United States v. Evans*, 924 F.3d 21 (2d Cir. 2019), the court stated that “the laudable goals motivating this approach have not been realized . . . .” The court stated:

The approach demands that federal courts employ an analysis for which they are not constitutionally (or practically) suited. While cases such as Evans’s undoubtedly pose an actual case or controversy as the Constitution demands, *see U.S. Const. art. III § 2, cl. I*, the categorical approach paradoxically instructs courts resolving such cases to embark on an intellectual enterprise grounded in the facts of *other* cases not before them, or even *imagined* scenarios. Courts are required to discern the outer reaches of countless federal and state statutory provisions in an exercise most reminiscent of the law school classroom, and quite alien to courts’ well-established role of adjudicating “concrete legal issues, presented in actual cases, not abstractions.” *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947) (quotation marks omitted).

*Id.* at 31. Judge Livingston’s opinion concluded, “We ask only that Congress or the Supreme Court take action. Until such time, the litany of ACCA challenges will continue, as will our efforts faithfully to apply the categorical approach, however awkward its demand that judges deciding cases act, instead, the part of law school professors spinning out hypotheticals.” *Id.* at 32. *Accord United States v. Scott*, 990 F.3d 94, 126 (2d Cir. 2021) (en banc) (Park, J., concurring on behalf of five judges, quoting numerous other judges, and stating: “As a growing number of judges across the country have explained, the categorical approach perverts the will of Congress, leads to inconsistent results, wastes judicial resources, and undermines confidence in the administration of justice.”); *United States v. Harris*, 88 F.4th 458, 471 (3d Cir. 2023) (Jordan, J., concurring on behalf of seven judges in denial of rehearing) (“As currently administered, the categorical approach undermines public trust in our justice system precisely because it produces decisions that cannot be squared with common sense.”); *id.* at 476 (“The chorus of voices over the years calling for a release from the analytical fetters of *Taylor* and its progeny could hardly be louder, reflecting a broad

consensus that the categorical approach has gone terribly awry and that serious corrections are in order.”).

In an appendix in *Chery v. Garland*, 16 F.4th 980, 987–92 (2d Cir. 2021), a Second Circuit panel suggested entirely discarding the lengthy definition of “aggravated felony” in immigration law, with the attendant categorical approach, in favor of “a simple bright-line definition: an offense for which the sentence imposed exceeds a specified length”; the court suggested that the same solution may be applied to other statutes requiring a categorical approach to define qualifying offenses.

*See also United States v. Montgomery*, 966 F.3d 335, 340 (5th Cir. 2020) (Higginson, J., concurring on behalf of full panel) (“Skepticism of the categorical approach is not new, but time has magnified the unworkability of this approach.”) (citing *United States v. Escalante*, 933 F.3d 395, 406 (5th Cir. 2019) (“In the nearly three decades since its inception, the categorical approach has developed a reputation for crushing common sense in any area of the law in which its tentacles find an inroad.”); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1149 (9th Cir. 2020) (Graber, J., concurring) (“I write separately to add my voice to the substantial chorus of federal judges pleading for the Supreme Court or Congress to rescue us from the morass of the categorical approach. . . . The categorical approach requires us to perform absurd legal gymnastics, and it produces absurd results. . . . It is past time for someone with the power to fix this mess to do so.”); *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017) (in a decision holding that Alabama sexual abuse by forcible compulsion is not a violent felony under ACCA, the court began: “So here we go down the rabbit hole again to a realm where we must close our eyes as judges to what we know as men and women. It is a pretend place in which a crime that the defendant committed violently is transformed into a non-violent one because other defendants at other times may have been convicted, or future defendants could be convicted, of violating the same statute without violence. Curiouser and curioser it has all become, as the holding we must enter in this case shows. Still we are required to follow the rabbit.”); *United States v. Perez-Silvan*, 861 F.3d 935, 944 (9th Cir. 2017) (concurring in a decision holding that a Tennessee aggravated assault provision qualified under the “crime of violence” definition in the pre-2016 version of § 2L1.2, Judge Owens wrote: “I continue to urge the Commission to simplify the Guidelines to avoid the frequent sentencing adventures more complicated than reconstructing the Staff of Ra in the Map Room to locate the Well of the Souls.”); *United States v. Martinez-Lopez*, 864 F.3d 1034, 1058 (9th Cir. 2017) (Judge Bybee, on a question of divisibility, labeled his opinion “concurring in part and dissenting in part, but frustrated with the whole endeavor.”). *United States v. McCollum*, 885 F.3d 300, 314 (4th Cir. 2018) (dissenting from a ruling that conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5), is not a crime of violence under § 4B1.2, Judge Traxler stated: “The majority has ignored plain Guidelines text, its own prior precedent, and elementary common sense. It has

embraced the principle that law must of necessity be counterintuitive, that the straightforward must yield to the convoluted, and that the obscure must supersede the obvious, as though clouds had been summoned to hide the sun. And this, finally, is what we have come to: plotting to murder one's fellow human beings is not a crime of violence. Heaven help us.”); *United States v. Williams*, 898 F.3d 323, 337 (3d Cir. 2018) (Roth, J., concurring, expressing the “concern that the categorical approach, along with its offspring, the modified categorical approach, is pushing us into a catechism of inquiry that renders these approaches ludicrous.”); *United States v. Garcia-Lopez*, 903 F.3d 887, 896 (9th Cir. 2018) (Tallman, J., concurring) (“It is time that Congress steps in to create a more reasonable, consistent, and functional standard for removing violent criminals from our country.”); *Williams v. Barr*, 960 F.3d 68, 80 (2d Cir. 2020) (concurring in a ruling that a Connecticut firearms statute was categorically overbroad in relation to an immigration provision, despite the fact that the defendant possessed an ordinary firearm, Judge Jacobs stated: “That cannot have been the intention of either the Connecticut General Assembly or the United States Congress. But the rule requiring a categorical match between the unambiguous terms of the two statutes has the effect of frustrating both of them. The result in the Court’s opinion is compelled, not endorsed. I would not try to justify it to any sensible person.”).

In *Lowe v. United States*, 920 F.3d 414 (6th Cir. 2019), the court held that the defendant’s Tennessee conviction for rape does not qualify as an ACCA violent felony because the crime may be committed by “coercion,” which includes “use of parental authority,” which does not require the use of force. Two judges concurred, stating, “Rape is always violent. . . . Yet, in the categorical–approach world, we cannot call rape what it is. Instead of analyzing the facts underlying Lowe’s crime to determine if it was violent, we must engage in a hypothetical exercise to determine whether the crime’s elements could be committed in a non–violent fashion. So, although rape is always violent as a matter of fact, the majority correctly applies our precedent to conclude that Lowe’s rape was not violent as a matter of law. But this case demonstrates, once again, that it is time for Congress to revisit the categorical approach so we do not have to live in a fictional world where we call a violent rape non–violent.” *Id.* at 420 (Thapar, J., concurring).

In an immigration matter, a Third Circuit panel began its opinion:

We deal today with another appearance of what is known as the “categorical approach” to determining whether and how a conviction under state law will have consequences for the convicted criminal under federal law. We must apply it now in an immigration case, but, in whatever context it surfaces, it’s a fair bet that this formalistic framework may result in some counterintuitive and hard–to–justify outcome. And so it does here. . . .

The categorical approach mandates our accedence to Cabeda's demand that we ignore what she actually did and focus instead on what someone else, in a hypothetical world, could have done. That's the analytical box the categorical approach puts us in. Thus, even though it is indisputable on this record – and, in fact, no one does dispute – that Cabeda repeatedly had sex with a minor, when we assess her conviction alongside the pertinent federal statutes, the categorical approach blinds us to the facts and compels us to hold that the crime of which she was convicted does not amount to the aggravated felony of “sexual abuse of a minor.” It is a surpassingly strange result but required by controlling law.

*Cabeda v. Attorney Gen. of United States*, 971 F.3d 165, 167 (3d Cir. 2020).

Application of the categorical approach thus often produces results that are quite anomalous if the purpose of sentencing law is to identify the most violent offenders. As seen in the text below, there are numerous examples under ACCA and the equivalent Guidelines provisions of strange results, in which state statutes related to murder, aggravated assault, rape, robbery, kidnapping, and other inherently violent crimes were found not to qualify as “violent” offenses under the federal provisions. *See, e.g., McCollum*, 885 F.3d 300 (Fourth Circuit holds that conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5), is not a crime of violence under § 4B1.2); *United States v. Leaverton*, 892 F.3d 1251 (10th Cir. 2018) (Oklahoma first-degree manslaughter, 21 Okla. Stat. § 711(2), does not qualify as “manslaughter” under the three strikes statute, 18 U.S.C. § 3559) *United States v. Hernandez-Montes*, 831 F.3d 284 (5th Cir. 2016) (Florida attempted second-degree murder, Fla. Stat. §§ 777.04(1), 782.04(2), does not qualify as a crime of violence under § 2L1.2, as, unlike the generic definition of murder, the statute does not require a specific intent to kill); *United States v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019) (Washington second-degree murder, Wash. Rev. Code § 9A.32.050, covers felony murder and is therefore overbroad in relation to and does not qualify as a 4B1.2 crime of violence); *United States v. Shell*, 789 F.3d 335 (4th Cir. 2015) (North Carolina second-degree rape, N.C.G.S.A. § 14–27.3, does not qualify as a crime of violence under § 4B1.2, as the statute did not require the use of physical force and could be predicated instead on the insufficiency of purported consent); *United States v. Jordan*, 812 F.3d 1183 (8th Cir. 2016) (Arkansas aggravated assault, Ark. Code § 5–13–204(a)(1), does not qualify under ACCA as the statutory requirement of creating a “substantial danger of death or serious physical injury” does not necessarily require the use of physical force); *United States v. Garcia-Jimenez*, 807 F.3d 1079 (9th Cir. 2015) (New Jersey aggravated assault in violation of N.J. Stat. § 2C:12–1(b)(1) (where the defendant stabbed a man in the chest) does not qualify as a crime of violence under § 2L1.2 as the generic definition of aggravated assault does not incorporate the mens rea of extreme indifference or recklessness, which may suffice under the New Jersey statute); *Lofton v. United States*, 920 F.3d 572, 575–76 (8th Cir. 2019) (Illinois conviction for aggravated criminal sexual abuse is not an ACCA violent felony; the crime involves sexual contact

by an adult over the age of 17 with a victim under the age of 13, but may be violated by having the child touch the offender for sexual gratification, and therefore does not necessarily require the use of physical force against another); *United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015) (Texas aggravated sexual assault of a child, Tex. Penal Code § 22.021(a)(1)(B)(i), (a)(2)(B), was not a “forcible sex offense” under the 4B1.2 elements or enumerated clause; the offense involves penetration of a person younger than 14 years old, but does not require force or lack of consent).

Thus, defense counsel usually celebrate application of the categorical approach. The Immigrant Legal Resource Center explains the process as follows: “What is the defense goal? The person’s conviction is evaluated not by what they did, but by the most minimal, least egregious conduct that has a realistic probability of being prosecuted under that statute. This is a great advantage. The defense goal is (a) to identify some conduct that violates the criminal statute but falls outside the generic definition, and (b) to show that there is a ‘realistic probability’ that this conduct actually is prosecuted under the statute.” Katherine Brady, *How to Use the Categorical Approach Now*, Immigrant Legal Resource Center 10 (Nov. 2019), [https://www.ilrc.org/sites/default/files/resources/how\\_to\\_use\\_the\\_categorical\\_approach\\_now\\_dec\\_2019\\_0.pdf](https://www.ilrc.org/sites/default/files/resources/how_to_use_the_categorical_approach_now_dec_2019_0.pdf).

A letter from the Department to the Sentencing Commission, dated August 10, 2018, stated that as of June 2018, there were 1,461 prisoners who received habeas release under *Johnson*, and that a striking 42% had already been rearrested, including for, collectively, multiple murders, kidnappings, sexual assaults, and robberies. At the same time, the letter stated, “As a result of these serious problems and disparities created by the categorical approach, the frequency of enhancements under the ACCA, § 2K2.1, and the career offender guideline have all fallen off dramatically since 2010.” For instance, there was a 55% drop from FY 2010 to FY 2017 in the number of defendants sentenced under ACCA, and a 31% drop during the same time span in the number of defendants to whom the career offender guideline was applied.

Judge William H. Pryor, Jr. (who is also the acting chair of the Sentencing Commission), began a recent concurring opinion (joined by four others) as follows: “How did we ever reach the point where this Court, sitting en banc, must debate whether a carjacking in which an assailant struck a 13–year–old girl in the mouth with a baseball bat and a cohort fired an AK–47 at her family is a crime of violence? It’s nuts. And Congress needs to act to end this ongoing judicial charade.” *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (en banc). He suggested solving the problem by requiring jury findings concerning the nature of prior offenses. *Id.* at 1258–62.

## V. Divisibility and the Modified Categorical Approach

## A. Divisibility

When adopting the categorical approach, the Supreme Court added:

This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary. For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

*Taylor*, 495 U.S. at 602.

“That kind of statute,” the Supreme Court later explained, “sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building or an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant’s prior conviction. The court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime.” *Descamps v. United States*, 570 U.S. 254, 257 (2013).

The modified categorical approach does not apply “when the crime of which the defendant was convicted has a single, indivisible set of elements.” *Id.* at 258.

*Descamps* addressed the California burglary statute, which applied to a “person who enters” certain locations with intent to commit a felony. This statute, the Court held, is broader than generic burglary (which requires an “unlawful or unprivileged” entry; in contrast, the California statute may apply to a shoplifter who is lawfully in the store). The statute presented no alternative elements, simply an indivisible element of entry that is categorically overbroad for ACCA purposes. The Court stated:

Whether *Descamps* did break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant. Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not. In that circumstance, a court may look to the additional documents to determine which of the statutory offenses (generic or non-generic)

formed the basis of the defendant’s conviction. But here no uncertainty of that kind exists, and so the categorical approach needs no help from its modified partner.

*Id.* at 265 (emphasis in original). The Court therefore held that the California burglary statute was overbroad for ACCA purposes, and no conviction under that statute will count for ACCA purposes, regardless of the facts of the offense.

## B. *Mathis*: Means vs. Elements

Making things even more complicated, the Supreme Court has distinguished between “elements” and “means.” A conviction resting on a statute that presents alternative elements may be subject to the modified categorical approach, as explained above. But that is not true, the Court ruled, for “a different kind of alternatively phrased law: not one that lists multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element.” *Mathis v. United States*, 579 U.S. 500, 506 (2016).

As described by the Court, “[e]lements’ are the ‘constituent parts’ of a crime’s legal definition—the things the ‘prosecution must prove to sustain a conviction.’” *Mathis*, 579 U.S. at 504 (quoting Black’s Law Dictionary 634 (10th ed. 2014)). “At a trial, they 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.* “Means,” on the other hand, are “various factual ways of committing” a single element. *Id.* at 506. A jury need not be unanimous as to the means by which a defendant committed a particular element of a crime. See *Richardson v. United States*, 526 U.S. 813, 817 (1999).

As a hypothetical, *Mathis* posited a statute that requires use of a “deadly weapon” as an element of a crime and further states that the use of a “knife, gun, bat, or similar weapon” would all qualify. The Court stated that this list, “merely specif[ying] diverse means of satisfying a single element of a single crime,” 579 U.S. at 506, describes only “means” and leaves the single element indivisible for purposes of application of ACCA. *Mathis* itself involved the Iowa burglary statute, which barred entry into an “occupied structure,” defined as including “any building, structure, [or] land, water, or air vehicle.” The Court determined that “those listed locations are not alternative elements, going toward the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying a single locational element . . . .” *Id.* at 507. And thus, because entry into a vehicle lies outside the generic burglary offense described in ACCA, the Court held that the Iowa burglary statute is categorically overbroad and may not support an ACCA enhancement, even if the particular defendant in fact committed generic burglary of a structure.

*Mathis* discussed how to distinguish between “elements” and “means” in a statute. First, a court should follow the directive of the state courts on this issue, if available. *Id.* at 517. Second, if “statutory alternatives carry different punishments, then under *Apprendi* they must be elements.” *Id.* at 518. Third, “[c]onversely, if a statutory list is drafted to offer ‘illustrative examples,’ then it includes only a crime’s means of commission. . . . And a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means).” *Id.*

The Court continued:

And if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself. As Judge Kozinski has explained, such a ‘peek at the [record] documents’ is for ‘the sole and limited purpose of determining whether [the listed items are] element[s] of the offense.’ *Rendon v. Holder*, 782 F.3d 466, 473–474 (C.A.9 2015) (opinion dissenting from denial of reh’g en banc). . . . Suppose, for example, that one count of an indictment and correlative jury instructions charge a defendant with burgling a ‘building, structure, or vehicle’—thus reiterating all the terms of Iowa’s law. That is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt. So too if those documents use a single umbrella term like ‘premises’: Once again, the record would then reveal what the prosecutor has to (and does not have to) demonstrate to prevail. . . . Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime. Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy ‘*Taylor*’s demand for certainty’ when determining whether a defendant was convicted of a generic offense.

*Mathis v. United States*, 579 U.S. at 518-19. But see *id.* at 543 (Alito, J., dissenting) (decrying this latest evolution of the categorical approach as “pointless formalism, . . . the veritable ne plus ultra of the genre”).

The *Mathis* Guidance summarizes the required analysis as follows:

To determine whether alternatives are means or elements, prosecutors should look to authoritative sources of state law (or federal law if the predicate is a federal offense). If no authoritative decision answers the question, prosecutors should look to the statute. If the listed alternatives carry different punishments, they are elements. If the statutory list merely offers illustrative examples, they are means. If a state statute identifies which facts must be charged, those facts are elements. As a last resort, prosecutors may look to the indictment and jury

instructions. Listing all the alternatives in the indictment or instructions indicates that the alternatives are only means. Referencing only one alternative in the indictment and instructions, however, could indicate that the statute contains a list of elements, each one of which defines a separate crime.

*Mathis* Guidance at pages 1–2 (Sept. 7, 2016); *see also id.* at pages 7–9 (more detailed summary).

Courts have held, although not unanimously, that a court may consult model jury instructions when determining whether a statute presents elements as opposed to means. *See, e.g., United States v. Bain*, 874 F.3d 1, 30 (1st Cir. 2017) (“There are a number of different ways of distinguishing elements from means, including looking at jury unanimity requirements, relevant model jury instructions, certain statutory provisions, and indictments.”); *United States v. McMillan*, 863 F.3d 1053, 1057 (8th Cir. 2017) (“We may use a state’s model jury instructions to ‘reinforce’ our interpretation of the means or elements inquiry.”); *Rivera v. Lynch*, 816 F.3d 1064, 1072 (9th Cir. 2016). *But see United States v. Aviles*, –938 F.3d 503, 514 n.6 (3d Cir. 2019) (holding that in determining state law for purposes of application of the categorical approach, the court considers only state court decisions and the text of the statute, not model jury instructions).

In its guidance memorandum regarding *Mathis*, the Criminal Division highlighted challenges posed by the means vs. elements question. It stated:

As Justice Breyer correctly recognized in his dissent, “there are very few States where one can find authoritative judicial opinions that decide the means/element question.” *Mathis*, 136 S. Ct. at 2264 (Breyer, J., dissenting). In preparation for the *Mathis* case, the Solicitor General’s Office conducted research on state burglary statutes and “found only ‘two States’ that, in the context of burglary, had answered the means/elements question.” *Id.*

*Mathis* Guidance at page 8 n.2. The guidance memorandum further explained that the Supreme Court’s invitation to “peek” at record documents may prove particularly troublesome, given that those documents might reflect individual charging practices rather than a definitive answer on the elements–means question. “Prosecutors should therefore proceed with caution before arguing that a statute is divisible based on the way in which a particular offense was charged in the defendant’s prior case, recognizing that this aspect of *Mathis* is not straightforward.” *Mathis* Guidance at 9 (Sept. 7, 2016). *See Richardson v. United States*, 890 F.3d 616 (6th Cir. 2018) (court finds the “peek” decisive; the court concludes that Georgia law is unclear as to whether the burglary statute, *Ga. Code § 16–7–1*, was divisible as to the locational element, but a “peek” at the charging documents revealed that the defendant was convicted of burglary of a dwelling house or building, and the offenses therefore qualified under

ACCA); cf. *United States v. Furlow*, 928 F.3d 311, 322 (4th Cir. 2019) (“We are unpersuaded that the sloppy drafting of indictments on some occasions overrides the state courts’ clear indications that the alternatives specified in section 44–53–375(B) are distinct offenses.”).

Indeed, while the Supreme Court predicted that divining the distinction between “elements” and “means” will prove “easy” in “many” cases, *Mathis*, 579 U.S. at 517, that is proving to be a questionable proposition. See, for instance, *United States v. Reyes*, 866 F.3d 316 (5th Cir. 2017), in which the court held (2–1) that the Illinois aggravated battery statute is divisible, and that the offense of aggravated battery with a deadly weapon is a crime of violence under the Guidelines, and each of the three judges applied a different analysis in resolving the elements vs. means question. In some cases, courts have thrown up their hands and certified to state supreme courts the question whether a particular state statute presents means or elements. *United States v. Lawrence*, 905 F.3d 653 (9th Cir. 2018) (certifying to the Oregon Supreme Court the questions whether Oregon first-degree robbery, Or. Rev. Stat. § 164.415, and second-degree robbery, § 164.405, are “divisible” for purposes of determining whether each is a 4B1.2 crime of violence); *United States v. Figueroa–Beltran*, 892 F.3d 997 (9th Cir. 2018) (the court certifies to the Nevada Supreme Court the question whether felony possession of a controlled substance with intent to sell, in violation of Nev. Rev. St. § 453.337, is divisible by identity of the controlled substance, for purposes of determining whether an offense under that statute qualifies as a “drug trafficking offense” under the 2015 version of § 2L1.2), see also *Figueroa–Beltran*, 995 F.3d 724 (9th Cir. 2021) (reporting result); *United States v. Franklin*, 895 F.3d 954 (7th Cir. 2018) (certifying to state supreme court question whether the **Wisconsin** burglary statute, Wis. Stat. § 943.10(1m)(a)–(f), is divisible for purposes of application of ACCA); see *Franklin v. United States*, 928 N.W.2d 545 (Wis. 2019) (answering that question in the negative)).

The Third Circuit’s decision in *United States v. McCants*, 952 F.3d 416 (3d Cir. 2020), contains a helpful analysis. It found divisible a New Jersey robbery statute that applied to one who “(1) Inflicts bodily injury or uses force upon another; or (2) Threatens another with or purposely puts him in fear of immediate bodily injury; or (3) Commits or threatens immediately to commit any crime of the first or second degree.” The court found these subsections divisible, because “the statute does not identify an individual element of which subsections (a)(1)–(3) are mere examples—it states no overarching genus of which they are species. Instead, it lists in the disjunctive three separately enumerated, alternative elements of robbery.” *Id.* at 426. In contrast, *McCants* stated, *Mathis* involved a statute that defined burglary as entering an “occupied structure,” and gave as examples of an occupied structure “any building, structure, [or] land, water, or air vehicle.” *Id.* The Third Circuit stated: “Thus, the element (the genus) for burglary was an occupied structure and the means (the species) were any building, structure, or land, water, or air vehicle. Here, the alternative

elements for robbery are (a)(1)–(3) and the means are the various types of force, threats, and crimes that could satisfy those subsections.” *Id.* Further, the court explained: “Subsections (a)(1)–(3) are elements because each requires different proof beyond a reasonable doubt to sustain a second-degree robbery conviction.” *Id.* The court added that the result would be different if the defendant showed that a jury could convict under the robbery statute without unanimity as to the subsection violated. But absent such proof, it relied on the structure of the statute. *Id.*

In *United States v. Allred*, 942 F.3d 641–52 (4th Cir. 2019), the court held that the offense of retaliation against a witness, in violation of 18 U.S.C. § 1513(b)(1), by causing injury to a person or damage to property, is divisible, in part because “the behavior typically underlying the causation of bodily injury ‘differs so significantly’ from that underlying damage to property that those statutory phrases cannot plausibly be considered alternative means.”

In *United States v. Hataway*, 933 F.3d 940, 944–45 (8th Cir. 2019), the court held that the indictment rested on the divisible part of a statute where the indictment quoted the entire, over-inclusive statute, but alleged specific facts making clear the offense fell within a divisible subsection.

In *United States v. Oliver*, 955 F.3d 857 (11th Cir. 2020), the court emphasized that if the text, state caselaw, and record of conviction do not resolve whether a particular statute was divisible, the issue must be resolved in favor of indivisibility. On that basis, the court held that terroristic threats in violation of Ga. Code § 16–11–37(a) does not qualify as an ACCA violent felony.

In *United States v. Garrett*, 24 F.4th 485 (5th Cir. 2022), the court held that robbery in violation of Texas law, Tex. Penal Code § 29.02, is divisible, between provisions involving injury and involving a threat of injury, in part because the subsections present different mens rea requirements (with recklessness sufficient for causing injury but not making a threat). The court quoted *United States v. Wehmhoefer*, 835 F. App’x 208, 211 (9th Cir. 2020), which stated: “[d]iffering mens rea requirements are a hallmark of divisibility.” *But see United States v. Brasby*, 61 F.4th 127, 135 (3d Cir. 2023) (“Mens rea generally is one element of an offense, and the specific mens rea is simply a means.”).

*Brasby* further suggested that an attempt offense is always divisible from substantive commission of the crime. *Id.*

### C. Permissible Documents

Where the modified categorical approach applies, as a statute presents alternative elements, at least one of which meets the pertinent ACCA definition and another does

not, a court may consult reliable judicial documents in an effort to identify the basis of a prior conviction. The court may not examine police reports or complaint applications, or other documents which may be contested. Rather, with respect to a trial, the court may consider the charging document and the jury instructions to determine what elements the jury necessarily found; and with respect to a guilty plea, the court “is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Shepard v. United States*, 544 U.S. 13, 16 (2005). This restriction reflects the Supreme Court’s goal to avoid the constitutional issue that would be presented were the sentencing court, rather than a jury, to determine facts that increase a statutory maximum sentence. *Id.* at 24–26; see *Descamps v. United States*, 570 U.S. 254, 269 (2013) (referencing “the categorical approach’s Sixth Amendment underpinnings”).

Permissible documents establishing a conviction may include any “reliable judicial records,” even if they are not certified. *United States v. Howard*, 599 F.3d 269, 273 (3d Cir. 2010) (incomplete certified conviction and uncertified docket). Likewise, in *United States v. Henderson*, 841 F.3d 623, 632 (3d Cir. 2016), the court allowed reliance on a court report describing the conviction, relying on the statement in *Shepard* that the sentencing court may consider “the charging document . . . or . . . some comparable judicial record of this information,” 544 U.S. at 26. See also *United States v. Hurtt*, 105 F.4th 520, 523–25 (3d Cir. 2024) (*Shepard* documents consisting of the defendant’s written plea colloquy, the court’s sentencing order, and its revised sentencing order revoking parole were sufficient to identify the subsection of conviction for a prior offense, and a written plea colloquy was sufficient with respect to another prior offense); *United States v. Boyd*, 55 F.4th 272, 278 (4th Cir. 2022) (South Carolina “sentencing sheet” was a sufficient *Shepard* document to identify the offense of conviction); *United States v. Burris*, 912 F.3d 386, 407 n.22 (6th Cir. 2019) (en banc) (Ohio state-court journal entries constitute valid *Shepard* documents) *United States v. Snellenberger*, 548 F.3d 699, 701–02 (9th Cir. 2008) (en banc) (per curiam) (the abstract of judgment or clerk minute order); *United States v. Benitez-De Los Santos*, 650 F.3d 1157, 1160 (8th Cir. 2011) (same). Cf. *United States v. Dittmar*, 897 F.3d 958 (8th Cir. 2018) (Iowa minutes of evidence are not permissible *Shepard* documents if the defendant has not confirmed their accuracy). See also *United States v. Reyes-Contreras*, 910 F.3d 169, 175–79 (5th Cir. 2018) (en banc) (ordinarily, in applying the modified categorical approach, the court may not rely on the indictment where the defendant did not plead guilty to a crime charged in the indictment; but where the defendant pled guilty to a lesser included offense, the indictment may be employed to pare down the basis of the conviction); *United States v. McCants*, 952 F.3d 416, 427 (3d Cir. 2020) (relying on the defendant’s admissions during a plea colloquy to specify the subsection of conviction); *United States v. Harris*, 68 F.4th 140, 145–46 (3d Cir. 2023) (same); *United States v. Williams*, 997 F.3d 519, 523–24 (4th Cir. 2021) (where a defendant pleads to a different offense than charged in the indictment,

the sentencing sheet controls; and a clerical error on a sentencing sheet, mistakenly stating that the offense was a lesser included offense, does not defeat the conclusion that the defendant was convicted of the offense identified); *United States v. Gandy*, 917 F.3d 1333, 1340–42 (11th Cir. 2019) (“What matters under the modified categorical approach is not the offense charged, but what elements the government proved or the defendant admitted committing”; therefore, the court may consider the contents of a police report that the defendant admitted as part of the factual basis of a plea). *See also United States v. Williams*, 80 F.4th 85, 98 (1st Cir. 2023) (a finding of conviction for a qualifying offense may be based on an *Alford* plea, as that admits the elements of the charged offense).

In *United States v. Silva*, 944 F.3d 993 (8th Cir. 2019), the court held that the district court did not commit clear error in determining which of two burglary statutes (one qualifying under ACCA, one not) that the defendant violated, even though no document cited the statute of conviction, where the indictment tracked the language of the qualifying statute, the judgment states that the defendant pleaded “guilty as charged,” and the court imposed a sentence that was only possible under that statute. The court rejected the defendant’s argument that this “reasoning backward” process offended the “demand for certainty” stated in *Mathis*, 579 U.S. at 519, stating: “the ‘demand for certainty’ refers to our need to be certain, when applying the modified categorical approach, that a given conviction represents a finding that a defendant committed the generic version of a crime. The modified categorical approach is separate from the factual inquiry into the statutory basis of a conviction that is at issue here. . . . In this context, we affirm if the district court did not clearly err, even though records may not establish the statute of conviction ‘with complete clarity.’” *Silva*, 944 F.3d at 996. *See also United States v. Hamilton*, 950 F.3d 567, 570 (8th Cir. 2020) (the information is the official charging document under Illinois law, and where that document makes clear the charging of a narrow provision within an overinclusive statute, the government is not required to produce additional documentation regarding admissions at a plea or judicial findings).

In *United States v. Vesey*, 966 F.3d 694, 698 (7th Cir. 2020), the court stated that it may consider the undisputed facts of an offense stated in a *Shepard* document to determine which prong of a statute formed the basis of the defendant’s conviction. *See also United States v. Stoney*, 62 F.4th 108, 112 (3d Cir. 2023) (in identifying the predicate crime for a 924(c) offense, the court may consider the plea agreement and attendant factual proffer as well as the indictment).

The Sixth Circuit held that a court may rely on a presentence report in limited circumstances: “only when: (1) the relevant part of the report is undisputed; (2) it characterizes an underlying state-court record; and (3) that underlying record is itself acceptable *Shepard* material . . . [T]he court may consider the presentence report only to determine the elements of the prior conviction . . . .” *United States v. Armes*, 953

F.3d 875, 884 (6th Cir. 2020). See also *United States v. Cunningham*, 15 F.4th 418, 821–22 (7th Cir. 2021) (the court permissibly relied on the PSR to establish the subsection of conviction, where the PSR was based on the certified record of conviction and was bolstered by separate criminal history reports from police departments); *United States v. Brasby*, 61 F.4th 127, 135 (3d Cir. 2023) (stating more generally that “reliance on the Presentence Investigation Report (‘PSR’) in the subsequent federal offense is permitted to establish the basis of a defendant’s prior conviction where the defendant does not object to its factual findings.”).

Thus, even if a statute is divisible—say an assault statute describes in one subsection a violent offense, but in another subsection an offense that does not meet the pertinent federal definition of a violent offense—if there is no *Shepard* document identifying the subsection of conviction, rather stating simply a violation of the statute, the court must conclude that the predicate conviction does not qualify in light of the possibility that the conviction rested on the lesser offense.

Note. If an issue is raised for the first time on appeal, the government may be able to present *Shepard* documents at that level, see, e.g., *United States v. Burris*, 912 F.3d 386, 396 n.5 (6th Cir. 2019) (en banc) (takes judicial notice of *Shepard* records which the government did not have reason earlier to admit); *United States v. Lynn*, 851 F.3d 786, 799 (7th Cir. 2017) (“Indeed, at our request, the Government produced these documents following oral argument”); or seek a remand to present the evidence, see, e.g., *United States v. Dunston*, 851 F.3d 91, 105 (1st Cir. 2017) (“we remand so that the district court may hold a hearing and afford the parties an opportunity to present evidence” regarding the defendant’s prior convictions”).

The *Shepard* rule applies in identifying the elements of the offense of conviction. It “does not apply to antecedent factual questions such as whether the defendant was convicted of a crime at all, or of which crime the defendant was convicted.” *United States v. Webster*, 636 F.3d 916, 919 (8th Cir. 2011). “For these antecedent questions, the normal rule governing sentencing determinations applies: ‘A court may consider any evidence in its sentencing determination that has sufficient indicia of reliability to support its probable accuracy.’” *United States v. Witherspoon*, 974 F.3d 876, 879 (8th Cir. 2020) (citation omitted).

## **VI. Interpretation of Statutes, and Realistic Probability**

In applying the categorical approach, the court must determine the elements of the pertinent offense (or of the divisible portion of the offense), and then decide whether those elements fall within (and are not broader than) the relevant federal definition. With respect to a state statute, the federal court is bound by the plain language of the statute or by the state supreme court’s interpretation of the required elements. See *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009–10 (9th Cir. 2015) (“if a

state statute explicitly defines a crime more broadly than the generic definition, no legal imagination is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime.”).

However, once the elements are established, the meaning of the federal requirement “is a question of federal law, not state law. And in answering that question we are not bound by a state court’s interpretation of a similar—or even identical—state statute.” *Johnson v. United States*, 559 U.S. 133, 138 (2010) (determining the meaning of “physical force” in the elements clause in ACCA).

In interpreting the “elements clause” of ACCA, the Supreme Court has suggested that it should not be construed in a manner that eliminates most possibly applicable offenses. “Where, as here, the applicability of a federal criminal statute requires a state conviction, we have repeatedly declined to construe the statute in a way that would render it inapplicable in many States.” *Stokeling v. United States*, 586 U.S. 73, 81 (2019); see also *Quarles v. United States*, 587 U.S. 645, 654 (2019) (“We should not lightly conclude that Congress enacted a self-defeating statute.”).

In *Delligatti v. United States*, 145 S. Ct. 797 (2025), the Court further expounded:

The elements clause is a definition of the term “crime of violence.” § 924(c)(3). When choosing among interpretations of a statutory definition, the “ordinary meaning” of the “defined term” is an important contextual clue. *Bond v. United States*, 572 U.S. 844, 861 (2014). Thus, we prefer interpretations of the elements clause that encompass prototypical “crimes of violence” over those that do not.

*Id.* at 808. The Court added: “Thus, when the meaning of the elements clause ‘is not clear,’ the ordinary meaning of the term ‘crime of violence’ is one of ‘the most important’ factors we can consider.” *Id.* at 810 (quoting A. Scalia & B. Garner, *Reading Law* 228 (2012)). It is also worth remembering that, according to the Supreme Court, “our focus on the minimum conduct criminalized by the state statute is not an invitation to apply ‘legal imagination’ to the state offense.” *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (addressing the categorical approach in the context of an immigration statute, and quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). In *Duenas-Alvarez*, the Court stated that the categorical approach

requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

549 U.S. at 193. See also, e.g., *Perez v. United States*, 885 F.3d 984, 990 (6th Cir. 2018) (“To excuse thousands of violent career criminals from ACCA’s consequences on account of a few (potentially) outlier lower court decisions, or gossamer-thin distinctions between the definitions of two offenses, is not to ‘apply the rule to particular cases,’ but to erase it.”) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)); *United States v. Patterson*, 853 F.3d 298, 304 (6th Cir. 2017) (rejecting effort to “[c]oncoct[] hypothetical and unrealistic examples divorced from the case law”).

There is uncertainty, however, regarding how the “realistic probability” rule applies where no actual case has applied the statute in the manner suggested by the defendant, but the statutory language at issue clearly permits such an application. Some cases, taking the Supreme Court at its word, require that the defendant “point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.” See, e.g., *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc). Dissenting judges in *Castillo-Rivera* disagreed, and the opinions there set forth the debate. Other courts also disagree with the result in *Castillo-Rivera*, holding that the “realistic probability” rule is inapplicable where a state statute explicitly defines a crime more broadly than the pertinent federal definition. See, e.g., *Salmonan v. Attorney Gen.*, 909 F.3d 73, 81–82 (3d Cir. 2018) (collecting Third Circuit precedent); *Liao v. Attorney General*, 910 F.3d 714, 723–24 (3d Cir. 2018) (holding that the “realistic probability” analysis is required only where the elements of the state offense match those of the generic offense, not where either the statute or case law interpreting the statute makes clear that the statute applies more broadly; citing numerous cases); *Aguirre-Zuniga v. Garland*, 37 F.4th 446, 450 (7th Cir. 2022) (if “the statute is overbroad on its face under the categorical approach, the inquiry ends. After applying the categorical approach, if the court determines that the statute is ambiguous or has indeterminate reach, only then will the court turn to the realistic probability test.”); *United States v. Owen*, 51 F.4th 292, 296 (8th Cir. 2022); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc); *United States v. Eason*, 953 F.3d 1184, 1191–92 (11th Cir. 2020) (holding that there is no requirement to show real-world examples where overreach is clear from the plain statutory language).

While the Ninth Circuit has adhered to the view that a statutory reference defeats the realistic probability argument, in *United States v. Rodriguez-Gamboa*, 972 F.3d 1148 (9th Cir. 2020), the court clarified that even where the statutory text is clear in applying to an act not covered by the federal definition, the “realistic probability” rule will reject a finding of overbreadth if the act is impossible in real life. In that case, the court held that possession of methamphetamine for sale, in violation of California law, is not overbroad under federal law in applying to both geometric and optical isomers of methamphetamine (while federal law applies only to optical isomers),

because “there is no such thing as a geometric isomer of methamphetamine.” The court stated: “Because we know as a scientific fact that dragons have never existed, we would not find overbroad a state statute criminalizing the possession of dangerous animals, defined to include dragons, if the relevant federal comparator outlawed possession of the same animals but did not include dragons. We see no reason to reach a different result here.” *Id.* at 1155.

Where there is no state supreme court case on the matter in question, courts have considered decisions of intermediate state appellate courts. *See, e.g., United States v. Burris*, 912 F.3d 386, 401 n.17 (6th Cir. 2019) (en banc). As a general rule, such decisions are not binding on a federal court seeking to interpret state law. The federal court must instead determine how it believes the state’s highest court would rule, using the intermediate court decision only as a consideration. *C.I.R. v. Bosch’s Estate*, 387 U.S. 456, 465 (1967). *See also United States v. Baldon*, 956 F.3d 1115, 1124–25 (9th Cir. 2020) (relies on both unpublished decisions and form jury instructions to show a realistic probability).

The decision in *United States v. Taylor*, 596 U.S. 845 (2022), appears to limit application of the “realistic probability” test to cases involving the interpretation of state statutes. That case concerned whether a *federal* statute categorically qualified as a predicate offense under 18 U.S.C. § 924(c). The Court distinguished *Duenas-Alvarez* as involving “a judgment about the meaning of a state statute,” where “it made sense to consult how a state court would interpret its own State’s laws.” Second, the Court stated, “in *Duenas-Alvarez* the elements of the relevant state and federal offenses clearly overlapped” and the only question faced was whether state courts applied the statute in a nongeneric manner, whereas in *Taylor*, the Court held, the predicate at issue did not overlap at all with the 924(c) definition at issue. *Id.* at 858–59. The Court accordingly held that the defendant, having established that the statutory language of the Hobbs Act did not categorically require proof of a threat of force in connection with an attempt to threaten the use of force, was not required to identify any case in which a person was prosecuted for such an attempt without an actual threat. Cf. *United States v. Kerstetter*, 82 F.4th 437, 441 (5th Cir. 2023) (“nothing in *Taylor* affects how to compare a state statute of conviction with a federal enhancement.”); *United States v. Bragg*, 44 F.4th 1067, 1076 (8th Cir. 2022) (same: the “realistic probability” test remains applicable after *Taylor* in the assessment of state offenses).

With respect to a recidivism statute, like ACCA, the court must focus on the pertinent statute as it existed at the time of the defendant’s prior offense. *Finding Old State Statutes* is a November 2016 DOJ Library Staff webinar that explains the available assistance in finding copies of state statutes as they appeared years ago. Further, *United States v. Vickers*, 967 F.3d 480, 485 n.2 (5th Cir. 2020), held that the state court interpretation of the statute as of the date of the prior offense is controlling such that later examples of prosecutions under the same statute are not relevant.

## VII. Violent Felony (ACCA) / Crime of Violence ([§ 16](#), [§ 924\(c\)](#), and [§ 4B1.2](#))

The categorical approach will apply in determining whether a prior conviction was for a “violent felony” as set forth in ACCA or for a “crime of violence” as set forth in [§ 4B1.2](#), and whether a current offense is a “crime of violence” under [§ 16](#), the elements clause of [§ 924\(c\)](#), and other statutes incorporating those definitions.

The term “violent felony” is defined in ACCA as:

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 . . . .*

[18 U.S.C. § 924\(e\)\(2\)\(B\)](#). The italicized portion of the definition of a “violent felony,” known as the “residual clause,” was voided by the Supreme Court in [Johnson v. United States, 576 U.S. 591 \(2015\)](#).

Thus, under present law, under ACCA a predicate conviction must qualify under either the “elements” or “force” clause (subsection (i)) or the “enumerated” clause (subsection (ii)). See [United States v. Pendleton, 894 F.3d 978, 981 \(8th Cir. 2018\)](#) (elements clause is not void for vagueness); [United States v. Green, 67 F.4th 657, 670-71 \(4th Cir. 2023\)](#) (same).

The definition of “crime of violence” in the career offender guideline, [U.S.S.G. § 4B1.2\(a\)](#), is similar. (The current version of [§ 2L1.2](#) (illegal reentry), effective November 1, 2016, presents an identical definition of “crime of violence” as in [§ 4B1.2](#), and therefore any discussion here of [§ 4B1.2](#) applies to [§ 2L1.2](#) as well.) The definition in [§ 4B1.2](#) contains an identical elements clause: “has as an element the use, attempted use, or threatened use of physical force against the person of another.” [§ 4B1.2\(a\)\(1\)](#). It also contains an enumerated clause, which contains a list of offenses that differs from that in ACCA’s enumerated clause.

The elements clauses in [§ 16](#) and [§ 924\(c\)](#) are slightly different, applying to a crime that “has as an element the use, attempted use, or threatened use of physical

force against the person *or property* of another.” This may produce results different from the application of ACCA and § 4B1.2. Further, § 16 and § 924(c) do not contain an enumerated clause.

This distinction was most notable with respect to Hobbs Act robbery, which defines “robbery” as the use of force against “person or property.” Thus, for several years courts held that Hobbs Act robbery was not a crime of violence under the § 4B1.2 elements clause, which requires the use of force against “the person of another.” *United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022); *United States v. Green*, 996 F.3d 176, 179–83 (4th Cir. 2021); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *Bridges v. United States*, 991 F.3d 793, 799–802 (7th Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. O’Connor*, 874 F.3d 1147 (10th Cir. 2017); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020). The Sentencing Commission adopted an amendment effective on November 1, 2023, that resolved the issue by making clear that Hobbs Act robbery does qualify as a “crime of violence” under Section 4B1.2.

In contrast, many courts have held that Hobbs Act robbery is a “crime of violence” under the elements clause of § 924(c), including the Sixth and Tenth Circuits, which applies to the use of force against “the person or property of another.” See, e.g., *United States v. Buck*, 847 F.3d 267, 274–75 (5th Cir. 2017); *United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017); *United States v. Fox*, 878 F.3d 574, 579 (7th Cir. 2017); *United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018).

In *Sessions v. Dimaya*, 584 U.S. 148 (2018), the Court invalidated the residual clause in § 16(b), and in *United States v. Davis*, 588 U.S. 445 (2019), the Court invalidated the residual clause in § 924(c) as unconstitutionally vague. This issue is discussed in detail below. See Part IX(B) (§ 16(b) and § 924(c) Residual Clauses). Thus, a crime may qualify under the “crime of violence” definitions in § 16 and § 924(c) only under the elements clauses.

## A. The Elements/Force Clause

Under the “elements” clause, a statute (or the divisible portion of a statute, as identified using the modified categorical approach) qualifies under ACCA or § 4B1.2 only if it requires proof of the use, attempted use, or threatened use of physical force against the person of another, and does not also allow conviction where such conduct is not present. The elements clauses of § 16 and § 924(c) also apply to the use, attempted use, or threatened use of physical force against the person *or property* of another.

As a general rule, a decision applying one elements clause may be applied to the identical term in another elements clause. In particular, because the ACCA and 4B1.2 elements clauses are identical, decisions regarding those terms apply interchangeably.

*See, e.g., United States v. Steed*, 879 F.3d 440, 446 (1st Cir. 2018); *United States v. Reyes*, 691 F.3d 453, 458 n.1 (2d Cir. 2012); *United States v. Hopkins*, 577 F.3d 507, 511 (3d Cir. 2009); *United States v. Montes–Flores*, 736 F.3d 357, 363 (4th Cir. 2013); *United States v. Johnson*, 880 F.3d 226, 234 (5th Cir. 2018); *United States v. Yates*, 866 F.3d 723, 728 (6th Cir. 2017); *United States v. Edwards*, 836 F.3d 831, 835 n.2 (7th Cir. 2016); *United States v. Hall*, 877 F.3d 800, 806 (8th Cir. 2017); *United States v. Willis*, 795 F.3d 986, 996 (9th Cir. 2015); *United States v. Wray*, 776 F.3d 1182, 1184–85 (10th Cir. 2015); *United States v. Martin*, 864 F.3d 1281, 1283 (11th Cir. 2017); *In re Sealed Case*, 548 F.3d 1085, 1089 (D.C. Cir. 2008).

In addressing this issue, however, counsel should assure that application of the categorical approach in earlier decisions comports with the more recent Supreme Court guidance regarding the proper application of the categorical approach, in *Descamps v. United States*, 570 U.S. 254 (2013) (addressing when an element is indivisible and therefore not subject to the modified categorical approach), and *Mathis v. United States*, 579 U.S. 500 (2016) (distinguishing between “means” and “elements” for purposes of application of the categorical approach).

## 1. Common issues

### a. Physical force

Much litigation regarding the various elements clauses concerns whether an offense requires as an element the use, attempted use, or threatened use of physical force.

In *Johnson v. United States*, 559 U.S. 133 (2010) (often referred to as “*Johnson 2010*”), the Court held that “physical force” “plainly refers to force exerted by and through concrete bodies—distinguishing physical force from, for example, intellectual force or emotional force.” *Id.* at 138. The Court further held that “‘physical force’ means *violent* force—that is, force capable of causing physical pain or injury to another person.” *Id.* at 140 (emphasis in original). “It might consist, for example, of only that degree of force necessary to inflict pain—a slap in the face, for example.” *Id.* at 143. The Court determined that a Florida battery statute applicable to “[a]ctually and intentionally touch[ing]” another person does not qualify, because that statute may be satisfied “by *any* intentional physical contact, no matter how slight.” *Id.* at 138 (citation omitted; emphasis in original).

This led to a number of lower court decisions disqualifying offenses under the elements clause that could be violated by “slight” force. Such decisions are likely invalid, in light of *Stokeling v. United States*, 586 U.S. 73 (2019). In *Stokeling*, the Supreme Court addressed a Florida robbery statute satisfied by the use of force sufficient to overcome a victim’s resistance, akin to the common law robbery standard

for robbery. The Court held that the reference to “physical force” in the ACCA elements clause rests on this standard, as the original 1984 enactment specifically referred to generic “robbery” as a crime requiring “force,” such that “[b]y retaining the term ‘force’ in the 1986 version of ACCA, [removing robbery as an enumerated offense, but] otherwise ‘[e]xpan[ding]’ the predicate offenses under ACCA, Congress made clear that the ‘force’ required for common-law robbery would be sufficient to justify an enhanced sentence under the new elements clause. We can think of no reason to read ‘force’ in the revised statute to require anything more than the degree of ‘force’ required in the 1984 statute.” *Stokeling*, 586 U.S. at 80.

This presents a low threshold, as the common law “did not distinguish between gradations of ‘violence.’ If an act physically overcame a victim’s resistance, ‘however slight’ that resistance might be, it necessarily constituted violence.” *Id.* at 78. Thus, such contact “need not cause pain or injury or even be prolonged”; rather, it need only be “capable” of provoking a response and thus “capable of causing physical pain or injury.” *Id.* at 82 (quoting *Johnson*, 559 U.S. at 140). *Stokeling* held that the ACCA definition of a “violent felony” “does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality.” *Id.* at 84.

The Court added:

A few examples illustrate the point. Under the common law, it was robbery “to seize another’s watch or purse, and use sufficient force to break a chain or guard by which it is attached to his person, or to run against another, or rudely push him about, for the purpose of diverting his attention and robbing him.” W. Clark & W. Marshall, Law of Crimes 554 (H. Lazell ed., 2d ed. 1905) (Clark & Marshall) (footnotes omitted). Similarly, it was robbery to pull a diamond pin out of a woman’s hair when doing so tore away hair attached to the pin. See 2 W. Russell, Crimes and Indictable Misdemeanors 68 (2d ed. 1828). But the crime was larceny, not robbery, if the thief did not have to overcome such resistance.

*Stokeling*, 586 U.S. at 78.

The Court explained that “[t]he nominal contact that *Johnson* addressed involved physical force that is different in kind from the violent force necessary to overcome resistance by a victim. The force necessary for misdemeanor battery does not require resistance or even physical aversion on the part of the victim; the ‘unwanted’ nature of the physical contact itself suffices to render it unlawful.” *Id.* at 82–83. “By contrast, the force necessary to overcome a victim’s physical resistance is inherently ‘violent’ in the sense contemplated by *Johnson*, and ‘suggest[s] a degree of power that would not be satisfied by the merest touching.’ 559 U.S., at 139. This is true because robbery that must overpower a victim’s will—even a feeble or weak-willed victim—

necessarily involves a physical confrontation and struggle. The altercation need not cause pain or injury or even be prolonged; it is the physical contest between the criminal and the victim that is itself ‘capable of causing physical pain or injury.’ *Id.*, at 140.” *Stokeling*, 586 U.S. at 83.

*Stokeling* stated: “*Johnson* thus does not require any particular degree of likelihood or probability that the force used will cause physical pain or injury; only potentiality.” *Id.* at 84. The Court supported Justice Scalia’s statement, in a concurring opinion in *United States v. Castleman*, 572 U.S. 157 (2014), “that force as small as ‘hitting, slapping, shoving, grabbing, pinching, biting, and hair pulling,’ *id.*, at 182 (alterations omitted), satisfied Johnson’s definition.” *Stokeling*, 586 U.S. at 85.

The Seventh Circuit stated: “We can summarize *Curtis Johnson* and *Stokeling* as follows: they require more than the simple offensive touching that the common law would have called for, but the requirement to show ‘force sufficient to overcome a victim’s resistance,’ 139 S. Ct. at 548, is not a demanding one.” *Klikno v. United States*, 928 F.3d 539, 547 (7th Cir. 2019).

*Delligatti v. United States*, 145 S. Ct. 797 (2025), adopted the reasoning of *Castleman* and confirmed that “the ‘use’ of ‘physical force’ in § 924(c) encompasses the knowing or intentional causation of bodily injury.” The Court added: “it is impossible to deliberately cause physical harm without the use of physical force,” and further, “even the indirect causation of bodily harm requires the use of violent force.” *Id.* at 805-06.

The operative question, therefore, is whether a statute of conviction required proof of at least such physical force as is capable of causing physical pain or injury to another person, and minor contact akin to that necessary to accomplish a common law robbery, by overcoming slight resistance, will suffice.

*Stokeling* supports those decisions that held that the degree of injury or harm required by the statute need not be significant. “While mere touching is not enough to show physical force, the threshold is not a high one; a slap in the face will suffice.” *United States v. Duncan*, 833 F.3d 751, 754 (7th Cir. 2016) (holding that the Indiana robbery statute, which may be violated by “putting any person in fear,” suffices because state law interprets that as imposing “fear of physical injury”). *Accord United States v. Swopes*, 886 F.3d 668, 671 (8th Cir. 2018) (en banc) (in the robbery context, a “blind-side bump, brief struggle, and yank—like the ‘slap in the face’ posited by *Johnson*, . . . involves a use of force that is capable of inflicting pain”); *United States v. Garcia*, 877 F.3d 944, 949–50 (10th Cir. 2017).

*Stokeling* calls into question contrary decisions, such as *United States v. Starks*, 861 F.3d 306, 319 (1st Cir. 2017) (Massachusetts robbery statute does not qualify

because it applies to purse snatching, which requires just enough force to make the victim aware of the purse snatching, but without touching the victim, without any awareness by the victim of the impending act, and without any intention to use force against the victim if the victim resists); *United States v. Castro-Vazquez*, 802 F.3d 28, 37–38 (1st Cir. 2015) (Puerto Rico robbery statute did not require violent force where “violence” was defined to include only the slightest use of force); *United States v. Bennett*, 863 F.3d 679, 681 (7th Cir. 2017) (Indiana conviction for resisting law enforcement and “inflicting bodily injury on or otherwise causing bodily injury to another person” “need not connote violence”: under state law, it would be sufficient if “a person is handcuffed by a police officer, tugs in the hope of squeezing his hands through the cuffs, and accidentally causes the officer to trip and fall as a result of the tugs.”); *United States v. Eason*, 829 F.3d 633, 641 (8th Cir. 2016) (Arkansas robbery statute satisfied by any “bodily impact” falls short of the ACCA requirement).

Courts consistently hold that the statutory element need not explicitly refer to “force”; rather, it is sufficient if the element necessarily involves the use of force as defined by the Supreme Court. *United States v. Garcia*, 877 F.3d 944, 952–53 (10th Cir. 2017) (in determining whether a statute requires physical force, statutory language disavowing such a requirement is controlling, but the statement of a state court (e.g., “no violent force is required”) is not necessarily so; instead, the court will look to the actual facts of the state cases to determine whether physical force as described by the Supreme Court is required).

Thus, for example, the D.C. Circuit held that the offense of Maryland robbery with a deadly weapon involves the use, attempted use, or threatened use of physical force, as “[c]ertainly the additional element of ‘use’ of a dangerous or deadly weapon supplies at minimum a ‘threat’ of physical force against the person of another.” *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016). Accord *United States v. Burns-Johnson*, 864 F.3d 313 (4th Cir. 2017) (North Carolina offense of robbery with a dangerous weapon qualified because the statute required use of firearm or other dangerous weapon, and “dangerous weapon” was defined by North Carolina courts to include any article, instrument, or substance that was likely to produce death or bodily harm). In *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc), the court described a “deadly weapon rule”: “When a felony must be committed with a deadly weapon and involves some degree or threat of physical force, it is a crime of violence under the elements clause.” *Id.* at 405 (citation omitted).

Likewise, courts routinely hold that offenses such as robbery and assault, that require the infliction or threatened infliction of bodily harm or injury, qualify under the ACCA or 4B1.2 elements clause. See, e.g., *United States v. Chapman*, 866 F.3d 129 (3d Cir. 2017) (18 U.S.C. §§ 871(a) (mailing a threat to harm the President) and 876(c) (mailing a threat to injure) are “crimes of violence” under career offender guideline; under the categorical approach, a “threat to injure” equates with the “threatened use of

physical force against the person of another” as stated in the crime of violence definition); *United States v. Seay*, 553 F.3d 732, 738 (4th Cir. 2009) (putting a person in fear of serious bodily injury necessarily involves a threat to use physical force); *United States v. Anderson*, 695 F.3d 390, 401 (6th Cir. 2012) (in aggravated assault statute, statutory requirement of “physical harm” is enough); *De Leon Castellanos v. Holder*, 652 F.3d 762, 766 (7th Cir. 2011) (a statutory requirement of any bodily injury comports with the ACCA force requirement as defined in *Johnson 2010*); *United States v. Vinton*, 631 F.3d 476, 485–86 (8th Cir. 2011) (concluding that Missouri’s second-degree-assault statute, which “requires a showing that the defendant attempted to cause, or knowingly caused, physical injury to another person,” has as an element the use or attempted use of physical force); *United States v. Forrest*, 611 F.3d 908, 910–11 (8th Cir. 2010) (“A threat that creates a fear ‘of imminent serious bodily injury’ is a threat of physical force.”); *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1290–91 (9th Cir. 2017) (citing numerous consistent Ninth Circuit cases). *United States v. Williams*, 888 F.3d 1126, 1132–33 (10th Cir. 2018) (requirement of bodily injury satisfies the physical force requirement).

### b. Direct vs. indirect use of force

In contesting the application of the elements clause, defendants frequently advance the argument that a statute presenting an element of bodily harm or injury does not qualify because an offender could violate the statute without physical force, by administering poison, or exposing the victim to a harmful toxin, or some other indirect method. In earlier years, some courts accepted this argument. However, following the Supreme Court’s decision in *United States v. Castleman*, 134 S. Ct. 1405 (2014), every appellate court has rejected it. In *Castleman*, the Court explained that “the knowing or intentional causation of bodily injury necessarily involves the use of physical force.” *Id.* at 169. At issue in *Castleman* was the federal offense of possession of a gun by a person convicted of a misdemeanor crime of domestic violence, in violation of 18 U.S.C. § 922(g)(9). Such a crime is defined in part as having as an element the “use or attempted use of physical force.” The trial court held that the Tennessee assault statute at issue did not qualify, “because one can cause bodily injury without violent contact, for example, by deceiving [the victim] into drinking a poisoned beverage.” 527 U.S. at 161–62 (internal quotation marks omitted).

The Supreme Court rejected this interpretation of “force,” relying on its statement in *Johnson 2010* that “physical force” is simply “force exerted by and through concrete bodies,” as opposed to “intellectual force or emotional force.” *Id.* at 170 (quoting *Johnson*, 559 U.S. at 138). The Court continued: “It is impossible to cause bodily injury without applying force in the common-law sense. . . . [T]he knowing or intentional application of force is a ‘use’ of force.” *Id.* at 170. Thus, the Court explained, “the word ‘use’ ‘conveys the idea that the thing used (here, ‘physical force’) has been made the user’s instrument.’” *Id.* at 171 (citation omitted). Where a

person gives poison, therefore, the use of force “is not the act of ‘sprinkl[ing]’ the poison; it is the act of employing poison knowingly as a device to cause physical harm. That the harm occurs indirectly, rather than directly (as with a kick or punch), does not matter. Under Castleman’s logic, after all, one could say that pulling the trigger on a gun is not a ‘use of force’ because it is the bullet, not the trigger, that actually strikes the victim.” *Id.*

Every Circuit then relied on *Castleman* to reject the defense argument as applied to ACCA and like elements clauses. See *United States v. Ellison*, 866 F.3d 32, 37 (1st Cir. 2017); *United States v. Hill*, 890 F.3d 51, 58–60 (2d Cir. 2018); *United States v. Chapman*, 866 F.3d 129, 132–33 (3d Cir. 2017); *United States v. Covington*, 880 F.3d 129, 134 (4th Cir. 2018); *United States v. Reyes-Contreras*, 910 F.3d 169, 180–82 (5th Cir. 2018) (en banc); *United States v. Verwiebe*, 874 F.3d 258, 261 (6th Cir. 2017); *Hill v. United States*, 877 F.3d 717, 720 (7th Cir. 2017); *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016); *United States v. Calvillo-Palacios*, 860 F.3d 1285, 1291 (9th Cir. 2017); *United States v. Benton*, 876 F.3d 1260, 1263 (10th Cir. 2017); *United States v. Deshazior*, 882 F.3d 1352, 1357–58 (11th Cir. 2018); *United States v. Redrick*, 841 F.3d 478, 484 (D.C. Cir. 2016). See also *United States v. Middleton*, 883 F.3d 485 (4th Cir. 2018) (stating that there still must be a causal link between the indirect force applied and the bodily injury, and finding that link absent in an involuntary manslaughter statute that may be violated by supplying alcohol to a person who later dies in a car crash).

In *Delligatti v. United States*, 145 S. Ct. 797, 805 (2025), addressing the elements clause in Section 924(c), the Court confirmed that “use” of physical force refers to both indirect and direct harm resulting from the conduct of the defendant.

The *Delligatti* Court further held that “use” of force refers to any conduct that is a but-for cause of injury, regardless whether that conduct involves an affirmative act or an omission to perform a duty required by law. That ruling abrogated the view of the Third Circuit, first stated in *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018), and affirmed the view of every other Circuit to previously address the issue. See, e.g., *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc); *United States v. Harrison*, 54 F.4th 884, 889–90 (6th Cir. 2022); *United States v. Smith*, 104 F.4th 314, 324 (D.C. Cir. 2024) (“intentionally withholding food or medicine with the object of causing another person’s death—whether styled as an ‘omission’ or otherwise—involves deliberately causing bodily injury through physical processes. And that, the Supreme Court has held, counts as using force.”).

### c. Recklessness offenses

In *Borden v. United States*, 593 U.S. 420 (2021), the Supreme Court held that offenses with a mens rea of recklessness do not qualify as “violent felonies” under

ACCA. The Court held that “the clause covers purposeful and knowing acts, but excludes reckless conduct.” Given the application of the categorical approach, that looks to the least serious conduct barred by a statute rather than the defendant’s actual conduct, this decision will likely result in many state statutes for assault, robbery, and even types of murder no longer qualifying as ACCA predicates.

The Court was divided 5–4, with only four justices joining Justice Kagan’s plurality decision.

Prior to 2016, courts uniformly held that a statute permitting conviction based on reckless as opposed to intentional conduct did not categorically require the “use” of physical force as set forth in the elements clause. Thus, the court would then hold that any statute that could be violated with a mens rea of recklessness did not categorically satisfy the elements clause, and no conviction under that statute could qualify as a violent felony / crime of violence. However, the Supreme Court’s decision in *United States v. Voisine*, 579 U.S. 686 (2016), appeared to undermine that conclusion. In *Voisine*, the Supreme Court determined that a conviction for a misdemeanor crime of domestic violence that was committed recklessly qualifies as a crime of violence under 18 U.S.C. § 922(g)(9), which prohibits possession of a firearm by a person convicted of a misdemeanor crime of domestic violence. In reaching this conclusion, the Court rejected petitioners’ contention that its decision in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), counseled otherwise. The Court observed that *Leocal*, which addressed a similar statutory provision in 8 U.S.C. § 16 (“the use . . . of physical force against the person or property or another”) held that merely accidental conduct may not be a “use” of force, but did not reach the issue of recklessness. *Id.* at 694. The Court concluded that the harm caused by “reckless behavior—acts undertaken with awareness of their substantial risk of causing injury”—“is the result of a deliberate decision to endanger another” and is therefore not an “accident.” *Id.* at 694.

In light of that ruling, the Department directed prosecutors to argue that offenses prohibiting volitional conduct that is reckless as to result involve the “use . . . of physical force against the person of another.” *Mathis Guidance* at 10–11 (Sept. 7, 2016).

Appellate courts then split on the issue. Post-*Voisine*, five Circuit Courts held that reckless conduct can constitute the requisite use of force under ACCA and [Section 4B1.2](#). See *United States v. Reyes-Contreras*, 910 F.3d 169, 183 (5th Cir. 2018) (en banc.); *United States v. Verwiebe*, 874 F.3d 258, 264 (6th Cir. 2017); *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016); *United States v. Pam*, 867 F. 3d 1191, 1207–08 (10th Cir. 2017); *United States v. Haight*, 892 F.3d 1271, 1280–81 (D.C. Cir. 2018) (Kavanaugh, J.).

The First Circuit disagreed. See *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017) (adopting the reasoning of *Bennett v. United States*, 868 F.3d 1, withdrawn and vacated as moot, 870 F.3d 34 (1st Cir. 2017)). But see *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020) (holding that the heightened form of recklessness required for murder offenses – malice aforethought – does satisfy the ACCA elements clause). A majority of a panel of the Fourth Circuit also disagreed with the majority view. *United States v. Middleton*, — F.3d —, 2018 WL 1056944, \*10–12 (4th Cir. 2018) (Floyd, J., concurring). See also *United States v. Harper*, 875 F.3d 329 (6th Cir. 2017) (following but expressing disagreement with Sixth Circuit precedent in *Verwiebe*).

In *United States v. Schneider*, 905 F.3d 1088, 1092 (8th Cir. 2018) the court held that a statute that criminalizes reckless driving cannot satisfy the force clause, *rehearing en banc denied*, 911 F.3d 504 (8th Cir. 2018) (court divides 5–5 over whether to rehear case; five judges express the view that a statute that sanctions reckless driving may qualify). The Eighth Circuit then limited the impact of that ruling, adhering to its general view that recklessness suffices under an elements clause, and stating with regard to *Schneider* and similar opinions, “Whatever the merit of those decisions, the court specifically limited their scope to driving offenses on the view that reckless driving ‘is distinct from other crimes of recklessness.’” *McCoy v. United States*, 960 F.3d 487, 490 (8th Cir. 2020) (citation omitted).

*Borden* then settled the issue, making clear that recklessness offenses do not suffice under an elements clause. In the *Borden* guidance memo, the Department agrees that the decision applies to like elements clauses in ACCA, the Guidelines, etc.

*United States v. Harris*, 941 F.3d 1048, 1054–56 (11th Cir. 2019), applying Alabama law, presents a lengthy discussion in support of the proposition that an attempt offense involves intent and cannot be committed recklessly. See also *United States v. Vesey*, 966 F.3d 694, 699 (7th Cir. 2020) (a general intent crime may qualify under the elements clause).

The *Borden* Court left open the question whether “extreme recklessness” (also called “depraved heart” recklessness), which applies to many murder and aggravated assault provisions, qualifies under ACCA. (The Department’s *Borden* guidance states that the Department continues to take the position that extreme recklessness offenses qualify under an elements clause.) In *United States v. Báez-Martínez*, 950 F.3d 119, 127–28 (1st Cir. 2020), the court correctly anticipated the *Borden* decision with regard to ordinary recklessness offenses, but held that an extreme recklessness offense does qualify under an elements clause. In *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (en banc), the court agreed, holding that second-degree murder in violation of 18 U.S.C. § 1111(a) is a 924(c) crime of violence, based on the conclusion that a crime committed with malice aforethought, defined here as a type of recklessness involving “depraved heart” extreme indifference to human life, qualifies as a 924(c) predicate.

*Accord United States v. Manley*, 52 F.4th 143, 150–51 (4th Cir. 2022) (a murder statute premised on extreme recklessness qualifies as a 924(c) crime of violence); *United States v. Harrison*, 54 F.4th 884, 890 (6th Cir. 2022) (the heightened mens rea of “wantonness” in the Kentucky murder statute is greater than mere recklessness and is sufficient notwithstanding *Borden*); *Janis v. United States*, 73 F.4th 628 (8th Cir. 2023) (depraved heart second-degree murder in violation of 18 U.S.C. § 1111(a) is a 924(c) crime of violence); *United States v. Kepler*, 74 F.4th 1292, 1303–12 (10th Cir. 2023) (second-degree murder, 18 U.S.C. § 1111(a) (as well as second-degree felony murder), is a 924(c) crime of violence; the malice requirement (depraved heart recklessness) is sufficient); *Alvarado-Linarez v. United States*, 44 F.4th 1334, 1344–45 (11th Cir. 2022) (extreme recklessness qualifies).

Oddly, the decision in *United States v. Lung’aho*, 72 F.4th 845 (8th Cir. 2023), seems to conflict with that court’s ruling in *Janis*. *Lung’aho* held that arson in violation of 18 U.S.C. § 844(f)(1) does not qualify as a 924(c) crime of violence, as the defendant may act “maliciously.” The court held that that mental state – acting in “willful disregard of the likelihood” that property with a federal connection will be damaged or destroyed – is not sufficient under the elements clause. The decision presents minimal discussion of the rulings with which it appears to conflict.

#### d. Conspiracy and attempt offenses

**Conspiracy offenses.** It is the Department’s position, with which courts have agreed, that a conspiracy offense does not satisfy the elements clause, as the offense may be committed upon a mere agreement without any use or threat of physical force. *Davis Guidance* at 7–8; *Mathis Guidance* at 10–11. The Fifth Circuit, for instance, held that “conspiracy to commit Hobbs Act robbery fails to satisfy the requirements of § 924(c)(3)(A)’s elements clause because it ‘does not necessarily require proof that a defendant used, attempted to use, or threatened to use force.’” *United States v. Lewis*, 907 F.3d 891, 894–95 (5th Cir. 2018) (citation omitted). *Accord United States v. Lara*, 970 F.3d 68, 74 (1st Cir. 2020); *United States v. Barrett*, 937 F.3d 126, 129 (2d Cir. 2019) (same: “The Supreme Court’s unequivocal rejection of a case-specific approach to § 924(c)(3)(B) precludes further reliance on the particular murderous violence of Barrett’s robbery conspiracy to identify that offense as a crime of violence predicate under § 924(c)(3)(B).”); *United States v. Simms*, 914 F.3d 229, 233–34 (4th Cir. 2019) (en banc) (the government concedes the point and the court agrees); *United States v. Khweis*, 971 F.3d 453, 464 (4th Cir. 2020) (conspiracy to provide material support to terrorism, 18 U.S.C. § 2339B, is not a 924(c) crime of violence); *United States v. Reece*, 938 F.3d 630, 635–36 (5th Cir. 2019) (conspiracy to commit bank robbery is not a 924(c) predicate); *United States v. Ledbetter*, 929 F.3d 338, 360–61 (6th Cir. 2019) (same); *Brown v. United States*, 942 F.3d 1069 (11th Cir. 2019) (per curiam) (the government concedes and the court agrees that conspiracy to commit Hobbs Act robbery is not a 924(c) crime of violence).

The government asserts that an exception exists for certain conspiracies to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(d), which require proof of a substantive offense to increase the statutory maximum sentence. See *Davis Guidance* at 7-8. In *United States v. Simmons*, 11 F.4th 239, 253-61 (4th Cir. 2021), the court disagreed with that view, holding that any RICO conspiracy in violation of 18 U.S.C. § 1962(d) is not categorically a 924(c) crime of violence, even if the government also proves as an aggravating factor that a murder was committed, increasing the statutory maximum. (The court distinguished cases in which the government must prove as an aggravating factor that “death results.”). The court in *United States v. Capers*, 20 F.4th 105, 116-22 (2d Cir. 2021), likewise disagreed with the government’s view and held that conspiracy to commit murder in furtherance of RICO, 18 U.S.C. § 1962(d), is not a 924(c) crime of violence. See also *United States v. Hankton*, 51 F.4th 578, 591 (5th Cir. 2022) (the government does not contest and the court holds that RICO conspiracy was an invalid 924(c) predicate); *United States v. Green*, 981 F.3d 945, 951-52 (11th Cir. 2020) (RICO conspiracy, 18 U.S.C. § 1962(d), is not a 924(c) crime of violence).

In *United States v. Tsarnaev*, 968 F.3d 24, 102–03 (1st Cir. 2020), the court held that a conspiracy to use a weapon of mass destruction, resulting in death, 18 U.S.C. §§ 2332a(a)(2), and a conspiracy to bomb a place of public use, resulting in death, 18 U.S.C. § 2332f(a)(1) and (2), are 924(c) crimes of violence because of the “death results” element. Likewise, in *United States v. Runyon*, 983 F.3d 716, 724–28 (4th Cir. 2020), the court held that conspiracy to commit murder for hire in which death results, in violation of 18 U.S.C. § 1958(a), is a 924(c) crime of violence. But see *United States v. Simmons*, 11 F.4th 239, 253–61 (4th Cir. 2021) (a RICO conspiracy in violation of 18 U.S.C. § 1962(d) is not categorically a 924(c) crime of violence, even if the government also proves as an aggravating factor that a murder was committed, increasing the statutory maximum).

Notwithstanding the fact that most conspiracy offenses do not qualify as a crime of violence, a conviction for a 924(c) offense may be upheld where it was predicated on both a conspiracy charge and a substantive count that does qualify as a crime of violence, and it is apparent that the jury found both predicates proven. See, e.g., *United States v. Laurent*, 33 F.4th 63, 89–91 (2d Cir. 2022) (the court is confident on plain error review that the 924(c) verdict would have been the same as to two defendants (but not a third); *Stone v. United States*, 37 F.4th 825, 829-32 (2d Cir. 2022) (same rule on habeas review; finding no prejudice where the 924(c) charge was predicated on both conspiracy and a substantive charge of murder, and the jury convicted of the murder charge; the court rejects the notion that the categorical approach itself applies in determining the basis of the 924(c) conviction); *United States v. Wilson*, 960 F.3d 136, 151 (3d Cir. 2020) (armed bank robbery is a crime of violence under § 924(c), and it is irrelevant that the court instructed that either conspiracy or the substantive offense

could be the predicate, as the jury convicted on both); *United States v. Crawley*, 2 F.4th 257, 263 (4th Cir. 2021) (“a § 924(c) conviction based on one valid and one invalid predicate offense remains sound following *Johnson* and its progeny, and we extend that holding to cases in which the defendant pleads guilty to a § 924(c) offense expressly based on the valid and invalid predicate.”); *United States v. Fulks*, 120 F.4th 146, 161 (4th Cir. 2024) (where a 924(c) guilty plea rested on both a valid and an invalid predicate, the plea is upheld if “there is a sufficient factual basis to find the defendant guilty on both predicates”); *United States v. Said*, 26 F.4th 653 (4th Cir. 2022) (under the *Brecht* harmless error standard, where 924(c) convictions rested on both valid and invalid predicates on which the jury convicted, the defendant must show “more than a reasonable possibility” that the verdict rested on an invalid count; mere uncertainty or speculation is not sufficient; here, “common sense” defeats the habeas petition, where the jury convicted the defendant of several substantive predicate crimes of violence involving an armed attack on a Navy vessel); *Baugh v. United States*, 64 F.4th 779 (6th Cir. 2023) (though the 924(c) conviction was predicated only on conspiracy to commit Hobbs Act robbery (an invalid predicate), that crime was “inextricably intertwined” with a charge of conspiracy to possess with intent to distribute cocaine (a valid predicate) on which the jury also convicted; in this situation, the error was harmless for purposes of habeas review); *Nicholson v. United States*, 78 F.4th 870, 883-86 (6th Cir. 2023) (applying *Baugh*); *United States v. Hari*, 67 F.4th 903, 910 (8th Cir. 2023) (where a 924(c) conviction was premised on two counts, for both of which the jury convicted, the 924(c) conviction is sustained if either predicate qualifies as a “crime of violence”); *United States v. Patterson*, 68 F.4th 402, 423 (8th Cir. 2023) (affirming conviction predicated on both conspiracy charge and a drug offense as these offenses “were so inextricably intertwined that no rational juror could have found Patterson and Damon possessed firearms in relation to one predicate but not the other.”); *United States v. Reed*, 48 F.4th 1082 (9th Cir. 2022) (where a jury was presented with both an invalid and a valid theory of 924(c) liability, the court on habeas review assesses whether the error was harmless; here, the error was harmless where the Hobbs Act conspiracy predicate (invalid) was “inextricably intertwined” with the drug conspiracy predicate (valid)); *United States v. Cannon*, 987 F.3d 924, 948 (11th Cir. 2021) (where a 924(c) charge was predicated on both a Hobbs Act conspiracy (an invalid predicate) and a cocaine conspiracy (a valid predicate), the error was harmless as “the trial record makes clear that the two predicate conspiracy crimes were so inextricably intertwined that no rational juror could have found that Cannon and Holton carried a firearm in relation to one predicate but not the other.”); *Granda v. United States*, 990 F.3d 1272 (11th Cir. 2021) (in an extensive analysis, the court explains that a defendant is not entitled to relief, either due to procedural default or on the merits, where a 924(o) offense (conspiracy to violate Section 924(c)) was predicated on conspiracy to commit Hobbs Act robbery (not a crime of violence) and several valid predicates, because “Granda’s conspiracy to commit Hobbs Act robbery was inextricably intertwined with the other predicate offenses. There is little doubt that if the jury found that Granda conspired to possess a firearm in furtherance of his conspiracy to commit Hobbs Act

robbery, it also found that he conspired to possess a firearm in furtherance of the other crime-of-violence and drug-trafficking predicates of which the jury convicted him.”); *Parker v. United States*, 993 F.3d 1257 (11th Cir. 2021) (applying *Granda* to similar facts); *Foster v. United States*, 996 F.3d 1100 (11th Cir. 2021) (same). See also *United States v. Ali*, 991 F.3d 561, 575–76 (4th Cir. 2021) (where the 924(c) charge was premised on both conspiracy and aiding and abetting a robbery, denying relief on plain error review as the evidence demonstrated that the defendant aided and abetted the crime, and therefore his substantial rights were not affected).

But see *United States v. Heyward*, 3 F.4th 75 (2d Cir. 2021) (finding plain error in fact-specific case where it was not clear that 924(c) conviction rested on valid predicate as opposed to a conspiracy predicate); *United States v. Capers*, 20 F.4th 105, 122–28 (2d Cir. 2021) (where the jury instructions permitted a 924(c) conviction based on both a valid predicate (drug conspiracy) and an invalid predicate (RICO conspiracy), and it is not clear that the jury’s verdict rested on the drug conspiracy alone, there was plain error); *United States v. Hankton*, 51 F.4th 578, 591 (5th Cir. 2022) (vacating 924(c) convictions based on both a RICO conspiracy (invalid) and drug conspiracy (valid), as the court cannot determine the basis of the conviction).

See also *Colotti v. United States*, 71 F.4th 102, 119 (2d Cir. 2023) (one divisible type of extortion charged as a RICO predicate qualifies as a 924(c) predicate, and one does not; the error in submitting the charge to the jury on both theories was harmless given that the court, “on the basis of the amplitude of the evidence, combined with the jury’s findings, concludes with a high degree of confidence ‘that a properly instructed jury would have found’ that he committed a § 924(c) offense predicated upon a valid crime of violence.”); *United States v. Hughes*, 117 F.4th 104 (3d Cir. 2024) (the jury instructions incorrectly suggested that a 924(c) offense could be predicated on attempted and not just completed Hobbs Act robbery, but on the third prong of plain error review, the Court does not apply the categorical approach, but rather reviews the whole record to determine which predicate crime the jury found; here, the evidence was clear that the defendant stole property in and therefore completed each robbery, and therefore the jury would have convicted on the 924(c) charges if required to find completed robberies).

*United States v. Robinson*, 67 F.4th 742, 751–53 (5th Cir. 2023) (the trial court erred before *Taylor* in instructing that either attempted or completed Hobbs Act robbery was a 924(c) crime of violence, but relief is not warranted on plain error review where all the evidence and arguments focused on the facts that the robberies were completed, not attempts).

It may be possible to re prosecute 924(c) charges where the conviction rested on a conspiracy predicate and is therefore invalid. See *United States v. Johnson*, 13 F.4th 348 (4th Cir. 2021) (where the defendant’s guilty plea to 924(c) charges was predicated

only on a conspiracy offense, but the indictment had referred to other substantive predicates that were dismissed as part of the plea, the government does not violate double jeopardy, following vacation of the 924(c) convictions, by re prosecuting the 924(c) counts based on the valid predicates).

As for the Sentencing Guidelines, under an amendment effective November 1, 2023, “The terms ‘crime of violence’ and ‘controlled substance offense’ include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.” § 4B1.2(d). Thus, a conspiracy offense that may not suffice under ACCA or another statutory provision may qualify under § 4B1.2. *See, e.g.*, *United States v. Martinez*, 602 F.3d 1166 (10th Cir. 2010) (attempted burglary qualifies under § 4B1.2 but not ACCA, as one covers attempt offenses and the other does not).

Prior to the 2023 amendment, the provision regarding inchoate offenses long appeared in the guideline commentary, in § 4B1.2 application note 1. The provision then came under attack, on two fronts. First, some courts held that “conspiracy” in the commentary refers to a generic offense that requires an overt act, and therefore the many federal conspiracy offenses that have no overt act requirement do not qualify. *See, e.g.*, *United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018) (holding that conspiracy to commit murder in aid of racketeering in violation of federal law is not a crime of violence under § 4B1.2 because “conspiracy” in that guideline refers to a generic offense which requires an overt act, which the federal statute at issue does not). Cf. *Quinteros v. Attorney Gen.*, 945 F.3d 772, 783–84 (3d Cir. 2019) (holding that conspiracy to commit assault with a dangerous weapon in violation of 18 U.S.C. § 1959(a)(6) does not qualify as an aggravated felony under immigration law, because “conspiracy” in the definition of aggravated felony under 8 U.S.C. § 1101(a)(43)(U) requires an overt act in light of “the modern overt act requirement reflected in the statutes of a majority of states and the MPC.”).

Second, some courts held that the commentary embracing inchoate offenses was invalid as it improperly expanded the scope of the guideline text. *See United States v. Nasir*, 17 F.4th 459, 468–72 (3d Cir. 2021) (en banc) (the definition of “controlled substance offense” in § 4B1.2 does not include inchoate offenses); *United States v. Abreu*, 32 F.4th 271, 276–78 (3d Cir. 2022) (the definition of “crime of violence” in § 4B1.2 does not include conspiracy offenses); *United States v. Mitchell*, 120 F.4th 1233, 1239–41 (4th Cir. 2024); *United States v. Havis*, 927 F.3d 382, 385–87 (6th Cir. 2019) (en banc); *United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc) (we hold that the definition of “controlled substance offense” in § 4B1.2(b) does not include inchoate offenses); *United States v. Winstead*, 890 F.3d 1082, 1090–92 (D.C. Cir. 2018). Other courts disagreed. *United States v. Rainford*, 110 F.4th 455, 475 n.5 (2d Cir. 2024); *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (en banc) (the commentary to § 4B1.2 including conspiracy crimes as controlled substance offenses remains binding); *United*

*States v. Maloid*, 71 F.4th 795, 806-14 (10th Cir. 2023) (the guideline commentary (specifically the provision in § 4B1.2 including conspiracy as a crime of violence) is binding; this rule is not altered by *Kisor*). Also disagreeing, though not citing the contrary decisions, *United States v. Garcia*, 946 F.3d 413 (8th Cir. 2019), held that both a “crime of violence” and a “controlled substance offense” under § 4B1.2 include accomplice liability such as aiding and abetting, based on the guideline commentary. Other Circuits have adhered to earlier precedent holding that inchoate offenses are properly included in the application note. *United States v. Lewis*, 963 F.3d 16, 21–25 (1st Cir. 2020); *United States v. White*, 97 F.4th 532 (7th Cir. 2024) (discussing issue at length and listing divided rulings of Circuits); *United States v. Lomax*, 51 F.4th 222, 229 (7th Cir. 2022); *United States v. Jefferson*, 975 F.3d 700, 707–08 (8th Cir. 2020). The Sentencing Commission made an amendment effective November 1, 2023, to resolve this issue by moving into the guideline text the declaration that career offender predicates include the inchoate offenses of conspiracy, attempt, and aiding and abetting. The Circuit split thus remains relevant only in the prosecution of offenses committed before that date.

**Attempt offenses.** The Supreme Court held in *United States v. Taylor*, 596 U.S. 845 (2022), that attempted Hobbs Act robbery in violation of 18 U.S.C. § 1951(a) is not a predicate “crime of violence” for purposes of application of 18 U.S.C. § 924(c). The Court reasoned that the attempt crime does not categorically require the use, attempted use, or threatened use of force, as it may occur without such conduct. The Court discussed a hypothetical offender named “Adam,” who might commit **Hobbs Act robbery** by only engaging in preparatory steps such as casing the premises, buying a ski mask, and plotting an escape route, before being intercepted by the police on the way to the target. Given the possibility of Adam’s existence, it is now held that no one who commits an attempted **Hobbs Act robbery** is subject to conviction under Section 924(c), however violent the offender’s actual conduct. *Id.* at 851–52.

The ruling in *Taylor* will likely result in similar rulings regarding other statutes addressing attempts to commit a violent crime, overruling previous ruling that any attempt to commit a crime that is a violent offense under an “elements clause” is itself a violent offense. That had been the majority view, flowing from the fact that an elements clause refers to “the use, *attempted use*, or threatened use of physical force.” See, e.g., *Collier v. United States*, 989 F.3d 212, 220–22 (2d Cir. 2021) (attempted bank robbery, 18 U.S.C. § 2113(a), is a 924(c) crime of violence); *United States v. Walker*, 990 F.3d 316 (3d Cir. 2021) (both Hobbs Act robbery, 18 U.S.C. § 1951, and attempted Hobbs Act robbery are “crimes of violence” under § 924(c)); *United States v. Smith*, 957 F.3d 590, 594–95 (5th Cir. 2020); *United States v. Clancy*, 939 F.3d 1135, 1140 (6th Cir. 2020) (it is not plain error to conclude that attempted Hobbs Act robbery is a 924(c) crime of violence); *Hill v. United States*, 877 F.3d 717, 719 (7th Cir. 2017); *United States v. Dominguez*, 954 F.3d 1251, 1261 (9th Cir. 2020); *United States v. St. Hubert*, 909 F.3d 335, 352 (11th Cir. 2018).

The government's position is that *Taylor* does not apply to an attempt offense where the substantive crime always has as an element the use of force. That is, *Taylor* involved a crime (Hobbs Act robbery) that may be committed by a mere threat, and concluded that an "attempt to threaten" may occur without any use or attempted use of force. In contrast, where the substantive crime always involves force and not a mere threat, *Taylor* should not apply. Courts have agreed with this view. The Fourth Circuit explained: "if a crime cannot be completed without the use of physical force, any attempt to commit that crime necessarily requires the attempted use of physical force." *United States v. Hunt*, 99 F.4th 161, 176 (4th Cir. 2024). The court rejected an argument that "an attempt offense would only qualify as a crime of violence if it categorically requires an act that sets force in motion – such as pointing a gun and pulling the trigger. That construction is far more restrictive than the proper understanding of a criminal attempt, and would reduce the 'attempted use' clause to a near nullity." *Id.* at 177.

In *United States v. States*, 72 F.4th 778, 783-91 (7th Cir. 2023), for instance, the court held that attempted murder of a federal official, 18 U.S.C. § 1114(a), is a 924(c) crime of violence, offering a lengthy explanation of why *Taylor* does not apply to attempts to commit a crime that requires the use of force. The court stated that the contrary "reading of *Taylor*—that no attempt offense is a crime of violence—would effectively strike 'attempted use ... of physical force' from § 924(c)(3)(A) because that phrase would describe an empty set of offenses." See also, e.g., *United States v. Lassiter*, 96 F.4th 629, 636–39 (4th Cir. 2024) (attempted murder in violation of Virginia law is a 924(c) crime of violence, and thus so is VICAR attempted murder premised on the state offense of attempted murder under Va. Code §§ 18.2-26, -32); *Dorsey v. United States*, 76 F.4th 1277, 1283–84 (9th Cir. 2023) (attempted killing in violation of 18 U.S.C. § 1512(a)(1) is a divisible witness tampering offense that qualifies as a 924(c) crime of violence; attempted murder is different from attempted Hobbs Act robbery, addressed in *Taylor*, which may be based only on an attempt to threaten); *Alvarado-Linares v. United States*, 44 F.4th 1334 (11th Cir. 2022) (attempted murder under VICAR and Georgia law qualifies as a 924(c) crime of violence, as it requires both the intent to kill and a substantial step towards that goal; an attempt to threaten, that was at issue in *Taylor*, is insufficient).

The government's view is that, in contrast to attempted Hobbs Act robbery, the offense of attempted bank robbery, in violation of 18 U.S.C. § 2113(a), does qualify as a "crime of violence" under 18 U.S.C. § 924(c), based on a statutory reading that proof of the use, attempted use, or threatened use of force is required for each offense, not mere preparation. See *Guidance Regarding Attempted Bank Robbery under 18 U.S.C. § 2113(a)* (March 9, 2023). Previous Circuit precedent is divided on this point, as the Department's memorandum explains. On the other hand, as stated in the Department's

2022 *Taylor* guidance memo, the government concedes that attempted carjacking in violation of 18 U.S.C. § 2119 does not categorically qualify as a “crime of violence.”

Whether an attempt offense qualifies as a predicate under the Guidelines is subject to the same debate addressed immediately above regarding the scope of the 4B1.2 application note.

**Aiding and abetting.** A statute that includes aiding—and—abetting liability is not overbroad under the categorical approach. The Supreme Court so held in the immigration context, where the categorical approach likewise applies in defining whether a predicate crime qualifies as one of the offenses that makes an alien subject to removal. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the alien was previously convicted of a state theft offense, that could also be committed by aiding and abetting; the Supreme Court held that the term “theft offense” in immigration law necessarily included aiding and abetting liability. The Court explained that all American jurisdictions have abrogated the distinction between principals and aiding and abetting, such that an offense that falls within a categorical description necessarily includes aiding and abetting as well. *Id.* at 189–90. Every court to address this issue in the context of the application of the elements clause to a criminal offense has reached the same conclusion. See, e.g., *Rojas-Tapia v. United States*, 130 F.4th 241, 253–57 (1st Cir. 2025) (§ 924(c)); *United States v. McCoy*, 995 F.3d 32, 57–58 (2d Cir. 2021) (§ 924(c)), modified on other grounds, 58 F.4th 72 (2d Cir. 2023); *Medunjanin v. United States*, 99 F.4th 129 (2d Cir. 2024) (explaining that this precedent is not disturbed by *Taylor*); *United States v. Stevens*, 70 F.4th 653, 661–62 (3d Cir. 2023) (§ 924(c)); *United States v. Ali*, 991 F.3d 561, 573–74 (4th Cir. 2021); *United States v. Hill*, 63 F.4th 335, 362–63 (5th Cir. 2023) (aiding and abetting Hobbs Act robbery is a 924(c) crime of violence); *United States v. Buie*, 960 F.3d 767, 772 (6th Cir. 2020) (“In every American jurisdiction, to our knowledge, principals and those who aid and abet them are held to have committed the same crime, and are punished in kind.”); *Nicholson v. United States*, 78 F.4th 870, 878–82 (6th Cir. 2023) (VICAR aiding-and-abetting assault with a dangerous weapon is a 924(c) crime of violence); *Young v. United States*, 22 F.4th 1115, 1123 (9th Cir. 2022) (“aiding and abetting a crime of violence, such as armed bank robbery, is also a crime of violence.”); *United States v. Eckford*, 77 F.4th 1228, 1237 (9th Cir. 2023) (explaining that result is not changed by *Taylor*); *United States v. Deiter*, 890 F.3d 1203, 1214–16 (10th Cir. 2018); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016); *Alvarado-Linares v. United States*, 44 F.4th 1334, 1348 (11th Cir. 2022); *United States v. Smith*, 104 F.4th 314, 323 (D.C. Cir. 2024) (aiding and abetting a crime of violence is itself a 924(c) crime of violence (citing the consistent rulings of 11 other Circuits on this issue)).

In *United States v. Carr*, 107 F.4th 636 (7th Cir. 2024), the court presented an exhaustive discussion of accomplice liability, finding that the Illinois “common design” theory of aiding and abetting, while broader than most formulations in theory, in

practice also requires reasonable foreseeability of a principal's act, such that Illinois law is not overbroad.

**Pinkerton liability.** “*Davis* does not conflict with or undermine the cases upholding § 924(c) convictions based on *Pinkerton* liability.” *United States v. Henry*, 984 F.3d 1343, 1356 (9th Cir. 2021). “Finding the [defendants] guilty through a theory of *Pinkerton* liability is still permissible as long as the underlying predicate offenses qualify as crimes of violence under the § 924(c) elements clause.” *United States v. Woods*, 14 F.4th 544, 552 (6th Cir. 2021). *Accord Gomez v. United States*, 87 F.4th 100, 109–10 (2d Cir. 2023); *United States v. Stevens*, 70 F.4th 653, 662 (3d Cir. 2023) (Hobbs Act robbery premised on *Pinkerton* theory qualifies as 924(c) crime of violence); *United States v. Gillespie*, 27 F.4th 934, 941–42 (4th Cir. 2022) (defendant was properly found liable under *Pinkerton* theory for use of a firearm in relation to a Hobbs Act robbery).

#### e. Common law offenses

The *Mathis* Guidance states:

*Mathis* involved a statutory predicate (Iowa burglary) and not a common-law crime. In *Descamps, supra*, the Court did not address whether or how the modified categorical approach applies to offenses defined by the courts rather than the legislature. The application of *Mathis* in that context remains unresolved. Prosecutors should be cautious in trying to apply the modified categorical approach to common-law offenses. To argue that a common-law offense is divisible, and hence that *Shepard* documents may be consulted to determine the basis for the conviction, precedential decisions must clearly define the offense as including alternative elements.

*Mathis* Guidance at page 17 (Sept. 7, 2016).

## 2. Robbery

Turning to particular types of offenses which are evaluated under an elements clause and the categorical approach, whether a robbery conviction qualifies under a recidivist statute is one of the most frequently litigated issues, given the prevalence of such convictions. The results have varied from state statute to state statute.

The following post-*Mathis* precedential appellate decisions address robbery offenses under the elements clauses of ACCA, § 16, § 924(c), and the Guidelines. Decisions with respect to one clause generally will apply to another elements clause as well. However, the Guidelines definition of “crime of violence,” in § 4B1.2(a)(2), also includes the enumerated offense of “robbery,” which some courts hold does not require

violent physical force and thus includes offenses that do not qualify under the elements clause. A discussion and pertinent decisions are presented in a later section of this topic page, regarding enumerated offenses.

With regard to the elements clause, the debate ordinarily turns on whether the state offense may be committed with only minimal force, and therefore does not satisfy the *Johnson* 2010 definition of “physical force” as “*violent* force—that is, force capable of causing physical pain or injury to another person.” 559 U.S. at 140 (emphasis in original). All pre–2019 decisions finding the force element of a state robbery law insufficient must be reassessed in light of *Stokeling v. United States*, 586 U.S. 73 (2019), which held that a statute presents a sufficient element of physical force if it matches the requirement of force sufficient to overcome a victim’s resistance, however slight that resistance (see the earlier discussion of *Stokeling* above in part 7(A) (1)(a)).

- **Federal unarmed bank robbery, 18 U.S.C. § 2113(a)**, is a crime of violence:

*United States v. Ellison*, 866 F.3d 32 (1st Cir. 2017) (§ 4B1.2 elements clause)  
*King v. United States*, 965 F.3d 60 (1st Cir. 2020) (§ 924(c); explaining at length that statute is divisible)  
*United States v. Moore*, 916 F.3d 231 (2d Cir. 2019) (§ 4B1.2 enumerated clause)  
*Collier v. United States*, 989 F.3d 212, 220–22 (2d Cir. 2021) (attempted bank robbery is a 924(c) crime of violence; may be overruled by *Taylor*)  
*United States v. Evans*, 924 F.3d 21, 28–31 (2d Cir. 2019) (ACCA)  
*United States v. Wilson*, 880 F.3d 80 (3d Cir. 2018) (§ 4B1.2 elements clause)  
*United States v. McNeal*, 818 F.3d 141, 153 (4th Cir. 2016) (ACCA)  
*United States v. Brewer*, 848 F.3d 711, 715–16 (5th Cir. 2017) (§ 4B1.2 elements clause)  
*United States v. Pervis*, 937 F.3d 546, 552–53 (5th Cir. 2019) (§ 924(c))  
*United States v. Butler*, 949 F.3d 230 (5th Cir. 2020) (§ 2113(a) is an ACCA violent felony; explaining that § 2113(a) is divisible, and burglary of a bank in violation of that statute is a separate crime from robbery)  
*United States v. McBride*, 826 F.3d 293, 296 (6th Cir. 2016) (§ 4B1.2 elements clause)  
*Wingate v. United States*, 969 F.3d 251, 263–64 (6th Cir. 2020) (§ 924(c))  
*United States v. Williams*, 864 F.3d 826 (7th Cir. 2017) (§ 924(c))  
*United States v. Campbell*, 865 F.3d 853 (7th Cir. 2017) (§ 4B1.2 elements clause); *United States v. Bevly*, 110 F.4<sup>th</sup> 1043, 1048 (7th Cir. 2024) (confirming *Campbell*, clarifying that bank robbery requires intentional conduct)  
*United States v. Harper*, 869 F.3d 624 (8th Cir. 2017) (§ 4B1.2 elements clause)  
*Estell v. United States*, 924 F.3d 1291 (8th Cir. 2019) (§ 924(c))

*United States v. Gutierrez*, 876 F.3d 1254, 1257 (9th Cir. 2017) (per curiam) (§ 924(c))  
*United States v. McCranie*, 889 F.3d 677, (10th Cir. 2018) (§ 4B1.2 elements clause)  
*United States v. Deiter*, 890 F.3d 1203, 1211–16 (10th Cir. 2018) (aiding and abetting a 2113(a) bank robbery qualifies as a violent felony under ACCA’s elements clause)  
*In re Sams*, 830 F.3d 1234, 1238–39 (11th Cir. 2016) (§ 924(c))  
*United States v. Armstrong*, 122 F.4th 1278, 1288-91 (11th Cir. 2024) (attempted bank robbery qualifies notwithstanding *Taylor*)

*Contra*: *United States v. Burwell*, 122 F.4th 984 (D.C. Cir. 2024) (holding that unarmed bank robbery in violation of § 2113(a) is not categorically a 924(c) crime of violence; the court reasoned that § 2113(a) may be violated by “extortion” as well as “force and violence, or by intimidation,” that extortion may not involve the use of force, and that the provision is not divisible); *see United States v. Armstrong*, 122 F.4th 1278, 1284-87 (11th Cir. 2024) (reaching the opposite conclusion, stating that robbery (taking by force, violence, or intimidation) and extortion are divisible elements in § 2113(a), and therefore a robbery by force continues to qualify as a 924(c) predicate; citing earlier consistent decisions of other courts).

- **Federal armed bank robbery**, **18 U.S.C. § 2113(d)**, is a crime of violence under § 924(c):

*United States v. Johnson*, 899 F.3d 191, 202–04 (3d Cir. 2018); *United States v. Jordan*, 96 F.4th 584 (3d Cir. 2024)  
*United States v. Smith*, 957 F.3d 590 (5th Cir. 2020)  
*United States v. Watson*, 881 F.3d 782 (9th Cir. 2018)  
*In re Hines*, 824 F.3d 1334 (11th Cir. 2016)

*See also United States v. Armour*, 840 F.3d 904 (7th Cir. 2016) (attempted armed bank robbery; may be overruled by *Taylor*)

- **Hobbs Act robbery**, **18 U.S.C. § 1951(a)**, is a crime of violence under § 924(c):

*United States v. Garcia-Ortiz*, 904 F.3d 102 (1st Cir. 2018)  
*United States v. Hill*, 890 F.3d 51 (2d Cir. 2018)  
*United States v. McCoy*, 58 F.4th 72 (2d Cir. 2023) (convictions based on attempted Hobbs Act robbery are vacated after *Taylor*, but conviction based on completed robbery remains valid); *United States v. Barrett*, 102 F.4th 60, 81-83 (2d Cir. 2024) (adhering to *McCoy*, and citing consistent

post-*Taylor* decisions of ten other Circuits recognizing completed robbery as a 924(c) predicate)

*United States v. Stoney*, 62 F.4th 108, 112-14 (3d Cir. 2023)

*United States v. Stevens*, 70 F.4th 653, 661-62 (3d Cir. 2023) (Hobbs Act robbery premised on either aiding-and-abetting or *Pinkerton* theory qualifies)

*United States v. Mathis*, 932 F.3d 242, 265-66 (4th Cir. 2019); *see also United States v. Ivey*, 60 F.4th 99, 116-17 (4th Cir. 2023) (reaffirming this conclusion notwithstanding *Borden*, as Hobbs Act robbery cannot be committed recklessly)

*United States v. Buck*, 847 F.3d 267, 274-75 (5th Cir. 2017)

*United States v. Gooch*, 850 F.3d 285, 292 (6th Cir. 2017)

*United States v. McHaney*, 1 F.4th 489 (7th Cir. 2021); *United States v. Worthen*, 60 F.4th 1066 (7th Cir. 2023) (reaffirming after *Taylor* that Hobbs Act robbery is a 924(c) crime of violence, and holding that aiding and abetting this offense qualifies as well)

*United States v. Jones*, 919 F.3d 1064, 1072 (8th Cir. 2019); *Green v. Garland*, 79

F.4th 920, 923 (8th Cir. 2023) (same conclusion notwithstanding *Taylor*, in case under § 16(a))

*United States v. Dominguez*, 954 F.3d 1251, 1258-62 (9th Cir. 2020) (overruled by *Taylor* to the extent it held that attempted Hobbs Act robbery is also a 924(c) crime of violence; the ruling regarding completed robbery is reaffirmed, 48 F.4th 1040 (9th Cir. 2022), as explained in *United States v. Eckford*, 77 F.4th 1228, 1233-36 (9th Cir. 2023))

*United States v. Melgar-Cabrera*, 892 F.3d 1053 (10th Cir. 2018), reaffirmed,

*United States v. Baker*, 49 F.4th 1348 (10th Cir. 2022)

*In re St. Fleur*, 824 F.3d 1337, 1341 (11th Cir. 2016)

*See also United States v. Taylor*, 596 U.S. 845, 851 (2022) (recognizing that an element of completed Hobbs Act robbery is that the defendant “intended to unlawfully take or obtain personal property by means of actual or threatened force”).

The same ruling applies to aiding and abetting Hobbs Act robbery. *United States v. Garcia-Ortiz*, 904 F.3d 102, 109 (1st Cir. 2018); *United States v. McCoy*, 995 F.3d 32, 57-58 (2d Cir. 2021), modified on other grounds, 58 F.4th 72 (2d Cir. 2023); *United States v. Ali*, 991 F.3d 561, 573-74 (4th Cir. 2021); *United States v. Hill*, 63 F.4th 335, 362-63 (5th Cir. 2023); *United States v. Richardson*, 948 F.3d 733, 741-42 (6th Cir. 2020); *United States v. Worthen*, 60 F.4th 1066 (7th Cir. 2023); *United States v. Deiter*, 890 F.3d 1203, 1215-16 (10th Cir. 2018); *In re Colon*, 826 F.3d 1301, 1305 (11th Cir. 2016). *See also United States v. Wiley*,

*78 F.4th 1355, 1364-65 (11th Cir. 2023)* (holding that result is not altered by *Taylor*).

Hobbs Act robbery is also a predicate ACCA violent felony. *United States v. Hatley*, 61 F.4th 536 (7th Cir. 2023) (Hobbs Act robbery is an ACCA violent felony; force directed at a person falls within the elements clause, and force directed at property is sufficiently aligned with the generic definition of extortion).

The Supreme Court held that attempted Hobbs Act robbery is not a 924(c) predicate. *United States v. Taylor*, 596 U.S. 845 (2022).

Upon the invalidation of the residual clause in *Davis*, conspiracy to commit Hobbs Act robbery does not qualify as a crime of violence. *United States v. Lara*, 970 F.3d 68, 74 (1st Cir. 2020); *United States v. Barrett*, 937 F.3d 126, 129 (2d Cir. 2019) (“The Supreme Court’s unequivocal rejection of a case-specific approach to § 924(c)(3)(B) precludes further reliance on the particular murderous violence of Barrett’s robbery conspiracy to identify that offense as a crime of violence predicate under § 924(c)(3)(B).”); *United States v. Simms*, 914 F.3d 229, 233–34 (4th Cir. 2019) (en banc); *United States v. Lewis*, 907 F.3d 891, 894–95 (5th Cir. 2018); *United States v. Ledbetter*, 929 F.3d 338, 360–61 (6th Cir. 2019); *Brown v. United States*, 942 F.3d 1069 (11th Cir. 2019) (per curiam). However, a 924(c) count may be valid where it was predicated on both a conspiracy and a substantive crime that qualifies as a predicate. See, e.g., *In re Navarro*, 931 F.3d 1298, 1302 (11th Cir. 2019) (the defendant was not entitled to relief where he admitted in his plea that the 924(c) charge was based on drug trafficking offenses as well as a conspiracy to commit Hobbs Act robbery).

- **Carjacking, 18 U.S.C. § 2119**, is a crime of violence under § 924(c):

*United States v. Cruz-Rivera*, 904 F.3d 63, 66 (1st Cir. 2018)

*United States v. Felder*, 993 F.3d 57, 79–80 (2d Cir. 2021)

*United States v. Evans*, 848 F.3d 242 (4th Cir. 2017); see also *United States v. Fulks*, 120 F.4th 146, 155-60 (4th Cir. 2024) (§ 2119 is divisible between completed and attempted carjacking offenses; a completed carjacking cannot rest on reckless conduct, and qualifies as a 924(c) predicate)

*United States v. Draven*, 77 F.4th 307, 317-18 (4th Cir. 2023) (aiding and abetting

carjacking resulting in death, 18 U.S.C. § 2119, is a 924(c) crime of violence)

*United States v. Jones*, 854 F.3d 737, 740–41 (5th Cir. 2017)

*United States v. Jackson*, 918 F.3d 467, 486 (6th Cir. 2019)

*Estell v. United States*, 924 F.3d 1291 (8th Cir. 2019)

*United States v. Gutierrez*, 876 F.3d 1254 (9th Cir. 2017) (per curiam)  
*Ovalles v. United States*, 905 F.3d 1300 (11th Cir. 2018) (attempted carjacking; may be overruled by *Taylor*)

- *United States v. Almonte-Nunez*, 963 F.3d 58, 67–68 (1st Cir. 2020) (**robbery of personal property belonging to the U.S.**, **18 U.S.C. § 2112**, is a **924(c)** crime of violence)
- *Kidd v. United States*, 929 F.3d 578 (8th Cir. 2019) (per curiam) (**robbery involving controlled substances**, **18 U.S.C. § 2118(a) and 2118(c)(1)**, is a crime of violence under the 924(c) elements clause; “intimidation” involves the threat of force); *accord Boulanger v. United States*, 978 F.3d 24, 32–34 (1st Cir. 2020); *Wingate v. United States*, 969 F.3d 251, 263–64 (6th Cir. 2020); *United States v. Burke*, 943 F.3d 1236 (9th Cir. 2019).
- *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017) (**Hobbs Act robbery**, **18 U.S.C. § 1951(a)**, is not a crime of violence under § 4B1.2, under either the enumerated or elements clause); *accord United States v. Chappelle*, 41 F.4th 102 (2d Cir. 2022); *United States v. Scott*, 14 F.4th 490 (3d Cir. 2021); *United States v. Green*, 996 F.3d 176, 179–83 (4th Cir. 2021); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *Bridges v. United States*, 991 F.3d 793, 799–802 (7th Cir. 2021); *United States v. Prigan*, 8 F.4th 1115 (9th Cir. 2021); *United States v. Eason*, 953 F.3d 1184 (11th Cir. 2020)
- *United States v. Fultz*, 923 F.3d 1192 (9th Cir. 2019) (**robbery on a government reservation**, **18 U.S.C. § 2111**, is a **section 924(c)** crime of violence under the elements clause, as are other robbery offenses that may be committed by “intimidation”); *Harris v. United States*, 19 F.4th 863, 871–72 (6th Cir. 2021) (aiding and abetting attempted robbery in violation of § 2111 is a 924(c) crime of violence; may be overruled by *Taylor*)
- *Knight v. United States*, 936 F.3d 495 (6th Cir. 2019) (the aggravated version of assault and robbery of a person having control of mail or government property, requiring wounding or putting the victim’s life in jeopardy with a dangerous weapon, **18 U.S.C. § 2114(a)**, is divisible, and qualifies as a crime of violence under the 924(c) elements clause); *accord Rojas-Tapia v. United States*, 130 F.4th 241, 253–57 (1st Cir. 2025) (re aggravated robbery involving putting the life of a postal employee in jeopardy through use of a dangerous weapon); *Forteza-Garcia v. United States*, 130 F.4th 18 (1st Cir. 2025) (re “wounding” a postal employee); *Pannell v. United States*, 115 F.4th 154 (2d Cir. 2024); *United States v. Bryant*, 949 F.3d 168 (4th Cir. 2020); *United States v. Castro*, 4 F.4th 345, 352 (5th Cir. 2021); *United States v. Enoch*, 865 F.3d 575 (7th Cir. 2017);

*United States v. Buck*, 23 F.4th 919 (9th Cir. 2022); *In re Watt*, 829 F.3d 1287, 1289 (11th Cir. 2016)

- *In re Welch*, 884 F.3d 1319, 1324 (11th Cir. 2018) (first-degree robbery in **Alabama**, Ala. Code § 13A–8–43(a), qualifies under ACCA); *cf. Ward v. United States*, 936 F.3d 914 (9th Cir. 2019) (explaining that *Stokeling* abrogated *United States v. Walton*, 881 F.3d 768, 773–74 (9th Cir. 2018) (which held that third-degree robbery in **Alabama**, Ala. Code § 13A–8–43(a), does not qualify under ACCA as it may be committed by minor force); *United States v. Hunt*, 941 F.3d 1259 (11th Cir. 2019) (per curiam) (second-degree robbery, § 13A–8–42, and third-degree robbery, § 13A–8–43, require the same element and therefore qualify under ACCA and § 4B1.2))
- *Ward v. United States*, 936 F.3d 914 (9th Cir. 2019) (holding that *Stokeling* abrogated the part of *United States v. Molinar*, 881 F.3d 1064 (9th Cir. 2017), which held that **Arizona** armed robbery, Ariz. Rev. Stat. §§ 13–1901(1), 13–1904(A), does not qualify under the elements clause of § 4B1.2, and *United States v. Jones*, 877 F.3d 884 (9th Cir. 2017), holding that the statute does not qualify under the elements clause of ACCA; the holding of *Molinar* remains binding that the statute does qualify under the 4B1.2 enumerated clause because generic robbery requires only de minimis force)
- *United States v. Smith*, 928 F.3d 714 (8th Cir. 2019) (**Arkansas** robbery, Ark. Code § 5–12–102, is § 4B1.2 crime of violence under both the elements and enumerated clauses, as it requires sufficient force to overcome victim’s resistance and does not criminalize mere snatching of property); *United States v. Mallett*, 66 F.4th 734 (8th Cir. 2023) (same ruling as to ACCA)
- *United States v. Dixon*, 805 F.3d 1193 (9th Cir. 2015) (**California** robbery, Cal. Penal Code § 211, does not qualify under ACCA, because force against a person may be accidental or negligent); *see also United States v. Walton*, 881 F.3d 768 (9th Cir. 2018) (second-degree robbery under **California** law, Cal. Penal Code § 211, did not qualify as a violent felony under ACCA); *United States v. Bankston*, 901 F.3d 1100 (9th Cir. 2018) (the court applies its decision in *Edling* regarding Nevada law (see below) and holds that **California** robbery in violation of Cal. Penal Code § 211 is no longer a § 4B1.2 crime of violence, after an August 2016 amendment limiting extortion offenses to the use of force against a person, but a sentence imposed prior to the amendment is upheld); *United States v. Garcia-Lopez*, 903 F.3d 887, 892–93 (9th Cir. 2018) (**California** robbery, in violation of Cal. Penal Code § 211, is not a crime of violence under § 16(a) (or an ACCA violent felony, reaffirming *Dixon*), because it may be committed with accidental force)

- *United States v. Harris*, 844 F.3d 1260, 1266–68 (10th Cir. 2017) (**Colorado** robbery, Colo. Rev. Stat. § 18–4–301(1), qualifies under ACCA); *see also United States v. Mendez*, 924 F.3d 1122 (10th Cir. 2019) (attempted robbery qualifies under § 4B1.2; the Colorado law of attempt matches the generic definition derived from the Model Penal Code)
- *United States v. Bordeaux*, 886 F.3d 189 (2d Cir. 2018) (**Connecticut** conviction for first-degree robbery with a weapon, Conn. Gen. Stat. § 53a–134(a)(4), is violent felony under ACCA); *Wood v. Barr*, 941 F.3d 628 (2d Cir. 2019) (per curiam) (same ruling under § 16(a) elements clause)
- *Shabazz v. United States*, 912 F.3d 73 (**Connecticut** robbery in violation of Conn. Gen. Stat. § 53a–133 is a violent felony under ACCA), *opinion on denial of rehearing*, 923 F.3d 82 (2d Cir. 2019); *Estremera v. United States*, 944 F.3d 452 (2d Cir. 2019) (reaffirming *Shabazz* after *Stokeling*, and holding that because both first degree robbery and attempted robbery, in violation of Conn. Gen. Stat. §§ 53a–134(a)(3) and 53a–49, and second degree robbery and conspiracy to commit robbery, in violation of §§ 53a–135(a)(1) and 53a–48, require proof of simple robbery in violation of § 53a–133, all qualify as ACCA violent felonies)
- *United States v. Stanford*, 75 F.4th 309 (3d Cir. 2023) (both first-degree **Delaware** robbery, 11 Del. Code § 832, and second-degree robbery, § 831, are categorically crimes of violence under the 4B1.2 elements clause; these provisions are divisible, but in any event, every type of robbery under these statutes qualifies, as the crimes require proof of the intentional use or threat of force)
- *In re Sealed Case*, 548 F.3d 1085, 1089 (D.C. Cir. 2008), a pre-*Mathis* decision that may no longer be good law, held that **D.C.** robbery, D.C. Code 22–2801, is divisible between offenses committed by force and those committed by stealth, for purposes of the definition of crime of violence in § 4B1.2; in *United States v. Sheffield*, 832 F.3d 296, 314–15 (D.C. Cir. 2016), the court repeated that conclusion, but held that attempted robbery, in violation of § 22–2802, is not divisible and does not qualify
- *Stokeling v. United States*, 586 U.S. 73 (2019) (**Florida** robbery in violation of Fla. Stat. § 812.13(1) is an ACCA violent felony) (abrogating *United States v. Geozos*, 870 F.3d 890, 900–01 (9th Cir. 2017), as recognized in *Ward v. United States*, 936 F.3d 914 (9th Cir. 2019)); *Welch v. United States*, 958 F.3d 1093 (11th Cir. 2020) (this conclusion applies to pre–1997 Florida robbery offenses)

as well); *United States v. Ochoa*, 941 F.3d 1074, 1108 (11th Cir. 2019) (applied to elements clause of 4B1.2 definition of crime of violence as well)

- *Garcia-Hernandez v. United States*, 915 F.3d 558, 561 (8th Cir. 2019) (in light of *Stokeling*, **Florida** armed robbery in 2003 under Fla. Stat. § 812.13(2)(b) is an ACCA violent felony)
- *United States v. Joyner*, 882 F.3d 1369 (11th Cir. 2018) (**Florida** strong arm robbery, Fla. Stat. §§ 812.13(1), 812.13(2)(c), is ACCA violent felony); *see also United States v. Lightsey*, 120 F.4th 851, 859-61 (11th Cir. 2024) (Florida attempted armed robbery is sufficiently different from the attempted Hobbs Act robbery statute addressed in *Taylor* to preclude the conclusion that *Taylor* abrogated prior Eleventh Circuit law in *Joyner* that the Florida attempt crime qualifies as an ACCA violent felony)
- *Boston v. United States*, 939 F.3d 1266 (11th Cir. 2019) (**Florida** conviction for principal to armed robbery, which includes aider-and-abettor liability, Fla. Stat. §§ 777.011, 812.13, is ACCA violent felony)
- *United States v. Fluker*, 891 F.3d 541 (4th Cir. 2018) (**Georgia** robbery, in violation of Ga. Code § 16-8-40(a), is broader than generic robbery, because it may involve minimal force, and is therefore not a crime of violence under the enumerated clause of § 4B1.2(a)(2); called into question by *Stokeling*)
- *Porter v. United States*, 959 F.3d 800 (6th Cir. 2020) (**Georgia** armed robbery, Ga. Code § 16-8-41(a), is an ACCA violent felony); *United States v. Brooks*, 112 F.4th 937, 943-46 (11th Cir. 2024) (Georgia robbery by force, § 16-8-40(a) (1), is part of a divisible statute and qualifies as a 4B1.2 crime of violence under the elements clause); *United States v. Harrison*, 56 F.4th 1325 (11th Cir. 2023) (Ga. Code § 16-8-40 is divisible, and section (a)(2), robbery by intimidation, falls within the enumerated definition of robbery in § 4B1.2)
- *United States v. Tagatac*, 36 F.4<sup>th</sup> 1000 (9th Cir. 2022) (**Hawaii** second-degree robbery in violation of Haw. Rev. Stat. § 708-841 is divisible, and subsection (b) robbery, involving a threat to use force, requires proof of intent and is a 4B1.2 crime of violence)
- *Klikno v. United States*, 928 F.3d 539 (7th Cir. 2019) (**Illinois** simple robbery, 720 Ill. Comp. Stat. 5/18-1(a), and therefore armed robbery as well, 5-18/2(a), are violent felonies under ACCA); *United States v. Chagoya-Morales*, 859 F.3d 411, 421-22 (7th Cir. 2017) (**Illinois** conviction for aggravated robbery, 720 Ill. Comp. Stat. 5/18-5(a), was crime of violence under the § 2L1.2 elements

clause); *United States v. Carr*, 107 F.4th 636 (7th Cir. 2024) (reaffirming that armed robbery is a 4B1.2 crime of violence; exhaustive discussion of accomplice liability finds that the Illinois “common design” theory of aiding and abetting, while broader than most formulations in theory, in practice also requires reasonable foreseeability of a principal’s act, such that Illinois law is not overbroad); *United States v. Smith*, 109 F.4th 888 (7th Cir. 2024) (reaffirming that Illinois aggravated robbery, 720 Ill. Comp. Stat. § 5/18-5(a), qualified as a 4B1.2 crime of violence and an 841(b)(1) serious violent felony; it may not be committed recklessly); *United States v. Brown*, 916 F.3d 706 (8th Cir. 2019) (Illinois robbery and attempted robbery qualify under ACCA and § 4B1.2); *United States v. Martin*, 15 F.4th 878, 883–85 (8th Cir. 2021) (Illinois aggravated robbery, § 5/18-2(a), is a 4B1.2 crime of violence under the enumerated clause)

- *United States v. Sykes*, 914 F.3d 615 (8th Cir. 2019) (Illinois aggravated vehicular hijacking, 720 Ill. Comp. Stat. 5/18-3(a), is a 4B1.2 crime of violence; the court repeats that robbery in violation of 720 Ill. Comp. Stat. 5/18-1(a), also qualifies, as both statutes are based on the common-law definition of robbery approved in *Stokeling*); *United States v. Brown*, 74 F.4th 527 (7th Cir. 2023) (pre-2013 version of Illinois aggravated vehicular hijacking statute, 720 Ill. Comp. Stat. Ann. 5/18-3, stated a 4B1.2 crime of violence; the offense included an implied element of knowing or purposeful use or threat of force); *United States v. Pulley*, 75 F.4th 9249 (8th Cir. 2023) (same; there is no realistic probability that a person would be convicted of the offense based on merely reckless conduct)
- *United States v. Duncan*, 833 F.3d 751 (7th Cir. 2016) (Indiana robbery, Ind. Code § 35-42-5-1, qualifies under ACCA); *United States v. Armour*, 840 F.3d 904 (7th Cir. 2016) (same as to the § 4B1.2 elements clause); *but see United States v. D.D.B.*, 903 F.3d 684 (7th Cir. 2018) (attempted robbery in Indiana, Ind. Code §§ 35-42-5-1, 35-41-5-1(a), does not qualify under the elements clause for transfer of a juvenile to adult prosecution, 18 U.S.C. § 5032 (similar to the ACCA violent felony elements clause), because to prove attempt the state need not prove intent, only knowing commission of a substantial step toward completing the crime)
- *Golinveaux v. United States*, 915 F.3d 564 (8th Cir. 2019) (Iowa robbery in violation of Iowa Code § 711.1(1) (established by (1) intent to commit a theft, and (2) an assault in carrying out the intent to commit a theft) is an ACCA violent felony)

- *United States v. Bong*, 913 F.3d 1252, 1264–66 (10th Cir. 2019) (post-*Stokeling* decision: **Kansas** robbery, Kan. Stat. § 21–3426, is not an ACCA violent felony, because it may apply to mere purse-snatching; and the aggravated robbery statute, Kan. Stat. § 21–3427, is not either, as it may be committed by mere possession of a dangerous weapon without any employment in the offense)
- *Mwendapeke v. Garland*, 87 F.4th 860 (7th Cir. 2023) (**Kentucky** robbery in the first degree, Ky. Rev. Stat. § 515.020, is categorically a “crime of violence” under § 16(a), and complicity to commit that offense qualifies as well, as it matches aiding-and-abetting liability)
- *United States v. Williams*, 39 F.4th 342, 346–49 (6th Cir. 2022) (**Kentucky** second-degree robbery, Ky. Rev. Stat. § 515.030, requires proof of intent and physical force as defined in *Stokeling*, and therefore qualifies as an ACCA violent felony)
- *United States v. James*, 950 F.3d 289 (5th Cir. 2020) (**Louisiana** armed robbery, La. Stat. § 14:64, is an ACCA violent felony; indeed, under *United States v. Brown*, 437 F.3d 450, 452 (5th Cir. 2006), which remains valid, a simple robbery, La. Stat. § 14:65, which presents the same elements except for being armed with a dangerous weapon, is an ACCA violent felony); *United States v. Parker*, 3 F.4th 178, 180–81 (5th Cir. 2021) (same ruling with regard to offense qualifying as a “serious violent felony” under § 3559(c)(2)(F)(ii))
- *United States v. Redrick*, 841 F.3d 478 (D.C. Cir. 2016) (**Maryland** common law offense of robbery with a dangerous weapon qualifies under ACCA); *United States v. Bell*, 901 F.3d 455, 468–72 (4th Cir. 2018) (same)
- *United States v. Johnson*, 945 F.3d 174, 180–81 (4th Cir. 2019) (**Maryland** robbery, Md. Code, Crim. Law § 3–402, is an ACCA violent felony); *United States v. Shanton*, 125 F.4th 548 (4th Cir. 2025) (reaffirmed following *Borden*)
- *United States v. Mulkern*, 854 F.3d 87, 93 (1st Cir. 2017) (**Maine** robbery in violation of Me. Rev. Stat. tit. 17-A, § 651(1)(B) or (C) does not qualify under ACCA)
- *United States v. Williams*, 80 F.4th 85 (1st Cir. 2023) (**Maine** robbery with the use of a dangerous weapon (RDW), Me. Rev. Stat. tit. 17-A, §§ 651(1)(B) and 1252(4), qualifies as a 4B1.2 crime of violence under the elements clause)
- *United States v. Starks*, 861 F.3d 306, 317–24 (1st Cir. 2017) (unarmed robbery in violation of **Massachusetts** law, Mass. Gen. Laws ch. 265, § 19(b), and

armed robbery in violation of Massachusetts law, Mass. Gen. Laws ch. 265, § 17, do not qualify as violent felonies under ACCA; unarmed robbery may be committed through mere purse snatching, and to commit an armed robbery, the perpetrator need not use utilize the weapon in committing the robbery or even display or otherwise make the victim aware of its presence); *accord United States v. Parnell*, 818 F.3d 974 (9th Cir. 2016) (Massachusetts armed robbery, Mass. Gen. Laws, ch. 265, §§ 17, 19(b), is not a violent felony under ACCA because the crime requires only minimal force and the weapon need not be displayed). *See also United States v. Frates*, 896 F.3d 93 (1st Cir. 2018) (Massachusetts convictions for unarmed robbery, Mass. Gen. Laws ch. 265, § 19(b), qualified under previous § 4B1.2 residual clause; but as the Sentencing Commission deleted that clause while the appeal was pending, case is remanded to permit district court to consider whether it would have imposed a different sentence) (all of these decisions are called into question by *Stokeling*)

- *Chaney v. United States*, 917 F.3d 895 (6th Cir. 2019) (**Michigan** conviction for attempted unarmed robbery, Mich. Comp. Laws § 750.530, prior to 2004 amendment, is ACCA violent felony); *United States v. Fuller–Ragland*, 931 F.3d 456 (6th Cir. 2019) (same ruling under the 4B1.2 elements clause, with regard to the post–2004 version; as before, “putting in fear” is the least of the acts criminalized, and under state law, it requires a threat of injury)
- *United States v. Lightfoot*, 119 F.4th 353 (4th Cir. 2024) (**Michigan** bank robbery, Mich. Comp. Laws § 750.531, is a divisible offense; the “assaultive” form falls within the enumerated offense of “robbery” that qualifies as a “serious violent felony” for purposes of the three-strikes statute, 18 U.S.C. § 3559(c))
- *United States v. Jennings*, 860 F.3d 450 (7th Cir. 2017) (**Minnesota** simple robbery, Minn. Stat. § 609.24, qualifies under ACCA); *United States v. Libby*, 880 F.3d 1011 (8th Cir. 2018) (same); *United States v. Pettis*, 888 F.3d 962, (8th Cir. 2018) (reaffirming *Libby* following en banc decision in *Swopes*); *United States v. Jackson–Bey*, 964 F.3d 730 (8th Cir. 2020) (reaffirming *Pettis* and *Libby* after *Stokeling*); *Ward v. United States*, 936 F.3d 914 (9th Cir. 2019) (aiding and abetting simple robbery under Minn. Stat. § 609.24 is an ACCA violent felony); *United States v. Robinson*, 925 F.3d 997 (8th Cir. 2019) (per curiam) (accordingly, aggravated robbery, § 609.245, qualifies as well under the § 4B1.2 elements clause)
- *United States v. Williams*, 950 F.3d 328 (5th Cir. 2020) (per curiam) (robbery in violation of **Mississippi** law, Miss. Code § 97–3–73, is an ACCA violent felony)

in the absence of any Mississippi case law suggesting “a realistic probability that Mississippi courts would apply the robbery statute to conduct that does not involve ‘the use, attempted use, or threatened use of physical force against the person of another.’”’)

- *United States v. Shine*, 910 F.3d 1061 (8th Cir. 2018) (**Missouri** first-degree robbery, Mo. Rev. Stat. § 569.020.1, is a crime of violence under the 4B1.1 elements clause); *United States v. Witherspoon*, 974 F.3d 876, 879–80 (8th Cir. 2020) (same ruling under ACCA)
- *United States v. Swopes*, 886 F.3d 668 (8th Cir. 2018) (en banc) (second-degree robbery conviction under **Missouri** law, Mo. Rev. Stat. § 569.030, is a violent felony under ACCA); *United States v. Ash*, 917 F.3d 1238 (10th Cir. 2019) (same ruling following *Stokeling*, based on exhaustive review of Missouri law showing that state, consistent with definition of robbery in *Stokeling*, distinguishes between force overcoming resistance and mere snatching); *United States v. Parker*, 929 F.3d 940 (8th Cir. 2019) (same ruling with regard to § 4B1.2); *United States v. Clark*, 934 F.3d 843 (8th Cir. 2019) (*Stokeling* reinforces the court’s conclusion in *Swopes* that Missouri second-degree robbery is an ACCA violent felony); *United States v. Gordon*, 69 F.4th 932 (8th Cir. 2023) (reaffirming *Swopes* notwithstanding *Taylor*)
- *Jones v. United States*, 922 F.3d 864 (8th Cir. 2019) (**Missouri** robbery in violation of the 1969 statute, Mo. Stat. § 560.120, is an ACCA violent felony because it required as an element the use of force sufficient to overcome victim’s resistance)
- *United States v. Edling*, 895 F.3d 1153, 1156–58 (9th Cir. 2018) (**Nevada** felony robbery, Nev. Rev. St. § 200.380, is not a crime of violence under § 4B1.2 because it may be committed by instilling fear of injury to property, not a person; the generic definition of “robbery” requires a threat of physical injury to a person, and under a 2016 guideline amendment, the generic definition of “extortion” does as well)
- *Boulanger v. United States*, 978 F.3d 24, 29–32 (1st Cir. 2020) (**New Hampshire** robbery, N.H. Rev. Stat. § 636:1(I), and armed robbery, § 636:1(III), are ACCA violent felonies)
- *United States v. McCants*, 952 F.3d 416 (3d Cir. 2020) (**New Jersey** robbery in violation of N.J. Stat. § 2C:15–1(a)(2) is a crime of violence under both the

elements and enumerated offense clauses of § 4B1.2(a)

- *Garcia-Hernandez v. United States*, 915 F.3d 558, 561 (8th Cir. 2019) (in light of *Stokeling*, New Jersey armed robbery under N.J.S.A. § 2C:15–1, is an ACCA violent felony)
- *United States v. Garcia*, 877 F.3d 934 (10th Cir. 2017) (New Mexico third-degree robbery, N.M. Stat. § 30–16–2, is a violent felony under ACCA); *United States v. Manzanares*, 956 F.3d 1220 (10th Cir. 2020) (armed robbery, a more serious offense under the same statute, also qualifies)
- *United States v. Burns-Johnson*, 864 F.3d 313 (4th Cir. 2017) (North Carolina offense of robbery with a dangerous weapon, in violation of N.C. Gen. Stat. § 14–87, is a violent felony under ACCA); *reaffirmed*, *United States v. Hamilton*, 95 F.4th 171 (4th Cir. 2024)
- *United States v. Dinkins*, 928 F.3d 349 (4th Cir. 2019) (North Carolina common law robbery, and the common law offense of accessory before the fact of armed robbery, are ACCA violent felonies; contrary precedent overturned in light of *Stokeling*)
- *United States v. Ojeda*, 951 F.3d 66, 70–72 (2d Cir. 2020) (any degree of robbery under New York law is an ACCA violent felony); *Stuckey v. United States*, 878 F.3d 62 (2d Cir. 2017) (first-degree robbery in New York, N.Y. Penal Law § 160.15, is a violent crime under ACCA); *accord Lassend v. United States*, 898 F.3d 115, 128 (1st Cir. 2018); *United States v. Hammond*, 912 F.3d 650 (4th Cir. 2019); *United States v. Sanchez*, 940 F.3d 526, 531–33 (11th Cir. 2019)
- *United States v. Pereira-Gomez*, 903 F.3d 155 (2d Cir. 2018) (New York attempted robbery in the second degree, N.Y. Penal Law §§ 110.00 and 160.10(2), and all other New York robbery offenses qualify under the Guidelines elements clause, as they require a level of physical force sufficient “to prevent resistance to the taking or to compel the owner to deliver up the property”). Other Circuits are divided on this issue, though *Stokeling* (2019) likely supports the Second Circuit’s result. See *United States v. Steed*, 879 F.3d 440, 450–51 (1st Cir. 2018) (attempted robbery in the second degree in New York, N.Y. Penal Law § 160.10(2)(a), was not a crime of violence under the elements clause of § 4B1.2, as it may apply to mere purse snatching); *United States v. Rabb*, 942 F.3d 1 (1st Cir. 2019) (applying *Steed* in a case involving New York law as it appeared in 2000, while suggesting that the law may have changed to now require force); *contra Perez v. United States*, 885 F.3d 984 (6th

Cir. 2018) (New York second-degree robbery is divisible; the type involving “aided by another person” is a violent felony under ACCA; New York courts interpret the required force to go beyond mere touching and to include force that would cause pain to another); *United States v. Williams*, 899 F.3d 659, 662–64 (8th Cir. 2018) (same).

- *United States v. Thrower*, 914 F.3d 770 (2d Cir. 2019) (per curiam) (New York third-degree robbery, N.Y. Penal Law §§ 160.00, 160.05, which is based on the common law definition of robbery, is an ACCA violent felony under the elements clause, as is any degree of New York robbery); *United States v. Moore*, 916 F.3d 231, 239–42 (2d Cir. 2019) (same ruling under 4B1.2 element clause); *United States v. Johnson*, 915 F.3d 223 (4th Cir. 2019) (the crime also falls within the enumerated crime of “robbery” in the three-strikes statute, 18 U.S.C. § 3559(c))
- *United States v. White*, 58 F.4th 889 (6th Cir. 2023) (aggravated robbery, in violation of Ohio Rev. Code § 2911.01(A)(1), based on displaying, brandishing, or using a weapon, or indicating that the offender possesses a weapon, is not an ACCA violent felony, as Ohio law states that there is no mens rea requirement with regard to the weapon element; overruling *United States v. Patterson*, 853 F.3d 298 (6th Cir. 2017); likely overruling *United States v. Johnson*, 933 F.3d 540 (6th Cir. 2019) (finding that the Ohio offense of complicity to commit aggravated robbery, as well as robbery in violation of § 2911.02(A)(2), qualifies); *United States v. Raymore*, 965 F.3d 475, 490 (6th Cir. 2020) (applying *Patterson*))
- *United States v. Cervenak*, -- F.4th --, 2025 WL 984495 (6th Cir. Apr. 2, 2025) (en banc) (robbery in violation of Ohio Rev. Code § 2911.02(A)(2) (theft involving infliction of physical harm) is not categorically “robbery” or “extortion” under the 4B1.2 enumerated clause; the offense is divisible by the type of theft involved; several of the theft offenses do not require obtaining something of value from another person, which is part of the generic definition of “extortion,” and Ohio robbery does not always require the misappropriation of property, which is part of the generic definition of “robbery”); abrogating *United States v. Carter*, 69 F.4th 361 (6th Cir. 2023); supporting *United States v. Ivy*, 93 F.4th 937, 943 (6th Cir. 2024) (a conviction for Ohio aggravated robbery with a deadly weapon that does not specify the predicate theft offense is not a crime of violence under the Guidelines, as many of the predicate theft offenses do not involve danger to a person or necessarily require proof of at least recklessness (as required by the generic definition of robbery))
- *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017) (Ohio robbery, in violation of Ohio Rev. Code § 2911.02(A)(3), does not qualify under either the elements

or enumerated clause of § 4B1.2; called into question by *Stokeling*)

- *United States v. Shelby*, 939 F.3d 974 (9th Cir. 2019) (**Oregon** third-degree robbery, Or. Rev. Stat. § 164.395, is not an ACCA violent felony, because the perpetrator may prevent a victim's resistance by acting so swiftly that the victim does not have time to resist (thus, notwithstanding *Stokeling*, reaffirming *United States v. Strickland*, 860 F.3d 1224 (9th Cir. 2017)). First-degree robbery, based on being "armed with a deadly weapon," § 164.415(1)(a), also does not qualify, because having a concealed weapon does not involve the use of force. The court does not resolve whether the first-degree robbery statute is divisible such that other aspects of first-degree robbery – using or attempting to use a dangerous weapon, or causing or attempting to cause serious physical injury – may qualify, because the *Shepard* documents here did not specify the subsection of conviction).
- *United States v. Peppers*, 899 F.3d 211, 233 (3d Cir. 2018) (**Pennsylvania** third-degree felony robbery, in violation of 18 Pa. Cons. Stat. § 3701(a)(1)(v), is not an ACCA violent felony because it may be committed with minimal force)
- *United States v. Henderson*, 64 F.4th 111, 117-20 (3d Cir. 2023) (conspiracy to commit robbery in **Pennsylvania** is not a 4B1.2 crime of violence; *Preston* (1990) has been abrogated)
- *United States v. Henderson*, 80 F.4th 207 (3d Cir. 2023) (**Pennsylvania** robbery in violation of 18 Pa. Cons. Stat. § 3701(a)(1)(ii) is a "crime of violence" under the 4B1.2 elements clause)
- *Rodriguez-Mendez v. United States*, -- F.4th --, 2025 WL 1039333 (1st Cir. Apr. 8, 2025) (motor vehicle robbery, Article 173B of the Puerto Rico Penal Code, is not an ACCA violent felony, because the required "intimidation" may be directed at property and not a person; further, it does not qualify as "extortion" under ACCA because the crime is not limited to taking property with the owner's consent, which is the hallmark of generic "extortion")
- *United States v. Doctor*, 842 F.3d 306, 308–12 (4th Cir. 2016) (**South Carolina** common law robbery qualifies under ACCA)
- *United States v. Croft*, 987 F.3d 93 (4th Cir. 2021) (**South Carolina** carjacking, S.C. Code § 16–3–1075, is an ACCA violent felony)
- *United States v. Southers*, 866 F.3d 364 (6th Cir. 2017) (**Tennessee** robbery, Tenn. Code § 39–13–401, qualifies under ACCA); *United States v. Belcher*, 40

F.4th 430 (6th Cir. 2022) (the court reaffirms that Tennessee robbery is an ACCA violent felony, as there is no precedent holding that it may be committed recklessly); *United States v. Campbell*, 122 F.4th 624, 628-29 (6th Cir. 2024) (reaffirming that Tennessee robbery is an ACCA violent felony, as it requires proof of knowing mens rea and at least a threat of injury)

- *United States v. Dorsey*, 91 F.4th 453 (6th Cir. 2024) (**Tennessee** facilitation (Tenn. Code § 39-11-403(a)) of aggravated robbery (§ 39-13-402(a)(1)-(2) is a 4B1.2 crime of violence)
- *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017) (the **Texas** aggravated robbery statute (Tex. Penal Code § 29.03) is divisible, and a conviction under § 29.03(a)(2), for “threatening someone with imminent bodily injury or death, or placing someone in fear of such, while using or exhibiting a deadly weapon in the course of committing theft,” is an ACCA violent felony)
- *United States v. Hall*, 877 F.3d 800, 807–08 (8th Cir. 2017) (**Texas** conviction for second-degree robbery, Tex. Penal Code § 29.02, constituted a violent felony under ACCA and a crime of violence under the elements clause of § 4B1.2)
- *United States v. Garrett*, 24 F.4th 485 (5th Cir. 2022) (**Texas** simple robbery, Tex. Penal Code § 29.02, is divisible, and the offense based on intentionally or knowingly threatening or placing another in fear of imminent bodily injury or death qualifies as an ACCA violent felony); *United States v. Jackson*, 30 F.4th 269, 275 (5th Cir. 2022) (same); *United States v. Powell*, 78 F.4th 203, 208-10 (5th Cir. 2023) (*Garrett* is not overruled by *Taylor*); *United States v. Wilkins*, 30 F.4th 1198 (10th Cir. 2022) (it was not plain error to conclude that **Texas** aggravated robbery, Tex. Penal Code § 29.02(a)(2), § 29.03(a)(2), is divisible, and the part addressing intentionally or knowingly threatening or putting another in fear of imminent bodily injury or death (using or exhibiting a deadly weapon) is a 4B1.2 crime of violence)
- *United States v. White*, 24 F.4th 378 (4th Cir. 2022) (**Virginia** common law robbery is not an ACCA violent felony, in light of the statement of the Virginia Supreme Court that robbery under Virginia common law may be committed by threatening to accuse the victim of a crime against nature); *United States v. Williams*, 64 F.4th 149 (4th Cir. 2023) (applying the same ruling to 1978 and 1982 offenses of robbery in violation of Va. Code § 18.2-16)
- *United States v. Williams*, 64 F.4th 149 (4th Cir. 2023) (**Virginia** robbery in violation of Va. Code Ann. § 18.2-16 is not categorically an ACCA violent

felony as it may be accomplished by threatening a sodomy accusation); *United States v. Parham*, 126 F.4th 280 (4th Cir. 2025) (same ruling with regard to § 4B1.2; leaving open the question whether use of a firearm to commit a robbery, in violation of § 18.2-53.1, qualifies)

- *United States v. Salmons*, 873 F.3d 446 (4th Cir. 2017) (**West Virginia** crime of aggravated robbery, W. Va. Code § 61-2-12, qualifies under the elements clause of § 4B1.2)
- *Cross v. United States*, 892 F.3d 288, 297 (7th Cir. 2018) (robbery in violation of **Wisconsin** law, Wis. Stat. § 943.32(1), does not require any particular degree of force and therefore is not a crime of violence under the § 4B1.2 elements clause; called into question by *Stokeling*)

### 3. Assault and battery offenses

The following post-*Mathis* precedential appellate decisions address assault and battery offenses under the elements clause of ACCA, § 16, § 924(c), and the Guidelines. The Guidelines definition of “crime of violence,” in § 4B1.2(a)(2), also includes the enumerated offense of “aggravated assault.” A discussion and pertinent decisions are presented in a later section of this topic page, regarding enumerated offenses.

- **Aggravated assault in violation of 18 U.S.C. § 111(b) qualifies under the elements clause:**

*United States v. Taylor*, 848 F.3d 476, 491–95 (1st Cir. 2017) (ACCA)

*Gray v. United States*, 980 F.3d 264 (2d Cir. 2020) (§ 924(c))

*United States v. Bullock*, 970 F.3d 210 (3d Cir. 2020) (§ 4B1.1)

*United States v. McDaniel*, 85 F. 4th 176, 183-88 (4th Cir. 2023) (1993 version qualifies under § 924(c))

*United States v. Hernandez-Hernandez*, 817 F.3d 207, 215 (5th Cir. 2016) (§ 2L1.2 elements clause)

*United States v. Rafidi*, 829 F.3d 437, 445–46 (6th Cir. 2016) (924(c))

*United States v. Medearis*, 65 F.4th 981, 986-87 (8th Cir. 2023) (assault with a deadly weapon, 18 U.S.C. § 111(b), is a 4B1.2 crime of violence; the crime

cannot be committed recklessly)

*United States v. Juvenile Female*, 566 F.3d 943, 948 (9th Cir. 2009) (§ 16)

*United States v. Kendall*, 876 F.3d 1264 (10th Cir. 2017) (§ 4B1.2 elements clause) (also holding that assault on a police officer, in violation of D.C. Code § 22–405(c), qualifies under § 4B1.2 elements clause)

*United States v. Bates*, 960 F.3d 1278, 1285–87 (11th Cir. 2020) (924(c))

- *United States v. McDaniel*, 85 F.4th 176, 185 (4th Cir. 2023) (the felony version of **assault in violation of 18 U.S.C. § 111(a)** (not involving a dangerous weapon) may be committed with any amount of force and is therefore not categorically an ACCA violent felony); *United States v. Dominguez-Maroyoqui*, 748 F.3d 918 (9th Cir. 2014) (same ruling with regard to term “crime of violence” in previous version of § 2L1.2)
- *United States v. Verwiebe*, 874 F.3d 258, 264 (6th Cir. 2017) (**assault with a dangerous weapon with intent to do bodily harm, 18 U.S.C. § 113(a)(3)**, and **assault resulting in serious bodily injury, 18 U.S.C. § 113(a)(6)**, are crimes of violence under the § 4B1.2 elements clause)
- *United States v. Gobert*, 943 F.3d 878 (9th Cir. 2019) (**assault with a dangerous weapon in violation of 18 U.S.C. § 113(a)(3)** is a crime of violence under the 924(c) elements clause); *United States v. Muskett*, 970 F.3d 1233 (10th Cir. 2020) (same; the court further rejects the claim of an ex post facto violation grounded on the evolving definition of “physical force” since the time of the defendant’s offense)
- *United States v. Benally*, 19 F.4th 1250, 1257–58 (10th Cir. 2021) (following *Borden*, assault resulting in serious bodily injury, 18 U.S.C. § 113(a)(6), is not a crime of violence under § 16, as it may be committed recklessly; it therefore also is not a “crime of violence” under the Mandatory Victims Restitution Act (MVRA)); *United States v. Devereaux*, 91 F.4th 1361 (10th Cir. 2024) (same result under § 4B1.2; the government does not contest this)
- *Manners v. United States*, 947 F.3d 377 (6th Cir. 2020) (**assault with a dangerous weapon in aid of racketeering, 18 U.S.C. § 1959(a)(3)**, is divisible, and stands as a 924(c) crime of violence); *United States v. Thomas*, 87 F.4th 267 (4th Cir. 2023) (same, as applied to VICAR offense predicated on violation of Va. Code §§ 18.2-53.1 and 18.2-282; the court adds that a mens rea of intent applies to every offense in § 1959(a)); *United States v. Kinard*, 93 F.4th 213 (4th

Cir. 2024) (same, as applied to VICAR offense predicated on N.C. Gen Stat. § 14-33(c)(1))

- *Quinteros v. Attorney Gen.*, 945 F.3d 772, 782–83 (3d Cir. 2019) (**conspiracy to commit assault with a dangerous weapon in violation of 18 U.S.C. § 1959(a)(6)** is not a “crime of violence” under the elements clause in 18 U.S.C. § 16(a))
- *In re Welch*, 884 F.3d 1319, 1324 (11th Cir. 2018) (subsection of **Alabama** first-degree assault statute criminalizing intentionally causing serious physical injury to another person, Ala. Code § 13A-6-20(a)(1), qualified under ACCA, as “serious physical injury” element required use of physical force); *United States v. Harris*, 941 F.3d 1048 (11th Cir. 2019) (subsection (2) also qualifies)
- *United States v. Orona*, 923 F.3d 1197 (**Arizona** aggravated assault in violation of Ariz. Rev. Stat. § 13–1203(A)(1) is not an ACCA violent felony), vacated for en banc review, 942 F.3d 1159 (9th Cir. 2019)
- *United States v. Lopez-Castillo*, 24 F.4th 1216 (8th Cir. 2022) (**Arizona** aggravated assault by strangulation in violation of Ariz. Rev. Stat. § 13–1204(B) is a 4B1.2 crime of violence)
- *United States v. Jordan*, 812 F.3d 1183 (8th Cir. 2016) (**Arkansas** aggravated assault, Ark. Code § 5–13–204(a)(1), does not qualify under ACCA as the statutory requirement of creating a “substantial danger of death or serious physical injury” does not necessarily require the use of physical force); *United States v. Hataway*, 933 F.3d 940 (8th Cir. 2019) (a violation of subsection (a)(2) (“Displays a firearm in such a manner that creates a substantial danger of death or serious physical injury to another person”) does qualify under ACCA and § 4B1.2)
- *United States v. Pyles*, 888 F.3d 1320 (8th Cir. 2018) (**Arkansas** conviction for aggravated assault on family member by impeding respiration, in violation of Ark. Code § 5–26–306(a)(3), involved use of physical force and qualified as ACCA violent felony)
- *Banuelos-Jimenez v. Garland*, 67 F.4th 806 (6th Cir. 2023) (**Arkansas** conviction for third-degree assault on family or household member, Ark. Code § 5-26-309(a), is a crime of violence under 18 U.S.C. § 16(a), as it requires proof that the defendant purposely created apprehension of imminent physical injury)
- *United States v. Burnett*, 35 F.4th 1147 (8th Cir. 2022) (**Arkansas** assault by suffocation or strangulation, Ark. Code § 5–13–204(a)(3), is a 4B1.2 crime of

violence)

- *United States v. Winston*, 845 F.3d 876 (8th Cir. 2017) (**Arkansas** second-degree battery, Ark. Code § 5–13–202(a)(2), qualified as ACCA violent felony)
- *United States v. Block*, 935 F.3d 655 (8th Cir. 2019) (per curiam) (applying the ruling in *United States v. Williams*, 690 F.3d 1056, 1067 (8th Cir. 2012), that held that **Arkansas** second-degree-battery, Ark. Code § 5–13–202(a)(4), is a 4B1.2 crime of violence, to reach the same result with respect to ACCA)
- *United States v. Thomas*, 838 F.3d 926 (8th Cir. 2016) (**Arkansas** first-degree battery conviction, Ark. Code § 5–13–201(a)(1), constituted crime of violence under § 4B1.2 elements clause); *United States v. Myers*, 896 F.3d 866, 872 (8th Cir. 2018) (**Arkansas** second-degree battery, Ark. Code § 5–13–202(a), was an ACCA violent felony because it requires bodily injury as an element), *reaffirmed*, 928 F.3d 763, 767 (8th Cir. 2019); *United States v. Garcia*, 946 F.3d 413 (8th Cir. 2019) (second-degree battery causing serious physical injury in violation of Ark. Code Ann. § 5–13–202(a)(1) qualifies as a 4B1.2 crime of violence)
- *United States v. Chambers*, 2025 WL 1007289, at \*4 (8th Cir. Apr. 4, 2025) (plea record revealed that the defendant pled guilty to the portion of Ark. Code § 5-26-304 addressing domestic battery by purposeful conduct, which qualifies as an ACCA predicate)
- *United States v. Gomez*, 115 F.4th 987 (9th Cir. 2024) (**California** assault with a deadly weapon, Cal. Penal Code § 245(a)(1), is not a 4B1.2 “crime of violence,” as it may be committed with reckless mens rea; that disqualifies it under both the elements clause and the enumerated reference to “aggravated assault,” which requires a mens rea greater than recklessness) (abrogating *United States v. Vasquez-Gonzalez*, 901 F.3d 1060 (9th Cir. 2018))
- *United States v. Perez*, 929 F.3d 1106 (9th Cir. 2019) (**California** battery resulting in serious bodily injury, Cal. Penal Code § 243(d), is a 4B1.2 crime of violence)
- *United States v. Walker*, 953 F.3d 577 (9th Cir. 2020) (**California** domestic violence in violation of Cal. Penal Code § 273.5 is an ACCA violent felony) *Olea-Serefina v. Garland*, 34 F.4th 856, 863–65 (9th Cir. 2022) (same ruling regarding **California** child abuse statute, Cal. Penal Code § 273d(a), as a crime of violence under § 16(a))

- *United States v. Ontiveros*, 875 F.3d 533 (10th Cir. 2017) (**Colorado** conviction for second-degree assault, Colo. Rev. Stat. § 18–3–203(1)(g), qualifies under § 4B1.2 elements clause)
- *Villanueva v. United States*, 893 F.3d 123 (2d Cir. 2018) (**Connecticut** first degree assault, Conn. Gen. Stat. § 53a–59(a)(1), is a violent felony under ACCA); *Banegas Gomez v. Barr*, 922 F.3d 101 (2d Cir. 2019) (same result under § 16(a))
- *Kondjoua v. Barr*, 961 F.3d 83 (2d Cir. 2020) (**Connecticut** sexual assault in the third degree in violation of Conn. Gen. Stat. § 53a–72a(a)(1) is a crime of violence under 18 U.S.C. § 16(a))
- *United States v. Brown*, 892 F.3d 305, 402–04 (D.C. Cir. 2018) (**D.C.** assault with a dangerous weapon, 22 D.C. Code § 402, is crime of violence under Sentencing Guidelines); *United States v. Haight*, 892 F.3d 127, 1279–81 (D.C. Cir. 2018) (same ruling with respect to ACCA)
- *United States v. Dixon*, 874 F.3d 678 (11th Cir. 2017) (**Florida** domestic battery by strangulation, Fla. Stat. §784.041(2)(a), qualifies under § 4B1.2 elements clause)
- *United States v. Vail–Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc) (**Florida** felony battery, Fla. Stat. § 784.041(1), which consists of an intentional touch or strike that actually causes great bodily harm, is a crime of violence under the § 2L1.2 elements clause); *United States v. Green*, 873 F.3d 846, 869 (11th Cir. 2017) (same ruling under ACCA)
- *United States v. Gandy*, 917 F.3d 1333, 1339–40 (11th Cir. 2019) (battery by intentionally causing bodily harm under **Florida** law, Fla. Stat. § 784.03(1)(a) (2), is a § 4B1.2 crime of violence)
- *United States v. Golden*, 854 F.3d 1256 (11th Cir. 2017) (per curiam) (**Florida** aggravated assault, Fla. Stat. § 784.021, is a crime of violence under § 4B1.2 elements clause); *Somers v. United States*, 66 F.4th 890 (11th Cir. 2023) (aggravated assault, Fla. Stat. § 784.021(1)(a), is an ACCA violent felony, as the Florida Supreme Court made clear that it requires proof of at least knowing conduct); *United States v. Gary*, 74 F.4th 1332 (11th Cir. 2023) (per curiam) (confirming that Florida aggravated assault, Fla. Stat. § 784.021(1), is an ACCA violent felony, as it requires proof of a simple assault, which involves an intentional threat to use violence against another person); *but see United States v. Anderson*, 99 F.4th 1106, 1110–13 (7th Cir. 2024) (disagrees with *Somers*,

and holds that the Florida aggravated assault statute as of 2001 may have applied to reckless conduct and therefore was not an ACCA predicate; the court cites Florida's "unique" approach to statutory interpretation and concludes that the state Supreme Court's decision does not define the statute as applied earlier)

- *United States v. Vereen*, 920 F.3d 1300, 1313–16 (11th Cir. 2019) (**Florida** convictions for aggravated battery, Fla. Stat. § 784.045(a), and battery subsequent to a previous battery conviction, § 784.03(2), are violent felonies under ACCA); *Lukaj v. U.S. Attorney Gen.*, 953 F.3d 1305, 1311–12 (11th Cir. 2020) (same ruling regarding § 16(a))
- *United States v. Valle-Ramirez*, 908 F.3d 981 (5th Cir. 2018) (**Georgia** aggravated assault conviction in violation of **Georgia** Code § 16–5–21(a)(2) and § 16–5–20(a)(2) (an act with a deadly weapon placing another in reasonable apprehension of immediately receiving a violent injury) is a crime of violence under § 16(a)); *but see United States v. Carter*, 7 F.4th 1039 (11th Cir. 2021) (a version of **Georgia** aggravated assault that can be accomplished with a mens rea of recklessness – aggravated assault with a deadly weapon under **Ga. Code** § 16–5–21(a)(2) based on a simple assault under **Ga. Code** § 16–5–20(a)(2) – is not an ACCA violent felony); *cf. United States v. Barlow*, 83 F.4th 1340, 1351–52 (9th Cir. 2023) (the divisible form of aggravated assault involving an attempted battery, § 16-5-20(a)(1), requires intent and qualifies as a 4B1.2 crime of violent under the elements clause)
- *Talamantes-Enriquez v. U.S. Att'y Gen.*, 12 F.4th 1340, 1351–52 (11th Cir. 2021) (**Georgia** battery in violation of **Ga. Code** § 16–5–23(a)(2) is a crime of violence under § 16(a))
- *United States v. Reyes*, 866 F.3d 316 (5th Cir. 2017) (**Illinois** aggravated battery statute, 720 Ill. Comp. Stat. § 5/12–3.05(f)(1), is divisible, and offense of aggravated battery involving use of deadly weapon is a crime of violence under § 2L1.2 elements clause)
- *United States v. Vesey*, 966 F.3d 694 (7th Cir. 2020) (the portion of the divisible **Illinois** aggravated assault statute, 720 Ill. Comp. Stat. § 5/12–2, applicable to putting a correctional officer in reasonable apprehension of a battery, is a 4B1.2 crime of violence); *United States v. Shaffers*, 22 F.4th 655, 665–67 (7th Cir. 2022) (same; holding that aggravated assault on a police officer, § 5/12–2(a)(6), was a 4B1.2 crime of violence, as it was predicated on the portion of a divisible battery statute that was a crime of violence under the elements clause)

- *United States v. Montez*, 858 F.3d 1085, 1092 (7th Cir. 2017) (**Illinois** offense of battery, based on causing bodily harm to an individual, [720 Ill. Comp. Stat. 5/12–3\(a\)](#), qualifies as a crime of violence under the § 4B1.2 elements clause)
- *United States v. Roman*, 917 F.3d 1043 (8th Cir. 2019) (**Illinois** aggravated battery, [720 Ill. Comp. Stat. Ann. 5/12–3.05\(c\)](#), is a § 4B1.2 crime of violence under the elements clause); *United States v. Clark*, 1 F.4th 632 (8th Cir. 2021) (same ruling as to aggravated battery of a peace officer in violation of subsection (d)(4), that is premised on requirement of causing bodily harm)
- *United States v. Dowthard*, 948 F.3d 814, 819–20 (7th Cir. 2020) (**Illinois** attempted aggravated domestic battery by strangulation, [720 Ill. Comp. Stat. 5/8–4\(a\)](#), [5/12–3.3\(a–5\)](#), is an ACCA violent felony)
- *United States v. Cunningham*, 15 F.4th 818 (7th Cir. 2021) (**Illinois** aggravated battery, [720 ILCS 5/12–4\(a\)](#) (“intentionally or knowingly causes great bodily harm”) is a 4B1.2 crime of violence; the offense under subsection (b) (simple battery) is not; here, the court documents specified the conviction was under (a)); *United States v. Garcia*, 37 F.4th 1294, 1305 (7th Cir. 2022) (1991 statute addressing aggravated battery with a firearm, [Ill. Rev. Stat. 1991, Ch. 38, ¶ 12–4.2](#), is categorically an ACCA violent felony)
- *Douglas v. United States*, 858 F.3d 1069 (7th Cir. 2017) (**Indiana** Class C felony convictions of battery resulting in serious bodily injury, [Ind. Code § 35–42–2–1\(a\)](#), qualified under ACCA)
- *Colon v. United States*, 899 F.3d 1236 (11th Cir. 2018) (**Indiana** felony battery statute, [Ind. Code § 35–42–2–1\(a\)\(2\)\(A\)–\(B\)](#), requires “physical force” and is an ACCA violent felony); *United States v. Love*, 7 F.4th 679 (7th Cir. 2021) (Class D felony battery, [Ind. Code § 35–42–2–1\(a\)\(2\)\(A\)](#), is an ACCA violent felony)
- *United States v. McGee*, 890 F.3d 730, 736–37 (8th Cir. 2018) (**Iowa** offense of assault while displaying a dangerous weapon in violation of [Iowa Code §§ 708.1 & 708.2\(3\)](#) is a crime of violence under 4B1.2 elements clause); *United States v. Shannan*, 66 F.4th 1177 (8th Cir. 2023) (same conclusion regarding “use” of a weapon under § 708.2(3), and aggravated domestic abuse assault in violation of [Iowa Code § 708.2A\(2\)\(c\)](#)); *United States v. Conrad*, 74 F.4th 957 (8th Cir. 2023) (same); *United States v. Carter*, 961 F.3d 953, 957–60 (7th Cir. 2020) (same); *United States v. Smith*, 981 F.3d 606 (7th Cir. 2020) (further discussion of divisibility of Iowa aggravated assault statute); *United States v. Green*, 70 F.4th 478 (8th Cir. 2023) (reaffirming that assault while

displaying dangerous weapon, Iowa Code § 708.2(3), categorically qualifies as 4B1.2 “crime of violence”; the court adds that any assault under § 708.1, to which § 708.2(3) refers, requires intent, not mere recklessness)

- *United States v. Parrow*, 844 F.3d 801 (8th Cir. 2016) (**Iowa** conviction for domestic abuse–strangulation, Iowa Code § 708.2A(2)(d), was a crime of violence under the § 4B1.2 elements clause)
- *United States v. Gaines*, 895 F.3d 1028 (8th Cir. 2018) (**Iowa** conviction for domestic abuse assault with intent to inflict serious injury, Iowa Code § 708.1(1), is § 4B1.2 crime of violence)
- *United States v. Daye*, 90 F.4th 941 (8th Cir. 2024) (**Iowa** offense of domestic abuse assault, enhanced (DAAE), Iowa Code § 708.2A(3)(b), is not a 4B1.2 crime of violence, as the enhanced offense may be based on commission of multiple prior misdemeanor domestic abuse assaults which are not violent)
- *United States v. Quigley*, 943 F.3d 390 (8th Cir. 2019) (**Iowa** aggravated misdemeanor of assault with intent to inflict serious injury, Iowa Code § 708.2(1), is indivisible, and stands as a crime of violence under the 4B1.2 elements clause); *United States v. Tinlin*, 20 F.4th 426 (8th Cir. 2021) (same ruling with regard to domestic abuse assault, Iowa Code Ann. §§ 708.1(1), 708.2A(2)(c))
- *United States v. Ford*, 888 F.3d 922, 929 (8th Cir. 2018) (**Iowa** conviction for assault with dangerous weapon on peace officer, Iowa Code § 708.3A(2), is violent felony under ACCA, as “[d]isplaying an instrument or device designed primarily for use in inflicting death or injury in connection with an assault is a violent felony”); *see also United States v. Hamilton*, 46 F.4th 864 (8th Cir. 2022) (assault on a police officer, Iowa Code § 708.3A(3), is indivisible, but qualifies as a 4B1.2 crime of violence as all forms require at least the threatened use of physical force); *United States v. Donath*, 107 F.4th 830, 835-37 (8th Cir. 2024) (adhering to *Hamilton*)
- *Jima v. Barr*, 942 F.3d 468 (8th Cir. 2019) (**Iowa** offense of willful injury causing bodily harm, Iowa Code § 708.4(2), is a crime of violence under § 16(a)); *United States v. Clark*, 1 F.4th 632, 636–37 (8th Cir. 2021) (same result as to ACCA); *United States v. McConnell*, 65 F.4th 398, 405-06 (8th Cir. 2023) (same result under § 4B1.2); *United States v. Cungtion*, 72 F.4th 865 (8th Cir. 2023) (reaffirming *Clark* notwithstanding *Borden*, as the Iowa crime requires proof of intent)

- *United States v. Bragg*, 44 F.4th 1067, 1075-77 (8th Cir. 2022) (**Iowa** willful injury, Iowa Code § 708.4(1), is an ACCA violent felony)
- *United States v. Benton*, 876 F.3d 1260, 1263 (10th Cir. 2017) (**Kansas** aggravated assault with a deadly weapon, Kan. Stat. § 21-3410(a), is a crime of violence under the § 4B1.2 elements clause)
- *United States v. Williams*, 888 F.3d 1126, (10th Cir. 2018) (**Kansas** aggravated battery, Kan. Stat. § 21-5413(b)(1)(B), is a crime of violence under the § 4B1.2 elements clause); *but see United States v. Adams*, 40 F.4th 1162 (10th Cir. 2022) (**Kansas** aggravated battery, Kan. Stat. § 21-5413(b)(1)(C), is overbroad and does not qualify as a 4B1.2 “crime of violence” because it applies to battery of a fetus as well as a living person, while the guideline applies only to force against a “person,” which means an individual born alive)
- *United States v. Price*, 851 F.3d 824 (8th Cir. 2017) (**Kansas** attempted aggravated assault, Kan. Stat. § 21-3410(a) (2007) (current version at Kan. Stat. § 21-5412(b)(1) (2011)) is crime of violence under the § 4B1.2 elements clause); *United States v. Chappell*, 69 F.4th 492, 494-95 (8th Cir. 2023) (same result regarding current version at § 21-5412(d)(1), concerning attempted aggravated assault of a police officer with a deadly weapon)
- *United States v. Williams*, 893 F.3d 696 (10th Cir. 2018) (**Kansas** aggravated battery, Kan. Stat. § 21-5202(b), is a crime of violence under the Guidelines)
- *United States v. Ash*, 7 F.4th 962 (10th Cir. 2021) (in light of *Borden*, reckless aggravated battery under Kansas law, in violation of Kan. Stat. § 21-3414(a)(2) (B), is not a § 4B1.2 crime of violence)
- *United States v. Maynard*, 894 F.3d 773 (6th Cir. 2018) (assault while under the influence of extreme emotional disturbance under **Kentucky** law, Ky. Rev. Stat. § 508.040, was a § 4B1.2 crime of violence, as it required intentional infliction of physical injury)
- *United States v. Garner*, 28 F.4th 678 (5th Cir. 2022) (**Louisiana** offense of aggravated assault with a firearm, La. Rev. Stat. § 14:37.4, may be committed negligently and therefore does not qualify as a 4B1.2 crime of violence)
- *United States v. Haight*, 892 F.3d 1271, 1281 (D.C. Cir. 2018) (**Maryland** first-degree assault, Md. Code, Crim. Law § 3-202(a), is an ACCA violent felony)

- *United States v. Battle*, 927 F.3d 160 (4th Cir. 2019) (**Maryland** assault with intent to murder, under former [Md. Code Ann., Art. 27, § 12](#), which is a statutory aggravated form of assault coupled with a specific intent to murder, is an ACCA violent felony)
- *United States v. Proctor*, 28 F.4th 538 (4th Cir. 2022) (**Maryland** assault with intent to prevent lawful apprehension or detainer, in violation of the since-repealed [Md. Code art. 27, § 386](#) (repealed 1996), is not an ACCA violent felony; it incorporates common-law assault, which may be committed by offensive touching or slight force)
- *United States v. Redd*, 85 F.4th 153, 165-68 (4th Cir. 2023) (**Maryland** first-degree-assault statute, [Md. Code, Art. 27 § 12A-1 \(1996\)](#), is indivisible, and does not qualify as an ACCA violent felony, because the part addressing assault with a firearm may be committed recklessly)
- *United States v. Edwards*, 857 F.3d 420 (1st Cir. 2017) (**Massachusetts** conviction of armed-assault-with-intent-to-murder, [Mass. Gen. Laws ch. 265, § 18\(b\)](#), is an ACCA violent felony)
- *United States v. Windley*, 864 F.3d 36 (1st Cir. 2017) (the reckless form of the **Massachusetts** common law crime of assault and battery with a dangerous weapon (“ABDW”) is not a violent felony under ACCA)
- *United States v. Tavares*, 843 F.3d 1 (1st Cir. 2016) (the intentional form of **Massachusetts** ABDW constitutes a crime of violence under the [§ 4B1.2 elements clause](#))
- *United States v. Barbosa*, 896 F.3d 60, 75–76 (1st Cir. 2018) (**Massachusetts** assault with a deadly weapon (ADW), [Mass. Gen. Laws ch. 265, § 15B\(b\)](#), is an ACCA violent felony); *Lassend v. United States*, 898 F.3d 115, 124–25 (1st Cir. 2018) (same); *United States v. Williams*, 80 F.4th 85, 91–94 (1st Cir. 2023) (reaffirming this conclusion following *Taylor* and *Borden*)
- *United States v. Faust*, 853 F.3d 39 (1st Cir. 2017) (the **Massachusetts** crimes of resisting arrest, [Mass. Gen. Laws, ch. 268, § 32B\(a\)](#), and intentional assault and battery on a police officer (“ABPO”), [Mass. Gen. Laws, ch. 265, § 13A](#), are not ACCA predicates)
- *United States v. Harris*, 853 F.3d 318 (6th Cir. 2017) (**Michigan** felonious assault statute, [Mich. Comp. Laws § 750.82](#), qualifies under the [§ 4B1.2 elements clause](#))

- *Raybon v. United States*, 867 F.3d 625 (6th Cir. 2017) (**Michigan** crime of assault with intent to do great bodily harm less than murder, Mich. Comp. Laws § 750.84(a), is crime of violence under the § 4B1.2 elements clause); *United States v. Ruska*, 926 F.3d 309 (6th Cir. 2019) (same ruling with regard to “violent felony” under the three-strikes statute, 18 U.S.C. § 3559(c)(2)(F)(ii))
- *United States v. Morris*, 885 F.3d 405, 409–12 (6th Cir. 2018) (felony domestic assault under **Michigan** law, Mich. Comp. Laws § 750.81, is not a crime of violence under the § 4B1.2 elements clause because it may be committed by mere offensive, but not harmful, touching of a victim’s person or of something closely connected with the victim’s person; the more expansive definition of “physical force” articulated in *Castleman* with respect to 18 U.S.C. § 922(g)(9) (firearm prohibition for a person convicted of a “misdemeanor crime of domestic violence”) does not apply; however, the Michigan statute does qualify under the pre–August 2016 residual clause); *but see United States v. Perry*, 116 F.4th 578 (6th Cir. 2024) (**Michigan** aggravated domestic violence, Mich. Comp. Laws § 750.81a(3), is a 4B1.2 crime of violence)
- *United States v. Yackel*, 990 F.3d 1132 (8th Cir. 2021) (the **Minnesota** definition of aiding and abetting is not overbroad in relation to federal law, and therefore a conviction for aiding and abetting assault, in violation of Minn. Stat. § 609.05(1), is a 4B1.2 crime of violence)
- *United States v. Jennings*, 860 F.3d 450 (7th Cir. 2017) (**Minnesota** felony domestic assault, Minn. Stat. § 609.2242, qualifies under ACCA)
- *United States v. Perry*, 908 F.3d 1126 (8th Cir. 2018) (**Minnesota** domestic assault, when a felony because committed “within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions,” Minn. Stat. § 609.2242(1), (4), is an ACCA violent felony)
- *United States v. Headbird*, 832 F.3d 844 (8th Cir. 2016) (**Minnesota** second degree assault, Minn. Stat. §§ 609.02(6), 609.222(1), qualifies as an ACCA violent felony if committed as an adult, not a juvenile)
- *United States v. Pendleton*, 874 F.3d 978 (8th Cir. 2018) (prior **Minnesota** convictions for second-degree assault with a dangerous weapon, Minn. Stat. § 609.222(1), are violent felonies under ACCA)

- *United States v. Wadena*, 895 F.3d 1078 (8th Cir. 2018) (**Minnesota** third-degree assault is an ACCA violent felony); *United States v. Huntington*, 44 F.4th 812 (8th Cir. 2022) (per curiam) (same ruling regarding third-degree assault, Minn. Stat. § 609.223, subdiv. 1)
- *United States v. Griffin*, 946 F.3d 759 (5th Cir. 2020) (per curiam) (the divisible portion of the **Mississippi** aggravated assault statute, requiring proof that defendant attempted to cause serious bodily injury to another, or caused such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to value of human life, Miss. Code § 97–3–7(2), is an ACCA violent felony)
- *United States v. Minnis*, 872 F.3d 889 (8th Cir. 2017) (convictions for **Missouri** first degree attempted assault, Mo. Rev. Stat. § 565.050, constituted crimes of violence under the § 4B1.2 elements clause); *United States v. Pryor*, 927 F.3d 1042 (8th Cir. 2019) (same decision under ACCA); *United States v. Wings*, 106 F.4th 793 (8th Cir. 2024) (same decision with respect to second-degree domestic assault, Mo. Rev. Stat. § 565.073.1(1) (2001), as a 4B1.2 crime of violence)
- *United States v. Ramey*, 880 F.3d 447 (8th Cir. 2018) (**Missouri** second-degree assault statute, Mo. Rev. Stat. § 565.060.1, is divisible; subsection 5, which forbids “[r]ecklessly caus[ing] physical injury to another person by means of discharge of a firearm,” is a crime of violence under the § 4B1.2 elements clause)
- *United States v. Welch*, 879 F.3d 324 (8th Cir. 2018) (**Missouri** second-degree assault statute is divisible; conviction under Mo. Rev. Stat. 565.060.1(2) (“attempts to cause or knowingly causes physical injury to another person by means of a deadly weapon or dangerous instrument”) is a crime of violence under the § 4B1.2 elements clause)
- *United States v. Darden*, 915 F.3d 579, 584–86 (8th Cir. 2019) (**Missouri** conviction for second-degree attempted assault on a law enforcement, Mo. Stat. § 565.082.1(1), is an ACCA violent felony)
- *United States v. Fields*, 863 F.3d 1012 (8th Cir. 2017) (**Missouri** second-degree assault statute, Mo. Rev. Stat. § 565.052.1(3), is not a crime of violence under § 4B1.2 because it may be violated by reckless driving); *United States v. Harris*, 907 F.3d 1095 (8th Cir. 2018) (per curiam) (applying the same ruling to **Missouri** second-degree domestic assault, Mo. Rev. Stat. § 565.073.1(2), which addresses domestic assault in barring “reckless” causation of “serious physical injury” to a family member)

- *United States v. Doyal*, 894 F.3d 974 (8th Cir. 2018) (**Missouri** conviction for second degree domestic assault, Mo. Stat. § 565.073(1), is a § 4B1.2 crime of violence; the statute is divisible, and the information stated that defendant “attempted to cause serious physical injury to [victim] by striking her with an automobile.”)
- *United States v. Irons*, 849 F.3d 743 (8th Cir. 2017) (**Missouri** conviction for knowingly committing violence to another offender housed in a department correction center, Mo. Rev. Stat. § 217.385(1), is an ACCA violent felony)
- *United States v. Castro*, 71 F.4th 735 (9th Cir. 2023) (**Montana** conviction for partner or family member assault (PFMA), Mont. Code §§ 45-2-101(5), 45-5-206(1)(a), is not a 4B1.2 crime of violence, as Montana’s “unusual” definition of required “bodily injury” included intentionally causing psychological, not physical, harm)
- *United States v. Edling*, 895 F.3d 1153, 1156 (9th Cir. 2018) (**Nevada** conviction for assault with a deadly weapon, Nev. Rev. St. § 200.471, qualified as a crime of violence under the elements clause of the career offender sentencing guideline)
- *United States v. Guizar-Rodriguez*, 900 F.3d 1044 (9th Cir. 2018) (while simple battery under **Nevada** law does not require violent force, the offense of battery with a deadly weapon, Nev. Rev. Stat. § 200.481(2)(e)(1), does, and qualifies as a crime of violence under the § 16(a) elements clause)
- *United States v. Fitzgerald*, 935 F.3d 814 (9th Cir. 2019) (**Nevada** conviction for attempted battery with substantial bodily harm, Nev. Rev. St. §§ 193.330, 200.481(2)(b), is a § 4B1.2 crime of violence under the elements clause); *Villagomez v. McHenry*, 127 F.4th 113 (9th Cir. 2025) (reaffirming *Fitzgerald* as applied to conviction for completed battery; finds both required actus reus and mens rea sufficient)
- *United States v. Abdullah*, 905 F.3d 739 (3d Cir. 2018) (**New Jersey** third-degree aggravated assault with a deadly weapon, in violation of N.J. Stat. § 2C:12-1(b)(2), is a § 4B1.2 crime of violence under the elements clause)
- *United States v. Maldonado-Palma*, 839 F.3d 1244 (10th Cir. 2016) (**New Mexico** conviction for aggravated assault with a deadly weapon, N.M. Stat. §§ 30-1-12(B), 30-3-2(A), was categorically a crime of violence under the § 2L1.2 elements clause); *United States v. Manzanares*, 956 F.3d 1220 (10th

Cir. 2020) (reaffirming ruling regarding aggravated assault with a deadly weapon, and further stating that aggravated battery, N.M. Stat. § 30-3-5(C), is also an ACCA violent felony)

- *Thompson v. Barr*, 924 F.3d 70 (2d Cir. 2019) (New York's second-degree assault statute, N.Y. Penal Law § 120.05(1), is a § 16(a) crime of violence); *Singh v. Barr*, 939 F.3d 457 (2d Cir. 2019) (so is second-degree assault by means of a deadly weapon or dangerous instrument, N.Y. Penal Law § 120.05(2)); *United States v. Tabb*, 949 F.3d 81, 84–86 (2d Cir. 2020) (attempted assault in the second degree with a dangerous weapon or instrument, § 120.05(2), is a 4B1.2 crime of violence; New York attempt is no broader than generic attempt); *Thompson v. Garland*, 994 F.3d 109 (2d Cir. 2021) (second-degree assault, N.Y. Penal Law § 120.05(1), is a crime of violence under 18 U.S.C. § 16(a)); *United States v. Brown*, 2 F.4th 109 (2d Cir. 2021) (same ruling under § 4B1.2); *United States v. Laurent*, 33 F.4th 63, 89-92 (2d Cir. 2022) (same ruling under § 924(c) and VICAR); *United States v. Cooper*, 131 F.4th 127, 131-34 (2d Cir. 2025) (second-degree attempted assault in a correctional facility, N.Y. Penal Law § 120.05(7), is a 4B1.2 crime of violence; the required proof of physical injury meets the force requirement)
- *Lassend v. United States*, 898 F.3d 115, 125-27 (1st Cir. 2018) (attempted New York second-degree assault, N.Y. Penal Law § 120.05(7), is an ACCA violent felony)
- *United States v. Castillo*, 36 F.4th 431 (2d Cir. 2022) (New York attempted second-degree gang assault in violation of N.Y. Penal Law §§ 120.06 and 110.00 is not a 4B1.2 crime of violence, as an intent to cause physical injury is not a “use” of force, and to the extent the offense requires the infliction of serious bodily injury that element is not coherently the focus of an attempt offense)
- *United States v. Simmons*, 917 F.3d 312 (4th Cir. 2019) (North Carolina conviction for assault with deadly weapon on government official, N.C. Gen. Stat. § 14-34.2, was not categorically § 4B1.2 crime of violence as it was plausible that North Carolina would punish culpably negligent conduct, such as driving with thoughtless disregard for safety of others)
- *United States v. Townsend*, 886 F.3d 441 (4th Cir. 2018) (North Carolina conviction for assault with a deadly weapon with intent to kill inflicting serious injury, N.C. Gen. Stat. § 14-32(a), categorically qualified as violent felony under ACCA); *accord United States v. Smith*, 70 F.4th 348 (6th Cir. 2023)

- *United States v. Rice*, 36 F.4th 578 (4th Cir. 2022) (**North Carolina** assault by strangulation, N.C. Gen. Stat. § 14–32.4(b), requires intentional conduct and therefore qualifies as a 4B1.2 crime of violence); *United States v. Robinson*, 92 F.4th 531 (4th Cir. 2024) (reaffirming *Rice*)
- *United States v. Schneider*, 905 F.3d 1088 (**North Dakota** aggravated assault, N.D. Cent. Code Ann. § 12.1–17–02(1)(a), does not qualify as a crime of violence under either the elements or enumerated clause of § 4B1.2(a), as it may be committed with ordinary recklessness that includes reckless driving) *rehearing en banc denied*, 911 F.3d 504 (8th Cir. 2018) (court divides 5-5 over whether to rehear case; five judges express the view that a statute that sanctions reckless driving may qualify)
- *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (*en banc*) (**Ohio** felonious assault, in violation of Ohio Rev. Code § 2903.11, and aggravated assault, in violation of § 2903.12, are divisible; subsection (A)(1) (causing “serious physical harm”) does not qualify under either the 4B1.2 elements or enumerated clauses, because it may include the infliction of psychological harm under state law; subsection (A)(2) (causes physical harm with a deadly weapon or dangerous ordinance) does qualify); *cf. United States v. Wilson*, 978 F.3d 990 (6th Cir. 2020) (aggravated robbery, in violation of Ohio Rev. Code § 2911.01(A)(3), presents the same language regarding physical harm, but may be an ACCA crime of violence depending on the particular theft offense on which it is predicated)
- *United States v. Raymore*, 965 F.3d 475, 487–90 (6th Cir. 2020) (**Ohio** assault in violation of Ohio Rev. Code § 2903.13(A) is a 4B1.2 crime of violence); *United States v. Alvarez*, 60 F.4th 554 (9th Cir. 2023) (same result under § 16(a))
- *United States v. Taylor*, 843 F.3d 1215 (10th Cir. 2016) (**Oklahoma** conviction for assault and battery with a dangerous weapon, Okla. Stat. tit. 21, § 645, was a crime of violence under the § 4B1.2 elements clause)
- *United States v. Winrow*, 49 F.4th 1372 (10th Cir. 2022) (**Oklahoma** aggravated assault and battery under Okla. Stat. tit. 21, § 646, is not divisible, and does not qualify as an ACCA violent felony as it may be violated in some circumstances by slight touching)
- *United States v. Johnson*, 911 F.3d 1062 (10th Cir. 2018) (**Oklahoma** assault and battery on a law enforcement officer, in violation of Okla. Stat. tit. 21, § 649(B), is not an ACCA violent felony; the statute is not divisible, and battery may be committed with the slightest touching)

- *United States v. Ramos*, 892 F.3d 599 (3d Cir. 2018) (aggravated assault with a deadly weapon in violation of **Pennsylvania** law, 18 Pa. Stat. § 2702(a)(4), is a crime of violence under the career offender elements clause)
- *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018) (a **Pennsylvania** conviction for first-degree aggravated assault, in violation of 18 Pa. Cons. Stat. § 2702(a)(1), is not a “violent felony” under ACCA, because it may be committed through an “act of omission” such as withholding food or medicine from the victim, which is not the “use of physical force” required by ACCA); *United States v. Harris*, 68 F.4th 140 (3d Cir. 2023) (reaffirming *Mayo*); both apparently overturned by *Delligatti v. United States*, 145 S. Ct. 797 (2025)
- *United States v. Jenkins*, 68 F.4th 148 (3d Cir. 2023) (**Pennsylvania** second-degree aggravated assault in violation of 18 Pa. Cons. Stat. § 2701(a)(3) is not categorically a “violent felony” under ACCA), apparently overturned by *Delligatti v. United States*, 145 S. Ct. 797 (2025)
- *United States v. Hurtt*, 105 F.4th 520, 524–25 (3d Cir. 2024) (**Pennsylvania** second-degree aggravated assault in violation of 18 Pa. Cons. Stat. § 2702(a)(6) (attempting by physical menace to put a designated public employee in fear of imminent serious bodily injury) is categorically a “crime of violence” under the career offender guideline)
- *United States v. Quinnones*, 16 F.4th 414 (3d Cir. 2021) (the portion of the **Pennsylvania** offense of assault by a prisoner, 18 Pa. Cons. Stat. § 2703, that criminalizes “caus[ing] another to come into contact with [bodily] fluid” when the prisoner knew or should have known the fluid came from someone with a communicable disease, is not a **4B1.2** crime of violence; the least culpable conduct addressed by the statute is spitting, which does not involve “physical force” as stated in the elements clause and defined by the Supreme Court, while the offender need only be negligent with regard to the existence of a communicable disease)
- *United States v. Nieves-Borrero*, 856 F.3d 5 (1st Cir. 2017) (**Puerto Rico** conviction for fourth degree aggravated felony, 33 P.R. Laws § 4750, is crime of violence under the **§ 4B1.2** elements clause)
- *United States v. Rose*, 896 F.3d 104 (1st Cir. 2018) (**Rhode Island** offense of assault with a dangerous weapon, R.I. Gen. Laws § 11–5–2(a), may be committed recklessly, and therefore under First Circuit precedent does not qualify as an ACCA violent felony)

- *United States v. Jones*, 914 F.3d 893 (4th Cir. 2019) (**South Carolina** statute making it a felony to assault, beat, or wound law enforcement officer while resisting arrest, [S.C. Code § 16–9–320\(B\)](#), was indivisible, and does not qualify under the ACCA elements clause because a person can perpetrate an assault by attempting to touch another in a rude or angry manner, including by spitting in another's face)
- *United States v. Canada*, 123 F.4th 159, 162 (4th Cir. 2024) (**South Carolina** conviction of criminal domestic violence, [S.C. Code § 16–25–20\(A\)](#), is not an ACCA felony because it may be committed recklessly; abrogating *United States v. Drummond*, 925 F.3d 681 (4th Cir. 2019))
- *United States v. Mack*, 56 F.4th 303 (4th Cir. 2022) (South Carolina first-degree assault and battery, [S.C. Code § 16-3-600\(C\)\(1\)\(b\)\(i\)](#), is a 4B1.2 crime of violence; the requirement that the offender “offer” or “attempt” to injure another person conveys intentional, not reckless conduct)
- *United States v. Perez-Silvan*, 861 F.3d 935 (9th Cir. 2017) (**Tennessee** aggravated assault is divisible, and [Tenn. Code § 39–13–102\(a\)\(1\)\(A\)](#) is a crime of violence under the [§ 2L1.2](#) elements clause); *United States v. Ogle*, 82 F.4th 272 (4th Cir. 2023) (same)
- *United States v. Harper*, 875 F.3d 329 (6th Cir. 2017) (**Tennessee** aggravated assault, in violation of [Tenn. Code § 39–13–102\(a\)\(1\)\(B\)](#), is a crime of violence under the [§ 4B1.2](#) elements clause; however, the panel criticizes the Sixth Circuit precedent on which this decision is based, which held that reckless conduct may satisfy the elements clause); *Davis v. United States*, 900 F.3d. 733 (6th Cir. 2018) (same ruling with respect to ACCA) (may be called into question by [Borden](#))
- *Sanchez-Perez v. Garland*, 100 F.4th 693 (6th Cir. 2024) (**Tennessee** misdemeanor domestic assault, [Tenn. Code Ann. § 39-13-101\(a\)\(2\)](#), is not a crime of violence under [18 U.S.C. § 16\(a\)](#), as the state definition of “bodily harm” permits a conviction based on causing fear of mental as well as physical harm)
- *United States v. Torres*, 923 F.3d 420 (5th Cir. 2019) (**Texas** aggravated assault in violation of [Tex. Penal Code § 22.01\(a\)\(2\)](#) (“intentionally or knowingly threatens another with imminent bodily injury”) is a section 16(a) crime of violence)

- *United States v. Greer*, 20 F.4th 1071 (5th Cir. 2021) (**Texas** “assault family violence impede breath or circulation,” **Texas Penal Code** § 22.01(b)(2)(B); and “assault family violence with previous convictions,” **Texas Penal Code** § 22.01(b)(2)(A), may be committed recklessly and thus are not 4B1.2 crimes of violence; *Borden* overruled contrary decision in *United States v. Howell*, 838 F.3d 489 (5th Cir. 2016))
- *United States v. Hoxworth*, 11 F.4th 693 (8th Cir. 2021) (**Texas** aggravated assault with a deadly weapon, **Tex. Penal Code Ann.** §§ 22.01(a)(1), .02(a)(2), may be committed recklessly and is therefore not an ACCA violent felony); *but see United States v. Calvillo-Palacios*, 860 F.3d 1285 (9th Cir. 2017) (held prior to *Borden* that this offense was a crime of violence under § 2L1.2 elements clause))
- *United States v. Fuentes-Rodriguez*, 22 F.4th 504 (5th Cir. 2022) (following *Borden*, **Texas** conviction for aggravated assault in violation of **Tex. Penal Code** § 22.01(a)(1), is not a “crime of violence” under § 16(a), as it may be committed recklessly); *United States v. Stoglin*, 34 F.4th 415 (5th Cir. 2022) (same ruling regarding “serious violent felony” under § 3559(c)(2)(F)(ii)); abrogates pre-*Borden* Fifth Circuit decisions regarding this statute)
- *United States v. Rodriguez-Flores*, 25 F.4th 385 (5th Cir. 2022) (**Texas** sexual assault of an adult, **Tex. Penal Code** § 22.011(a)(1), is not a “crime of violence” under § 16, as the various ways in which the offense may occur “without consent” are non-divisible means and some do not involve physical force)
- *United States v. Bates*, 24 F.4th 1017 (5th Cir. 2022) (**Texas** offense of assault of public servant, **Tex. Penal Code** § 22.01(a)(1), (b)(1), may be committed recklessly and thus is not a 4B1.2 crime of violence); *United States v. Kelley*, 40 F.4th 276, 286-87 (5th Cir. 2022) (same))
- *United States v. Bettcher*, 911 F.3d 1040 (10th Cir. 2018) (**Utah** second-degree aggravated assault, in violation of **Utah Code Ann.** § 76-5-103, is a § 4B1.2 crime of violence, notwithstanding that it may be committed recklessly)
- *United States v. Rumley*, 952 F.3d 538 (4th Cir. 2020) (**Virginia** unlawful wounding, in violation of **Va. Code** § 18.2-51, is an ACCA violent felony); *United States v. Manley*, 52 F.4th 143, 148-49 (4th Cir. 2022) (same result under § 924(c))
- *Amaya v. Garland*, 15 F.4th 976, 980-82 (9th Cir. 2021) (**Washington** first-degree assault, **Wash. Rev. Code** § 9A.36.011, is a crime of violence under

§ 16(a); it requires specific intent; further, exposing another to HIV is a use of physical force)

- *United States v. Robinson*, 869 F.3d 933 (9th Cir. 2017) (**Washington** second-degree assault, Wash. Rev. Code § 9A.36.021(1), is indivisible and overbroad, and does not qualify as a crime of violence under the § 4B1.2 elements clause; *United States v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019) (the crime also does not qualify as enumerated aggravated assault, as it encompasses assault with intent to commit a felony and is therefore overbroad); *United States v. Door*, 917 F.3d 1146, 1154 (9th Cir. 2019) (it also does not qualify under the former 4B1.2 residual clause)
- *Yates v. United States*, 842 F.3d 1051 (7th Cir. 2016) (**Wisconsin** conviction for battery by a prisoner, Wis. Stat. §§ 939.22(4), 940.20(1) (as in effect in 1995–96), is ACCA violent felony)
- *Jones v. United States*, 870 F.3d 750 (8th Cir. 2017) (**Wisconsin** conviction for battery of a law enforcement officer, Wis. Stat. §§ 939.22(4), 940.20(2), is violent felony under ACCA)
- *Beltran-Aguilar v. Whitaker*, 912 F.3d 420 (7th Cir. 2019) (**Wisconsin** state court conviction for battery involving domestic abuse, Wis. Stat. § 940.19(1), was § 16(a) crime of violence)
- *United States v. Winder*, 926 F.3d 1251 (10th Cir. 2019) (**Wyoming** offense of felony interference with a peace officer, Wyo. Stat. § 6–5–204(b), requiring proof that the defendant intentionally and knowingly caused or attempted to cause bodily injury to a peace officer, is a § 4B1.2 crime of violence)

#### 4. Murder and manslaughter

The following post-*Mathis* precedential appellate decisions address murder and manslaughter offenses under the elements clause of ACCA, § 16, § 924(c), and the Guidelines. The Guidelines definition of “crime of violence,” in § 4B1.2(a)(2), also includes the enumerated offenses of “murder” and “voluntary manslaughter,” which may be broader than the relevant definition under the elements clause. A discussion and pertinent decisions are presented in a later section of this topic page, regarding enumerated offenses.

- *United States v. Velazquez-Fontanez*, 6 F.4th 205, 218–19 (1st Cir. 2021) (drive-by shooting murder in violation of 18 U.S.C. § 36(b)(2)(A) is a 924(c) crime of violence)

- *United States v. Howald*, 104 F.4th 732, 742-44 (9th Cir. 2024) (attempt to kill on account of the victim's actual or perceived sexual orientation, **18 U.S.C. § 249(a)(2)(A)(ii)(II)**, is a divisible offense that qualifies as a 924(c) crime of violence)
- *United States v. Jackson*, 32 F.4th 278 (4th Cir. 2022) (murder in violation of **18 U.S.C. § 1111(a)** is divisible; while felony murder in violation of that statute is not a 924(c) "crime of violence," as it does not require proof of intent, premeditated first-degree murder is a **924(c)** crime of violence; "federal premeditated murder requires an intentional mens rea and thus does not in any way violate *Borden*'s requirement."); *United States v. Bagola*, 108 F.4th 722, 728 (8th Cir. 2024) (first-degree murder is a 924(c) crime of violence)
- *Janis v. United States*, 73 F.4th 628 (8th Cir. 2023) (second-degree murder, **18 U.S.C. § 1111(a)**, is a 924(c) crime of violence; the malice requirement (depraved heart recklessness) is sufficient; the court also finds that there is no authority for a conviction for second-degree murder based on a mother's conduct toward an unborn child, which would purportedly not be the use of force against the "person of another"); *United States v. Kepler*, 74 F.4th 1292, 1303-12 (10th Cir. 2023) (second-degree murder, **18 U.S.C. § 1111(a)** (as well as second-degree felony murder), is a 924(c) crime of violence; the malice requirement (depraved heart recklessness) is sufficient); *United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (en banc) (second-degree murder is a 924(c) crime of violence); *Thompson v. United States*, 924 F.3d 1153, 1158–59 (11th Cir. 2019) (same).
- *Brewer v. United States*, 89 F.4th 1091 (8th Cir. 2024) (voluntary manslaughter under **18 U.S.C. § 1112** is a 924(c) crime of violence); *United States v. Draper*, 84 F.4th 797 (9th Cir. 2023) (same; holding that the required proof of "depraved heart" is akin to extreme recklessness that qualifies under the elements clause)
- *United States v. Benally*, 843 F.3d 350 (9th Cir. 2016) (involuntary manslaughter under **18 U.S.C. §§ 1112** and **1153** is not a crime of violence under § 924(c), as it may be committed with gross negligence)
- *United States v. States*, 72 F.4th 778, 783-91 (7th Cir. 2023) (attempted murder of a federal official, **18 U.S.C. § 1114(a)**, is a 924(c) crime of violence; *Taylor* does not apply to attempts to commit a crime that requires the use of force)
- *United States v. Smith*, 957 F.3d 590 (5th Cir. 2020) (attempted murder in violation of **18 U.S.C. § 1114(3)** is an ACCA predicate)

- *United States v. Mathis*, 932 F.3d 242, 265 (4th Cir. 2019) (witness tampering by means of murder, **18 U.S.C. § 1512(a)**, is a 924(c) crime of violence)
- *In re Irby*, 858 F.3d 231 (4th Cir. 2017) (second-degree retaliatory murder of a witness, **18 U.S.C. § 1513(a)(1)(B)**, is a crime of violence under § 924(c))
- *Dorsey v. United States*, 76 F.4th 1277, 1282-85 (9th Cir. 2023) (attempted killing in violation of **18 U.S.C. § 1512(a)(1)** is a divisible witness tampering offense that qualifies as a 924(c) crime of violence, as is use of physical force against a witness in violation of **§ 1512(a)(2)**)
- *United States v. Boman*, 873 F.3d 1035, 1042 (8th Cir. 2017) (travel in or use of interstate commerce to facilitate murder-for-hire, **18 U.S.C. § 1958**, is not a 924(c) crime of violence); *United States v. Cordero*, 973 F.3d 603, 625–26 (6th Cir. 2020) (the government concedes and the court agrees that the same result applies to § 4B1.2); *but see United States v. Runyon*, 983 F.3d 716, 724–28 (4th Cir. 2020) (conspiracy to commit murder for hire in which death results, in violation of **18 U.S.C. § 1958(a)**, is a 924(c) crime of violence); *United States v. Linehan*, 56 F.4th 693, 706-07 (9th Cir. 2022) (solicitation, in violation of **18 U.S.C. § 373**, of using a facility of interstate commerce with intent that a murder be committed, in violation of **18 U.S.C. § 1958(a)**, is not a crime of violence as the **§ 1958(a)** offense does not qualify under the elements clause)
- *United States v. Manley*, 52 F.4th 143, 147-49 (4th Cir. 2022) (VICAR assault, **18 U.S.C. § 1959(a)(3)**, premised on unlawful wounding in violation of **Virginia Code § 18.2-51**, and VICAR murder, **§ 1959(a)(1)**, premised on murder in violation of **Virginia Code § 18.2-32** (first and second-degree murder), are 924(c) crimes of violence); *United States v. Hunt*, 99 F.4th 161, 178–80 (4th Cir. 2024) (same)
- *Alvarado-Linares v. United States*, 44 F.4th 1334 (11th Cir. 2022) (VICAR murder, **18 U.S.C. § 1959(a)**, qualifies as a 924(c) crime of violence; both Georgia law, **Ga. Code § 16-5-1(a)** and federal law prohibit murder with malice aforethought, which qualifies under the elements clause; attempted murder qualifies as well, as it requires both the intent to kill and a substantial step towards that goal; an attempt to threaten, that was at issue in *Taylor*, is insufficient)
- *United States v. Tipton*, 95 F.4th 831, 847-52 (4th Cir. 2024) (VICAR murder, **18 U.S.C. § 1959(a)(1)**, is a 924(c) crime of violence; as the federal generic

definition suffices, it is not necessary to look to the underlying state-law premise of the charge)

- *United States v. Morris*, 61 F.4th 311 (2d Cir. 2023) (VICAR assault with a deadly weapon, **18 U.S.C. § 1959(a)(3)**, predicated on either N.Y. Penal Law § 120.05(2) or § 120.10(1), is a 924(c) crime of violence)
- *United States v. Smith*, 104 F.4th 314, 322-30 (D.C. Cir. 2024) (CCE murder in violation of **21 U.S.C. § 848(e)(1)(A)** qualifies as a 924(c) crime of violence; it is irrelevant that the crime may be committed through indirect force or by omission to act, and proof of intentional, not reckless conduct is required)
- *Boaz v. United States*, 884 F.3d 808 (8th Cir. 2018) (repealed **Arizona** offense of exhibiting a violent weapon, Ariz. Rev. Stat. § 13–916 (1974), qualifies as a violent felony under ACCA)
- *Hylor v. United States*, 896 F.3d 1219 (11th Cir. 2018) (**Florida** attempted first-degree murder is an ACCA violent felony)
- *United States v. Jones*, 906 F.3d 1325 (11th Cir. 2018) (**Florida** second-degree murder, Fla. Stat. § 782.04(1)(a), is an ACCA violent felony)
- *Hill v. United States*, 877 F.3d 717 (7th Cir. 2017) (both murder and attempted murder in **Illinois**, 720 Ill. Comp. Stat. 5/8–4(a), 5/9–1(a)(1), are violent felonies under ACCA)
- *United States v. Coleman*, 60 F.4th 1184 (8th Cir. 2023) (Illinois attempted murder, 720 Ill. Comp. Stat. 5/8-4(a), 5/9-1(a), is an enumerated 4B1.2 crime of violence; the categorical approach does not consider affirmative defenses, and therefore it does not matter that Illinois did not allow for the affirmative defense of abandonment while the federal generic crime did)
- *United States v. Teague*, 884 F.3d 726 (7th Cir. 2018) (**Illinois** second-degree murder, 720 Ill. Comp. Stat. 5/9–1, is a crime of violence under the elements clause of § 4B1.2, and also qualifies as “voluntary manslaughter” under the enumerated clause)
- *United States v. Peeples*, 879 F.3d 282, 286–87 (8th Cir. 2018) (**Iowa** attempted murder statute, Iowa Code § 707.11 (1991), is a crime of violence under the § 4B1.2 elements clause)

- *United States v. Harrison*, 54 F.4th 884, 888-89 (6th Cir. 2022) (**Kentucky** complicity to commit murder (a form of accomplice liability), **Ky. Stat. §§ 502.020(1), 507.020**, is a “serious violent felony” under **18 U.S.C. § 3559(c) (2)(F)(ii)**, incorporated into **21 U.S.C. § 841(b)(1)(A)**, as murder involves the use of physical force, and it is irrelevant whether the defendant himself used force; further, an omission in the face of a legal duty to act, such as starving a child, involves the “use” of force under the elements clause)
- *United States v. Ortiz-Orellana*, 90 F.4th 689, 701-04 (4th Cir. 2024) (**Maryland** first-degree murder in violation of **Md. Code., Crim. Law § 2-201(a)** is divisible, and premeditated murder under that statute qualifies as a 924(c) crime of violence; it therefore may serve as a predicate for murder in aid of racketeering, **18 U.S.C. § 1959(a)(1)**)
- *United States v. Maldonado*, 988 F.3d 103 (1st Cir. 2021) (**Massachusetts** armed assault with intent to murder, under a “joint venture” theory as it existed in 2007, is a **4B1.2** crime of violence, as the theory is the same as aiding and abetting that qualifies under **§ 4B1.2**)
- *United States v. Jamison*, 85 F.4th 796 (6th Cir. 2023) (**Michigan** second-degree murder, committed with malice, **Mich. Comp. Laws § 750.316**, is an ACCA violent felony, as is commission of this offense with a firearm in violation of **§ 750.227b(1)**; this felony-firearm offense is divisible by the type of felony)
- *United States v. Matthews*, 25 F.4th 601 (8th Cir. 2022) (**Minnesota** attempted second-degree murder, **Minn. Stat. § 609.19(1)**, is an ACCA violent felony as it requires specific intent; indeed, no Minnesota attempt offense may be committed with mens rea of recklessness)
- *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc) (voluntary manslaughter in violation of **Missouri** law, **Mo. Rev. Stat. § 565.023.1**, including assisted suicide, qualifies under the pre-2015 elements clause of **§ 2L1.2**, as it requires proof of the indirect use of physical force)
- *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021) (en banc) (**New York** first-degree manslaughter, **N.Y. Penal Law § 125.20(1)**, is an ACCA violent felony and a **4B1.2** crime of violence under the elements clauses; the Court holds that an act of “omission” that results in the use of physical force to cause injury is sufficient); *Stone v. United States*, 37 F.4th 825, 832-33 (2d Cir. 2022) (applies *Scott* to determine that **VICAR** conviction for murder in aid of racketeering in violation of **N.Y. Penal Law § 125.25(1)** is a 924(c) crime of violence); *see also*

*United States v. Torres*, 124 F.4th 84, 97-98 (2d Cir. 2024) (murder in violation of N.Y. Penal Law § 125.25(1) falls within the generic definition of murder)

- *United States v. Sanchez*, 940 F.3d 526 (11th Cir. 2019) (**New York** conviction for attempted second-degree murder, N.Y. Penal Law § 125.25(1), even if crime could be committed by poisoning or by omission, is ACCA violent felony, where subsection of statute under which defendant was convicted had element of intent to cause death of another)
- *United States v. Smith*, 882 F.3d 460 (4th Cir. 2018) (voluntary manslaughter under **North Carolina** law is an ACCA violent felony)
- *United States v. Leaverton*, 895 F.3d 1251 (10th Cir. 2018) (Oklahoma first-degree manslaughter, 21 Okla. Stat. § 711(2), does not qualify as “manslaughter” under the three strikes statute; the state law requires heat of passion so great as to destroy intent to kill, whereas the generic offense requires intent to kill accompanied by a state of passion engendered by adequate provocation)
- *United States v. Benitez-Beltran*, 892 F.3d 462 (1st Cir. 2018) (attempted murder in violation of **Puerto Rico** law, 33 P.R. Laws § 4001, falls within the generic definition of “attempt” and “murder” in the Guidelines definition of crime of violence); *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020) (**Puerto Rico** second-degree murder and attempted murder as of 1996 qualified as ACCA violent felonies)
- *United States v. Middleton*, 883 F.3d 485, (4th Cir. 2018) (involuntary manslaughter under **South Carolina** law is not an ACCA violent felony)
- *United States v. Parham*, 119 F.4th 488 (6th Cir. 2024) (**Tennessee** conviction for attempted second-degree murder, Tenn. Code §§ 39-12-101, 39-12-101(a) (3), is a 4B1.1 crime of violence)
- *United States v. Vickers*, 967 F.3d 480 (5th Cir. 2020) (**Texas** murder in violation of Tex. Penal Code § 19.02 (including felony murder), as the statute existed prior to 2007, is an ACCA violent felony)
- *United States v. Trujillo*, 4 F.4th 258 (5th Cir. 2021) (**Texas** intoxication manslaughter, Tex. Penal Code § 49.08(a), does not constitute a “crime of violence” under 18 U.S.C. § 16)

- *United States v. Mathis*, 932 F.3d 242, 264–65 (4th Cir. 2019) (**Virginia** first-degree murder, [Va. Code § 18.2–32](#), is a 924(c) crime of violence)
- *United States v. Lassiter*, 96 F.4th 629, 636-39 (4th Cir. 2024) (attempted murder in violation of **Virginia** law is a 924(c) crime of violence, and thus so is VICAR attempted murder premised on the state offense of attempted murder under [Va. Code §§ 18.2-26, -32](#)); *United States v. Hunt*, 99 F.4th 161, 178–79 (4th Cir. 2024) (same)
- *United States v. Studhorse*, 883 F.3d 1198 (9th Cir. 2018) (**Washington** attempted first-degree murder, [Wash. Rev. Code §§ 9A.32.030\(1\), 9A.28.020\(1\)](#), is a crime of violence under the § 16 elements clause, incorporated into [18 U.S.C. § 931\(a\)](#) (possession of body armor by a person convicted of a crime of violence), and under the **4B1.2** elements clause)
- *United States v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019) (**Washington** second-degree murder, [Wash. Rev. Code § 9A.32.050 \(2003\)](#), covers felony murder and is therefore overbroad in relation to and does not qualify under the **4B1.2** enumerated reference to murder, and also does not qualify under the elements clause because it encompasses negligent or accidental felony murder)

## 5. Other crimes

In the *Davis Guidance*, at pages 9–13, the Department states its view that the following federal offenses do not qualify as “crimes of violence” under the 924(c) elements clause (and thus under other elements clauses as well):

- **Kidnapping**, in violation of [18 U.S.C. § 1201\(a\)](#), unless “death results.”
- **Arson**, in violation of [18 U.S.C. § 844\(i\)](#), unless “death results” or the targeted property belongs to the United States.
- **Hobbs Act extortion**, in violation of [18 U.S.C. § 1951](#).
- **Escape**, in violation of [18 U.S.C. § 751](#).
- Statutes that criminalize the **interstate transportation of adults and children for unlawful sexual purposes**, including [18 U.S.C. §§ 1591\(a\), 2251\(a\), 2421–2423](#).
- **Material support to terrorism**, [18 U.S.C. §§ 2339A, 2339B](#).

The application of [Section 924\(c\)](#) to an offense of violent crime in aid of racketeering (**VICAR**) is complex. VICAR applies to a person who is paid by a racketeering enterprise to commit, or for the purpose of gaining entrance to or maintaining or increasing position in a racketeering enterprise commits murder, kidnapping, maiming, assault with a dangerous weapon, or assault resulting in serious bodily injury, or “threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States,” or attempts or conspires to do so.

Whether the VICAR offense meets the [924\(c\)](#) definition of a “crime of violence” depends on the underlying VICAR act, to which the categorical approach must be applied. Generally, with respect to all of the wrongs listed, except a threat to commit a crime of violence, VICAR depends on a generic, federal definition, as made clear in the legislative history. *See, e.g.*, 129 Cong. Rec. 22, 906 (98th Cong. 1st Sess. Aug 4, 1983) (“While Section [1959] proscribes murder, kidnapping, maiming, assault with a dangerous weapon, and assault resulting in serious bodily injury in violation of federal or State law, it is intended to apply to these crimes in a generic sense, whether or not a particular State has chosen those precise terms for such crimes.”); *Cousins v. United States*, 198 F. Supp. 3d 621, 626 (E.D. Va. 2016) (“Section 1959 reaches the generic conduct described therein without concern for the labels a state may use in criminalizing the conduct that qualifies as a VICAR predicate.”); *United States v. Le*, 316 F. Supp. 2d 355, 361 & n.13 (E.D. Va. 2004) (same; collecting cases). *But see*

*Alvarado-Linares v. United States*, 44 F.4th 1334, 1343 (11th Cir. 2022) (where the indictment alleged only a state murder offense as the predicate, the court evaluates whether that offense qualifies). Essentially, a VICAR offense may qualify as a predicate 924(c) crime of violence if either the federal generic definition of the violent act, or the charged state predicate, suffices under the elements clause. Decisions issued by the Fourth Circuit in March 2024 illustrate this. *United States v. Lassiter*, 96 F.4th 629, 636-39 (4th Cir. 2024) (as attempted murder in violation of Virginia law is a 924(c) crime of violence, the charge of VICAR attempted murder qualifies under § 924(c); *United States v. Tipton*, 95 F.4th 831, 847-52 (4th Cir. 2024) (as the federal generic definition of murder suffices, it is not necessary to look to the underlying state-law premise of the VICAR charge)).

The threat to commit a crime of violence, on the other hand, is the one VICAR crime that Congress specifically tied to the general definition of “crime of violence” that appears in 18 U.S.C. § 16. See S. Rep. No. 98-225 at 307 (Aug. 4, 1983) (the Senate Report regarding 18 U.S.C. §§ 1959 and 16 states that “[t]he term means an offense—either a felony or a misdemeanor—that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or any felony that, by its nature, involves the substantial risk that physical force against another person or property may be used in the course of its commission.”). Thus, in *United States v. Keene*, 955 F.3d 391 (4th Cir. 2020), the court agreed with the government that the categorical approach does not apply in determining whether a state offense charged as a VICAR act qualifies as “assaults with a dangerous weapon” under the statute. The court stated: “Rather, under the plain language of the VICAR statute, a defendant may be convicted when, by his conduct, he ‘assaults’ another person with a dangerous weapon ‘in violation of’ the state law charged in the indictment. This unambiguous statutory language precludes application of a formalistic, overinclusive categorical approach, and instead holds defendants accountable for their actual conduct as presented to a jury.” *Id.* at 398.

Prosecutors are encouraged to consult with the Organized Crime and Gang Section (OCGS) regarding the application of Section 924(c) to VICAR offenses.

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The following post-*Mathis* precedential appellate decisions address these and other offenses under the elements clause of ACCA, § 16, § 924(c), and the Guidelines.

- *United States v. Roof*, 10 F.4th 314, 400–05 (4th Cir. 2021) (obstructing religious exercise resulting in death, in violation of 18 U.S.C. § 247(a)(2),

and a **hate crime resulting in death**, in violation of **18 U.S.C. § 249(a)(1)**, are **924(c)** predicates)

- *United States v. Hari*, 67 F.4th 903, 910-11 (8th Cir. 2023) (**obstructing by force the free exercise of religious beliefs** in violation of **18 U.S.C. § 247(a)(2)** is a **924(c)** crime of violence)
- *United States v. Doggart*, 947 F.3d 879, 887–88 (6th Cir. 2020) (**destruction of religious property** resulting in bodily injury, or committed with a dangerous weapon, explosive, or fire, in violation of **18 U.S.C. § 247(d)(3)**, is a crime of violence under the elements clause of the solicitation statute, **18 U.S.C. § 373**, which mirrors the **924(c)** elements clause)
- *United States v. Linehan*, 56 F.4th 693, 699-706 (9th Cir. 2022) (**solicitation, in violation of 18 U.S.C. § 373, of transportation of an explosive with the knowledge or intent that it would be used to kill, injure, or intimidate any individual, in violation of 18 U.S.C. § 844(d)**, is a crime of violence under the elements clause, as **§ 844(d)** involves the attempted use of physical force)
- *United States v. Davis*, 53 F.4th 168 (4th Cir. 2022) (**arson of property owned or used by the U.S., in violation of 18 U.S.C. § 844(f)**, is not a **924(c)** crime of violence, as the defendant may damage his own property)
- *United States v. Lung'aho*, 72 F.4th 845 (8th Cir. 2023) (**arson in violation of 18 U.S.C. § 844(f)(1)** does not qualify as a **924(c)** crime of violence, as the defendant may act “maliciously”; that mental state – acting in “willful disregard of the likelihood” that property with a federal connection will be damaged or destroyed – is not sufficient)
- *United States v. Salas*, 889 F.3d 681, 683–84 (10th Cir. 2018) (the government concedes and the court finds that **arson** in violation of **18 U.S.C. § 844(i)** is not a crime of violence under the **924(c)** elements clause because a person may destroy his own property in violation of **§ 844(i)**, and therefore the statute is not limited to the use of physical force against the property “of another”) (in contrast, arson is an enumerated offense under ACCA and 4B1.2); *United States v. Mink*, 9 F.4th 590, 614 (8th Cir. 2021) (same concession and result); *United States v. Mathews*, 37 F.4<sup>th</sup> 622 (9th Cir. 2022)
- *United States v. Tsarnaev*, 968 F.3d 24, 99–103 (1st Cir. 2020) (the court disagrees with the government and holds that **arson**, even resulting in death, **18 U.S.C. § 844(i)**, is not a **924(c)** crime of violence because it may be committed recklessly)

- *United States v. Mjoness*, 4 F.4th 967 (10th Cir. 2021) (**18 U.S.C. § 875(c)** is divisible, and the portion addressing transmission of a “threat to injure” is a 924(c) crime of violence)
- *United States v. Chapman*, 866 F.3d 129 (3d Cir. 2017) (**mailing a threat to injure, 18 U.S.C. § 876(c)**, is a crime of violence under the **4B1.2 elements clause**)
- *United States v. Boman*, 873 F.3d 1035 (8th Cir. 2017) (a prior conviction for use of a firearm during and in relation to a crime of violence, **18 U.S.C. § 924(c)**, is not a violent felony under ACCA)
- *United States v. Valentin*, 118 F.4th 579, 588-90 (3d Cir. 2024) (brandishing a firearm in furtherance of a crime of violence, in violation of **18 U.S.C. § 924(c)**, is a predicate “crime of violence” under the career offender guideline)
- *United States v. Jenkins*, 849 F.3d 390 (7th Cir. 2017) (**kidnapping** in violation of **18 U.S.C. § 1201(a)** is not a crime of violence under **§ 924(c)**), *vacated on other grounds*, 584 U.S. 973 (2018); *United States v. Walker*, 934 F.3d 375 (4th Cir. 2019) (same); *United States v. Gillis*, 938 F.3d 1181, 1203–10 (11th Cir. 2019) (same ruling in application of similar elements clause in solicitation statute, **18 U.S.C. § 373**)
- *United States v. Ross*, 969 F.3d 829, 837–40 (8th Cir. 2020) (**kidnapping resulting in death, 18 U.S.C. § 1201(a)**, is a **924(c)** crime of violence), *petition for rehearing en banc denied*, 977 F.3d 1295 (8th Cir. 2020) (with dissenting opinion); *In re Hall*, 979 F.3d 339, 345–46 (5th Cir. 2020) (same; adding that “all federal capital charges must incorporate the required elements of § 3591(a) (2), and therefore necessarily satisfy the elements clause of § 924(c)”)
- *United States v. Melaku*, 41 F.4th 386 (4th Cir. 2022) (**willfully injuring or committing depredation against property of United States, 18 U.S.C. § 1361**, is not a 924(c) crime of violence; the court adopts the reasoning of the Tenth Circuit in *Bowen* that spray-painting property is not violent conduct and therefore the statute does not categorically qualify; the court suggests that mere damage to property is insufficient to show the use of physical force against the “property of another” unless the crime also “involve[s] the potential risk of pain or injury to persons.”)
- *United States v. Khatallah*, 41 F.4th 608, 631-34 (D.C. Cir. 2022) (**18 U.S.C. § 1363**, addressing the **malicious destruction of buildings and property within**

the special maritime and territorial jurisdiction of the United States, or conspiracy to commit that offense, is divisible; the substantive crime qualifies as a 924(c) crime of violence even if conspiracy does not)

- *United States v. Allred*, 942 F.3d 641 (4th Cir. 2019) (the offense of **retaliation against a witness**, in violation of **18 U.S.C. § 1513(b)(1)**, by causing injury to a person or damage to property, is divisible, and the offense involving causing bodily injury is a violent felony under ACCA)
- *United States v. Bowen*, 936 F.3d 1091 (10th Cir. 2019) (**retaliation against a witness**, in violation of **18 U.S.C. § 1513(b)(2)**, is not a crime of violence under § 924(c); it may be committed by “spray painting a car,” which is not a sufficiently violent act to satisfy the elements clause (though the court does not define what act against property would suffice))
- *United States v. Jackson*, 865 F.3d 946, 952 (7th Cir. 2017) (**sex trafficking of a minor**, **18 U.S.C. § 1591(a)**, does not qualify as a crime of violence under the elements clause of § 924(c)(3)(A)); *United States v. Jackson*, 7 F.4th 261 (5th Cir. 2021) (same)
- *United States v. Nikolla*, 950 F.3d 51 (2d Cir. 2020) (**threatening physical violence in furtherance of Hobbs Act extortion, in violation of part of 18 U.S.C. § 1951(a)**, is a **924(c)** crime of violence; the offense matches the elements clause, and the suggested possibility that a defendant may commit the crime by threatening himself or his own property is not accepted because there is no example of such a prosecution)
- *Haynes v. United States*, 936 F.3d 683 (7th Cir. 2019) (the offense of **travel in interstate commerce to commit a crime of violence**, **18 U.S.C. § 1952(a)(2) (B)**, is divisible by the type of crime of violence committed; here, the offense was Hobbs Act robbery, which is a crime of violence under the **§ 16(a)** elements clause, and therefore the travel violation is a crime of violence under the **924(c)** elements clause)
- *United States v. Toki*, 23 F.4th 1277 (10th Cir. 2022) (the government concedes and the court agrees that **VICAR offenses**, **18 U.S.C. § 1959(a)**, predicated on state assault crimes that may be committed recklessly, are not 924(c) predicates following Borden)
- *United States v. Eldridge*, 63 F.4th 962 (2d Cir. 2023) (the government concedes and the court agrees that **kidnapping in the second degree under N.Y. Penal Law § 135.20**, the predicate for a charge of kidnapping in aid of

racketeering, 18 U.S.C. § 1959(a)(1), is not categorically a 924(c) crime of violence because it may be committed by deception)

- *Delligatti v. United States*, 145 S. Ct. 797 (2025) (VICAR attempted murder, 18 U.S.C. § 1959(a)(5), predicated on attempted second-degree murder under New York law, N.Y. Penal Law § 125.25(1), is a 924(c) crime of violence); *United States v. Davis*, 74 F.4th 50, 54-56 (2d Cir. 2023) (VICAR murder, 18 U.S.C. § 1959(a)(1), premised on intentional second-degree murder in violation of New York law, N.Y. Penal Law § 125.25(1), is a 924(c) crime of violence)
- *United States v. Laurent*, 33 F.4th 63, 87-88 (2d Cir. 2022) (a substantive RICO offense is a 924(c) crime of violence where at least one predicate was a violent offense); *Colotti v. United States*, 71 F.4th 102, 109 (2d Cir. 2023) (“RICO is a divisible statute and . . . substantive RICO can be a crime of violence when it is predicated on an offense that necessarily requires an actual, attempted, or threatened use of force. . . . A conviction for a substantive RICO offense will constitute a crime of violence if the conviction was based on at least one predicate act that can be committed only by use of force.”)
- *United States v. Brown*, 945 F.3d 72, 76 (2d Cir. 2019) (conspiracy to commit racketeering, 18 U.S.C. § 1962(d), is a “crime of violence” under the 4B1.2 elements clause, where the predicate racketeering acts were bank robbery; the court looks to the predicate offenses to determine whether a crime of violence is charged); *accord United States v. Solis-Vasquez*, 10 F.4th 59 (1st Cir. 2021) (treating aggravated RICO conspiracy, 18 U.S.C. § 1963(a), as a “crime of violence” under § 16(a), for purposes of application of the restitution statute, was not plain error; precedent suggests that proof of completion of a predicate act is a required element, and that act here (Massachusetts second-degree murder) is a crime of violence); *but see United States v. Capers*, 20 F.4th 105, 116–22 (2d Cir. 2021) (“aggravated” conspiracy to commit murder in furtherance of RICO, 18 U.S.C. § 1962(d), is not a 924(c) crime of violence); *United States v. Simmons*, 11 F.4th 239, 253–61 (4th Cir. 2021) (a RICO conspiracy in violation of 18 U.S.C. § 1962(d) is not categorically a 924(c) crime of violence, even if the government also proves as an aggravating factor that a murder was committed, increasing the statutory maximum); *United States v. McLaren*, 13 F.4th 386, 413–14 (5th Cir. 2021) (aggravated RICO conspiracy, 18 U.S.C. § 1963(a), is not a predicate for 924(c) or 924(j)); *United States v. Green*, 981 F.3d 945, 951–52 (11th Cir. 2020) (conspiracy in violation of § 1962(d) is not a 924(c) crime of violence)
- *United States v. Thayer*, 40 F.4th 797 (7th Cir. 2022) (the court joins the Fourth, Eighth, Ninth, and Eleventh Circuits in holding that a circumstance-specific

approach, not a rigid categorical approach, applies to the definition of “sex offense” incorporated in the offense of noncompliance with SORNA, in violation of **18 U.S.C. § 2250**)

- *United States v. Diaz*, 865 F.3d 168 (4th Cir. 2017) (**interfering with a flight crew**, in violation of **49 U.S.C. § 46504**, is overbroad and does not qualify under the § 16 elements clause, and therefore the Mandatory Victims Restitution Act (MVRA) does not apply)
- *Dent v. Sessions*, 900 F.3d 1075, 1084–85 (9th Cir. 2018) (**Arizona third-degree escape**, Ariz. Rev. Stat. § 13–2502, is not a crime of violence under the 16(a) elements clause)
- *United States v. Myers*, 928 F.3d 763 (8th Cir. 2019) (**Arkansas first-degree terroristic threats**, Ark. Code § 5–13–301(a)(1)(A), is an ACCA violent felony; the statute is divisible and the defendant was convicted of the portion involving a threat of death or serious physical injury); *Martin v. United States*, 904 F.3d 594 (8th Cir. 2018) (each subsection of the **Arkansas first-degree terroristic threatening** statute, Ark. Code Ann. § 5–13–301(a)(1), qualifies as an ACCA violent felony); the reasoning underlying the contrary decision in *United States v. Rico-Mejia*, 859 F.3d 318 (5th Cir. 2017), is overruled in *United States v. Reyes-Contreras*, 910 F.3d 169, 180–82 (5th Cir. 2018) (en banc). *But see United States v. Harris*, 950 F.3d 1015 (8th Cir. 2020) (**Arkansas** conviction for committing terroristic acts in violation of Ark. Code § 5–13–300 is not a 4B1.2 crime of violence, as the defendant could be convicted under that statute for acting with purpose of injuring property, rather than persons, and this mens rea element is indivisible).
- *United States v. Coleman*, 918 F.3d 592 (8th Cir. 2019) (**Arkansas kidnapping** statute, Ark. Code § 5–11–102, is indivisible and not an ACCA violent felony)
- *United States v. Mendez-Henriquez*, 847 F.3d 214 (5th Cir. 2017) (**California** statute criminalizing **maliciously and willfully discharging a firearm at an occupied motor vehicle**, Cal. Penal Code § 246, was divisible, and portion here qualified as a crime of violence under the § 2L1.2 elements clause)
- *United States v. Acevedo-De La Cruz*, 844 F.3d 1147 (9th Cir. 2017) (**California** conviction for **violation of protective order involving an act of violence or credible threat of violence**, Cal. Penal Code § 273.6(d), was a crime of violence under the § 2L1.2 elements clause)

- *United States v. Baldon*, 956 F.3d 1115 (9th Cir. Apr. 21, 2020) (**California** carjacking, Cal. Penal Code § 215, is not a 4B1.2 crime of violence because this indivisible statute may rest on a threat to property as well as a person); *Gutierrez v. Garland*, 106 F.4th 866, 872–77 (9th Cir. 2024) (same ruling under § 16(a); while that definition also reaches threats to property, the carjacking statute remains overbroad, as it applies to mere fear as well as force, and because it presents no mens rea requirement)
- *United States v. Doran*, 978 F.3d 1337 (8th Cir. 2020) (**California** offense of making a threat to commit a crime which will result in death or great bodily injury, Cal. Penal Code § 422, is a 4B1.2 crime of violence)
- *United States v. Venjohn*, 104 F.4th 179 (10th Cir. 2024) (**Colorado felony menacing**, Colo. Rev. Stat. § 18-3-206 – knowingly placing or attempting to place another person in fear of imminent serious bodily injury, through use of an actual or simulated firearm, knife, or bludgeon – is not a 4B1.2 crime of violence under *Taylor*, as state law provides that the defendant need not actually communicate any threat, only that the defendant’s conduct, if discovered, would place the victim in fear of imminent serious bodily injury)
- *United States v. Deshazior*, -- F.3d --, 2018 WL 944768 (11th Cir. 2018) (**Florida sexual battery with a deadly weapon**, Fla. Stat. § 794.011(3), is an ACCA violent felony)
- *United States v. Joyner*, -- F.3d --, 2018 WL 1015765 (11th Cir. 2018) (**Florida crime of resisting an officer with violence**, Fla. Stat. § 843.01, is an ACCA violent felony)
- *United States v. Oliver*, 962 F.3d 1311 (11th Cir. 2020) (**Georgia** conviction for terroristic threats, for threatening to commit a crime of violence, Ga. Code § 16–11–37(a) (2010) is divisible and qualifies as an ACCA violent felony)
- *United States v. Ferguson*, 100 F.4th 1301 (11th Cir. 2024) (the **Georgia** witness intimidation statute, Ga. Code § 16-10-32(b), is divisible, and the portion related to threatening “physical harm” qualifies as an ACCA violent felony)
- *Lofton v. United States*, 920 F.3d 572, 575–76 (8th Cir. 2019) (**Illinois** conviction for **aggravated criminal sexual abuse**, in violation of 720 Ill. Comp. Stat. 5/11–1.60(c)(1)(i), is not an ACCA violent felony; the crime involves sexual contact by an adult over the age of 17 with a victim under the age of 13, but may be violated by having the child touch the offender for sexual

gratification, and therefore does not necessarily require the use of physical force against another)

- *United States v. Robinson*, 29 F.4th 370 (7th Cir. 2022) (**Illinois** aggravated discharge of a firearm, [720 Ill. Comp. Stat. 5/24–1.2\(a\)](#) (2011), is an ACCA violent felony)
- *United States v. Mancillas*, 880 F.3d 297, 303–04 (7th Cir. 2018) (**strangulation** in violation of **Indiana** law, [Ind. Code § 35–42–2–9\(b\)](#) (as in effect in 2007), is a crime of violence under the § 4B1.2 elements clause)
- *United States v. Bennett*, 863 F.3d 679 (7th Cir. 2017) (**Indiana** offense of **resisting law enforcement**, [Ind. Code § 35–44–3–3\(b\)\(1\)](#), is not an ACCA violent felony)
- *Portee v. United States*, 941 F.3d 263 (7th Cir. 2019) (**Indiana** convictions for **pointing a firearm**, [Ind. Code § 35–47–4–3](#), and **intimidation** by threat to commit a forcible felony, [§ 35–45–2–1\(b\)\(1\)\(A\)](#), are not ACCA violent felonies; the firearm offense may involve joking, for instance, and thus not involve a threat of physical force, and the intimidation threat may be directed at oneself and not the person of another); *but see United States v. Smith*, 981 F.3d 606, 611 (7th Cir. 2020) (suggesting that *Portee* is in tension with Supreme Court decision in *Stokeling*)
- *Johnson v. United States*, 24 F.4th 1110 (7th Cir. 2022) (**Indiana** criminal **deviate sexual conduct**, [Ind. Code § 35–42–4–2](#), is divisible, and the provision addressing compulsion by force or threat of force is an ACCA violent felony)
- *United States v. Bennett*, 972 F.3d 966, 974–76 (8th Cir. 2020) (**Iowa** crime of going “armed with intent,” [Iowa Code § 708.8](#), is not an ACCA violent felony; it is unclear whether the movement must be in furtherance of the intent to use a dangerous weapon against the person of another, and thus the crime falls short of an attempt to use physical force)
- *United States v. Dixon*, 27 F.4th 568 (7th Cir. 2022) (**Iowa** intimidation with a dangerous weapon, [Iowa Code § 708.6\(1\)](#), is a 4B1.2 crime of violence); *but see United States v. Frazier*, 48 F.4th 884 (8th Cir. 2022) (threatening to intimidate with a deadly weapon, [Iowa Code § 708.6\(2\)](#), is not a 4B1.2 crime of violence, as the defendant may be reckless with respect to putting a victim in fear)
- *United States v. Kent*, 44 F.4th 773 (8th Cir. 2022) (**Iowa** offense of interference with official acts involving infliction of bodily injury, [Iowa Code § 719.1\(1\)\(d\)](#),

is a 4B1.2 crime of violence; “inflicting bodily injury” requires intentional conduct)

- *United States v. Collins*, 811 F.3d 63, 66 (1st Cir. 2016) (**Maine** offense of **criminal threatening with a dangerous weapon**, Me. Rev. Stat., tit. 17-A, § 209(1), is a crime of violence under the § 4B1.2 elements clause)
- *United States v. Hunt*, 941 F.3d 1259 (11th Cir. 2019) (per curiam) (**Michigan** carjacking, Mich. Comp. Laws § 750.529a, is an ACCA violent felony)
- *United States v. Mata*, 869 F.3d 640 (8th Cir. 2017) (**Minnesota** offense of **third-degree criminal sexual conduct with force or coercion**, Minn. Stat. §§ 609.106(1)(a)(3), 609.344(1)(c), is divisible; offense with force is an ACCA violent felony)
- *United States v. McMillan*, 863 F.3d 1053 (8th Cir. 2017) (**Minnesota** offense of **third-degree riot**, Minn. Stat. § 609.71(3), is not a crime of violence under the 4B1.2 elements clause)
- *United States v. McFee*, 842 F.3d 572 (8th Cir. 2016) (**Minnesota** offense of **making terroristic threats**, Minn. Stat. §§ 609.713(1), 609.1095(1)(d), does not qualify under ACCA)
- *United States v. Fogg*, 836 F.3d 951 (8th Cir. 2016) (**Minnesota** statute that proscribed the **reckless discharge of firearm “at or toward a person,”** Minn. Stat. § 609.66(1e), qualified as an ACCA violent felony; irrelevant that offense may be committed recklessly), *abrogation by Borden recognized in United States v. Hoxworth*, 11 F.4th 693 (8th Cir. 2021)
- *United States v. Fisher*, 25 F.4th 1080 (8th Cir. 2022) (**Minnesota** burglary, Minn. Stat. § 609.582, is divisible, and subdivision 1(c) (assault during burglary) is a “serious violent felony” under 21 U.S.C. § 841(b)(1)); *United States v. Huntington*, 44 F.4th 812 (8th Cir. 2022) (per curiam) (same ruling under ACCA)
- *United States v. Johnson*, 880 F.3d 226, 234–35 (5th Cir. 2018) (**Mississippi** carjacking in violation of Miss. Code § 97–3–117 is a crime of violence under the § 4B1.2 elements clause)
- *United States v. Hudson*, 851 F.3d 807 (8th Cir. 2017) (**Missouri** conviction of **unlawful use of a weapon**, Mo. Rev. Stat. § 571.030.1(4), is a crime of violence under the § 4B1.2 elements clause); *United States v. Swopes*, 892 F.3d 961

(8th Cir. 2018) (same decision with respect to ACCA); *United States v. Pryor*, 927 F.3d 1042 (8th Cir. 2019); *United States v. Larry*, 51 F.4th 290 (8th Cir. 2022) (reaffirming that unlawful use of a weapon – exhibiting, Mo. Rev. Stat. § 571.030.1(4), is a 4B1.2 crime of violence; holding that *Borden* does not disturb prior Circuit precedent on this issue, as the crime must be committed knowingly)

- *United States v. Harris*, 60 F.4th 1104, 1108 (8th Cir. 2023) (the divisible portion of Mo. Rev. Stat. § 571.030.1(9) addressed to shooting at persons from a motor vehicle is an ACCA violent felony)
- *United States v. Long*, 906 F.3d 720 (8th Cir. 2018) (**Missouri** offense of **armed criminal action** – commission of a felony “with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon,” Mo. Stat. § 571.015(1)—is a crime of violence under the 4B1.2 residual clause in effect prior to August 2016)
- *United States v. Brown*, 73 F.4th 1011 (8th Cir. 2023) (**Missouri** resisting arrest, Mo. Stat. § 575.150.1(1), (2), is divisible; the part of the offense involving resisting arrest by use or threatened use of violence or physical force against another person is a 4B1.2 crime of violence, while resisting arrest by fleeing is not)
- *United States v. Williams*, 24 F.4th 1209 (8th Cir. 2022) (**Nebraska** terroristic threats, Neb. Rev. Stat. § 28–311.01, is not divisible and may be committed through reckless conduct; it is therefore not an ACCA violent felony and *Fletcher v. United States*, 858 F.3d 501 (8th Cir. 2017), is abrogated)
- *United States v. Edling*, 895 F.3d 1153, 1159 (9th Cir. 2018) (**coercion** in violation of **Nevada** law, Nev. Rev. Stat. § 207.190, is not a crime of violence under § 4B1.2)
- *United States v. Pam*, 867 F.3d 1191 (10th Cir. 2017) (**shooting at or from a motor vehicle** in **New Mexico**, in violation of N.M. Stat. § 30–3–8(B), is an ACCA violent felony)
- *Colotti v. United States*, 71 F.4th 102, 113-15 (2d Cir. 2023) (**New York extortion** by threat of physical injury to a person, N.Y. Penal Law § 155.40(2)(a), constitutes a 924(c) crime of violence, while extortion committed by threat of damage to property, § 155.40(2)(b), does not; the provisions are divisible)

- *Higdon v. United States*, -- F.3d --, 2018 WL 827534 (6th Cir. 2018) (**discharging a firearm into an occupied structure**, in violation of **North Carolina** law, N.C. Gen. Stat. § 14–34.1, is not an ACCA violent felony)
- *United States v. Hammons*, 862 F.3d 1052 (10th Cir. 2017) (**Oklahoma drive-by shooting** statute, Okla. Stat. tit. 21, § 652(b), is a violent felony under ACCA)
- *United States v. Titties*, 852 F.3d 1257 (10th Cir. 2017) (**Oklahoma** conviction of **pointing a firearm at another**, Okla. Stat. tit. 21, § 1289.16, is not an ACCA violent felony)
- *United States v. Degeare*, 884 F.3d 1241 (10th Cir. 2018) (**Oklahoma** forcible sodomy, 21 Okla. Stat. tit. 21, § 888, is part of a non–divisible statute that includes statutory rape and therefore does not qualify as a violent felony under ACCA)
- *Flores–Vega v. Barr*, 932 F.3d 878 (9th Cir. 2019) (**Oregon** crime of strangulation, Or. Rev. Stat. § 163.187(1), is categorically a crime of violence under § 16(a))
- *United States v. Delgado–Sanchez*, 849 F.3d 1 (1st Cir. 2017) (**Puerto Rico** offense of **discharging or pointing a firearm**, 25 P.R. Laws § 458n(a), is a crime of violence under the § 4B1.2 elements clause)
- *United States v. Menendez-Montalvo*, 88 F.4th 326 (1st Cir. 2023) (the **Puerto Rico** provision prohibiting use of physical force or psychological abuse, intimidation, or persecution against domestic partner, 8 P.R. Laws § 631, is not a **4B1.2** crime of violence because any gradation of physical force is sufficient for the crime)
- *United States v. Hataway*, 933 F.3d 940, 945–46 (8th Cir. 2019) (**South Carolina** conviction for **pointing a firearm at another person**, S.C. Code § 16–23–410, is an ACCA violent felony and **4B1.2** crime of violence)
- *Lowe v. United States*, 920 F.3d 414 (6th Cir. 2019) (the defendant’s 1985 Tennessee conviction for **rape**, in violation of Tenn. Code § 39–2–604(a)(1) (1982) (and, the court suggests, the current version, at § 39–13–503(a)(1)) does not qualify as an ACCA violent felony because it may be committed by

“coercion,” which includes “use of parental authority,” which does not require the use of force)

- *United States v. Perlaza-Ortiz*, 869 F.3d 375 (5th Cir. 2017) (Texas statute, Tex. Penal Code § 22.05(b), for **discharge of a firearm at a person or building** is not divisible and is therefore overbroad under the § 4B1.2 elements clause)
- *United States v. Martinez-Rodriguez*, 857 F.3d 282 (5th Cir. 2017) (Texas statute criminalizing **causing injury to child**, Tex. Penal Code § 22.04(a), was not divisible, and did not qualify as a crime of violence under the § 16 elements clause because it may be committed by omission)
- *United States v. Massey*, 858 F.3d 380 (5th Cir. 2017) (Texas offense of **taking weapon from peace officer**, Tex. Penal Code § 38.14, is an ACCA violent felony)
- *United States v. Reid*, 861 F.3d 523 (4th Cir. 2017) (**knowingly and willfully inflicting bodily injury on a non-prisoner lawfully in a correctional facility in Virginia**, in violation of Va. Code § 18.2–55, is a violent felony under ACCA’s elements clause)
- *United States v. Mathis*, 932 F.3d 242, 266–67 (4th Cir. 2019) (**Virginia kidnapping**, Va. Code § 18.2–47, is not a 924(c) crime of violence, as it may be committed by deception rather than force)
- *United States v. Al-Muwakkil*, 983 F.3d 748, 756–60 (4th Cir. 2020) (**Virginia attempted rape**, in violation of Va. Code Ann. § 18.1–44, is not an ACCA violent felony; the statute is indivisible, and the offense may be committed with constructive force (i.e., based on the victim’s age or lack of mental ability))
- *Rodriguez-Hernandez v. Garland*, 89 F.4th 742 (9th Cir. 2023) (**Washington misdemeanor harassment - domestic violence**, Wash. Rev. Code § 9A.46.020(1), is a crime of violence under 18 U.S.C. § 16(a))
- *United States v. Werle*, 877 F.3d 879 (9th Cir. 2017) (**Washington conviction for felony harassment**, Wash. Rev. Code § 9A.46.020(2)(b)(ii), qualifies under the § 4B1.2 elements clause)
- *United States v. Covington*, 880 F.3d 129 (4th Cir. 2018) (**West Virginia unlawful wounding**, in violation of W. Va. Code § 61–2–9(a), is a crime of violence under the § 4B1.2 elements clause)

- *United States v. Thomas*, 27 F.4th 556 (7th Cir. 2022) (Wisconsin child abuse offense, involving intentionally causing bodily harm against a child, Wis. Stats § 948.03(2)(b), is a 4B1.2 crime of violence; the court has decided that the overt use of physical force is not required for the offense to qualify)

## B. Enumerated Offenses

Under the enumerated offenses clauses in ACCA and § 4B1.2, offenses may qualify as a “violent felony” (ACCA) or “crime of violence” (§ 4B1.2), even if they do not satisfy the elements clause. For instance, as explained earlier, the elements clause requires proof of the use of violent physical force, but an enumerated offense may not. Likewise, even though the Supreme Court held in *Borden* held that the elements clause is not satisfied by a recklessness offense, some enumerated offenses committed recklessly, like murder in § 4B1.2(a)(2), will still qualify, as explained below.

In applying an enumerated offense clause, the court must identify the generic definition of the offense, and then determine whether the statute of conviction matches and does not stray beyond the generic definition. If the statute (or a divisible portion) applies to conduct that falls outside the statute, then no conviction under the statute (or divisible portion) qualifies. The Fourth Circuit stated:

However, the categorical approach does not require us to match up the language word for word between the statute and the generic definition. [*Taylor v. United States*, 495 U.S. 575 (1990),] requires only that the statutory definition “substantially corresponds” with the generic enumerated crime to be considered a crime of violence. [*Id.* at 602.] Further, we consider whether there is “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.” *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007).

*United States v. Flores-Granados*, 783 F.3d 487, 495–96 (4th Cir. 2015). In *Quarles v. United States*, 587 U.S. 645 (2019), the Supreme Court likewise emphasized: “the *Taylor* Court cautioned courts against seizing on modest state–law deviations from the generic definition of burglary. A state law’s ‘exact definition or label’ does not control. *Id.* at 599. As the Court stated in *Taylor*, so long as the state law in question ‘substantially corresponds’ to (or is narrower than) generic burglary, the conviction qualifies under § 924(e). *Id.* at 602.” *Quarles*, 587 U.S. at 654–55.

In *United States v. Brasby*, 61 F.4th 127 (3d Cir. 2023), the Court discussed at length the appropriate method in defining a generic offense in relation to the Guidelines’ enumerated clause. The court stated: “The Model Penal Code (‘MPC’) is ‘an ideal starting point’ for the categorical approach.” *Id.* at 137 (quoting *United States v. Marrero*, 743 F.3d 389, 400 (3d Cir. 2014)). The court added, in part:

This Court has previously held that “the most important factor in defining the generic version of an offense is the approach of the majority of state statutes defining the crime.” However, the Supreme Court recently indicated in *Esquivel-Quintana* that “this sort of multijurisdictional analysis . . . is not required by the categorical approach” but may nonetheless offer “useful context” to “shed light on the ‘common understanding and meaning’ of the federal provision being interpreted.” We therefore hold that multijurisdictional surveys are not required under the categorical approach, though they will still often be helpful in determining the generic definition of an offense.

*Id.* at 138 (footnotes omitted; quoting *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 396 n.3 (2017)).

## 1. ACCA

Under the enumerated clause of ACCA, a crime qualifies as a violent felony if it “is burglary, arson, or extortion, [or] involves the use of explosives.” See 18 U.S.C. § 924(e)(2)(B)(ii). This series of crimes, known as the “enumerated crimes,” are per se violent felonies. *Taylor v. United States*, 495 U.S. 575, 597 (1990) (“Congress thought that certain general categories of property crimes—namely burglary, arson, extortion, and the use of explosives—so often presented a risk of injury to persons, or were so often committed by career criminals, that they should be included in the enhancement statute even though, considered solely in terms of their statutory elements, they do not necessarily involve the use or threat of force against a person.”).

*Taylor* held that each of the enumerated crimes describes a “generic offense,” and courts must apply the categorical approach to any statutory crime of conviction to determine whether the elements of the crime match the generic definition.

### a. Burglary

The generic offense of “burglary” set forth in the enumerated clause is defined as “an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” *Taylor*, 495 U.S. at 598. Such a structure includes a vehicle “designed or adapted for overnight use.” *United States v. Stitt*, 586 U.S. 27 (2018). In *Quarles v. United States*, 587 U.S. 645 (2019), resolving a Circuit split, the Court held that “remaining-in burglary occurs when the defendant forms the intent to commit a crime *at any time* while unlawfully remaining in a building or structure.” *Id.* at 650 (emphasis in original).

In applying this definition to a state burglary statute, prosecutors should apply (and be careful to assure that prior precedent comports with) the Supreme Court decisions in *Descamps v. United States*, 570 U.S. 254 (2013) (holding that an element

of the California burglary statute, which applied to a “person who enters” certain locations with intent to commit a felony, was indivisible and overbroad, as it permits conviction even for one who lawfully enters the premises), and *Mathis v. United States*, 579 U.S. 500 (2016) (holding that an element of the Iowa burglary statute, which barred entry into an “occupied structure,” was indivisible and overbroad, as the term included vehicles, and the illustrative list of “structures” in the statute only described “means” and not divisible elements). *See also James v. United States*, 550 U.S. 192, 212 (2007) (statute which applies to curtilage is overbroad). As a result of these decisions, despite the fact that “burglary” is an enumerated ACCA predicate, the application of prior convictions for burglary as ACCA predicates is called into question in some states.

Appellate decisions regarding ACCA since *Mathis* include:

- *United States v. Stitt*, 586 U.S. 27 (2018) (residential burglary under **Arkansas** law, Ark. Code § 5–39–101(4)(A), is not overbroad by applying to a vehicle designed or adapted for overnight use); *United States v. Sims*, 933 F.3d 1009 (8th Cir. 2019) (on remand from the Supreme Court, confirming following *Stitt* that **Arkansas** burglary, Ark. Code § 5–39–201(a)(1) (1997), is an ACCA predicate; its application to any vehicle used for residential purposes falls within the generic definition of burglary)
- *United States v. Jones*, 951 F.3d 1138 (9th Cir. 2020) (**Colorado** second-degree burglary of a dwelling, Colo. Rev. Stat. § 18–4–203(2)(a), is an ACCA violent felony)
- *United States v. Esprit*, 841 F.3d 1235 (11th Cir. 2016) (**Florida** burglary in violation of Fla. Stat. §§ 810.02(1)(b)(1), 810.011(2), is indivisible and does not qualify under ACCA)
- *United States v. Gundy*, 842 F.3d 1156 (11th Cir. 2016) (**Georgia** burglary in violation of Ga. Code § 16–7–1(a) qualifies under ACCA); *Richardson v. United States*, 890 F.3d 616 (6th Cir. 2018) (disagreeing somewhat with the *Gundy* analysis but ultimately agreeing that the Georgia burglary offense qualified where a “peek” at the charging documents revealed that the defendant was convicted of burglary of a dwelling house or building). *But see United States v. Cornette*, 932 F.3d 204 (4th Cir. 2019) (Georgia burglary statute, Ga. Code § 26–1601 (1968), as interpreted as of the defendant’s conviction in 1976, was overbroad and did not qualify as an ACCA predicate; it applied to entry into any vehicle, whether designed for dwelling or not); *see also United States v. Coats*, 8 F.4th 1228, 1240–61 (11th Cir. 2021) (the **Georgia** burglary conviction was an enumerated ACCA predicate; the conviction under the state’s

“party to a crime” statute, Ga. Code § 16–2–20, sufficed; the court explains in an exhaustive analysis that the provision does not extend significantly beyond liability under a generic accomplice liability standard)

- *United States v. Glispie*, 978 F.3d 502 (7th Cir. 2020) (on certification, the Illinois Supreme Court held that the “limited authority” doctrine applies to **Illinois** residential burglary, 720 Ill. Comp. Stat. § 5/19–3; the crime is therefore overbroad compared to generic burglary and does not qualify under ACCA; this decision appears to abrogate *Smith v. United States*, 877 F.3d 720 (7th Cir. 2017), and *Dawkins v. United States*, 809 F.3d 953 (7th Cir. 2016)). See also *United States v. Nebinger*, 987 F.3d 734 (7th Cir. 2021) (applying *Glispie*); *United States v. Haney*, 840 F.3d 472, 475–76 (7th Cir. 2016) (pre–1982 version of statute did not qualify); *United States v. Byas*, 871 F.3d 841 (8th Cir. 2017) (statute did not qualify because the term “building” in the statute includes a detached semitrailer; this ruling is called into question by *Stitt*)
- *United States v. Foster*, 877 F.3d 343 (7th Cir. 2017) (per curiam) (**Indiana** conviction for Class B burglary of dwelling, Ind. Code § 35–43–2–1, is ACCA violent felony); *United States v. Perry*, 862 F.3d 620 (7th Cir. 2017) (same ruling as to Class C violation of statute); *Faulkner v. United States*, 926 F.3d 475 (8th Cir. 2019) (same); *United States v. Erlinger*, 77 F.4th 617, 620–21 (7th Cir. 2023) (reaffirming that Indiana burglary, Ind. Code § 35–43–2–1, is an ACCA predicate), *rev'd on other grounds*, 144 S. Ct. 1840 (2024)
- *United States v. Malone*, 889 F.3d 310, (6th Cir. 2018) (**Kentucky** second-degree burglary, Ky. Rev. Stat. §§ 511.010(3), 511.030, qualifies under ACCA); *Shepherd v. Krueger*, 911 F.3d 861 (7th Cir. 2018) (same)
- *United States v. Montgomery*, 974 F.3d 587, 592–93 (5th Cir. 2020) (**Louisiana** simple burglary of an inhabited dwelling, La. Rev. Stat. § 14:62.2(A), falls within ACCA)
- *United States v. Bowers*, 27 F.4th 130 (1st Cir. 2022) (**Maine** burglary, 17–A Me. Rev. Stat. § 401(1), is generic “burglary” under ACCA)
- *Quarles v. United States*, 587 U.S. 645 (2019) (**Michigan** crime of third-degree home invasion, Mich. Comp. Laws § 750.110a(4), was categorically equivalent to generic burglary, and thus, qualified as an ACCA violent felony); *United States v. Paulk*, 46 F.4th 399 (6th Cir. 2022) (the court rejects an additional challenge regarding this statute that was not addressed in *Quarles*)

- *United States v. Vega*, 960 F.3d 669 (5th Cir. 2020) (**Michigan** second-degree home invasion, in violation of Mich. Comp. Laws § 750.110a(3), falls within generic burglary)
- *United States v. Ritchey*, 840 F.3d 310 (6th Cir. 2016) (**Michigan** conviction for breaking and entering, Mich. Comp. Laws § 750.110, did not constitute burglary under ACCA)
- *United States v. Crumble*, 878 F.3d 656, 660–61 (8th Cir. 2018) (**Minnesota** third-degree burglary statute (Minn. Stat. § 609.582(3)) and second-degree burglary statute (Minn. Stat. § 609.582(2)(a)) do not qualify as predicate convictions under ACCA); *United States v. McArthur*, 850 F.3d 925, 937–39 (8th Cir. 2017) (holding that § 609.582(3) is indivisible and reaching same result); *Van Cannon v. United States*, 890 F.3d 656 (7th Cir. 2018) (agreeing with Eighth Circuit regarding **Minnesota** conviction for second-degree burglary, Minn. Stat. § 609.582(2)(a), not qualifying as predicate violent felony under ACCA)—these decisions may have been *overruled by Quarles v. United States*, 587 U.S. 645 (2019); in *Raymond v. United States*, 933 F.3d 988, 992 (8th Cir. 2019), the court raised the possibility and remanded for further consideration, though in *Guenther v. Marske*, 997 F.3d 735 (7th Cir. 2021), the court adhered to its precedent without detailed discussion
- *United States v. Thompson*, 54 F.4th 849 (5th Cir. 2022) (**Mississippi** burglary of a dwelling, Miss. Code § 97-17-23, qualifies as an ACCA predicate); *United States v. Silva*, 944 F.3d 993 (8th Cir. 2019) (the parties agreed that **Mississippi** burglary in violation of Miss. Code § 97-17-23 is generic burglary under ACCA, while burglary in violation of Miss. Code § 97-17-33(1) is overbroad; *Shepard* documents show that the defendant was convicted of the former)
- *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (en banc) (**Missouri** second-degree burglary, Mo. Rev. Stat. § 569.170, does not qualify as a violent felony under ACCA; the majority held that the terms “building or inhabitable structure” refers to means and are indivisible, though the judges divided regarding the reasoning for this holding); *Brown v. United States*, 929 F.3d 554 (8th Cir. 2019) (same ruling regarding earlier statute, Mo. Rev. Stat. § 560.070 (1969))
- *United States v. Driscoll*, 892 F.3d 1127 (10th Cir. 2018) (**Nebraska** burglary statute, Neb. Rev. Stat. § 28-507, does not qualify under the ACCA generic definition of burglary)

- *United States v. Turrieta*, 875 F.3d 1340 (10th Cir. 2017) (**New Mexico** residential burglary, N.M. Stat. § 30–16–3(A), qualifies under ACCA)
- *Muttee v. United States*, 920 F.3d 624 (9th Cir. 2019) (post–*Stitt* decision that **North Carolina** breaking–or–entering statute, N.C. Gen. Stat. Ann. § 14–54, which defines a “building” as encompassing mobile homes, qualifies as generic burglary under ACCA)
- *United States v. Dodge*, 963 F.3d 379 (4th Cir. 2020) (**North Carolina** breaking and entering, N.C. Gen. Stat. § 14–54, is generic burglary within ACCA)
- *United States v. Evans*, 924 F.3d 21, 26–27 (2d Cir. 2019) (**North Carolina** second-degree burglary, N.C. Gen. Stat. § 14–51, falls within the enumerated ACCA predicate of “burglary”)
- *United States v. Kinney*, 888 F.3d 360 (8th Cir. 2018) (**North Dakota** burglary statute, N.D. Cent. Code § 12.1–22–02, does not qualify under ACCA as it is indivisible and applies to both structures and vehicles) (put in doubt by *United States v. Stitt*, 586 U.S. 27 (2018), as recognized in *Winarske v. United States*, 915 F.3d 765, 768 n.3 (8th Cir. 2019))
- *Greer v. United States*, 938 F.3d 766 (6th Cir. 2019) (the pre–1996 (“Pre–Senate Bill 2”) **Ohio** offense of aggravated burglary, Ohio Rev. Code § 2911.11(A)(3), qualifies as burglary under ACCA; the court presents an extensive review of the law of other states in the same time period to demonstrate that the Ohio law, in applying to a range of structures, including vehicles, where person was or likely to be present, was narrower or similar to the statutes of most states); *Waagner v. United States*, 971 F.3d 647, 657–61 (7th Cir. 2020) (same)
- *United States v. Hamilton*, 889 F.3d 688, (10th Cir. 2018) (the court is uncertain whether **Oklahoma** second-degree burglary, Okla. Stat. tit. 21, § 1435, which applies to more than generic burglary, is divisible, and accordingly holds that it may not apply as an ACCA predicate); *but see United States v. Washington*, 890 F.3d 891 (10th Cir. 2018) (without citing *Hamilton*, panel suggests that **Oklahoma** conviction for second-degree burglary, 21 Okla. Stat. § 1435, qualified under ACCA; decision focuses on whether habeas petitioner met burden of showing that ACCA determination rested on the residual clause, holding that burden was not met)
- *United States v. Peppers*, 899 F.3d 211, 234–36 (3d Cir. 2018) (burglary in violation of **Pennsylvania** law, 18 Pa. Cons. Stat. § 3502, does not qualify

under the enumerated offense provision of ACCA), called into question by *United States v. Stitt*, 586 U.S. 27 (2018)

- *United States v. Stitt*, 586 U.S. 27 (2018) (aggravated burglary under **Tennessee** law, Tenn. Code § 39–14–403, qualifies under ACCA), overruling *United States v. Stitt*, 860 F.3d 854 (6th Cir. 2017) (en banc); *Brumbach v. United States*, 929 F.3d 791 (6th Cir. 2019) (confirming that **Tennessee** aggravated burglary qualifies under ACCA following *Stitt*); *United States v. Brown*, 957 F.3d 679 (6th Cir. 2020) (same as to subsection (a)(1) of the state statute; the court rejects the argument that the statute is overbroad in applying to entry by “instrument” as well as by a body part)
- *United States v. Ferguson*, 868 F.3d 514 (6th Cir. 2017) (Class D burglary convictions under **Tennessee** law, Tenn. Code § 39–14–402(a)(1, 2, 3), fit within the generic definition of burglary and are therefore ACCA violent felonies)
- *Cradler v. United States*, 891 F.3d 659, 669–71 (6th Cir. 2018) (overruling *United States v. Caruthers*, 458 F.3d 459 (6th Cir. 2006), and holding that the pre–1989 **Tennessee** third-degree burglary statute, Tenn. Code § 39–904, is not a violent felony under ACCA, as it may be violated by a person already lawfully inside a building); *Cartwright v. United States*, 12 F.4th 572 (6th Cir. 2021) (similar ruling that pre–1989 **Tennessee** convictions for first-degree or second-degree burglary, Tenn. Code §§ 39–901 through 39–904, are not ACCA predicates because they permit conviction based on “breaking after entry”)
- *United States v. Herrold*, 941 F.3d 173 (5th Cir. 2019) (en banc) (**Texas** burglary, Tex. Penal Code § 30.02(a), qualifies as an ACCA predicate; the term “burglary” in ACCA is not unconstitutionally vague); *United States v. Wallace*, 964 F.3d 386 (5th Cir. 2020) (following *Herrold* and rejecting argument that Texas burglary statute does not require proof of intent); *United State v. Pena*, 952 F.3d 503, 508 (4th Cir. 2020) (agreeing that the Texas burglary offense is “generic burglary” under *Taylor*); *United States v. Hutchinson*, 27 F.4th 1323 (8th Cir. 2022) (same)
- *United States v. Al-Muwakkil*, 983 F.3d 748, 760–64 (4th Cir. 2020) (the court addresses a 1990 **Virginia** burglary conviction, in violation of the version of Va. Code Ann. § 18.2–90 then in effect, for breaking and entering with intent to commit murder, under the elements clause rather than as an enumerated offense, and holds that the offense is not an ACCA violent felony as the breaking may be constructive, and committed without the intent to use force at the time)

- *United States v. White*, 836 F.3d 437 (4th Cir. 2016) (burglary in violation of **West Virginia** law, W. Va. Code § 61–3–11(a), does not qualify under ACCA), possibly overruled in *United States v. Stitt*, 586 U.S. 27 (2018)
- *Franklin v. United States*, 928 N.W.2d 545 (Wis. 2019) (on certification from the Seventh Circuit, the state supreme court holds that the different location subsections of the **Wisconsin** burglary statute, Wis. Stat. § 943.10(1m)(a)–(f), are not divisible; as recognized in *United States v. Franklin*, 772 F. App’x 366 (7th Cir. 2019), and *United States v. Holston*, 773 F. App’x 336 (8th Cir. 2019), this means that the burglary statute, as it applies to vehicles, is overbroad and does not qualify as an ACCA violent felony, and *United States v. Lamb*, 847 F.3d 928 (8th Cir. 2017), holding to the contrary, is abrogated)

#### b. Arson

The Supreme Court has not yet defined generic arson. The circuits to address the issue define generic arson as the “malicious burning of any property,” real or personal. See, e.g., *United States v. Gatson*, 776 F.3d 405, 410 (6th Cir. 2015) (Ohio offense for “knowingly caus[ing] or creat[ing] a substantial risk of physical harm to property without the victim’s consent” by “means of fire or explosion” is categorically an “arson” predicate); *United States v. Misleveck*, 735 F.3d 983, 988 (7th Cir. 2013); *United States v. Whaley*, 552 F.3d 904, 907 (8th Cir. 2009) (“the generic offense of arson, for purposes of the sentence enhancement in § 924(e), has as elements the malicious burning of real or personal property of another”; the Missouri statute qualifies); *United States v. Miller*, 246 F. App’x 369, 372 (6th Cir. 2007) (unpublished); *United States v. Hathaway*, 949 F.2d 609, 610–11 (2d Cir. 1991); *United States v. Furlow*, 928 F.3d 311, 323–25 (4th Cir. 2019) (the district court did not commit plain error in holding that Georgia first-degree arson in violation of Ga. Code § 16–7–60(a) falls within ACCA generic arson); *United States v. Buie*, 960 F.3d 767 (6th Cir. 2020) (**Tennessee** arson in violation of Tenn. Code § 39–3–202 (1982) (repealed) is an ACCA enumerated offense).

In *United States v. Gamez*, 89 F.4th 608 (7th Cir. 2024), the court held that **Indiana** arson in violation of Ind. Code § 35-43-1-1(a) does not categorically qualify as “arson” under ACCA, because the statute refers to “means of fire, explosive, or destructive device.” The court reasoned that a “destructive device” may include “non-incendiary weapons that operate by compressed air or another non-explosive propellant,” and therefore the crime may occur without burning and falls outside the generic definition.

The Criminal Division advised in its *Mathis Guidance* in 2016: “there remains a debate as to whether the property, if personal, must be the property of another and whether it must have a minimal value. For a detailed examination of arson, please ask

your Appellate Section liaison for the ‘no appeal’ recommendation of Parker Rider–Longmaid in *United States v. Cleophas Williams*, No. 15-cr-2016 (D. Minn. Apr. 15, 2016). Mr. Rider–Longmaid traces arson from its common–law roots through more recent federal and state enactments.”

#### c. Extortion

Generic extortion is defined as “obtaining something of value from another with his consent induced by the wrongful use of force, fear, or threats.” *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 409 (2003) (quoting *United States v. Nardello*, 393 U.S. 286, 290 (1969)). A statute must categorically require these elements, and no more, to qualify as “extortion” under the enumerated clause. See *United States v. Gardner*, 823 F.3d 793, 802 n.5 (4th Cir. 2016) (the North Carolina offense of common law robbery requires a taking without consent, and therefore is not categorically “extortion” under ACCA), *overruled on other grounds*, *United States v. Dinkins*, 928 F.3d 349 (4th Cir. 2019).

In *Raines v. United States*, 898 F.3d 680, 688–90 (6th Cir. 2018) (per curiam), the court held that extortionate collection of debt, in violation of 18 U.S.C. § 894(a)(1), does not qualify as an ACCA violent felony under either the elements clause or the enumerated clause. With regard to the enumerated clause, the court reasoned that the crime is broader than the generic definition because it encompasses non–consensual takings and not only a taking with the victim’s induced consent, and because the generic form of extortion requires that the defendant actually obtain something of value, whereas § 894(a)(1) could encompass a situation in which the defendant obtains an extension of credit for a third party. Similarly, in *Rodriguez-Mendez v. United States*, -- F.4th --, 2025 WL 1039333 (1st Cir. Apr. 8, 2025), the Court held that motor vehicle robbery, Article 173B of the Puerto Rico Penal Code, is not an ACCA violent felony, because, with respect to “extortion,” the crime is overbroad in not limiting to taking property with the owner’s consent, which is the hallmark of generic “extortion.”

#### d. Use of explosives

There is little case law regarding this provision. See *United States v. Pendleton*, 665 F. App’x 836, 840–41 (11th Cir. 2016) (unpublished) (no plain error in determination that threat to discharge a destructive device, in violation of Florida law, involved “use of explosives,” as issue is one of first impression).

### 2. Section 4B1.2

Section 4B1.2(a)(2), as amended effective August 1, 2016, presents a list of enumerated offenses. Application note 1 proceeds to offer a definition of only three —“forcible sex offense,” “extortion,” and “robbery.” For all the others—murder,

voluntary manslaughter, kidnapping, aggravated assault, arson, and 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)—the court must divine the generic definition of the crime, and then apply the categorical approach to determine whether the statute at issue (or a divisible portion thereof) meets the generic definition and does not include conduct that fails to meet the generic definition.

The requirement to identify the generic meaning derives from the Supreme Court’s discussion in *Taylor*, where the Court determined that in referring to “burglary” in ACCA as an enumerated violent felony Congress meant “the generic sense in which the term is now used in the criminal codes of most States.” *Taylor v. United States*, 495 U.S. 575, 598 (1990). To derive this generic meaning, courts uniformly hold, “we may rely on various sources, such as state and federal statutes, state and federal common law, the Model Penal Code, criminal law treatises, the United States Code of Military Justice, and dictionaries.” *United States v. Hernandez-Montes*, 831 F.3d 284, 292 (5th Cir. 2016). See also, e.g., *United States v. Ramirez*, 708 F.3d 295, 302–03 (1st Cir. 2013); *United States v. Graves*, 877 F.3d 494, 502 (3d Cir. 2017) (further holding that where the Model Penal Code differs “in an important respect from the approach taken by the significant majority of states . . . the most important factor in defining the generic version of an offense is the approach of the majority of state statutes defining the crime”); *United States v. Gattis*, 877 F.3d 150, 156 (4th Cir. 2017); *United States v. Rede-Mendez*, 680 F.3d 552, 556 (6th Cir. 2012); *United States v. Kosmes*, 792 F.3d 973, 976–77 (8th Cir. 2015); *United States v. Gomez-Leon*, 545 F.3d 777, 790 (9th Cir. 2008) (“we derive its uniform meaning from the generic, contemporary meaning employed by most states, guided by scholarly commentary”); *United States v. O’Connor*, 874 F.3d 1147, 1151 (10th Cir. 2017); *United States v. Lockley*, 632 F.3d 1238, 1242 (11th Cir. 2011).

It should be noted that the current version of §§ 2L1.2 (illegal reentry), effective November 1, 2016, presents an identical list of enumerated offenses in its definition of “crime of violence.” Thus, any decision regarding a particular enumerated offense under one guideline will apply to the other guideline as well.

Prior to the 2016 amendments to §§ 2L1.2 and 4B1.2, both guidelines offered definitions of “crime of violence” that overlapped with respect to these enumerated offenses—murder, voluntary manslaughter, kidnapping, aggravated assault, robbery, and arson—and the same enumerated offenses remain in the lists in both guidelines. Therefore, categorical approach decisions at any time regarding any of these offenses, under either guideline, should apply to the application of either guideline.

The 2016 amendments removed some enumerated offenses that had been listed in both guidelines—burglary of a dwelling, involuntary manslaughter, and extortionate extension of credit. The prior versions of the guidelines applied before the

amendments, which are not retroactive ([§ 4B1.2](#) was amended effective August 1, 2016, and [§ 2L1.2](#) was amended effective November 1, 2016). In addition, the amendments altered the definition of the enumerated offenses of extortion and forcible sex offense in both guidelines. Moreover, the pre-amendment version of [§ 2L1.2](#) included definitions of terms that have been removed from the current guideline – “child pornography offense,” “national security or terrorism offense,” “human trafficking offense,” “alien smuggling offense,” and “aggravated felony.” Any interpretation of these provisions is of diminishing relevance, as they do not apply in sentencing after November 1, 2016.

The following discussion applies to the current list of enumerated offenses, with a concluding note regarding the frequently applied enumerated offense of “burglary of a dwelling,” which was removed from [§ 4B1.2](#) as of August 1, 2016, and from [§ 2L1.2](#) as of November 1, 2016.

#### a. Murder

The Third Circuit offered this generic definition of murder, to which the statute at issue must be compared under the categorical approach:

The majority of state murder statutes criminalize at least three types of murder: (1) intentional killing; (2) killing during the commission of a felony; and (3) killing that, although unintentional, occurs in the course of dangerous conduct that demonstrates a reckless or malignant disregard for serious risks posed to human life.

*United States v. Marrero*, 743 F.3d 389, 400 (3d Cir. 2014). *Marrero* held that third-degree murder in Pennsylvania, in violation of 18 Pa. Cons. Stat. § 2501(a), qualifies. See also *United States v. Vederoff*, 914 F.3d 1238, 1246–47 (9th Cir. 2019) (adopting the Third Circuit definition); *United States v. Manzano*, 112 F.4th 915, 919–20 (10th Cir. 2024) (same).

Post-*Mathis* precedential appellate decisions regarding the enumerated offense of murder are:

- *United States v. McCollum*, 885 F.3d 300, 314 (4th Cir. 2018) (conspiracy to commit murder in aid of racketeering, in violation of 18 U.S.C. § 1959(a)(5), is not a crime of violence under [§ 4B1.2](#) because it does not require an overt act and thus falls outside the generic offense of conspiracy covered by the guideline)
- *United States v. Hernandez-Montes*, 831 F.3d 284 (5th Cir. 2016) (Florida attempted-second-degree murder law, Fla. Stat. §§ 777.04(1), 782.04(2), which

did not require specific intent to kill, was too broad to constitute the enumerated offense of attempted murder under § 2L1.2)

- *United States v. Manzano*, 112 F.4th 915 (10th Cir. 2024) (**Oklahoma** second-degree murder, 21 Okla. Stat. § 701.8, does not qualify as a 4B1.2 crime of violence under the enumerated reference to “murder,” as it addresses a death caused in the commission of “any felony,” which may include felonies that are only potentially dangerous)
- *United States v. Vederoff*, 914 F.3d 1238 (9th Cir. 2019) (**Washington** second-degree murder, Wash. Rev. Code § 9A.32.050, covers felony murder and is therefore overbroad in relation to and does not qualify under the 4B1.2 enumerated reference to murder, and also does not qualify under the elements clause because it encompasses negligent or accidental felony murder)

#### b. Voluntary manslaughter

Note that, prior to the August 1, 2016, amendment to § 4B1.2, all forms of manslaughter were an enumerated crime of violence. The amendment limited this to voluntary manslaughter, removing involuntary manslaughter, so decisions addressing pre–August 2016 sentencing may not be dispositive. No decision has yet addressed the import of this particular amendment.

In *United States v. Rivera-Muniz*, 854 F.3d 1047, 1051 (9th Cir. 2017), the court canvassed the earlier case law, approving another court’s statement that “‘manslaughter’ as enumerated in the Guidelines means a criminal homicide that is committed (a) recklessly or (b) intentionally if committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.” *United States v. Kosmes*, 792 F.3d 973, 977 (8th Cir. 2015). *Rivera-Muniz* determined that the **California** voluntary manslaughter statute qualified. *See also United States v. Castillo*, 891 F.3d 417, 421 (2d Cir. 2018) (manslaughter in the first degree under **New York** law, N.Y. Penal Law § 125.20(1), is narrower than the generic definition of “manslaughter” and qualifies under the 2015 version of the § 4B1.2 enumerated clause).

Post–*Mathis* precedential appellate decisions regarding the enumerated offense of manslaughter are:

- *United States v. Lobaton-Andrade*, 861 F.3d 538, 539 (5th Cir. 2017) (**Arkansas** manslaughter statute, Ark. Code § 5–10–104, is overbroad and indivisible, and does not qualify as a crime of violence under § 2L1.2)

- *United States v. Mendoza-Padilla*, 833 F.3d 1156 (9th Cir. 2016) (**Florida** manslaughter statute, Fla. Stat. § 782.07, was broader than generic definition and therefore did not qualify as an enumerated crime of violence under § 2L1.2)
- *United States v. Teague*, 884 F.3d 726 (7th Cir. 2018) (**Illinois** second-degree murder, 720 Ill. Comp. Stat. 5/9–1, is a crime of violence under the elements clause of § 4B1.2, and also qualifies as “voluntary manslaughter” under the enumerated clause)
- *United States v. Reyes-Contreras*, 910 F.3d 169 (5th Cir. 2018) (en banc) (voluntary manslaughter in violation of the first subsection of the **Missouri** statute, Mo. Rev. Stat. § 565.023.1, is divisible and qualifies as generic manslaughter)

### c. Kidnapping

The court in *United States v. Flores-Granados*, 783 F.3d 487 (4th Cir. 2015), provided an exhaustive discussion of the prior case law and pertinent considerations in establishing the generic offense of kidnapping, determining that a **North Carolina** statute, N.C. Gen. Stat. § 14–39, qualified as an enumerated offense under § 2L1.2. The court concluded:

In considering the statutes of the fifty states and the District of Columbia as well as the Model Penal Code, we conclude that the best characterization of generic kidnapping is (1) unlawful restraint or confinement of the victim, (2) by force, threat or deception, or in the case of a minor or incompetent individual without the consent of a parent or guardian, (3) either for a specific nefarious purpose or with a similar element of heightened intent, or (4) in a manner that constitutes a substantial interference with the victim’s liberty. Here, because the North Carolina statute requires a specific nefarious purpose for conviction, even for second-degree kidnapping, it is well within this definition and as such, it is categorically a crime of violence.

*Id.* at 493–94. See also *United States v. De Jesus Ventura*, 565 F.3d 870, 876 (D.C. Cir. 2009) (pursuant to 50-state survey the generic definition of kidnapping must include “(1) an act of restraining, removing, or confining another; and (2) an unlawful means of accomplishing that act”; **Virginia** felonious abduction, Va. Code § 18.2–47(A), does not qualify under the § 2L1.2 enumerated clause).

In *United States v. Harris*, 890 F.3d 480, 489–90 (4th Cir. 2018), the Fourth Circuit applied its decision in *Flores-Granados*, and held that the **North Carolina** offense of kidnapping in the second degree, N.C. Gen. Stat. § 14–39(b), for releasing

the victim in a safe place without serious injury and without having been sexually assaulted, was less severe than the first-degree kidnapping offense addressed in *Flores–Granados*, but nonetheless categorically fit within the generic definition of kidnapping and therefore qualified as an enumerated crime of violence under § 4B1.2(a)(2).

The Eighth and Ninth Circuits have held that kidnapping in *Arizona, Ariz. Rev. Stat. § 13-1304*, falls within the generic definition. *United States v. Goforth*, 87 F.4th 380 (8th Cir. 2023) (plain error review); *United States v. Marquez-Lobos*, 697 F.3d 759, 764-67 (9th Cir. 2012).

#### d. Aggravated assault

Courts addressing the generic definition of aggravated assault have generally applied the Model Penal Code, which states that a defendant commits aggravated assault if he or she “(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly, or recklessly under circumstances manifesting extreme indifference to the value of human life, or (b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.” *Model Penal Code § 211.1(2)*. See *United States v. Torres-Diaz*, 438 F.3d 529, 536 (5th Cir. 2006) (“Our primary source for the generic contemporary meaning of aggravated assault is the Model Penal Code.”); *United States v. Fierro-Reyna*, 466 F.3d 324, 329 (5th Cir. 2006) (considering the Model Penal Code, LaFave, and various state statutes, and concluding that “the generic, contemporary meaning of aggravated assault involves aggravating factors such as use of a deadly weapon and causation of serious bodily injury”); *United States v. McFalls*, 592 F.3d 707, 717 (6th Cir. 2010) (observing that the Model Penal Code definition of aggravated assault “approximates the definition of ‘aggravated assault’ used by several states that have consolidated the crimes of assault and battery”); *United States v. Rede-Mendez*, 680 F.3d 552, 556–57 (6th Cir. 2012) (concluding that the MPC definition of aggravated assault is the generic definition for the purpose of deciding whether an offense is a crime of violence, “at least in states which have merged the crimes of assault and battery”); *United States v. Schneider*, 905 F.3d 1088 (generic aggravated assault requires “extreme indifference recklessness,” as required in 31 states and the District of Columbia, and not mere recklessness (which 18 states permit)), *rehearing en banc denied*, 911 F.3d 504 (8th Cir. 2018) (court divided 5–5 over whether to rehear case); *United States v. Simmons*, 917 F.3d 312, 318 (4th Cir. 2019) (same); *United States v. Gomez-Hernandez*, 680 F.3d 1171, 1178 (9th Cir. 2012) (based on a survey of the MPC and state statutes, finding that intent to cause serious bodily injury and use of a deadly weapon to attempt to cause bodily injury (serious or not) are both generic aggravating factors); *United States v. Palomino Garcia*, 606 F.3d 1317, 1333 (11th Cir. 2010) (after “considering the elements of the crime that are common to most states’ definitions of that crime, as well as learned treatises, and the Model Penal Code,” determining that the use of a deadly weapon or the intent to cause

serious bodily injury are necessary elements of the “contemporary, generic offense” of aggravated assault). See also Wayne R. LaFave, *Substantive Criminal Law* § 16.2(d) (noting that the two most common aggravating factors are the means used to commit the crime, such as use of a deadly weapon, and the consequences of the crime, such as serious bodily injury).

It is unclear, however, what mens rea must apply in the aggravated assault offense for it to qualify as an enumerated generic offense. In *United States v. Guillen-Alvarez*, 489 F.3d 197, 200 (5th Cir. 2007), the court held that even a crime committed with ordinary recklessness fell within the generic definition of aggravated assault under § 2L1.2. But a number of other Circuits have rejected that view. *United States v. Barcenas-Yanez*, 826 F.3d 752, 756 (4th Cir. 2016); *United States v. McFalls*, 592 F.3d 707, 717 (6th Cir. 2010); *United States v. Schneider*, 905 F.3d 1088, 1094–95 (8th Cir. 2018); *United States v. Esparza-Herrera*, 557 F.3d 1019, 1025 (9th Cir. 2009) (per curiam); *United States v. Gomez*, 114 F.4th 987 (9th Cir. 2024).

Even less clear is whether a crime committed with extreme recklessness (such as malice) suffices as a generic crime, as the Model Penal Code provides. *United States v. Garcia-Jimenez*, 807 F.3d 1079, 1084–86 & n.5 (9th Cir. 2015), held that a crime that may be committed with extreme indifference recklessness falls outside the generic definition of aggravated assault, asserting that the crime is not so established in the majority of states. But the Eighth Circuit in *Schneider* presented the numbers in a different way, and after declaring that 31 states permitted conviction for aggravated assault based on either intentional conduct or extreme recklessness, suggested that extreme recklessness would be sufficient. *Schneider*, 905 F.3d at 1096–97.

In *United States v. Brasby*, 61 F.4th 127 (3d Cir. 2023), the Court held that aggravated assault committed with extreme recklessness matches the generic definition. It rested that conclusion on the statement of the Model Penal Code, the conclusion of most treatises, and an exhaustive multi-state examination, that concluded that 31 states permit conviction on an extreme recklessness theory (while 14 require greater intent and 6 are unclear).

The Department’s *Borden* guidance memo states that depending on circuit precedent, prosecutors may continue to argue that reckless aggravated assault constitutes a Guidelines crime of violence. Memo at 8–9.

Post-*Mathis* precedential appellate decisions regarding the enumerated offense of aggravated assault include:

- *United States v. Morales-Alonso*, 878 F.3d 1311 (11th Cir. 2018) (**Georgia** aggravated assault, Ga. Code § 16–5–21(a)(2), is a crime of violence under the

enumerated clause of § 2L1.2); *United States v. Hicks*, 100 F.4th 1295 (11th Cir. 2024) (applying this ruling to § 4B1.2)

- *United States v. Brasby*, 61 F.4th 127 (3d Cir. 2023) (**New Jersey** aggravated assault, N.J. Stat. § 2C:12-1(b)(1), qualifies as a “crime of violence” under the career offender guideline, as the crime – causing serious bodily injury recklessly “under circumstances manifesting extreme indifference to the value of human life” – falls within the “enumerated” definition of “aggravated assault” in the guideline)
- *United States v. Schneider*, 905 F.3d 1088 (**North Dakota** aggravated assault, N.D. Cent. Code Ann. § 12.1–17–02(1)(a), does not qualify as a crime of violence under either the elements or enumerated clause of § 4B1.2(a), as it may be committed with ordinary recklessness that includes reckless driving), *rehearing en banc denied*, 911 F.3d 504 (8th Cir. 2018) (court divides 5–5 over whether to rehear case; five judges express the view that a statute that sanctions reckless driving may qualify)
- *United States v. Shepherd*, 848 F.3d 425, 427 (5th Cir. 2017) (**Texas** aggravated assault, Tex. Penal Code § 22.02(a), qualifies under the enumerated clause of § 4B1.2)

#### e. Forcible sex offense

Section 4B1.2(e)(1) states: “‘Forcible sex offense’ includes where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced. The offenses of sexual abuse of a minor and statutory rape are included only if the sexual abuse of a minor or statutory rape was (A) an offense described in 18 U.S.C. § 2241(c) or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.”

Prior to Amendment 798 (Aug. 1, 2016), the commentary to Section 4B1.2 referred to a “forcible sex offense” as an enumerated crime, but provided no further definition. It did not specifically refer to sexual abuse of a minor or statutory rape. At the same time, the illegal reentry guideline, § 2L1.2, did include sexual abuse of a minor and statutory rape as examples of crimes of violence, and further included the notation that a forcible sex offense “include[s] where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced.” The 2016 amendment to § 4B1.2 incorporated the latter language; it also added references to sexual abuse of a minor and statutory rape, but for the first time limited such offenses to “(A) an offense described in 18 U.S.C. § 2241(c)

or (B) an offense under state law that would have been an offense under section 2241(c) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.” That change appeared in the application notes, then was moved to the guideline text in November 2023.

The commentary to Amendment 798 states that the additions “reflect[] the Commission’s determination that certain forcible sex offenses which do not expressly include as an element the use, attempted use, or threatened use of physical force against the person of another should nevertheless constitute ‘crimes of violence’ under § 4B1.2.”

In light of all of these changes, earlier case law regarding § 2L1.2 (as amended in 2008) may be relevant in interpreting the current enumerated offense of “forcible sex offense” (which is now identical in § 2L1.2 and § 4B1.2), but counsel must proceed cautiously in researching and addressing this area.

In the first precedential decision addressing the amended guideline, *United States v. Gieswein*, 887 F.3d 1054 (10th Cir. 2018), the court held that an **Oklahoma** lewd molestation conviction, 21 Okla. Stat. § 1123, was overbroad and thus not categorically a “forcible sex offense,” as the state statute, in contrast with 18 U.S.C. § 2241(c), did not require a sexual act, and applied to conduct with any person under 16 years of age (§ 2241(c) only applies to victims under the age of 12). The court further held that the categorical approach continues to apply in defining this enumerated offense.

The decision in *United States v. Alfaro*, 835 F.3d 470 (4th Cir. 2016), is important, in that it addressed the pre-amendment language of § 2L1.2 that now appears in both guidelines. Extensively reviewing prior case law, *id.* at 475–78, it concluded that “a ‘sex offense’ is an offense involving sexual conduct with another person. . . . And as the Guidelines commentary itself makes clear, a sex offense is ‘forcible’ if it is not consensual. *See U.S.S.G. § 2L1.2 cmt. n.1(B)(iii)* (explaining that ‘forcible sex offenses’ includes offenses ‘where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced’).” *Id.* at 478. The court held that **Maryland** third-degree sexual assault, Md. Code Crim. Law § 3–307, qualified under the pre-amendment enumerated list in § 2L1.2.

Post-*Mathis* precedential appellate decisions regarding “forcible sex offense” include:

- *United States v. Alay*, 850 F.3d 221 (5th Cir. 2017) (rape in violation of **California** law, Cal. Penal Code § 261(a)(3), is a “forcible sex offense” under pre-amendment § 2L1.2)

- *United States v. Williams*, 949 F.3d 1056, 1066–67 (7th Cir. 2020) (the government concedes and the court agrees that **Illinois** aggravated criminal sexual abuse, **720 Ill. Comp. Stat. 5/11–1.60**, is not a “forcible sex offense,” as it included touching person through clothing, and encompassed touching of “any part of the body,” not just genitalia)
- *United States v. Rocha-Alvarado*, 843 F.3d 802 (9th Cir. 2016) (**Oregon** offense of attempted sexual abuse in the first degree, **Or. Rev. Stat. § 163.427(1)(a)(B) and (C)**, was “forcible sex offense” that qualified as crime of violence under pre-amendment **§ 2L1.2**)
- *United States v. Hernandez-Avila*, 892 F.3d 771 (5th Cir. 2018) (under the 2015 version of **§ 2L1.2**, a prior **Texas** conviction for sexual assault was not a crime of violence, as it criminalized sexual intercourse with a victim under 17, rather than a victim under 16, as the generic federal definition of sexual abuse of a minor required, *see Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017))

#### **f. Robbery**

Section 4B1.2(e)(3) provides:

“Robbery” is the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining. The phrase “actual or threatened force” refers to force that is sufficient to overcome a victim’s resistance.

This provision was added November 1, 2023. It copies the definition of robbery from the Hobbs Act, **18 U.S.C. § 1951(b)(1)**, and thus serves to negate prior holdings of a number of appellate courts that Hobbs Act robbery did not qualify as a “crime of violence” under **Section 4B1.2**.

Previously, before this definition was added, courts were obligated to divine a generic definition of “robbery” to compare against the provision at issue. It is unclear following the amendment whether decisions on this topic, described below, remain applicable.

The earlier understanding of generic robbery was consistent: “[A]ll fifty states define robbery, essentially, as the taking of property from another person or from the immediate presence of another person by force or by intimidation.” *United States v.*

*Walker*, 595 F.3d 441, 446 (2d Cir. 2010). “Generic robbery constitutes the ‘misappropriation of property under circumstances involving immediate danger to the person.’ Most states require property to be taken from a person or a person’s presence by means of force or putting in fear.” *United States v. Yates*, 866 F.3d 723, 734 (6th Cir. 2017).

There was a circuit split regarding whether more than minimal force is required for the generic offense. This is significant, because if a statute requires only minimal force, it will not qualify under the ACCA or § 4B1.2 elements clause, but may still qualify as an enumerated offense under § 4B1.2. The matter is discussed at length in *United States v. Graves*, 877 F.3d 494 (3d Cir. 2017), which held that de minimis force is sufficient under the enumerated clause, and **North Carolina** common law robbery therefore qualifies under the career offender guideline as a crime of violence. *Graves* stated that older decisions of the Fifth and Ninth Circuits hold to the contrary, but based on minimal reasoning. In *United States v. Gattis*, 877 F.3d 150, 156–57 (4th Cir. 2017), the court reached the same result as *Graves* with respect to the **North Carolina** offense, following an extensive discussion of the generic definition. *Accord United States v. Molinar*, 881 F.3d 1064 (9th Cir. 2017) (generic robbery requires only de minimis force, and therefore **Arizona** armed robbery, Ariz. Rev. Stat. §§ 13–1901(1), 13–1904(A), qualifies under the § 4B1.2 enumerated clause, even though it does not qualify under the elements clause); *United States v. Lockley*, 632 F.3d 1238, 1244 (11th Cir. 2011); *United States v. Duncan*, 833 F.3d 751, 755–56 (7th Cir. 2016). *Contra United States v. Yates*, 866 F.3d 723, 734 (6th Cir. 2017).

The new definition of “robbery” in Section 4B1.2(e)(3) (“force that is sufficient to overcome a victim’s resistance”) is derived from the Supreme Court’s explication in *Stokeling v. United States*, 586 U.S. 73, 80 (2019), of the common law definition of robbery. It is doubtful that de minimis force qualifies under this definition.

Following the decision in *Borden*, there was also uncertainty regarding whether a robbery committed recklessly may qualify as an enumerated offense. The **Department’s guidance memo** states that depending on circuit precedent, prosecutors may continue to argue that robbery committed through the reckless causation of injury constitutes generic robbery. Memo at 8–9. See *United States v. Ivy*, 93 F.4th 937, 944 (6th Cir. 2024) (stating that most states require purposeful conduct, while a minority, and the Model Penal Code, require recklessness). This conclusion is now in even greater doubt following the 2023 amendment that incorporates the Hobbs Act definition of robbery.

Post-*Mathis* precedential appellate decisions regarding the enumerated offense of robbery that predated the November 1, 2023, amendment include:

- *United States v. Stovall*, 921 F.3d 758 (8th Cir. 2019) (**Arkansas** robbery in violation of Ark. Code § 5–12–102 falls within the enumerated offense of

robbery in § 4B1.2); *United States v. Ellis*, 127 F.4th 1122, 1127 (8th Cir. 2025) (“While *Borden* may cast doubt on whether robbery under Arkansas law qualifies as a crime of violence under the force clause, it does not disturb our decisions in *Smith* or *Stovall* that held it is a qualifying offense under the enumerated offenses clause.”)

- *United States v. Chavez-Cuevas*, 862 F.3d 729 (9th Cir. 2017) (**California** robbery, Cal. Penal Code § 211, qualified as a crime of violence under the enumerated provision of § 2L1.2, because its elements would always constitute either generic robbery or generic extortion, both of which are defined as crimes of violence in the guideline); *United States v. Barragan*, 871 F.3d 689, 714 (9th Cir. 2017) (same); but *United States v. Bankston*, 901 F.3d 1100 (9th Cir. 2018) (**California** robbery in violation of Cal. Penal Code § 211 is no longer a § 4B1.2 crime of violence, after an August 2016 amendment limiting extortion offenses to the use of force against a person, but a sentence imposed prior to the amendment is upheld)
- *United States v. Baldon*, 956 F.3d 1115 (9th Cir. 2020) (**California** carjacking, Cal. Penal Code § 215, is not a 4B1.2 crime of violence because this indivisible statute may rest on a threat to property as well as a person; it therefore does not satisfy the elements clause or the generic enumerated offenses of robbery and extortion)
- *United States v. Harrison*, 56 F.4th 1325 (11th Cir. 2023) (**Georgia** robbery statute, Ga. Code § 16-8-40, is divisible, and section (a)(2), robbery by intimidation, falls within the enumerated definition of robbery in § 4B1.2)
- *United States v. Carr*, 107 F.4th 636 (7th Cir. 2024) (reaffirming that Illinois armed robbery, 720 Ill. Comp. Stat. 5/18-2(a), is a 4B1.2 crime of violence, stating that the offense matches the generic definition)
- *United States v. Montiel-Cortes*, 849 F.3d 221 (5th Cir. 2017) (robbery in violation of **Nevada** law, Nev. Rev. Stat. § 200.380, met generic definitions in § 2L1.2, as any Nevada robbery involving an immediate danger would satisfy the generic, contemporary definition of robbery, while any Nevada robbery involving a future danger would satisfy the generic, contemporary definition of extortion)
- *United States v. Pereira-Gomez*, 903 F.3d 155 (2d Cir. 2018) (**New York** attempted robbery in the second degree, N.Y. Penal Law §§ 110.00 and 160.10(2), does not qualify as “robbery” under the enumerated clause of the former § 2L1.1 because, unlike the generic offense, it does not require that

stolen property be taken from the person or presence of another; but it and all other **New York** robbery offenses qualify under the elements clause)

- *United States v. Butts*, 40 F.4th 766 (6th Cir. 2022) (robbery in violation of **Ohio Rev. Code** § 2911.02(A)(2) (“Inflict, attempt to inflict, or threaten to inflict physical harm on another”) may be committed recklessly and therefore does not qualify as a **4B1.2** crime of violence; the court does not address the meaning of robbery under the enumerated clause); *United States v. Ivy*, 93 F.4th 937, 943 (6th Cir. 2024) (a conviction for Ohio aggravated robbery with a deadly weapon that does not specify the predicate theft offense is not a crime of violence under the Guidelines, as many of the predicate theft offenses do not involve danger to a person or necessarily require proof of at least recklessness (as required by the generic definition of robbery))
- *United States v. Yates*, 866 F.3d 723 (6th Cir. 2017) (**Ohio** robbery, in violation of **Ohio Rev. Code** § 2911.02(A)(3), does not qualify under either the elements or enumerated clause of § **4B1.2**)
- *United States v. Ball*, 870 F.3d 1, 6 (1st Cir. 2017) (**Pennsylvania** second-degree robbery under **18 Pa. Cons. Stat.** §3701(a)(1)(iv) is a crime of violence under the enumerated clause as well as the now-removed residual clause of § **4B1.2 (a)**)
- *United States v. Adair*, 16 F.4th 469 (5th Cir. 2021) (**Texas** robbery, **Tex. Penal Code** § 29.02, is an enumerated **4B1.2** crime of violence)
- *United States v. Peterson*, 902 F.3d 1016 (9th Cir. 2018) (**Washington** offense of robbery in violation of **Wash. Rev. Code** § 9A.56.190 is not a § **4B1.2** crime of violence, as the force may be applied against either the person or property, and the crime is therefore broader than both robbery and extortion as described in the guideline)

**g. Arson**

The Fifth Circuit considered the issue at length, identifying “the consensus among state statutes that defines contemporary arson as involving the malicious burning of property, personal or real, without requiring that the burning threaten harm to a person.” *United States v. Velez-Alderete*, 569 F.3d 541, 544 (5th Cir. 2009) (holding that the **Texas** arson statute, **Tex. Penal Code** § 28.02, qualifies under the Guidelines). Other courts “have all concluded that the modern generic definition of arson is the intentional (or willful) and/or malicious burning of property.” *United States v. Delgado-Montoya*, 663 F. App’x 719, 724 (10th Cir. 2016) (unpublished) (citing

*United States v. Gatson*, 776 F.3d 405, 410 (6th Cir. 2015)); *United States v. Misleveck*, 735 F.3d 983, 988 (7th Cir. 2013); *United States v. Whaley*, 552 F.3d 904, 907 (8th Cir. 2009); *Velez-Alderete*, 569 F.3d at 546 (per curiam); *United States v. Hathaway*, 949 F.2d 609, 610 (2d Cir. 1991) (per curiam)). See also *United States v. Lee*, 608 F. App’x 375, 377 (6th Cir. 2015) (unpublished) (“The widely accepted ‘generic’ definition of arson thus includes the knowing burning of personal property without consent or with unlawful intent.”) (quoting *United States v. Miller*, 246 F. App’x 369, 372 (6th Cir. 2007) (unpublished)).

The Criminal Division advised in its *Mathis Guidance* in 2016: “there remains a debate as to whether the property, if personal, must be the property of another and whether it must have a minimal value. For a detailed examination of arson, please ask your Appellate Section liaison for the ‘no appeal’ recommendation of Parker Rider–Longmaid in *United States v. Cleophas Williams*, No. 15-cr-2016 (D. Minn. Apr. 15, 2016). Mr. Rider–Longmaid traces arson from its common–law roots through more recent federal and state enactments.”

Most recently, *United States v. Ferguson*, 131 F.4th 617 (7th Cir. 2025), held that arson in violation of 18 U.S.C. § 844(i) qualifies as an enumerated 4B1.2 crime of violence. The court determined that it meets the generic definition, which is malicious damage to property by means of fire or explosion, and does not exclude arson of one’s own property which is not for the purposes of insurance fraud.

#### **h. Extortion**

Application note 1 to § 4B1.2 states: “‘Extortion’ is obtaining something of value from another by the wrongful use of (A) force, (B) fear of physical injury, or (C) threat of physical injury.” This definition was added in Amendment 798 (Aug. 1, 2016), and is narrower than the preceding version, which considered “extortion” and “extortionate extension of credit” as crimes of violence. The commentary to Amendment 798 stated that “the amendment narrows the generic definition of extortion by limiting the offense to those having an element of force or an element of fear or threats ‘of physical injury,’ as opposed to non–violent threats such as injury to reputation.”

Several courts have held that the amendment narrowed the definition of extortion for purposes of § 4B1.2, such that it no longer encompasses crimes against property, only against a person. These courts have reasoned that “physical injury” is best interpreted as bodily injury. *United States v. Green*, 996 F.3d 176, 179–83 (4th Cir. 2021); *United States v. Camp*, 903 F.3d 594 (6th Cir. 2018); *Bridges v. United States*, 991 F.3d 793 (7th Cir. 2021) (Hobbs Act robbery is not a 4B1.2 crime of violence; the argument was arguably available to counsel, and therefore a hearing is warranted to

determine whether counsel was ineffective in failing to raise it); *United States v. Peterson*, 902 F.3d 1016 (9th Cir. 2018); *United States v. O'Connor*, 874 F.3d 1147 (10th Cir. 2017). That ruling had the perverse effect of removing from the career offender guideline all Hobbs Act robberies (which may be committed by force against a person or property), and notoriously violent extortion offenses (such as extortionate efforts by mobsters or labor racketeers which involve the destruction of property). With respect to Hobbs Act robbery, the Sentencing Commission resolved the issue through a November 1, 2023, amendment to Section 4B1.2 that establishes at least Hobbs Act robbery as an enumerated “crime of violence.”

i. **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)**

The statutes listed here—26 U.S.C. § 5845(a) and 18 U.S.C. § 841(c)—only define the types of firearm or explosive at issue. They do not define what type of “use or unlawful possession” meets this definition of a “crime of violence,” though the issue seems straightforward. There is no case law.

j. **Burglary of a dwelling [prior to August 1, 2016, only]**

Amendment 798 (Aug. 1, 2016), removed “burglary of a dwelling” as an enumerated crime of violence in § 4B1.2 (matched in the amendment to § 2L1.2 effective November 1, 2016). With respect to sentencings that occurred before August 1, 2016, recent post-*Mathis* precedential decisions have held:

- *United States v. Garcia-Martinez*, 845 F.3d 1126 (11th Cir. 2017) (**Florida** second degree burglary of a dwelling, Fla. Stat. § 810.011(2), was not categorically a crime of violence under former § 2L1.2); *United States v. Urbina-Fuentes*, 900 F.3d 687 (5th Cir. 2018) (same)
- *United States v. Bernel-Aveja*, 844 F.3d 206 (5th Cir. 2016) (**Ohio** burglary, Ohio Rev. Code § 2911.21(A), is overbroad and does not qualify under the former § 2L1.2)
- *United States v. Steiner*, 847 F.3d 103, 120 (3d Cir. 2017) (burglary under **Pennsylvania** law, 18 Pa. Cons. Stat. § 3502(A), was not “burglary of a dwelling” under the former § 4B1.2)
- *United States v. Castro-Alfonso*, 841 F.3d 292 (5th Cir. 2016) (aggravated burglary under **Tennessee** law, Tenn. Code § 39–14–403, was a crime of violence under the former § 2L1.2)

- *United States v. Fuentes–Canales*, 902 F.3d 468 (5th Cir. 2018) (**Texas** burglary of a habitation, in violation of **Tex. Penal Code § 30.02(a)** and **(d)**, is broader than and does not qualify as burglary of a dwelling under the former **§ 2L1.2**)
- *United States v. Godoy*, 890 F.3d 531 (5th Cir. 2018) (while the Fifth Circuit has held that **Texas** burglary in violation of **Tex. Penal Code § 30.02** is broader than generic burglary, under the former residual clause the offense was a crime of violence under the 2015 version of **§ 2L1.2(b)(1)(C)**)
- *United States v. Reyes–Ochoa*, 861 F.3d 582 (5th Cir. 2017) (**Virginia** burglary statute, **Va. Code § 18.2–90**, is indivisible and overbroad under the former **§ 2L1.2** definition of crime of violence)
- *United States v. Edwards*, 836 F.3d 831, 836–38 (7th Cir. 2016) (**Wisconsin** burglary, **Wis. Stat. § 943.10(1m)(a)**, is broader than “burglary of a dwelling” and therefore does not qualify under the pre–Aug. 2016 crime of violence definition in **§ 4B1.2**)

## **VIII. Serious Drug Offense (ACCA) / Controlled Substance Offense (§ 4B1.2)**

**ACCA “serious drug offense.”** The term “serious drug offense” in ACCA is defined as:

- (i) an offense 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 for which a maximum term of imprisonment of ten years or more is prescribed by law; or
- (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (**21 U.S.C. § 802**)), for which a maximum term of imprisonment of ten years or more is prescribed by law . . . .

**18 U.S.C. § 924(e)(2)(A).** This definition applies not only in ACCA, but also to defendants who are sentenced under **21 U.S.C. § 841(b)(1)(A), (B)**, in sentencing proceedings that take place after the enactment of the First Step Act on December 21, 2018. Those who commit drug trafficking offenses are subject to higher mandatory minimum sentences under those provisions depending on the type and quantity of drug, if they had one or more prior convictions for a “serious drug felony” or a “serious

violent felony.” “Serious drug felony” is described in 21 U.S.C. § 802(57) (effective Dec. 21, 2018) as an offense described in 18 U.S.C. § 924(e)(2)(A), for which the offender served a term of imprisonment of more than one year and was released within 15 years of commencement of the instant offense (those limitations are not present in ACCA).

Whether an offense is punishable by 10 years or more is determined under the law applicable to the offense at the time of the conviction, even if the penalty was later lowered, unless that reduction was made retroactive. *McNeill v. United States*, 563 U.S. 816 (2011); *United States v. Mayes*, 928 F.3d 502 (6th Cir. 2019). The maximum term of imprisonment for ACCA purposes is the maximum term set by the state law’s applicable recidivist provision, rather than the maximum term that would apply without the recidivist enhancements. *United States v. Rodriguez*, 553 U.S. 377, 393 (2008). See, e.g., *United States v. Wallace*, 937 F.3d 130,143–44 (2d Cir. 2019) (a New York offense qualified because a recidivism statute increased the maximum penalty to more than 10 years).

The application of the definition of “serious drug offense” has not been problematic. The first part, 18 U.S.C. § 924(e)(2)(A)(i), embraces every significant federal drug trafficking offense, including conspiracy crimes. The only disputes, accordingly, arise under subsection (ii), concerning state crimes.

In *Shular v. United States*, 589 U.S. 154 (2020), the Court held that the categorical approach that applies in determining whether an offense qualifies as a “serious drug offense” under subsection (ii) is different than the approach applicable to identifying a “violent felony” under ACCA. While the latter may require comparison of the elements of a statute to a generic identified crime, the question with respect to a “serious drug offense” under ACCA is whether the elements of the state offense at issue “necessarily entail[] one of the types of conduct” stated in subsection (ii): “manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance.”

(The Supreme Court’s decision in *Shular* overturned *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018), where the court held that a court must identify a “generic” analogue for the offenses described in the “serious drug offense” definition in ACCA, and then determine whether the state offense matches or is narrower than the generic crime. On those grounds, the court held that a Washington drug trafficking statute did not qualify, because the state’s definition of accomplice liability is broader than the generic definition. *Franklin* relied on *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), which held that Washington’s accomplice liability statute is broader than accomplice liability under federal law and therefore renders the state’s drug trafficking law categorically broader than a federal drug trafficking equivalent. In *Bourtzakis v. United States Attorney Gen.*, 940 F.3d 616 (11th Cir. 2019), the court

disagreed with that conclusion, and in *Alfred v. Garland*, 64 F.4th 1025 (9th Cir. 2023), the Ninth Circuit overruled both *Valdivia-Flores* and *Franklin*.)

Further, ACCA uses the term “involving,” and most courts view this term as expansive. The Eighth Circuit explained, “18 U.S.C. § 924(e)(2)(A)(ii) uses the term ‘involving,’ an expansive term that requires only that the conviction be ‘related to or connected with’ drug manufacture, distribution, or possession, as opposed to including those acts as an element of the offense.” *United States v. Bynum*, 669 F.3d 880, 886 (8th Cir. 2012) (holding that knowingly offering to sell drugs is an offense “involving” drug distribution); *see also United States v. Whindleton*, 797 F.3d 105, 109 (1st Cir. 2015); *United States v. King*, 325 F.3d 110, 113 (2d Cir. 2003); *United States v. Gibbs*, 656 F.3d 180, 188 (3d Cir. 2011) (holding that a conviction for wearing body armor while committing a felony may “involve” drug manufacturing, distribution, or possession when the underlying felony is a drug offense); *United States v. Brandon*, 247 F.3d 186, 190–191 (4th Cir. 2001); *United States v. Herrold*, 813 F.3d 595, 599 (5th Cir. 2016), *cert. granted, judgment vacated on other grounds*, 580 U.S. 911 (2016), *reaffirmed*, 685 F. App’x 302 (5th Cir. 2017) (unpublished); *United States v. White*, 837 F.3d 1225, 1233 (11th Cir. 2016) (recognizing an “inferred intent” to distribute in a conviction under a Georgia trafficking statute that only required possession of a large quantity of cocaine); *United States v. Williams*, 488 F.3d 1004, 1009 (D.C. Cir. 2007) (finding that a conviction for an inchoate crime like attempted distribution sufficiently “involved” distribution). *But see United States v. Mulkern*, 854 F.3d 87, 96–97 (1st Cir. 2017) (in light of overbroad Maine statutory definition of “trafficking,” conviction for possession with intent to distribute 2 grams of heroin did not qualify as a serious drug offense). *See also United States v. Lyman*, 991 F.3d 994, 997 (8th Cir. 2021) (counting as an ACCA “serious drug offense” a crime that may have a mens rea of recklessness was not plain error, as “[a]t least one circuit. . . has held that [n]o element of mens rea with respect to the illicit nature of the controlled substance is expressed or implied.” *United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014).”).

The term “involving” is not unconstitutionally vague. *United States v. Ojeda*, 951 F.3d 66, 73–76 (2d Cir. 2020).

However, in a lengthy discussion in *United States v. Fields*, 53 F.4th 1027, 1044–49 (6th Cir. 2022), the Court suggested that *Shular* narrowed the meaning of “involving,” by requiring that the state offense “necessarily entails” the conduct described in the definition of “serious drug offense” in § 924(e)(2)(A)(ii).

There is a debate, however, regarding whether state drug offenses do not qualify as predicate ACCA “serious drug offenses” because the state definition pertinent to the drug in question is broader than the definition in the Controlled Substances Act. These purported discrepancies often involve substances never actually found in actual

narcotics prosecutions. For instance, some courts have held that principal state cocaine trafficking statutes do not qualify where the state definition of cocaine still includes ioflupane, an analogue used only in nuclear medicine for the diagnosis of Parkinson’s disease, that was removed from the federal definition of cocaine in September 2015. *See, e.g., United States v. Perez*, 46 F.4th 691, 701 (8th Cir. 2022).

This issue also produced a Circuit split on a timing question, defining at what point the comparison is made between the federal and state definitions. The Supreme Court resolved the issue in *Brown v. United States*, 144 S. Ct. 1195 (2024), holding that the comparison is made at the time the defendant committed the state crime. (This decision abrogated a variety of different approaches in lower courts. *See, e.g., United States v. Williams*, 61 F.4th 799 (10th Cir. 2023) (the comparison of drug schedules for purposes of application of ACCA is made at the time of the federal gun offense); *United States v. Hope*, 28 F.4th 487 (4th Cir. 2022) (the federal schedule in effect at the time of the federal sentencing is the point of comparison).)

**§ 4B1.2 “controlled substance offense.”** The definition of “controlled substance offense” in § 4B1.2(b) is similar to that of “serious drug offense,” but not identical:

The term “controlled substance offense” means 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.

Section 2L1.2 of the Guidelines uses the term “drug trafficking offense” instead of “controlled substance offense,” and the definition is slightly different: “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 a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.”

As the Department explained in the *Mathis Guidance* at page 15 (Sept. 7, 2016), defendants now frequently challenge the attribution of a “serious drug offense” or “controlled substance offense” in two additional ways.

First, they argue that the state law is overbroad because it covers more drugs than the CSA. *See, e.g., Mellouli v. Lynch*, 575 U.S. 798, 802 (2015) (Kansas drug statute includes at least nine substances not on the federal controlled substances list). When comparing covered drugs, prosecutors will have to determine if the state offense is divisible by elements under *Mathis*. Some state

drug statutes are divisible by drug type; that is, the identity of the drug must be alleged in the indictment and found by the jury beyond a reasonable doubt. *See, e.g., United States v. Vega-Ortiz*, 822 F.3d 1031, 1035 (9th Cir. 2016)

(“California treats the identity of a controlled substance as an element that must be found by the jury, further supporting the conclusion that [the California drug statute] is divisible” by drug type). In those instances, prosecutors will have to show only that the charged drug falls within the CSA controlled substances definition. Where a state drug statute is not divisible by drug type, it will likely be divisible by penalty range, in which case prosecutors will have to establish that all drugs in the same range as the charged offense fit within the CSA definition. Cf. *Burrage v. United States*, 571 U.S. 204, 208–09 (2014) (penalty ranges in 21 U.S.C. § 841 define separate offenses).

Defendants are also making *Mathis* arguments based on the conduct covered by state statutes. Some state statutes include a broader list of alternatives than “manufacturing, distributing, or possessing with intent to distribute.” In particular, some statutes include simple possession, while others include “offers to sell.” Again, prosecutors will have to look to the structure of the statute, authoritative state decisions, and possibly charging documents and jury instructions to determine whether the conduct variants are elements or means, and whether the proscribed conduct is broader than the conduct listed in ACCA’s definition of a “serious drug offense.” 18 U.S.C. § 924(e)(2)(A)(ii).

– **Overbreadth of drug schedule.** In applying the guideline definition of “controlled substance offense,” courts are divided regarding whether the term “controlled substance” refers exclusively to substances found in the federal drug schedules. If it does, this means a state statute may be categorically overbroad where it addresses substances not found on the federal schedules. A related issue is when that comparison is made – at the time of the prior offense, or at the time of the federal sentencing. *United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021), illustrates the problem. It assumed that “controlled substance” is limited to the federal definition (as the government had not timely raised the issue), and that the comparison is made between the definition of the state crime at the time it occurred and the content of the federal controlled substances schedule at the time of sentencing for the instant federal offense. It thus held that a Massachusetts conviction for possession with intent to distribute “marijuana” was categorically overbroad, because the state law at the time of the offense in 2014 included hemp, but hemp had been removed from the federal schedules by the time of sentencing in 2018.

Several other circuits have held that “controlled substance” refers exclusively to substances found in the federal drug schedule. *See United States v. Townsend*, 897 F.3d 66, 72 (2d Cir. 2018); *United States v. Minor*, 121 F.4th 1085, 1089 (5th Cir. 2024); *United States v. Bautista*, 989 F.3d 698, 702 (9th Cir. 2021). By contrast, multiple

circuits have held that the definition of “controlled substance” is not tethered to the federal standard. See *United States v. Lewis*, 58 F.4th 764 (3d Cir. 2023) (in § 4B1.2, “controlled substance” is defined by either state or federal law, and the applicable definition is that in effect at the time of the prior conviction; accordingly, a 2012 conviction for possession with intent to distribute marijuana in violation of N.J. Stat. § 2C:35-5 qualifies as a “controlled substance offense,” even though the state defined marijuana at the time to include hemp and no longer does so); *United States v. Ward*, 972 F.3d 364, 369–75 & n.12 (4th Cir. 2020); *United States v. Jones*, 81 F.4th 591, 597–600 (6th Cir. 2023); *United States v. Ruth*, 966 F.3d 642, 651–54 (7th Cir. 2020); *United States v. Ramirez*, 52 F.4th 705, 711–16 (7th Cir. 2022) (lengthy defense of this position); *United States v. Henderson*, 11 F.4th 713, 717–19 (8th Cir. 2021); *United States v. Jones*, 15 F.4th 1288, 1291–94 (10th Cir. 2021); *United States v. Dubois*, 94 F.4th 1284, 1296–1300 (11th Cir. 2024). See also *United States v. Crocco*, 15 F.4th 20 (1st Cir. 2021) (discussing the issue at length but declining to resolve it on plain error review); *United States v. Chaires*, 88 F.4th 172, 179–86 (2d Cir. 2023) (Sullivan, J., concurring) (urging reconsideration of Second Circuit’s minority view).

Courts disagree not only regarding whether the federal definition of a controlled substance offense is relevant, but also regarding when the comparison is made to determine the controlling definition. As noted, the First Circuit in *Abdulaziz* held that the comparison is made at the time of federal sentencing for the instant offense. The Fifth Circuit in *Minor* and the Ninth Circuit in *Bautista* agree. In contrast, in *United States v. Clark*, 46 F.4th 404 (6th Cir. 2022), the court disagreed regarding the timing issue. It held that the term “controlled substance” in the career offender guideline is defined with reference to the drug schedules in place at the time of the prior conviction at issue; thus, the court held that even though hemp is currently excluded from the definition of marijuana, a conviction entered before that change took place qualifies. In *United States v. Drake*, 126 F.4th 1242 (6th Cir. 2025), the court adhered to this view, explaining that it is not changed by the Supreme Court’s decision regarding ACCA in *Brown v. United States*, 602 U.S. 101 (2024). See also *United States v. Lewis*, 58 F.4th 764 (3d Cir. 2023) (same); *United States v. Harbin*, 56 F.4th 843 (10th Cir. 2022) (in Circuit holding that no comparison to federal schedule is made, not deciding on plain error review whether the comparison in the state definition is made at the time of the crime or at the time of sentencing; thus, not disturbing conclusion that earlier Wyoming marijuana offense was a 4B1.1 controlled substance offense even though hemp was later removed from the state definition); *United States v. Dubois*, 94 F.4th 1284, 1296–1300 (11th Cir. 2024) (holding that “controlled substance” is defined by state law, and the comparison is made at the time of the state offense).

– **Inchoate offenses.** An issue unique to the Guidelines is whether drug offenses based on conspiracy, attempt, or aiding and abetting qualify. Under an amendment effective November 1, 2023, “The terms ‘crime of violence’ and ‘controlled substance

offense’ include the offenses of aiding and abetting, attempting to commit, or conspiring to commit any such offense.” § 4B1.2(d).

Prior to the 2023 amendment, the provision regarding inchoate offenses long appeared in the guideline commentary, in § 4B1.2 application note 1. The provision then came under attack. Some courts held that the commentary embracing inchoate offenses was invalid as it improperly expanded the scope of the guideline text. See *United States v. Nasir*, 17 F.4th 459, 468-72 (3d Cir. 2021) (en banc) (the definition of “controlled substance offense” in § 4B1.2 does not include inchoate offenses); *United States v. Abreu*, 32 F.4th 271, 276-78 (3d Cir. 2022) (the definition of “crime of violence” in § 4B1.2 does not include conspiracy offenses); *United States v. Mitchell*, 120 F.4th 1233, 1239-41 (4th Cir. 2024); *United States v. Havis*, 927 F.3d 382, 385-87 (6th Cir. 2019) (en banc); *United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023); *United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023) (en banc) (we hold that the definition of “controlled substance offense” in § 4B1.2(b) does not include inchoate offenses); *United States v. Winstead*, 890 F.3d 1082, 1090-92 (D.C. Cir. 2018). Other courts disagreed. *United States v. Rainford*, 110 F.4th 455, 475 n.5 (2d Cir. 2024); *United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (en banc) (the commentary to § 4B1.2 including conspiracy crimes as controlled substance offenses remains binding); *United States v. Maloid*, 71 F.4th 795, 806-14 (10th Cir. 2023) (the guideline commentary (specifically the provision in § 4B1.2 including conspiracy as a crime of violence) is binding; this rule is not altered by *Kisor*). Also disagreeing, though not citing the contrary decisions, *United States v. Garcia*, 946 F.3d 413 (8th Cir. 2019), held that both a “crime of violence” and a “controlled substance offense” under § 4B1.2 include accomplice liability such as aiding and abetting, based on the guideline commentary. Other Circuits have adhered to earlier precedent holding that inchoate offenses are properly included in the application note. *United States v. Lewis*, 963 F.3d 16, 21-25 (1st Cir. 2020); *United States v. White*, 97 F.4th 532 (7th Cir. 2024) (discussing issue at length and listing divided rulings of Circuits); *United States v. Lomax*, 51 F.4th 222, 229 (7th Cir. 2022); *United States v. Jefferson*, 975 F.3d 700, 707-08 (8th Cir. 2020).

The Sentencing Commission made an amendment effective November 1, 2023, to resolve this issue by moving into the guideline text the declaration that career offender predicates include the inchoate offenses of conspiracy, attempt, and aiding and abetting. The Circuit split thus remains relevant only in the prosecution of offenses committed before that date.

Notably, even courts that held that an attempt offense does not qualify under the previous Guidelines distinguished distribution offenses that embrace “attempted transfer” as referring to qualifying crimes and not inchoate offenses. See, e.g., *United States v. Dawson*, 32 F.4th 254 (3d Cir. 2022) (the Pennsylvania drug trafficking statute, 35 Pa. Stat. § 780-113(a)(30), qualifies as a 4B1.2 “controlled substance offense”; the fact that, like the federal distribution crime, it reaches the “attempted transfer” of a controlled substance, does not alter that result); *United States v. Groves*,

65 F.4th 166, 172-74 (4th Cir. 2023) (21 U.S.C. §§ 841(a) is a 4B1.2 “controlled substance offense”; while it reaches an attempted transfer, that is not the type of attempt that the guideline does not reach); *United States v. Davis*, 75 F.4<sup>th</sup> 428, 442-45 (4th Cir. 2023) (distribution of cocaine base, which is a divisible offense in S.C. Code § 44-53-375(B), is a 4B1.2 controlled substance offense; while the Fourth Circuit has held that attempt offenses do not qualify under the current guideline, an “attempted transfer” under this statute involves a completed distribution); *United States v. Miller*, 75 F.4th 215, 228-31 (4th Cir. 2023) (North Carolina sale or delivery of a controlled substance, N.C. Gen. Stat. § 90-95(a)(1), is a 4B1.2 controlled substance offense; delivery requires an actual, constructive, or attempted transfer from one person to another, and is not a mere attempt statute); *United States v. Gardner*, 32 F.4th 504, 529 (6th Cir. 2022) (same result as to “the actual, constructive, or attempted transfer” of a controlled substance in violation of Mich. Comp. Laws § 333.7105(1)); *United States v. Miller*, 34 F.4th 500 (6th Cir. 2022) (the Tennessee offense of knowingly delivering a controlled substance, Tenn. Code § 39-17-417(a)(2), is a 4B1.2 controlled substance offense, though this result was not applied in *Havis*; *Havis* was correct that an attempt offense is not a “controlled substance offense” under the current Guidelines, but the parties there incorrectly stipulated that “attempted transfer” as a type of distribution amounts to such an attempt offense).

Other courts also held that “conspiracy” in the guideline commentary refers to a generic offense that requires an overt act, and therefore conspiracy in violation of 21 U.S.C. § 846, which has no overt act requirement, does not qualify. *United States v. Norman*, 935 F.3d 232 (4th Cir. 2019); *United States v. Martinez-Cruz*, 836 F.3d 1305 (10th Cir. 2016); *United States v. Crooks*, 997 F.3d 1273, 1279-80 (10th Cir. 2021). Cf. *United States v. Merritt*, 934 F.3d 809 (8th Cir. 2019) (the panel cannot overrule the court’s precedent holding that the application note including conspiracy offenses is valid; and given the split in authority the district court did not commit plain error in relying on a conspiracy offense which does not require an overt act). See *United States v. Tabb*, 949 F.3d 81, 86-89 (2d Cir. 2020) (expressly disagreeing with *Norman*); *United States v. Smith*, 989 F.3d 575, 586 (7th Cir. 2021) (same).

**§ 924(c) “drug trafficking crime.”** The application of the part of Section 924(c) that prohibits the use or possession of a firearm in relation to a “drug trafficking crime,” has not been problematic. The statute defines this as “any 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,” 18 U.S.C. § 924(c)(2). That definition includes conspiracies to commit drug trafficking crimes, *see, e.g.*, *United States v. Chaidez*, 916 F.2d 563, 565-566 (9th Cir. 1990) (per curiam), and just about any federal drug trafficking offense which a prosecutor might want to use as a 924(c) predicate.

**Decisions regarding drug offense predicates.** Post-*Mathis* decisions on these subjects include:

- *United States v. Williams*, 898 F.3d 323 (3d Cir. 2018) (a violation of **RICO** was a predicate “controlled substance offense” under the career offender guideline, as the RICO statute is divisible by predicate act, and the predicate acts here were violations of 21 U.S.C. § 841(a)(1) or conspiracy to commit such a violation)
- *United States v. Furaha*, 992 F.3d 871 (9th Cir. 2021) (a violation of **18 U.S.C. § 924(c)** predicated on a controlled substance offense is itself a “controlled substance offense” under § 4B1.2)
- *United States v. Booker*, 994 F.3d 591, 595–96 (6th Cir. 2021) (distribution in violation of **21 U.S.C. § 841(a)(1)** is a 4B1.2 “controlled substance offense”)
- *United States v. Allen*, 909 F.3d 671 (4th Cir. 2018) (a conviction under **21 U.S.C. § 843(b)** of using a communication facility to facilitate an underlying controlled substance offense (here, possession with intent to distribute) is itself a “controlled substance offense” under § 4B1.2)
- *United States v. Martinez-Cruz*, 836 F.3d 1305 (10th Cir. 2016) (conviction for conspiracy to possess a controlled substance with intent to distribute, **21 U.S.C. § 846**, was not a drug trafficking offense under § 2L1.2 because the generic definition of “conspiracy” required an overt act); *United States v. Norman*, 935 F.3d 232 (4th Cir. 2019) (same); *United States v. Crooks*, 997 F.3d 1273, 1279–80 (10th Cir. 2021) (same); *contra United States v. Rodriguez-Rivera*, 989 F.3d 183 (1st Cir. 2021) (holding that § 846 conspiracy is a “controlled substance offense” under the Guidelines); *United States v. Tabb*, 949 F.3d 81, 86–89 (2d Cir. 2020) (same); *United States v. Smith*, 989 F.3d 575, 586 (7th Cir. 2021) (same)
- *United States v. Williams*, 926 F.3d 966 (8th Cir. 2019) (a federal **924(c)** conviction predicated on a drug conspiracy is a controlled substance offense under § 4B1.2(b))
- *United States v. White*, 837 F.3d 1225 (11th Cir. 2016) (**Alabama** statute criminalizing possession of marijuana for “other than personal use,” **Ala. Code § 13A–12–213(a)(1)**, qualified as serious drug offense under ACCA)
- *Hollis v. United States*, 958 F.3d 1120 (11th Cir. 2020) (**Alabama** conviction for distribution of cocaine, **Ala. Code § 13A–12–211**, is an ACCA serious drug

felony and a 4B1.1 controlled substance offense)

- *United States v. Gardner*, 34 F.4th 1283 (11th Cir. May 27, 2022) (the “maximum term of imprisonment” in the ACCA definition of “serious drug offense” refers in this case to Alabama’s statutory maximum penalties for the defendant’s prior drug offenses, not the high end of the particular sentencing range calculated for the prior convictions under Alabama’s presumptive sentencing standards)
- *United States v. Guerrero*, 910 F.3d 72 (2d Cir. 2018) (**Arizona** conviction for selling, importing, or transferring a narcotic drug, *Ariz. Rev. Stat. § 13–3408(A)(7)*, did not qualify as a predicate “drug trafficking offense” under the former § 2L1.2, as it applied to benzylfentanyl and thenylfentanyl, which were not listed as controlled substances under the federal Controlled Substances Act)
- *United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021) (in determining whether the defendant was convicted of a “controlled substance offense” under § 4B1.2(b), the court compares the elements of the offense at the time of that conviction against the federal definition as of the time of the federal sentencing; the federal definition of marijuana was changed as of Dec. 20, 2018 (prior to the federal sentencing), to exclude hemp, and therefore the **Arizona** offense of attempted transportation of marijuana, *Ariz. Rev. Stat. § 13–3405(A)(4)*, is overbroad, as the Arizona definition of marijuana included hemp at the time of conviction for the state offense)
- *United States v. Meux*, 918 F.3d 589 (8th Cir. 2019) (**Arkansas** statute that criminalizes manufacturing, delivering, or possessing with intent to manufacture or deliver a controlled substance, *Ark. Code § 5–64–401(a)* (as in effect between 1991 and 2004), stated an ACCA serious drug offense); *United States v. Bass*, 996 F.3d 729, 741–42 (5th Cir. 2021) (**Arkansas** possession of a controlled substance with intent to deliver, *Ark. Code § 5–64–401*, is an ACCA serious drug offense)
- *United States v. Murillo-Alvarado*, 876 F.3d 1022 (9th Cir. 2017) (**California** drug trafficking statute, *Cal. Health & Safety Code § 11351*, was divisible based on type of substance, and offense involving cocaine was drug trafficking offense under § 2L1.2)
- *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc) (**California** *Health & Safety Code § 11352* is divisible with respect to both its controlled substance requirement and its actus reus requirement; a conviction for selling cocaine qualified as a drug trafficking offense under § 2L1.2)

- *United States v. Ocampo-Estrada*, 873 F.3d 661 (9th Cir. 2017) (**California** Health & Safety Code § 11378 is divisible based on particular drug at issue; but *Shepard* documents were inadequate to prove offense)
- *United States v. Rodriguez-Gamboa*, 972 F.3d 1148 (9th Cir. 2020) (**California** possession of methamphetamine for sale, Cal. Health & Safety Code §§ 11033, 11055(d)(2), 11378.1, is a “controlled substance offense” under immigration law; it is not overbroad in applying to both geometric and optical isomers of methamphetamine (while federal law applies only to optical isomers), because “there is no such thing as a geometric isomer of methamphetamine.”)
- *United States v. Doran*, 978 F.3d 1337 (8th Cir. 2020) (reclassification of **California** offense of possession of marijuana for sale, Cal. Health & Safety Code § 11359, as a misdemeanor, does not alter status of pre-reclassification violation as a 4B1.2 controlled substance offense)
- *United States v. McKibben*, 878 F.3d 967 (10th Cir. 2017) (**Colorado** distribution statute, Colo. Rev. Stat. § 18–18–405(1)(a), covers “offers to sell” and therefore is broader than controlled substance offense under § 4B1.2(b))
- *Chery v. Garland*, 16 F.4th 980, 984–86 (2d Cir. 2021) (in holding that Conn. Gen. Stat. § 21a–277(a) is an aggravated felony under immigration law, the Court observes that *United States v. Savage*, 542 F.3d 959, 965–66 (2d Cir. 2008) (a guideline decision), has been abrogated, and the Connecticut prohibition of an “offer to sell” is consistent with federal law)
- *Spaho v. United States Attorney Gen.*, 837 F.3d 1172, 1177 (11th Cir. 2016) (the **Florida** drug trafficking statute, Fla. Stat. § 893.13(1)(a) is divisible under *Mathis* as it “delineates six discrete alternative elements: sale, delivery, manufacture, possession with intent to sell, possession with intent to deliver, and possession with intent to manufacture.”)
- *United States v. Lange*, 862 F.3d 1290 (11th Cir. 2017) (**Florida** conviction of being a principal in the first degree to attempted manufacture of controlled substance, Fla. Stat. § 777.011, was a “controlled substance offense” under § 4B1.2)
- *Shular v. United States*, 589 U.S. 154 (2020) (**Florida** selling cocaine and possessing cocaine with intent to sell, in violation of Fla. Stat. § 893.13(1)(a), are ACCA serious drug offenses); *United States v. Penn*, 63 F.4th 1305 (11th Cir. 2023) (reaching the same result upon holding that the definition of “serious

drug offense” does not require any particular mens rea with regard to the illicit nature of the controlled substance, and includes attempted transfer of a controlled substance (the least serious conduct in violation of the Florida statute); *United States v. Bishop*, 940 F.3d 1242 (11th Cir. 2019) (**Florida** drug conspiracy in violation of Fla. Stat. § 893.13(1)(a) is a “controlled substance offense” under the Guidelines)

- *United States v. Conage*, 50 F.4th 81 (11th Cir. 2022) (**Florida** drug trafficking under Fla. Stat. § 893.135(1)(b)1 is an ACCA serious drug offense)
- *United States v. Miles*, 75 F.4th 1213 (11th Cir. 2023) (**Florida** conviction for possessing a listed chemical with reasonable cause to believe it would be used to manufacture a controlled substance, Fla. Stat. § 893.149(1), is not a conviction involving “manufacturing” a controlled substance, and thus does not qualify as an ACCA serious drug offense; “possessing one ingredient to make a controlled substance ‘with reasonable cause to believe’ that some person will use it to manufacture a controlled substance is too far removed from the conduct of manufacturing itself”)
- *Hollis v. United States*, 958 F.3d 1120 (11th Cir. 2020) (**Georgia** conviction for trafficking in cocaine, based on possession of 28 grams or more of cocaine, Ga. Code § 16–13–31(a)(1), is an ACCA serious drug offense)
- *Tellez-Ramirez v. Garland*, 87 F.4th 424 (9th Cir. 2023) (the **Idaho** drug distribution statute, Idaho Code § 37-2732(a), is divisible by drug type; further, the state’s definition of aiding and abetting liability is not broader than the federal definition)
- *United States v. Redden*, 875 F.3d 374 (7th Cir. 2017) (**Illinois** conviction for delivery of a controlled substance, 720 Ill. Comp. Stat. § 570/401, meets the definition of a “controlled substance offense” for purposes of § 4B1.2; distinguishes the Fifth Circuit decision in *Hinkle* because the Illinois statute, unlike the Texas provision at issue in *Hinkle*, does not apply to an “offer to sell”); *United States v. Jones*, 882 F.3d 1169 (8th Cir. 2018) (same; the fact that the state statute applies to controlled substance analogues does not make it overbroad, as federal law treats any reference to controlled substances as including analogues)
- *United States v. De La Torre*, 940 F.3d 938, 949 (7th Cir. 2019) (**Illinois** felony unlawful possession of controlled substances, 720 Ill. Comp. Stat. § 570/402(c), is not a “felony drug offense” under § 802(44), because at the time of the defendant’s prior convictions the Illinois schedules listed propylhexedrine as a

Schedule V controlled substance, and the federal definition does not include that substance; further, the Illinois statute is not divisible)

- *United States v. Clayborn*, 951 F.3d 937 (8th Cir. 2020) (**Illinois** delivery of a controlled substance, [720 Ill. Comp. Stat. 570/407\(b\)\(2\)](#), is a “controlled substance offense” under § 4B1.2(b); the guideline term is not limited to “commercial” transactions)
- *United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020) (**Illinois** possession of a controlled substance, [720 Ill. Comp. Stat. § 570/401\(c\)\(2\)](#), is categorically broader than the federal definition, as it includes positional isomers of cocaine as well as optical and geometric isomers, and thus it does not qualify as a “felony drug offense” for purposes of an 851 enhancement applicable to [21 U.S.C. § 841\(b\)\(1\)\(C\)](#); but the offense does qualify as a “controlled substance offense” under the 4B1.2 career offender guideline); *United States v. Wallace*, 991 F.3d 810, 816–17 (7th Cir. 2021) (further discussion of latter point); *United States v. Henderson*, 11 F.4th 713, 717–19 (8th Cir. 2021) (agreeing with Seventh Circuit on both points); *United States v. Turner*, 55 F.4th 1135, 1142–43 (7th Cir. 2022) (extending *Ruth* to hold that manufacture or delivery of a controlled substance, [720 Ill. Comp. Stat. § 570/401\(d\)](#), is not an 841 predicate)
- *Elion v. United States*, 76 F.4th 620 (7th Cir. 2023) (**Illinois** “look-alike” substance offenses, [720 Ill. Comp. Stat. § 570/404\(b\)](#), are not 4B1.2 controlled substance offenses, as the statute can be violated by “advertising,” which is broader than attempt, and is not divisible from the other statutory terms)
- *United States v. De La Torre*, 940 F.3d 938, 950–52 (7th Cir. 2019) (**Indiana** dealing in a schedule I, II, or III controlled substance in violation of [Ind. Code § 35-48-4-2](#) is not a “felony drug offense” under § 802(44) because it applies to more substances than the federal definition: under federal law, methamphetamine includes only its optical isomers, whereas “the Indiana definition includes something more than just optical isomers of methamphetamine”; in addition, Indiana includes parahexyl and a “combination product containing tiletamine and zolazepam (Telazol),” which are not covered in federal law); *Aguirre-Zuniga v. Garland*, 37 F.4th 446 (7th Cir. 2022) (ruling that dealing methamphetamine under [Indiana Code § 35-48-4-1.1](#) (prior to a 2020 amendment limiting the definition of methamphetamine to optical isomers) is overbroad for the same reason in relation to federal law and therefore does not qualify as an “aggravated felony” under immigration law)
- *United States v. Smith*, 921 F.3d 708 (7th Cir. 2019) (**Indiana**’s statute regarding dealing in cocaine or narcotic drug, [Ind. Code § 35-48-4-1](#), is divisible, and the

portion based on knowingly possessing a controlled substance with intent to deliver is a controlled substance offense under § 4B1.2; the distinction between “deliver” in Indiana’s statute and “distribute” in the Guidelines’ definition is without a difference); *United States v. Williams*, 931 F.3d 570 (7th Cir. 2019) (statute is also a serious drug offense under ACCA; the fact that the statute also prohibited financing the manufacture or delivery of cocaine did not make it overbroad)

- *United States v. Garcia*, 948 F.3d 789 (7th Cir. 2020) (an **Indiana** drug distribution statute, Ind. Code § 35–48–4–10, is not divisible, and because it applies to salvia is overbroad and does not qualify as a felony drug offense under § 802(44))
- *United States v. Boleyn*, 929 F.3d 932 (8th Cir. 2019) (**Iowa** conviction for delivery of a controlled substance, Iowa Code § 124.401, is a “serious drug offense” under ACCA, a “felony drug offense” under 21 U.S.C. § 841(b)(1)(D), and a “controlled substance offense” under § 4B1.2(b); aiding and abetting under Iowa law is not broader than the federal standard); *United States v. Clayborn*, 951 F.3d 937 (8th Cir. 2020) (**Iowa** delivery of a controlled substance, Iowa Code Ann. § 124.401(1)(d), is a “controlled substance offense” under § 4B1.2(b); the guideline term is not limited to “commercial” transactions); *United States v. Castellanos Muratella*, 956 F.3d 451 (8th Cir. 2020) (**Iowa** felony drug convictions under Iowa Code Ann. § 124.401 are 4B1.2 controlled substance offenses; even though the statute applies to both “counterfeit” substances and “simulated” controlled substances, while the guideline only mentions “counterfeit” substances, the statute’s definition of “simulated controlled substance” contains element that match the federal meaning of “counterfeit” substance); *see also United States v. Bailey*, 37 F.4th 467, 469–70 (8th Cir. 2022) (per curiam) (possession of marijuana with intent to deliver, Iowa Code § 124.401, is a 4B1.2 controlled substance offense notwithstanding that at the time the state definition of marijuana included hemp)
- *United States v. Maldonado*, 864 F.3d 893 (8th Cir. 2017) (**Iowa** conviction for possession with intent to deliver marijuana, Iowa Code § 124.101(7), was controlled substance offense under § 4B1.2; did not extend to “offer to sell”)
- *United States v. Ford*, 888 F.3d 922, 930 (8th Cir. Apr. 25, 2018) (**Iowa** conviction for manufacturing methamphetamine and possession of methamphetamine with intent to deliver, Iowa Code § 124.401(1), was “serious drug offense” under ACCA; even though the Iowa statute applied to simulated

controlled substances, while the federal definition does not, the statute is divisible)

- *United States v. Perez*, 46 F.4th 691 (8th Cir. 2022) (**Iowa** delivery of cocaine, [Iowa Code § 124.401\(1\)\(c\)\(2\)](#), is not an ACCA serious drug offense; the court compares the state drug schedule in effect at the time of the offense (2013) to the federal schedule at the time of the federal gun crime (2019), and finds the state offense as previously defined to be currently overbroad because the federal schedule no longer includes ioflupane in the definition of cocaine)
- *United States v. Madkins*, 866 F.3d 1136, 1143–48 (10th Cir. 2017) (**Kansas** convictions for possession with intent to sell cocaine, [Kan. Stat. 65–4161\(a\)](#), and possession with intent to sell marijuana, [Kan. Stat. 65–4163\(a\)\(3\)](#), are not controlled substance offenses under § 4B1.2 because each embraces an “offer to sell”)
- *United States v. Jackson*, 995 F.3d 476 (6th Cir. 2021) (**Kentucky** trafficking in the second degree, [Ky. Rev. Stat. § 218A.1413](#), is a 4B1.2 “controlled substance offense”; the fact that it applies to “transfers” not for commercial purposes does not make it overbroad; but conspiracy to commit this offense does not qualify, in light of *Havis*)
- *United States v. Fields*, 53 F.4th 1027, 1052-53 (6th Cir. 2022) (first-degree trafficking in a controlled substance, [Ky. Rev. Stat. § 218A.1412](#), is a 924(e) “serious drug offense”; the state definition of methamphetamine was not overbroad; it included an over-the-counter inhaler containing certain levels of levmetamfetamine, which was exempted by federal regulation, but another Kentucky statute excluded any substance that lawfully could be sold over the counter without a prescription under federal law)
- *United States v. Barlow*, 17 F.4th 599 (5th Cir. 2021) (**Louisiana** possession with intent to distribute marijuana, [La. Rev. Stat. § 40:966\(A\)](#), is a “serious drug offense” under ACCA)
- *United States v. Frierson*, 979 F.3d 385 (5th Cir. 2020) (**Louisiana** possession with intent to distribute a Schedule II controlled substance, [La. Rev. Stat. § 40:967\(A\)](#), is divisible by the type and quantity of drug, because it presents different punishments on that basis; an offense involving cocaine is a 4B1.2 controlled substance offense)
- *United States v. Mohamed*, 920 F.3d 94 (1st Cir. 2019) (**Maine** drug trafficking of cocaine base in violation of [Me. Rev. St. tit. 17-A, § 1103\(1-A\)\(A\)](#), is a

controlled substance offense under § 4B1.2, notwithstanding that Maine law permits a jury to infer intent from the quantity of drug involved); *United States v. Moran-Stenson*, 115 F.4th 11 (1st Cir. 2024) (§ 1103(1-A)(A) is divisible by the type of drug, and therefore a prior conviction involving cocaine base qualified as a 4B1.2 controlled substance offense)

- *United States v. Johnson*, 945 F.3d 174, 182–83 (4th Cir. 2019) (**Maryland** possession with intent to distribute a controlled substance, *Md. Code, Crim. Law* § 5–602(2), is a “controlled substance offense” under § 4B1.2, as the statute does not reach a mere “offer to sell”)
- *United States v. Aviles*, 938 F.3d 503, 514–15 (3d Cir. 2019) (a **Maryland** conviction for possession of a dangerous substance with intent to distribute or manufacture in violation of *Md. Crim. Code* § 5–602 does not qualify as a “felony drug offense” under 21 U.S.C. § 802(44); it covers controlled substances not within the federal definition, and the *Shepard* documents did not specify the substance at issue (such that it is not necessary to determine here whether this statute is divisible))
- *United States v. Lopez*, 890 F.3d 332 (1st Cir. 2018) (**Massachusetts** convictions for distribution of a class B drug, and possession with intent to distribute a class A drug, *Mass. Gen. Laws ch. 94C*, §§ 32(a), 32A(a), qualified as serious drug offenses under ACCA despite the fact that, because those offenses were prosecuted in a Massachusetts district court, the defendant’s maximum term of incarceration was 2½ years, where both offenses prescribed a maximum punishment of 10 years in prison)
- *United States v. Barbosa*, 896 F.3d 60, 74–75 (1st Cir. 2018) (**Massachusetts** conviction for possession of a controlled substance with intent to distribute under *Mass. Gen. Laws ch. 94C*, § 32A(a) is an ACCA serious drug offense; it is sufficient that it carried a 10–year maximum, even if the maximum is 3 years where charged in district court)
- *United States v. Capelton*, 966 F.3d 1 (1st Cir. 2020) (the version of the **Massachusetts** drug distribution statute, *Mass. Gen. Laws ch. 94C*, § 32A(a), in effect from 1983 to 2009, qualifies as a 4B1.2 controlled substance offense; the scope of accomplice liability was not broader than the generic definition)
- *United States v. Doe*, 49 F.4th 589, 598–600 (1st Cir. 2022) (applying *Shular*, the court holds that **Massachusetts** drug distribution, *Mass. Gen. Laws ch. 94C*, § 32A, is an ACCA “serious drug offense,” notwithstanding that it applies to “dispensing”)

- *United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021) (whether a previous offense qualifies as a “controlled substance offense” under § 4B1.2 is determined as of the time of sentencing; in this case, at that time in 2018, the controlled substance schedules did not include hemp, and thus a **Massachusetts** conviction for possession with intent to distribute “marijuana,” which was defined under state law in 2014 as including hemp, was overbroad and did not qualify)

*United States v. House*, 872 F.3d 748, 753–54 (6th Cir. 2017) (**Michigan** controlled substance statute is “divisible,” and Mich. Comp. Laws § 333.7401 qualifies as controlled substance offense under § 4B1.2); *United States v. Thomas*, 969 F.3d 583 (6th Cir. 2020) (**Michigan** delivery of heroin and possession with intent to deliver marijuana, Mich. Comp. Laws § 333.7401, are 4B1.2 controlled substance offenses); *United States v. Hill*, 982 F.3d 441, 443–44 (6th Cir. 2020) (explaining that an attempted transaction qualifies as “delivery” under both Michigan and federal law, and therefore the Michigan offense qualifies under § 4B1.2 notwithstanding *Havis*); *United States v. Gardner*, 32 F.4th 504, 529 (6th Cir. 2022) (same result as to “the actual, constructive, or attempted transfer” of a controlled substance in violation of Mich. Comp. Laws § 333.7105(1)); *United States v. Wilkes*, 78 F.4th 272 (6th Cir. 2023) (§ 33.7401 qualifies as an ACCA serious drug offense; while Michigan bans cocaine and its “stereoisomers,” a term not seen in federal law, the term “geometric isomers” in the CSA includes the diastereomers of cocaine covered by the Michigan term), *supplemented*, -- F.4th --, 2025 WL 972623 (6th Cir. Apr. 1, 2025)

- *United States v. Wadena*, 895 F.3d 1075 (8th Cir. 2018) (**Minnesota** conviction for possession with intent to sell in the fourth degree, Minn. Stat. § 152.024(2) (2), was a serious drug offense under ACCA)
- *United States v. Block*, 935 F.3d 655 (8th Cir. 2019) (per curiam) (applying *United States v. Bynum*, 669 F.3d 880, 887 (8th Cir. 2012), which held that **Minnesota** offenses of selling a narcotic drug in violation of Minn. Stat. § 152.023, subdiv. 1(1) (third degree) and selling a controlled substance in violation of § 152.024, subdiv. 1 (fourth degree) are ACCA serious drug offenses, in determining that a similar Texas offense also qualifies; even an “offer to sell” is an offense “involving” drug distribution under ACCA)
- *Bannister v. Barr*, 960 F.3d 492, 494 (8th Cir. 2020) (**Minnesota** fifth-degree possession statute, Minn. Stat. § 152.025, subd. 2(a), is divisible by type of substance)

- *United States v. Owen*, 51 F.4th 292 (8th Cir. 2022) (**Minnesota** third-degree drug-sale statute, Minn. Stat. § 152.023, subd. 1(1), with respect to cocaine, does not qualify as an ACCA serious drug offense, as the state includes every isomer of cocaine within the definition of cocaine, and federal law criminalizes only optical and geometric isomers)
- *United States v. Heard*, 62 F.4th 1109 (8th Cir. 2023) (prior to 2011, the **Minnesota** statute addressing MDMA distribution, Minn. Stat. § 152.02(2)(3), reached any isomer, and was thus overbroad and did not qualify as an ACCA “serious drug offense,” as the federal definition of MDMA only reached “optical, positional, or geometric” isomers)
- *United States v. Hill*, 912 F.3d 1135 (8th Cir. 2019) (**Missouri** statute, Mo. Rev. Stat. § 195.211.1 (1989), which criminalized the distribution, delivery, manufacture, or production of a controlled substance, and applies to an “offer” as well, is a serious drug offense under ACCA because it is a crime “involving” the distribution of drugs); *United States v. Jones*, 934 F.3d 842 (8th Cir. 2019) (same); *United States v. Young*, 6 F.4th 804, 810 (8th Cir. 2021) (**Missouri** distribution of cocaine base in violation of Mo. Rev. Stat § 195.211 (1989) is an ACCA serious drug offense)
- *United States v. Thomas*, 886 F.3d 1274 (8th Cir. 2018) (**Missouri** offenses of sale of a controlled substance, Mo. Stat. § 195.211.3, and possession with intent to deliver an imitation controlled substance, § 195.242.1, are controlled substance offenses under § 4B1.2(b); each requires more than a mere offer to sell); *United States v. Reid*, 887 F.3d 4341 (8th Cir. 2018) (same decision with regard to attempted possession of a controlled substance with intent to deliver not more than five grams of marijuana, and delivery of not more than five grams of marijuana, both in violation of Mo. Stat. § 195.211); *United States v. McDaniel*, 925 F.3d 381, 388–89 (8th Cir. 2019) (same conclusion with regard to ACCA)
- *United States v. Myers*, 56 F.4th 595 (8th Cir. 2022) (**Missouri** sale of cocaine, Mo. Rev. Stat. § 195.211, is not an ACCA serious drug felony, as the state definition of cocaine is overbroad; the federal definition includes only optical and geometric isomers, while the state definition includes positional isomers as well)
- *United States v. House*, 31 F.4th 745, 750–53 (9th Cir. 2022) (a conviction under Mont. Code § 45–9–103 for criminal possession of marijuana with intent to distribute is not a 4B1.2(b) controlled substance offense because the state crime reaches hemp and federal law does not)

- *United States v. House*, 31 F.4th 745, 753 (9th Cir. 2022) (the court did not commit plain error in holding that a conviction under Mont. Code §§ 45–2–302 and 45–9–101 for criminal distribution of cocaine was a 4B1.2 controlled substance offense, despite the fact that [<sup>123</sup>I]ioflupane was removed from the list of schedule II substances)
- *United States v. Maldonado*, 864 F.3d 893 (8th Cir. 2017) (**Nebraska** conviction for criminal attempt to conspire to distribute methamphetamine, Neb. Rev. Stat. § 28–401(9), was controlled substance offense under § 4B1.2; did not extend to “offer to sell”)
- *United States v. Figueroa–Beltran*, 995 F.3d 724 (9th Cir. 2021) (on certification, the **Nevada** Supreme Court held that felony possession of a controlled substance with intent to sell, in violation of Nev. Rev. St. § 453.337, is divisible by identity of the controlled substance, and thus an offense involving cocaine is a “drug trafficking offense” under the 2015 version of § 2L1.2)
- *United States v. Davis*, 33 F.4th 1236 (9th Cir. 2022) (the government concedes that a 2011 **Nevada** conviction for possession with intent to sell marijuana in violation of Nev. Rev. St. § 453.337 is not a 4B1.2 “controlled substance offense,” because under *Bautista* the statute is overbroad in including hemp)
- *United States v. Burghardt*, 939 F.3d 397, 406–09 (1st Cir. 2019) (dealing a controlled substance under **New Hampshire** law, N.H. Rev. Stat. § 318–B:2(I), is an ACCA serious drug offense)
- *United States v. Aviles*, 938 F.3d 503, 512–14 (3d Cir. 2019) (a **New Jersey** conviction for operation of a controlled substance production facility in violation of N.J. Stat. § 2C:35–4 is not a “felony drug offense” under 21 U.S.C. § 802(44), as it reaches a substance that is not covered by the federal definition, and under the categorical approach the state law is not divisible)
- *United States v. Lewis*, 58 F.4th 764 (3d Cir. 2023) (in § 4B1.2, “controlled substance” is defined by either state or federal law, and the applicable definition is that in effect at the time of the prior conviction; accordingly, a 2012 **New Jersey** conviction for possession with intent to distribute marijuana in violation of N.J. Stat. § 2C:35–5 qualifies as a “controlled substance offense,” even though the state defined marijuana at the time to include hemp and no longer does so)

- *United States v. Davis*, 873 F.3d 343 (1st Cir. 2017) (New York sale of a controlled substance under N.Y. Penal Law § 220.31, and attempted criminal sale of a controlled substance under N.Y. Penal Law § 110 (which includes an offer to sell), are “controlled substance offenses” under § 4B1.2) *contra United States v. Townsend*, 897 F.3d. 66, 74 (2d Cir. 2018) (the New York statute regarding sale of a controlled substance, N.Y. Penal Law § 220.31, is not divisible, and does not qualify as a § 4B1.2 “controlled substance offense” because it prohibits the sale of HCG, which was not controlled under the federal Controlled Substances Act); *see also United States v. Thompson*, 961 F.3d 545 (2d Cir. 2020) (New York attempted sale of a controlled substance in the fifth degree, N.Y. Penal Law § 220.31, is not a “felony drug offense” under 21 U.S.C. §§ 802(44) and 841(b)(1) because the state statute applies to hCG, a pregnancy hormone that is not listed in § 802(44); even if some take that drug along with anabolic steroids, this does not bring the substance within the “relating to” provision: “‘Relating to’ links ‘conduct’ to ‘narcotics drugs, marihuana, anabolic steroids, or depressant or stimulant substances.’” “‘Relating to’ does not link other non-controlled substances or compounds to the forgoing enumerated classes of drugs.”)
- *United States v. Wallace*, 937 F.3d 130, 142–43 (2d Cir. 2019) (a New York conviction for attempted criminal sale of a controlled substance in the third degree, N.Y. Penal Law § 220.39, is an ACCA serious drug offense, even if the crime includes only an attempt to “offer or agree” to sell a narcotic drug, as it is a crime “involving” distribution); *United States v. Ojeda*, 951 F.3d 66, 73–76 (2d Cir. 2020) (New York convictions for attempted sale of a controlled substance in the third degree, N.Y. Penal Law § 220.39, and attempted possession of a controlled substance with intent to sell in the third degree, § 220.16(1), are serious drug offenses under ACCA)
- *United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022), *petition for rehearing denied*, 60 F.4th 720 (2d Cir. 2023) (applying *Townsend*, and holding that the defendant’s 2002 conviction of third-degree attempted criminal sale of a controlled substance, N.Y. Penal Law §§ 220.39(1) and 110, was not a 4B1.2 predicate because New York’s controlled substances schedule included naloxegol, an opium alkaloid derivative, which was removed from the federal CSA in 2015; the fact that the schedules were the same at the time of the state offense is not relevant, as the comparison is made at the time of the federal crime (the court does not decide whether that date is that of the federal offense or of the federal sentencing))
- *United States v. Minter*, 80 F.4th 406 (2d Cir. 2023) (sale of cocaine, in violation of N.Y. Penal Law § 220.39, is not an ACCA “serious drug offense,” because

the **New York** definition of cocaine presents no limitation on the types of isomers it reached, and was thus categorically broader than the federal definition, which expressly limited itself to only optical and geometric isomers); *United States v. Chaires*, 88 F.4th 172 (2d Cir. 2023) (applying the same result under § 4B1.2)

- *United States v. Miller*, 75 F.4th 215, 227-30 (4th Cir. 2023) (**North Carolina** sale or delivery of a controlled substance, N.C. Gen. Stat. § 90-95(a)(1), is a 4B1.2 controlled substance offense; delivery requires an actual, constructive, or attempted transfer from one person to another, and is not a mere attempt statute)
- *United States v. Walker*, 858 F.3d 196 (4th Cir. 2017) (**Ohio** drug trafficking in violation of Ohio Rev. Code § 2925.03(A)(2) is a controlled substance offense under former § 2L1.2); *United States v. Smith*, 960 F.3d 883 (6th Cir. 2020) (same under § 4B1.2)
- *United States v. Godinez*, 955 F.3d 651 (7th Cir. 2020) (**Ohio** conviction for possession of cocaine, Ohio Rev. Code § 2925.11(C)(4)(f), is not a “serious drug offense” under ACCA, and therefore not a “serious drug felony” under § 841(b)(1), as it does not require proof of intent to manufacture or distribute; it is not an offense “involving” such conduct given that another state statute addresses trafficking)
- *United States v. Alston*, 976 F.3d 727 (6th Cir. 2020) (applying *Havis*, the court held that **Ohio** drug trafficking in violation of Ohio Rev. Code § 2925.03(A)(1), which criminalizes offers to sell drugs, does not qualify as a 4B1.2 controlled substance offense; the government concedes the point but preserves its objection); *United States v. Palos*, 978 F.3d 373, 374–75 (6th Cir. 2020) (same)
- *United States v. Cantu*, 964 F.3d 924 (10th Cir. 2020) (**Oklahoma** conviction for drug distribution, 63 Okla. Stat. § 2-401(A)(1), is not an ACCA “serious drug offense” because the statute is not divisible by type of drug and methamphetamine was in same category of drugs for punishment purposes as three Oklahoma controlled dangerous drugs that were not controlled substances under federal law); *but see United States v. Jones*, 15 F.4th 1288 (10th Cir. 2021) (this offense is a “controlled substance offense” under § 4B1.2)
- *United States v. Williams*, 48 F.4th 1125, 1139-45 (10th Cir. 2022) (prior **Oklahoma** convictions for possessing with intent to distribute a controlled dangerous substance in violation of Okla. Stat. tit. 63, § 2-401(A)(1), based on marijuana offenses, did not qualify as ACCA predicates, because by the time of

the federal gun offense hemp had been removed from the federal definition of marijuana and the state provision was then overbroad in relation)

- *United States v. Crum*, 934 F.3d 963 (9th Cir. 2019) (per curiam) (**Oregon** delivery of methamphetamine, [Or. Rev. Stat. § 475.890](#), is a 4B1.2 controlled substance offense; the guideline commentary encompasses solicitation and offering to sell, and while the panel agrees with recent Sixth and D.C. Circuit decisions that the commentary is invalid, it is bound by prior Circuit precedent)
- *United States v. Henderson*, 841 F.3d 623 (3d Cir. 2016) (**Pennsylvania** drug trafficking statute, [35 Pa. Cons. Stat. § 780–113\(f\)\(1\)](#), is divisible and qualifies as an ACCA serious drug offense)
- *United States v. Glass*, 904 F.3d 319 (3d Cir. 2018) (**Pennsylvania** drug distribution in violation of [35 Pa. Cons. Stat. § 780–113\(a\)\(30\)](#) qualifies as a “controlled substance offense” under the career offender guideline; assuming that a statute criminalizing a mere “offer to sell” is broader than the guideline definition, the Pennsylvania statute does not reach a mere offer); *United States v. Daniels*, 915 F.3d 148 (3d Cir. 2019) (same ruling under ACCA, adding that ACCA includes attempt offenses (and, the Court suggests, conspiracy offenses as well), and the Pennsylvania definition of attempt and accomplice liability is not broader than the federal definition for purposes of applying ACCA (as both definitions are based on the Model Penal Code)); *United States v. Dawson*, 32 F.4th 254 (3d Cir. 2022) (the Pennsylvania drug trafficking statute, [35 Pa. Stat. § 780–113\(a\)\(30\)](#), qualifies as a 4B1.2 “controlled substance offense”; the fact that, like the federal distribution crime, it reaches the “attempted transfer” of a controlled substance, does not alter that result); *United States v. Hurtt*, 105 F.4th 520, 525–26 (3d Cir. 2024)
- *United States v. Womack*, 55 F.4th 219, 236-40 (3d Cir. 2022) (the Pennsylvania drug distribution statute, [35 Pa. Stat. § 780-113\(a\)\(30\)](#), is not overbroad in relation to the 4B1.1 definition of “controlled substance offense”; the Court rejects the defendant’s argument that the state statute reaches “administering,” an act not covered in the guideline definition)
- *United States v. Brown*, 47 F.4th 147 (3d Cir. 2022) (prior **Pennsylvania** conviction for marijuana trafficking, [35 Pa. Stat. § 780-113\(a\)\(30\)](#), qualified as an ACCA serious drug offense; even though hemp was removed from the federal definition of marijuana in 2018, making the state definition now overbroad, the point of comparison is at the time of the federal gun offense; here, that was in 2016, when the federal and state definitions were the same)

- *United States v. Martinez-Benitez*, 914 F.3d 1 (1st Cir. 2019) (**Puerto Rico**) attempt/conspiracy to commit a controlled substance offense, in violation of **24 P.R. Laws § 2406**, is not a **4B1.2** controlled substance offense, where the sentencing document does not specify the crime the defendant attempted/conspired to commit, and the statute may apply to possession as well as distribution offenses)
- *United States v. Furlow*, 928 F.3d 311, 319–22 (4th Cir. 2019) (**South Carolina**) statute prohibiting distribution and purchase of methamphetamine or cocaine base, **S.C. Code § 44–53–375(B)**, was divisible, and the defendant's particular offense of distribution of cocaine qualified as an ACCA serious drug offense and a **4B1.2** controlled substance offense); *United States v. Williams*, 997 F.3d 519, 524–25 (4th Cir. 2021) (**South Carolina**) possession with intent to distribute crack cocaine, **S.C. Code § 44–53–375(B)**, is a **4B1.2** controlled substance offense; that is not defeated by the fact that state law allows a permissive inference that possession of more than one gram evinces an intent to distribute (as opposed to a rebuttable presumption, which would be problematic)); *United States v. Davis*, 75 F.4th 428, 442–45 (4th Cir. 2023) (distribution of cocaine base, which is a divisible offense in **S.C. Code § 44–53–375(B)**, is a **4B1.2** controlled substance offense; while the Fourth Circuit has held that attempt offenses do not qualify under the current guideline, an “attempted transfer” under this statute involves a completed distribution); *but see United States v. Hope*, 28 F.4th 487 (4th Cir. 2022) (**South Carolina**) drug trafficking in violation of **S.C. Code § 44–53–445** is not an ACCA “serious drug felony”; the state statute is not divisible by drug type and is therefore overbroad, as it addresses more controlled substances than the federal schedule; and even if it were divisible, the statute as to marijuana is overbroad as hemp was removed from the federal schedule in 2018, and the pertinent comparison is between the state statute as of the time of the offense (here 2013) and the federal definition as of the time of federal sentencing (here 2020))
- *United States v. Goldston*, 906 F.3d 390, 394–97 (6th Cir. 2018) (drug distribution in **Tennessee** in violation of **Tenn. Code § 39–17–417(a)(2)** is a serious drug offense under ACCA; its term “deliver” is not broader than the term “distribute” in the ACCA definition); *United States v. Miller*, 34 F.4th 500 (6th Cir. 2022) (the offense is also a **4B1.2** controlled substance offense, though this result was not applied in *United States v. Havis*, 927 F.3d 382 (6th Cir. 2019) (en banc) (per curiam); *Havis* was correct that an attempt offense is not a “controlled substance offense” under the current Guidelines, but the parties there incorrectly stipulated that “attempted transfer” as a type of distribution amounts to such an attempt offense)

- *United States v. Garth*, 965 F.3d 493 (6th Cir. 2020) (**Tennessee** possession of drugs with intent to deliver, Tenn. Code § 39–17–417(a)(4), is a 4B1.2 controlled substance offense; distinguishes *Havis*); *United States v. Coleman*, 977 F.3d 666 (8th Cir. 2020) (same)
- *United States v. Rockymore*, 909 F.3d 167 (6th Cir. 2018) (under the complex **Tennessee** sentencing guidelines, the defendant’s maximum sentence for delivery of cocaine convictions was six years and therefore the convictions did not qualify as serious drug offenses under ACCA)
- *United States v. Eason*, 919 F.3d 385 (6th Cir. 2019) (**Tennessee** offense of purchasing an ingredient that could be used to manufacture methamphetamine with a reckless disregard of its intended use is a crime “involving” the manufacture of a controlled substance and therefore qualifies as an ACCA serious drug offense)
- *United States v. Myers*, 925 F.3d 881 (6th Cir. 2019) (**Tennessee** conviction for initiation of a process intended to result in the manufacture of methamphetamine, Tenn. Code §§ 39–17–435, 40–35–111(b)(2), is an ACCA serious drug offense)
- *United States v. Cain*, 877 F.3d 562 (5th Cir. 2017) (per curiam) (**Texas** delivery offense under Tex. Health & Safety Code § 481.112(a) is a “serious drug offense” under ACCA); *United States v. Kerstetter*, 82 F.4th 437, 441 (5th Cir. 2023) (same; the court rejects the argument that the state law covers an isomer of cocaine not addressed in the federal schedule, as the defendant “did not identify any actual cases where Texas brought charges against someone under § 481.112(a) for delivery of position isomers of cocaine.”)
- *United States v. Prentice*, 956 F.3d 295 (5th Cir. 2020) (**Texas** offense of possessing controlled substance with intent to deliver, Tex. Health & Safety Code § 481.112, is an ACCA serious drug offense; even though it includes offers to sell, that is conduct “involving” distribution of controlled substances as interpreted in *Shular*); *United States v. Block*, 935 F.3d 655 (8th Cir. 2019) (per curiam) (same)
- *United States v. Tanksley*, 848 F.3d 347 (5th Cir. 2017) (**Texas** offense of possession with intent to deliver a controlled substance, Tex. Health & Safety Code § 481.112(a), is indivisible and prohibits “mere delivery,” and therefore does not qualify as a controlled substance offense under § 4B1.2); *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016) (same decision on grounds that statute

applies to “offer to sell”); *United States v. Cavazos*, 950 F.3d 329 (6th Cir. 2020) (same); *United States v. Campos*, 79 F.4th 903, 910-14 (8th Cir. 2023) (same)

- *United States v. Babcock*, 40 F.4th 1172 (10th Cir. 2022) (**Utah** drug trafficking, Utah Code § 58-37-8(1)(a)(ii), is a 4B1.2 “controlled substance offense”; an “offer to sell” in violation of the statute is an attempt that falls within the guideline definition)
- *United States v. Vanoy*, 957 F.3d 865 (8th Cir. 2020) (**Virginia** prohibition of possession with intent to manufacture, sell, give, or distribute a controlled substance, Va. Code Ann. § 18.2–248, is divisible by the type of controlled substance, and an offense involving cocaine qualifies as a serious drug offense under ACCA); *United States v. Stancil*, 4 F.4th 1193 (11th Cir. 2021) (the court agrees that § 18.2–248 is an ACCA serious drug offense; the fact that it may be violated by “giving” a drug without remuneration does not defeat that conclusion)
- *United States v. Ward*, 972 F.3d 364 (4th Cir. 2020) (for purposes of § 4B1.2, the “controlled substances” covered under the state law of conviction need not be coextensive with those listed in the federal Controlled Substances Act; **Virginia** conviction for possession with the intent to distribute heroin, Va. Code § 18.2–248, is a 4B1.2 controlled substance offense)
- *United States v. Brown*, 879 F.3d 1043 (9th Cir. 2018) (**Washington** conviction for conspiracy to distribute methamphetamine, Wash. Rev. Code §§ 9A.04.010(2), 9A.28.040(2)(f), 69.50.401(1), 69.50.407, was not categorically a controlled substance offense under § 4B1.2(b) because the Washington conspiracy statute allowed for a conspiracy conviction when the only other party was a law enforcement officer or informant who did not actually intend to take part in the conspiracy)
- *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018) (because the **Washington** state accomplice liability statute is broader than the generic definition, no offense of unlawful delivery of a controlled substance, Wash. Rev. Code § 69.50.401, may qualify as an ACCA serious drug offense”). *But see United States v. Door*, 917 F.3d 1146, 1152–53 (9th Cir. 2019) (the court suggests that because of the breadth of Washington’s aiding-and-abetting provision, no state offense may qualify under the § 4B1.2 enumerated offenses provision, but holds that this rule does not apply to application of the elements clause); *Amaya v. Garland*, 15 F.4th 976, 982–86 (9th Cir. 2021) (the court confirms that for purposes of application of the elements clause, the scope of accomplice liability in Washington (general intent) does not disqualify every

state offense; the decision in *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), addressed only assessment of an enumerated offense); *Alfred v. Garland*, 64 F.4th 1025 (9th Cir. 2023) (the court overrules both *Valdivia-Flores* and *Franklin* as to the treatment of accomplice liability in Washington)

- *United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022) (the commentary to § 4B1.2 that adds inchoate offenses to the definition of a “controlled substance offense” is invalid, and therefore a **West Virginia** conviction for delivery of crack cocaine in violation of a statute that criminalizes attempt offenses, *W. Va. Code §§ 60A-1-101(h), 60A-4-401(a)*, is not a career offender predicate); appears to abrogate *United States v. Dozier*, 848 F.3d 180 (4th Cir. 2017)
- *United States v. Jefferson*, 975 F.3d 700, 707 (8th Cir. 2020) (**Wisconsin** conviction for possessing with intent to distribute cocaine, Wis. Stat. § 961.41(1m), was predicate 4B1.2 “controlled substance offense”; the term “delivery” was not overbroad)
- *United States v. Turner*, 47 F.4th 509 (7th Cir. 2022) (**Wisconsin** offense of trafficking cocaine, Wis. Stat. §§ 961.41(1)(cm), is an ACCA serious drug offense; while the state offense applies to (1) narcotic analogs of cocaine and (2) esters and salts of esters of cocaine, the first is subsumed in the federal definition of a controlled substance analogue, and the second involves a factual impossibility)

## IX. Residual Clause

### A. ACCA Residual Clause

In *Johnson v. United States*, 576 U.S. 591 (2015), the Supreme Court held that the “residual clause” of the “violent felony” definition in ACCA—“or otherwise involves conduct that presents a serious potential risk of physical injury to another”—is unconstitutionally vague and therefore void. The majority concluded “the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges.” *Id.* at 597. Therefore, no prior conviction may qualify as a predicate conviction under this provision; a “violent felony” must instead qualify under the elements clause or the enumerated offenses clause. The Court explicitly noted that its decision “does not call into question application of the [ACCA] to . . . the remainder of the Act’s definition of a violent felony,” including a felony offense that “has as an element the use, attempted use, or threatened use of physical force against the person of another,” 18 U.S.C. § 924(e)(2)(B)(i), and a felony offense that “is burglary, arson, or extortion, [or] involves

use of explosives,” 18 U.S.C. § 924(e)(2)(B)(ii). 576 U.S. at 606. *Johnson* also does not affect ACCA’s definition of “serious drug offense.” 18 U.S.C. § 924(e)(2)(A).

Previously, the Supreme Court endeavored in a number of decisions to apply the residual clause, as did lower courts, addressing such offenses as attempted burglary, *James v. United States*, 550 U.S. 192 (2007); driving under the influence, *Begay v. United States*, 553 U.S. 137 (2008); failure to report to a penal institution, *Chambers v. United States*, 555 U.S. 122 (2009); and vehicular flight from a law enforcement officer, *Sykes v. United States*, 564 U.S. 1 (2011). All of those decisions are now inoperative.

## B. § 924(c) Residual Clause

In *Sessions v. Dimaya*, 584 U.S. 148 (2018), the Court invalidated the residual clause in § 16 (b), determining that the same analysis presented in *Johnson* applied. Next, in *United States v. Davis*, 588 U.S. 445 (2019), the Court reached the same determination regarding the residual clause in § 924(c)(3)(B). In *Davis*, the government argued that the 924(c) residual clause should be interpreted to require a case-specific assessment of whether the defendant’s particular conduct presented a risk of the use of physical force. The Supreme Court disagreed, ruling that the categorical approach applies, and the statute is unduly vague in describing the categorical offenses at issue.

In light of *Davis*, the government must rely on the elements clause of the crime-of-violence definition in § 924(c)(3)(A) to establish a predicate offense as a crime of violence.

The decision in *Davis* was consistent with earlier holdings in *United States v. Simms*, 914 F.3d 229 (4th Cir. 2019); *United States v. Salas*, 889 F.3d 681 (10th Cir. 2018); and *United States v. Eshetu*, 898 F.3d 36 (D.C. Cir. 2018) (per curiam), all of which denied the government’s argument regarding the residual clause. *Davis* overturned decisions that agreed with the government’s position: *United States v. Douglas*, 907 F.3d 1 (1st Cir. 2018); *United States v. Barrett*, 903 F.3d 166 (2d Cir. 2018); and *Ovalles v. United States*, 905 F.3d 1231 (11th Cir. 2018) (en banc).

*Davis* resulted in a great number of challenges to past convictions under section 924(c) and other provisions. The *Dimaya* page on DOJBook includes a memorandum from the Appellate Chiefs Working Group suggesting procedures, learned from experience in addressing past changes to sentencing law, for the efficient handling of such challenges in a U.S. Attorney’s Office. Also posted are form administrative orders

that the chief judge of a court may enter to facilitate the efficient handling of numerous motions, and [Excel spreadsheets](#) that a USAO may use to track multiple motions.

The Bail Reform Act also includes a definition of “crime of violence” that presents an elements clause and a residual clause that mirror those in [18 U.S.C. § 16](#). *See 18 U.S.C. § 3156(a)(4)*. The definition is pertinent in allowing a detention hearing under [§ 3142\(f\)\(1\)\(A\)](#). In *United States v. Watkins*, 940 F.3d 152 (2d Cir. 2019), the court held that the residual clause is valid and not subject to a vagueness challenge.

## C. Sentencing Guidelines Residual Clause

### 1. Advisory Guidelines

Prior to August 1, 2016, the career offender guideline definition of “crime of violence,” in [§ 4B1.2\(a\)](#), contained a residual clause identical to the ACCA clause invalidated in *Johnson*. However, on March 6, 2017, in *Beckles v. United States*, 580 U.S. 256 (2017), the Supreme Court held that the advisory Guidelines’ residual clause remains valid after *Johnson* because the advisory Guidelines, unlike ACCA, “do not fix the permissible range of sentences,” and thus “are not subject to a vagueness challenge under the Due Process Clause.” *Id.* at 263.

Effective August 1, 2016, the Guidelines were amended, removing the residual clause in the definition of “crime of violence.” However, the amendment was not made retroactive by the Sentencing Commission, and thus the application of the residual clause at sentencing prior to August 1, 2016, should be upheld on appeal or collateral review. *See, e.g., United States v. Wurie*, 867 F.3d 28 (1st Cir. 2017); *United States v. Jones*, 878 F.3d 10 (2d Cir. 2017) (first-degree robbery in violation of N.Y. Penal Law § 160.15 is crime of violence under the residual clause); *United States v. Smith*, 884 F.3d 437, 440–41 (2d Cir. 2018) (same ruling regarding second-degree robbery); *United States v. Thompson*, 874 F.3d 412 (4th Cir. 2017); *United States v. House*, 872 F.3d 748 (6th Cir. 2017); *United States v. Steward*, 880 F.3d 983 (8th Cir. 2018); *United States v. Adkins*, 883 F.3d 1207, 1211–13 (9th Cir. 2018) (lengthy discussion concluding that amendment was substantive, not clarifying); *United States v. Martin*, 864 F.3d 1281 (11th Cir. 2017). *See also United States v. Jackson*, 901 F.3d 706 (6th Cir. 2018) (the Guidelines residual clause remains applicable where a matter was remanded for resentencing based on a violation of law; in such a situation, the manual applied at the original sentencing proceeding is applied). The Department’s *Beckles Guidance* explains that pre-*Johnson* case law addressing the residual clause continues to apply in these cases. The application of the residual clause, as of July 26, 2013, is addressed at length in the *Descamps Guidance* issued on that date, at pages 7–12.

The same rule should apply to application of the holding in *Dimaya* that the 18 U.S.C. § 16(b) residual clause is void. Under *Beckles*, that ruling should not apply in situations where Section 16(b) was incorporated into an advisory guideline. *United States v. Godoy*, 890 F.3d 531, 537–40 (5th Cir. 2018) (§ 16(b) remains a viable source of defining aggravated felonies under the 2015 version of § 2L1.2(b)(1)(C)); *United States v. Sanchez-Rojas*, 889 F.3d 950 (8th Cir. 2018) (the decision in *Dimaya* regarding the 18 U.S.C. § 16(b) residual clause is inapplicable to the former advisory guideline for illegal reentry, § 2L1.2).

## 2. Mandatory Guidelines

Habeas challenges remain pending to the application of the 4B1.2 residual clause at the time, prior to the *Booker* decision in 2005, that the Guidelines were mandatory. In its *Beckles Guidance*, the Department states the position that mandatory Guidelines as well as the advisory Guidelines addressed in *Beckles* are not subject to a vagueness challenge, adding, “Prosecutors should raise applicable affirmative defenses to § 2255 motions challenging Guidelines sentences imposed pre-*Booker*. Those defenses include non-retroactivity, timeliness, and procedural default, as well as collateral review waivers.” The Guidance provides pertinent arguments, which other offices have updated based on decided cases.

In *Moore v. United States*, 871 F.3d 72 (1st Cir. 2017), and *In re Hoffner*, 870 F.3d 301 (3d Cir. 2018), the courts decided that petitioners made a sufficient prima facie showing to allow the filing of a second or successive 2255 motion challenging the application of the mandatory career offender guideline. However, the claims have thus far not fared well on the merits, with most courts (including the Third Circuit, after *Hoffner*) denying habeas relief on the grounds that *Johnson* was limited to invalidation of the ACCA residual clause, and the Supreme Court has not announced any “new rule” finding that the mandatory guideline was unconstitutionally vague. *Nunez v. United States*, 954 F.3d 465 (2d Cir. 2020); *United States v. Green*, 898 F.3d 315 (3d Cir. 2018) (a challenge based on *Johnson* to the mandatory application of the career offender guideline is untimely, as the Supreme Court has not recognized that the mandatory Guidelines are subject to a vagueness challenge, and therefore 28 U.S.C. § 2255(f)(3), permitting a filing within one year of the Supreme Court’s recognition of a new right, does not apply); *United States v. Brown*, 868 F.3d 297, 302–03 (4th Cir. 2017); *United States v. London*, 937 F.3d 502 (5th Cir. 2019); *Raybon v. United States*, 867 F.3d 625, 630 (6th Cir. 2017); *Russo v. United States*, 902 F.3d 880 (8th Cir. 2018); *United States v. Blackstone*, 903 F.3d 1020 (9th Cir. 2018); *United States v. Pullen*, 913 F.3d 1270 (10th Cir. 2019); *United States v. Greer*, 881 F.3d 1241 (10th Cir. 2018). See also *United States v. Hoffner*, 289 F. Supp. 3d 658 (E.D. Pa. 2018) (following approval by the Third Circuit of the filing of the successive motion, the district court dismisses it as untimely). In contrast, in *Cross v. United States*, 892 F.3d 288 (7th Cir. 2018), the court disagreed with the government on all points, holding that the residual clause in

the mandatory guideline is unconstitutionally vague, *id.* at 299–306, that this is a substantive rule that applies retroactively on collateral review, *id.* at 306, and that a challenge to the application of the residual clause in the mandatory guideline, brought within one year of *Johnson*, is timely, and not a matter of procedural default, *id.* at 294–97. But see *Sotelo v. United States*, 922 F.3d 848 (7th Cir. 2019) (Cross does not apply where the court at the original sentencing explicitly relied on the elements clause; a challenge to that determination is untimely as *Mathis* does not apply retroactively on collateral review). In *Shea v. United States*, 976 F.3d 63 (1st Cir. 2020), and *United States v. Arrington*, 4 F.4th 162 (D.C. Cir. 2021), the courts likewise held that a defendant may maintain a post-*Johnson* 2255 challenge to the application of the residual clause in the mandatory career offender provision.

On October 15, 2018, the Supreme Court denied ten certiorari petitions presenting vagueness challenges to the formerly mandatory Sentencing Guidelines. Justice Sotomayor, joined by Justice Ginsburg, dissented, noting that the Court specifically left this question open in *Beckles* and that this batch of petitions is likely the Court’s last best chance to answer it, due to Section 2255’s time limits.

## X. Other ACCA Issues: Separate Occasions and Juvenile Offenses

The categorical approach applies to ACCA in other respects.

1. To qualify as separate countable offenses under ACCA, offenses must have been “committed on occasions different from one another.” See 18 U.S.C. § 924(e)(1). The Supreme Court has held that this invites a “multi-factored” assessment, *Wooden v. United States*, 595 U.S. 360, 369 (2022), that must be determined by a jury beyond a reasonable doubt, *Erlinger v. United States*, 144 S. Ct. 1840 (2024). When applying ACCA, the court itself may only determine the date of the prior offense, the fact of the conviction, and the categorical question whether the crime presents elements meeting the ACCA definition. In answering those questions, the court is limited to consulting *Shepard* document, such as “judicial records, plea agreements, and colloquies between a judge and the defendant.” *Id.* at 1844. “None of that, however, means that a court may use *Shepard* documents or any other materials for any other purpose. To ensure compliance with the Fifth and Sixth Amendments, a sentencing judge may use the information he gleans from *Shepard* documents for the ‘limited function’ of determining the fact of a prior conviction and the then-existing elements of that offense.” *Id.*

An error in not submitting the different-occasions question to the jury is subject to review for harmless error. *United States v. Campbell*, 122 F.4th 624, 629-33 (6th Cir. 2024) (here, any error in not submitting the issue to the jury was harmless as the defendant’s three prior drug offenses were committed months apart and hundreds of

miles away from each other, such that a jury would have found the different-occasions requirement met).

2. The ACCA specifically states that some juvenile adjudications can meet the first “violent felony” prong. To do so, the juvenile adjudication must (1) involve “the use or carrying of a firearm, knife, or destructive device” and (2) be a crime that would be punishable by more than one year of imprisonment if committed by an adult. See [18 U.S.C. § 924\(e\)\(2\)\(B\)](#); *see also* [18 U.S.C. § 924\(e\)\(2\)\(C\)](#) (“[T]he term ‘conviction’ includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.”). The offense must then also qualify as a “violent felony” under either the elements clause or the enumerated clause.

Like adult convictions, courts must use a “categorical approach” in determining whether a juvenile adjudication meets the requirements. Thus, the statute at issue must necessarily require proof of the use or carrying of a firearm, knife, or destructive device as an element of the offense. See [United States v. Rosa](#), 507 F.3d 142, 157–59 (2d Cir. 2007); [United States v. Richardson](#), 313 F.3d 121, 126–28 (3d Cir. 2002); [United States v. Flores](#), 922 F.3d 681 (5th Cir. 2019) (the government conceded, and the court agreed, that the categorical approach applies to the requirement under ACCA that any juvenile predicate must involve use or carrying of a knife, firearm, or destructive device; and that Texas aggravated assault, [Tex. Penal Code § 22.02\(a\)](#), is overbroad in that respect, as a deadly weapon under Texas law could be anything, including a hand or foot); [United States v. Wells](#), 473 F.3d 640, 645–46 (6th Cir. 2007); [United States v. Kirkland](#), 450 F.3d 804, 806–08 (8th Cir. 2006); [United States v. Nevels](#), 490 F.3d 800, 808–09 (10th Cir. 2007); [United States v. Burge](#), 407 F.3d 1183, 1187 (11th Cir. 2005). *But see* [United States v. Sweeney](#), 821 F.3d 893, 904 (7th Cir. 2016) (stating that whether the categorical approach applies here is an open question in the Seventh Circuit). This subject is discussed in greater detail in [Section 7.9 of the Federal Firearms Manual](#).

## XI. Post-Conviction Litigation

### A. Availability of Collateral Relief

**ACCA challenges.** On April 18, 2016, the Supreme Court held that the rule in *Johnson*, invalidating the ACCA residual clause, was a substantive new rule that is retroactive on collateral review. [Welch v. United States](#), 578 U.S. 120 (2016).

Accordingly, in a timely motion filed within one year after *Johnson* was decided on June 26, 2015, a defendant may seek relief under [28 U.S.C. § 2255](#) from a sentence that rested on the ACCA residual clause, either in a first or second petition under [§ 2255](#). See [Cravens v. United States](#), 894 F.3d. 891 (8th Cir. 2018) (a defendant is entitled to habeas relief where the sentence violated ACCA, and even though the court could have imposed the same sentence by imposing consecutive terms on multiple

counts, it is unlikely that it would have done so; distinguishing *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) (en banc), which held that habeas relief is not available in the career offender context, as the original sentence there did not exceed the statutory maximum on any count).

*Mathis* also applies retroactively on collateral review, but may only be raised in an initial 2255 motion. See, e.g., *Mays v. United States*, 817 F.3d 728, 734 (11th Cir. 2016) (allowing initial petition). Because a successive 2255 motion must rest on a new rule of constitutional law, that remedy is not available for application of *Descamps* or *Mathis*, which are decisions of statutory construction. Thus, where the defendant’s ACCA sentence did not rest on the invalidated residual clause, but instead on an application of the modified categorical approach under the elements or enumerated clause that is called into question by *Descamps* or *Mathis*, the government should oppose a successive 2255 motion. A number of courts agree that such claims are not permitted. *In re Conzelmann*, 872 F.3d 375 (6th Cir. 2017); *Holt v. United States*, 843 F.3d 720 (7th Cir. 2016); *Winarske v. United States*, 913 F.3d 765 (8th Cir. 2019) (a claim based on *Mathis* is not retroactive and may not be presented in successive petition); *Ezell v. United States*, 778 F.3d 762, 766–67 (9th Cir. 2015); *In re Griffin*, 823 F.3d 1350, 1356 (11th Cir. 2016). See *United States v. Peppers*, 899 F.3d 211, 228–30 (3d Cir. 2018) (discussing this issue at length in the context of a second or successive 2255 motion, and holding that where a *Johnson* challenge is permissible because the original sentence “may” have rested on the residual clause, the court may then consider all post-*Johnson* decisions in determining whether the defendant meets his burden to show the ACCA sentence was invalid).

The Department directs that “prosecutors should affirmatively waive the statute of limitations defense in cases where the defendant is ineligible for an ACCA sentence in light of *Johnson*.” *Mathis Guidance* at page 23 (Sept. 7, 2016). Further,

If, after making an independent assessment, a prosecutor concludes that the defendant is not eligible for the ACCA enhancement under current law, then the government should affirmatively and explicitly waive all procedural bars (timeliness, claim preservation, collateral-review waivers) and agree that the defendant is entitled to Section 2255 relief (which, in cases where the defendant has already served more than 10 years in prison, would include an order granting immediate release).

*Id.*

The Department’s position is that, to obtain habeas relief under *Johnson*, the defendant has the burden to show that that the sentence rested on the residual clause, and if there is any doubt, the petition should be denied. The appellate courts have taken

different positions on this issue. The decisions generally fall into two camps, though the explanations vary widely.

These courts hold that a motion is allowed if the ACCA sentence “may have” relied on the residual clause: *United States v. Peppers*, 899 F.3d 211, 220–24 (3d Cir. 2018) (stating that no relief would be available “where the record is clear that a defendant was not sentenced under the residual clause, either because the sentencing judge said another clause applied or because the evidence provides clear proof that the residual clause was not implicated”, but stating that the burden at the merits stage rests on the movant to show by a preponderance of the evidence that the sentence rested on the residual clause, *id.* at 235 n.21); *United States v. Winston*, 850 F.3d 677, 682 (4th Cir. 2017); *United States v. Geozos*, 870 F.3d 890, 895 (9th Cir. 2017).

These courts hold that a motion is allowed only if it is “more likely than not” that the ACCA sentence relied on the residual clause: *United States v. Dimott*, 881 F.3d 232, 240–43 (1st Cir. 2018) (stating, “a mere possibility is insufficient”); *United States v. Clay*, 921 F.3d 550 (5th Cir. 2019); *Williams v. United States*, 927 F.3d 427 (6th Cir. 2019); *Walker v. United States*, 900 F.3d 1012 (8th Cir. 2018); *United States v. Driscoll*, 892 F.3d 1127 (10th Cir. 2018); *Beeman v. United States*, 871 F.3d 1215, 1221–22 (11th Cir. 2017); *United States v. West*, 64 F.4th 1335 (D.C. Cir. 2023). See also 899 F.3d 1218 (11th Cir. 2018) (order denying rehearing en banc in *Beeman*, with lengthy competing statements outlining the debate); but see *Santos v. United States*, 982 F.3d 1303 (11th Cir. 2020) (applying *Beeman*); *Williams v. United States*, 985 F.3d 813, 820–21 (11th Cir. 2021) (same); *Pitts v. United States*, 4 F.4th 1109 (11th Cir. 2021) (same). In *Walker*, the Eighth Circuit stated that this is a factual question for the district court, which may consider, in part, “the relevant background legal environment” at the time of sentencing. See also *United States v. Copeland*, 921 F.3d 1233 (10th Cir. 2019) (exhaustive discussion of method of determining whether the court earlier relied on the residual clause); *Williams v. United States*, 927 F.3d 427, 439–45 (6th Cir. 2019) (another exhaustive discussion, explaining that courts may look at the sentencing record, the legal background, informed decisionmakers (like the sentencing judge), the nature of the predicate offense, and subsequent legal developments); *Weeks v. United States*, 930 F.3d 1263 (11th Cir. 2019) (where a claimant challenged his ACCA enhancement on direct appeal, the relevant time frame to consider when determining whether the residual clause solely caused the enhancement of a claimant’s sentence extends through direct appeal). See also *Fernandez v. United States*, 114 F.4th 1170 (11th Cir. 2024) (applying *Beeman* to a 924(c) challenge, and holding that even though both 924(c) predicates (conspiracy and attempted Hobbs Act robbery) are invalid under current law, the defendant cannot obtain relief as he does not show that the court relied on the invalidated residual clause).

The position of other courts remains unclear. See *Massey v. United States*, 895 F.3d 248 (2d Cir. 2018) (denying relief where the record unequivocally showed that the

sentencing court originally relied on the elements clause, not the residual clause). See also *United States v. Lewis*, 904 F.3d 867 (10th Cir. 2018) (the defendant failed to meet his burden to show that his original sentence relied on the invalidated residual clause, where the background legal environment at the time of sentencing in 2010 held that Kansas burglary qualified under the enumerated clause and *Mathis* had not yet been decided); *Martin v. United States*, 904 F.3d 594 (8th Cir. 2018) (a claim that relies on *Mathis* may not be presented in a successive 2255 motion).

Note that a particular issue that may arise is where a statute is divisible and presents at least one part that qualifies as a predicate and one part that does not, and the *Shepard* documents do not make clear which was the basis of the conviction. In a criminal prosecution, the government would have the burden to prove the basis of the conviction, and would in this situation fail to establish a predicate. But on habeas review, it may be argued that the burden falls on the defendant, see, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 468–469 (1938) (the habeas petitioner bears the burden of proof), such that relief in this situation should be denied. The Supreme Court so held in the immigration context, in *Pereida v. Wilkinson*, 592 U.S. 224 (2021), holding that application of the burden is decisive in application of the categorical approach in this situation. The Court stated:

Mr. Pereida is right that, when asking whether a state conviction triggers a federal consequence, courts applying the categorical approach often presume that a conviction rests on nothing more than the minimum conduct required to secure a conviction. But Mr. Pereida neglects to acknowledge that this presumption cannot answer the question *which* crime the defendant was convicted of committing. To answer that question, parties and judges must consult evidence. And where, as here, the alien bears the burden of proof and was convicted under a divisible statute containing some crimes that qualify as crimes of moral turpitude, the alien must prove that his actual, historical offense of conviction isn't among them.

*Id.* at 236. The government may argue that this rule applies in habeas matters. As *Pereida* recognized, the same categorical approach was developed in criminal law matters, before being exported to certain immigration provisions as well, *id.* at 233 (“The Court first discussed the categorical approach in the criminal context, but it has since migrated into our INA cases.”), and throughout the opinion the Court cited its criminal law decisions in explaining the categorical approach and the necessary inquiry. *Id.* at 238 (citing *Taylor v. United States*, 495 U.S. 575 (1990); *Mathis v. United States*, 579 U.S. 500 (2016); *Descamps v. United States*, 570 U.S. 254 (2013); *Shepard v. United States*, 544 U.S. 13 (2005)). The Supreme Court stated: “Really, this Court has never doubted that the who, what, when, and where of a conviction—and the very existence of a conviction in the first place—pose questions of fact. Nor have we questioned that, like any other fact, the party who bears the burden of proving these

facts bears the risks associated with failing to do so.” *Pereida*, 592 U.S. at 238-39. See *Borden Guidance Memo* at 18 (authorizing this burden argument, while adding, “Although the defendant bears the burden, prosecutors should produce any document in the government’s possession that would tend to indicate that the defendant’s claim has merit.”).

Presentation of a permissible *Johnson* 2255 claim does not permit consideration of other time-barred challenges to a sentence. *Hrobowski v. United States*, 904 F.3d 566 (7th Cir. 2018). See also *United States v. Hill*, 915 F.3d 669 (9th Cir. 2019) (2255 motion was properly denied where the defendant was sentenced under an 11(c)(1)(B) plea that specified that no ACCA enhancement was applied).

A prisoner may not use a successive 2255 motion to present a *Johnson* claim that was available to him and denied in his first 2255 motion. *Randolph v. United States*, 904 F.3d 962 (11th Cir. 2018). See also *Munoz v. United States*, 28 F.4th 973 (9th Cir. 2022) (*Davis* was decided while the defendant’s first 2255 motion was pending, and therefore it was not unavailable and may not now be the basis of a successive motion).

In opposing 2255 relief, the government is not barred from relying on ACCA predicates which it did not highlight at the original sentencing proceeding, but which the defendant admitted he incurred, to show that the defendant has a sufficient number of predicates notwithstanding invalidation of one or more. *Tribue v. United States*, 929 F.3d 1326 (11th Cir. 2019); *Dotson v. United States*, 949 F.3d 317 (7th Cir. 2020) (emphasizing that this result is permissible where the defendant himself had previously admitted the ACCA qualification of an additional conviction and thus had notice). See also *United States v. Sharp*, 21 F.4th 1282 (11th Cir. 2021) (where reliance on a particular conviction was barred by binding precedent at the time of sentencing, the government did not waive an objection by not raising it, and may appeal where the law changed within the time for appeal). In *United States v. Hodge*, 902 F.3d 420 (4th Cir. 2018) the court held that, in attempting to salvage an ACCA sentence on habeas review, the government may not advance a prior conviction that was not included in the original PSR to which the government did not object. But in *United States v. Rumley*, 952 F.3d 538, 544–47 (4th Cir. 2020), the court held that, at the resentencing that follows the grant of habeas relief, the government may rely on an additional conviction that is included in a new PSR in order to reinstate ACCA status. The court emphasized that what is required to rely on an additional conviction is full notice to the defendant and an opportunity to respond. See also *United States v. Benton*, 24 F.4th 309 (4th Cir. 2022) (applying *Hodge*); *United States v. Anderson*, 99 F.4th 1106, 1113–14 (7th Cir. 2024) (also declining to permit reliance on separate conviction where there was not “fair notice”); Cf. *United States v. Velez–Vargas*, 32 F.4th 12 (1st Cir. 2022) (under the facts of this case, the government may not advance on remand an alternative predicate basis for a finding of a “crime of violence” under the Guidelines).

In *United States v. Bentley*, 49 F.4th 275 (3d Cir. 2022), the Court discussed at length the Circuits’ various approaches on habeas review to the question whether the sentencing court relied on the invalid residual clause to find liability under ACCA. The Third Circuit concluded that a habeas court may consider any prior conviction that was mentioned during the criminal case as a possible predicate. That would not include a crime listed in the PSR but not described there as a possible predicate. Here, the PSR listed prior North Carolina offenses that qualify as “burglary” under ACCA as possible predicates; the Court concluded that they thus may have been considered by the sentencing court, and preclude habeas relief at this time.

Relief under Section 2255 may not necessarily result in a different sentence. See, e.g., *Troiano v. United States*, 918 F.3d 1082 (9th Cir. 2019) (upon resentencing an ACCA count following *Johnson* pursuant to § 2255, whether to resentence on unrelated counts is within the discretion of the court, and the court did not abuse its discretion here in not adjusting the sentence on the other counts such that the overall sentence remained the same). Further, a court may decline to reach a challenge entirely where the defendant is serving an unchallenged concurrent term as long or longer than the term on the challenged count. See, e.g., *Kassir v. United States*, 3 F.4th 556 (2d Cir. 2021) (declining to address challenge to one count as the defendant is serving concurrent life sentences on two other counts); *Al-'Owhali v. United States*, 36 F.4th 461 (2d Cir. 2022) (under the concurrent sentence doctrine, the court exercises its discretion to decline to review the merits of 924(c) challenge where the sentence on that count runs consecutively to unchallenged life sentences); *Duka v. United States*, 27 F.4th 189 (3d Cir. 2022) (permissible not to address challenge to consecutive 924(c) term where the defendant is serving an unchallenged life sentence on another count); *United States v. Charles*, 932 F.3d 153 (4th Cir. 2019) (the court did not abuse its discretion in declining, under the concurrent sentence doctrine, to entertain a *Johnson* challenge to a firearm sentence, where the defendant was subject to an intact concurrent sentence of the same length on other charges); *Oslund v. United States*, 944 F.3d 743 (8th Cir. 2019) (same).

**§ 16(b) challenges.** The Department agrees that the decision in *Dimaya*, which invalidated the residual clause in the 16(b) definition of “crime of violence,” applies retroactively on collateral review. Section 2255 petitions based on that decision may be filed within one year of the ruling, by April 17, 2019. But see *United States v. Vargas-Soto*, 35 F.4th 979 (5th Cir. 2022) (divided decision holding that a claim resting on *Dimaya* and the *Johnson* ruling that the residual clause was void for vagueness was available earlier and thus procedurally defaulted).

**§ 924(c) challenges.** Following *United States v. Davis*, 588 U.S. 445 (2019), there are numerous habeas challenges to 924(c) convictions. The Department has issued guidance on the pertinent issues.

In *United States v. Williams*, 897 F.3d 660 (5th Cir. 2018), the court approved the dismissal of a 2255 motion based on the argument that the 924(c) residual clause is invalid as untimely, because the court has not yet invalidated that clause and therefore the one-year period for filing a motion on this issue has not begun to run. Likewise, in *Brown v. United States*, 906 F.3d 159 (1st Cir. 2018), the court denied a successive 2255 challenge to a 924(c) conviction on the grounds that the Supreme Court had not applied *Johnson* to § 924(c).

Following *Davis*, courts held that petitioners may pursue a second or successive challenge to a 924(c) conviction. *In re Hammoud*, 931 F.3d 1032 (11th Cir. 2019) (the court authorizes a second or successive claim based on *Davis*, as it announced a new rule of constitutional law that is retroactively applicable to cases on collateral review, and the defendant establishes a prima facie case that the sentencing court relied only on the residual clause in holding that solicitation to commit murder is a 924(c) crime of violence); *In re Cannon*, 931 F.3d 1236 (11th Cir. 2019) (same authorization with regard to predicate of conspiracy to commit Hobbs Act robbery; no permission granted for challenges to substantive Hobbs Act, drug offenses, and carjacking crimes which remain crimes of violence under the elements clause; further holding that where a 924(c) charge rested on multiple predicates, the petitioner bears the burden of proving the likelihood that the jury based its verdict solely on an invalid predicate and not also on a valid predicate); *In re Matthews*, 296 F.3d (3d Cir. 2019) (authorizing wholesale petitions to file successive 2255 motions based on *Davis* in 924(c) crime-of-violence cases; the court does not inquire into the merits, such as whether it is already established that the defendant's 924(c) predicate qualifies as a crime of violence under the elements clause); *In re Graham*, 61 F.4th 433 (4th Cir. 2023) (a second or successive 2255 motion is permitted to challenge a 924(c) conviction predicated on attempted Hobbs Act robbery); *In re Franklin*, 950 F.3d 909 (6th Cir. 2020) (per curiam); *In re Mullins*, 942 F.3d 975 (10th Cir. 2019). See also *Hall v. United States*, 58 F.4th 55, 60-62 (2d Cir. 2023) (*Davis* is a new rule of substantive law that is retroactively applicable on collateral review); *Higgs v. Watson*, 984 F.3d 1235, 1239–40 (7th Cir. 2021) (*Davis* is a constitutional decision, which must be raised in a 2255 motion; therefore resort to § 2241 is not available); *Jones v. United States*, 39 F.4th 523 (8th Cir. 2022) (permitting 2255 motion based on *Davis* to challenge 924(c) conviction predicated on a conspiracy charge).

In *United States v. Jones*, 935 F.3d 266 (5th Cir. 2019), the Court held that where a 924(c) charge rested on both a valid and invalid predicate, review is for plain error, and the defendant must show a reasonable probability of a different verdict; that was established in *Jones* on the particular facts of the case. In *United States v. Brazier*, 933 F.3d 796 (7th Cir. 2019), the court held that where a 924(c) charge is vacated due to *Davis*, the court may revisit the entire sentencing “package” and determine whether to adjust the sentences on unchallenged counts in light of removal of the 924(c)

consecutive penalty. *See also United States v. Brown*, 26 F.4th 48, 59–64 (1st Cir. 2022) (lengthy discussion and citation of cases from all Circuits supporting view that after 924(c) charge is vacated, the court may resentence on all counts, even if the terms imposed on those other counts had already been served). The Department’s *Davis Guidance* contains extensive additional information on these subjects.

In *Kimbrough v. United States*, 71 F.4th 648 (6th Cir. 2023), the court held that counsel was not ineffective in failing to challenge a 924(j) charge predicated on attempted Hobbs Act robbery, by not foreseeing the *Taylor* decision, as “existing precedent did not ‘clearly foreshadow’ *Taylor*.<sup>10</sup>”

**Borden issues.** The Department has issued similar guidance regarding claims based on the 2021 decision in *Borden* that crimes committed with mens rea of recklessness do not qualify as violent offenses under an elements clause. *See Borden Guidance Memo* at 16–17. In brief, the Department recognizes that *Borden* applies retroactively on collateral review in initial 2255 motions, but it may not be asserted in a second or successive motion, or to challenge on collateral review a guidelines determination. *See Jones v. United States*, 36 F.4th 974 (9th Cir. 2022) (a successive motion cannot be based on *Borden*, which stated a new rule of statutory, not constitutional law).

**Other statutes.** In *United States v. Gatewood*, 979 F.3d 391 (6th Cir. 2020), the court held that a challenge to application of the “serious violent felony” provision of the three-strikes statute, 18 U.S.C. § 3559(c), was procedurally defaulted when brought by a defendant sentenced before the 2007 Supreme Court decision in *James v. United States*, 550 U.S. 192 (2007), that upheld a residual clause against a vagueness challenge (thus precluding such challenges until *James* was overruled). The court reasoned that a challenge to a residual clause was available before 2007 and thus defaulted if not presented, barring collateral relief now.

In *Jones v. United States*, 82 F.4th 1039 (11th Cir. 2023), the court held that a defendant may not challenge the three-strikes statute in a second or successive 2255 motion, as the Supreme Court has not yet declared the “residual clause” in that statute invalid.

**Guidelines challenges.** As explained earlier, *Beckles* foreclosed any challenge to the application of the residual clause in the former § 4B1.2, with respect to advisory guidelines, and litigation is ongoing with regard to such challenges to the mandatory career offender guideline. The Department’s position is that challenges to the mandatory guideline are also unavailing, for numerous procedural and substantive reasons. *See Part IX(C)(2)* of this monograph.

Defendants may also attempt to present § 2255 challenges to an advisory career offender determination based not on the invalidation of the residual clause, but on the assertion that new case law provides that an offense previously held to qualify under the elements or enumerated provisions no longer does. In *Snider v. United States*, 908 F.3d 183, 190–92 (6th Cir. 2018), the court held that such a non-constitutional challenge to application of the advisory career offender guideline may not be considered under § 2255; and an ineffectiveness challenge based on the error fails because counsel is not expected to forecast changes in the law (in that case, regarding treatment of burglary of a dwelling under the pre-2016 career offender guideline). The court observed that while other Circuits are divided on the issue whether habeas relief in this situation is available from application of the mandatory guidelines, none has afforded relief in the advisory guideline context. See *Hanson v. United States*, 941 F.3d 874 (7th Cir. 2019) (denying habeas relief in challenge to advisory career offender determination). But see *United States v. Winbush*, 922 F.3d 227 (4th Cir. 2019) (granting relief based on ineffective assistance of counsel; and further holding that where the government did not identify a robbery conviction to support a career offender enhancement at the time of sentencing, it cannot raise it to oppose § 2255 relief (based on ineffective assistance of counsel) now that one of the convictions supporting the original career offender designation has been determined to be infirm).

**Savings clause.** For many years, courts debated whether a defendant, who has exhausted his § 2255 opportunities, may obtain relief under 28 U.S.C. § 2241, based on the “savings clause” in § 2255, where a new statutory interpretation reveals that the defendant is not guilty of the offense of conviction. The Supreme Court resolved the issue in *Jones v. Hendrix*, 599 U.S. 465 (2023), holding that Section 2241 may not be employed in this manner. That precludes post-conviction relief from a conviction or sentence following an initial § 2255 motion, except in the very limited circumstances set forth in § 2255(h) (newly discovered evidence of innocence, or a new rule of constitutional law made retroactive by the Supreme Court). See, e.g., *Hogsett v. Lillard*, 72 F.4th 819 (7th Cir. 2023) (based on *Jones v. Hendrix*, affirming the denial of a 2241 motion seeking relief based on *Borden*).

*Jones v. Hendrix* abrogates decisions such as *United States v. Wheeler*, 886 F.3d 415 (4th Cir. 2018), *Hill v. Masters*, 836 F.3d 591 (6th Cir. 2016), *McCormick v. Butler*, 977 F.3d 521 (6th Cir. 2020), *Brown v. Caraway*, 719 F.3d 583 (7th Cir. 2013), *Beason v. Marske*, 926 F.3d 932 (7th Cir. 2019), and *Allen v. Ives*, 950 F.3d 1184 (9th Cir. 2020), which allowed various challenges under § 2241 to the treatment of predicate offenses under ACCA or the Guidelines.

## B. Overserved Time

In some situations, where a defendant obtains habeas relief based on *Johnson* or its progeny, it may be that the defendant has already served more time than the

statutory maximum, as affected by *Johnson* and its progeny, permits. For instance, if a defendant was convicted only under 18 U.S.C. § 922(g), and incorrectly sentenced under ACCA, the correct statutory maximum is 10 years' imprisonment, while the ACCA sentence was 15 years or longer. If the defendant has already served more than 10 years, he has "overserved time."

In this situation, per the [Department's February 12, 2018, guidance](#), at the time the defendant obtains habeas relief, prosecutors should urge the sentencing court to impose a new determinate sentence within the applicable statutory maximum; they should not seek a "time served" sentence if the defendant has already served more than the maximum. *See United States v. Nichols*, 897 F.3d 729 (6th Cir. 2018) (where the court vacated an ACCA sentence, a new sentence of "time served" was unlawful where the defendant had already served more than the statutory maximum for a § 922(g) offense, and would remain in custody on a consecutive sentence he was still serving for a narcotics offense committed while in prison; the court further holds that any new sentence imposed is subject to review for reasonableness).

The question of "overserved time" may also affect resolution of a later violation of supervised release. This issue may arise any time a defendant's new sentence, following habeas relief, could be less than the time he has already served (even if the time served is within the statutory maximum). If the court imposes a new sentence that is less than the actual time already served, the defendant has "overserved time." And the BOP will afford credit for that overserved time if the inmate is later sentenced to imprisonment based on a revocation of supervision resulting from the original sentence. *See BOP Program Statement 5880.28; Sentence Computation Manual (CCCA of 1984)*. *See also United States v. Ketter*, 908 F.3d 61 (4th Cir. 2018) (where the new range after the grant of 2255 relief was 27–33 months, and the defendant had served 90 months, any error in the imposition of a new term of "time served" was harmless where the court reduced the term of supervised release from five years to two years).

In a memorandum issued on November 10, 2016, the Criminal Chiefs Working Group provided the following suggestions for addressing this situation:

1. At any resentencing following a successful *Johnson* claim, ask the court to impose a sentence of time—served or its equivalent, if such a sentence is supported by the statutory maxima on the counts of conviction.
2. If the defendant has credit for overserved time and violates supervised release, ask the court to increase the sentence on the violation by the amount of any time BOP has credited for overserved time, based on Sentencing Guideline § 7B1.3(e).

3. If the defendant has such substantial credit for overserved time that it may exceed the maximum term of imprisonment for a revocation violation, (a) ask the court to impose a penalty for violation of supervised release on each count of conviction to run consecutively, *see United States v. Dees*, 467 F.3d 847, 851–52 (3d Cir. 2006) (approving and citing cases supporting this practice), and/or (b) if the basis of the violation of supervision is a new criminal offense, consider bringing separate charges against the defendant for that new criminal conduct if the facts and circumstances warrant it.

### C. Appellate Waiver

An appellate or collateral review waiver may apply to foreclose relief on a claim based on the Supreme Court's recent categorical approach decisions. *See, e.g., Remington v. United States*, 872 F.3d 72 (1st Cir. 2017) (applies appeal and collateral review waiver to foreclose *Johnson* ACCA claim in 2255 motion); *Cook v. United States*, 84 F.4th 118, 125 (2d Cir. 2023) (the court enforces collateral-review waivers against claims that 924(c) convictions were based on invalid predicates: “where the waiver itself is clear, unambiguous, knowingly and voluntarily entered, and supported by consideration – here, the government’s agreement not to pursue charges or arguments that could have resulted in a much higher sentence – the terms of the plea agreements must be enforced”); *Sanford v. United States*, 841 F.3d 578 (2d Cir. 2016) (enforcing collateral review waiver with respect to challenge to career offender sentence); *United States v. Barnes*, 953 F.3d 383 (5th Cir. 2020) (enforces collateral review waiver of *Johnson* challenge to ACCA enhancement); *Slusser v. United States*, 895 F.3d 437 (6th Cir. 2018) (enforcing appellate waiver and dismissing 2255 challenge to ACCA sentence); *Portis v. United States*, 33 F.4th 331 (6th Cir. 2022) (the court enforces a collateral review waiver to 924(c) convictions that were based on conspiracy to commit Hobbs Act robbery); *Oliver v. United States*, 951 F.3d 841 (7th Cir. 2020) (enforces collateral review waiver against claim that theft from a federally licensed firearms dealer, in violation of 18 U.S.C. § 922(u), is not a 924(c) crime of violence); *Plunkett v. Sproul*, 16 F.4th 248 (7th Cir. 2021) (enforcing collateral review waiver of challenge to career offender sentence; explaining that waiver is applicable notwithstanding changes in the law); *Davila v. United States*, 843 F.3d 729 (7th Cir. 2016) (enforcing collateral review waiver with respect to challenge to 924(c) conviction based on *Johnson*); *United States v. Worthen*, 842 F.3d 552 (7th Cir. 2016) (enforcing appellate waiver with respect to challenge to 924(c) conviction based on *Johnson*); *Grzegorczyk v. United States*, 997 F.3d 743 (7th Cir. 2021) (same result with respect to challenge based on *Davis*), *cert. denied*, 142 S. Ct. 2580 (2022) (accompanied by statement that “the Seventh Circuit correctly concluded that the defendant’s unconditional guilty plea precluded any argument based on the new caselaw”); *United States v. Caldwell*, 38 F.4th 1161 (5th Cir. 2022) (per curiam) (enforcing appellate waiver to foreclose 924(c) challenge, based on the Supreme

Court’s statement in *Grzegorczyk*); *King v. United States*, 41 F.4th 1363 (11th Cir. 2022) (enforcing a collateral review waiver to preclude a challenge to a 924(c) conviction predicated on a conspiracy charge); *Rudolph v. United States*, 92 F.4th 1038 (11th Cir. 2024).

Most appellate waiver provisions, however, do not apply to a claim that a sentence exceeded the statutory maximum, which is often the basis of a challenge to a sentence under ACCA (which increases the statutory maximum for a violation of 18 U.S.C. § 922(g)). See *United States v. Cornette*, 932 F.3d 204, 208–10 (4th Cir. 2019) (appellate waiver will not be enforced as to claim that *Johnson* invalidated the sentencing increase based on the unconstitutional residual clause).

Further, the Department instructs that if the prosecutor agrees that a defendant’s ACCA sentence is invalid following *Johnson* or *Mathis*, the government should waive reliance on the appellate waiver. *Mathis Guidance* at page 19 (Sept. 7, 2016). “On the other hand, prosecutors may seek to enforce an appeal waiver where a defendant argues that a prior conviction was not a ‘crime of violence’ under the guidelines. . . . In deciding whether to enforce an appeal waiver, prosecutors should consider whether the *Mathis* error had a substantial effect on the defendant’s sentence. Prosecutors may also take into account other relevant factors, including the seriousness of the defendant’s criminal record, whether the government dismissed other counts carrying mandatory minimum sentences, and whether the defendant pleaded guilty in exchange for a specific sentence under Fed. R. Crim. P. 11(c)(1)(C).” *Id.* See *United States v. Peppers*, 899 F.3d 211, 224–26 (3d Cir. 2018) (the fact that a sentence was entered under Rule 11(c)(1)(C) does not foreclose relief where the sentence exceeded the statutory maximum absent a now-invalid ACCA determination).

The Department instructs that prosecutors should not enforce an appellate waiver with regard to a valid 924(c) challenge under *Davis*. *Davis Guidance* at 21. The Department states that a prosecutor may enforce a collateral review waiver on a *Davis* claim where the defendant is serving a life sentence (or has been sentenced to death) on an untainted count and therefore vacatur of the erroneous Section 924(c) sentence will not reduce his jail time. Prosecutors may also enforce a collateral review waiver where, in return for pleading guilty to the Section 924(c) count, the government agreed to forgo charges that also bore a statutory maximum of life imprisonment, or that, in the aggregate, would have produced a guideline sentencing range starting at or above the defendant’s Section 924(c) sentence. *Davis Guidance* at 31–32.

In *United States v. Goodall*, 21 F.4th 555 (9th Cir. 2021), the Court enforced an appellate waiver notwithstanding the fact that the defendant’s 924(c) conviction rested on a conspiracy charge that no longer qualifies as a predicate following *Davis*. The Court stated, “By waiving his appellate rights, Goodall knowingly and voluntarily assumed the risk that the law might change in his favor.” *Id.* at 558. The government

had foregone charges based on eight armed robberies, in exchange for a plea to two robbery conspiracy counts and one 924(c) charge. In these circumstances, the Court stated, “Goodall cannot enjoy the fruits of his favorable plea agreement and then later claim the deal is rotten. . . . The government did not pursue many robbery and firearm charges and made a lenient sentencing recommendation in exchange for Goodall’s plea. If Goodall had been charged with all possible crimes, Goodall’s ‘crime of violence’ argument would not even exist. And the government dropped one § 924(c) count, which would have added another 25–year mandatory sentence. Rather than accept the benefit of his bargain, Goodall seeks to parlay the plea agreement’s leniency into reversible error. We decline the invitation.” *Id.* at 564–65.

In contrast, in *United States v. McKinney*, 60 F.4th 188 (4th Cir. 2023), the court held that a defendant was entitled to 2255 relief from an invalid 924(c) charge (it was based on Hobbs Act conspiracy), notwithstanding an appellate waiver provision, and notwithstanding the government’s assertion of procedural default. The majority deemed it irrelevant that, when the defendant pled guilty to a now-invalid 924(c) count, the government dismissed a separate 924(c) count that would be valid today.

Similar guidance regarding claims based on *Borden* is presented in the *Borden* guidance memo, at pages 12–13.