# VIOLENT FELONIES & CRIMES OF VIOLENCE: NAVIGATING THE APPLICATION OF THE CATEGORICAL APPROACH


ABSTRACT

*In the world of federal courts, sentencing can vary greatly depending on the defendant's criminal history. When reaching a sentence, federal courts must classify crimes as violent felonies and crimes of violence in accordance with federal sentencing laws and guidelines. However, what happens when a state statute seems unclear? How should a court navigate a situation in which there is little to no case precedent? These questions are perplexing and have the potential to create circuit splits.*

*This Note will explore how violent felonies and crimes of violence are classified, and how to navigate this complicated part of federal sentencing. This Note will also detail the categorical approach, and specifically how judges have approached the issue. Finally, this Note will detail applying the categorical approach to state convictions, specifically instances when determining the actus reus or mens rea may be difficult.*


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## I. Introduction

The Armed Career Criminal Act (the ACCA) provides sentencing enhancements for prior convictions classified as violent felonies.[1] The Federal Sentencing Guidelines (the Guidelines) supplemented this, providing enhancements for crimes of violence.[2] In recent decades, several court cases have changed the effect the ACCA and the Guidelines have on sentencing,[3] but sentencing in the federal system remains complicated.[4] This is especially true when federal courts try to classify state convictions under federal sentencing laws and guidelines using the categorical approach.[5]

## II. The Armed Career Criminal Act and the Federal Sentencing Guidelines

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

Passed in 1984, the Armed Career Criminal Act provides a sentencing enhancement for criminal defendants with prior convictions.[6] It imposes a mandatory minimum of 15 years of imprisonment for those with three or more prior violent felony convictions or serious drug offenses.[7] It also provides for a maximum of life in prison.[8] Because of sentencing enhancements like these, federal sentencing can be rather harsh for repeat offenders.[9]

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1. *See* Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185 (codified as amended at 18 U.S.C. § 924(e)); *see also* Johnson v. United States, 576 U.S. 591, 593 (2015). Discussions in this Note refer to the ACCA broadly to include the amended language of 18 U.S.C. § 924(e).
2. *See* U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2024).
3. *See infra* Parts II–III.
4. *See infra* Part IV.
5. *See infra* Part V.
6. *See* Armed Career Criminal Act of 1984 § 1802; *see also Johnson*, 576 U.S. at 593.
7. 18 U.S.C. § 924(e)(1); *see also Johnson*, 576 U.S. at 593.
8. *See* Armed Career Criminal Act of 1984 § 1802; 18 U.S.C. § 924(e)(1) (establishing only a minimum sentence, but placing no maximum); *see also Johnson*, 576 U.S. at 593.
9. *See supra* sources cited note 8.

The ACCA outlines serious drug offenses in addition to violent felonies, providing sentencing enhancements for both.[10] This Note focuses on violent felonies. The ACCA provides a definition of a violent felony, stating:

> [T]he 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--
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> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
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> (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 . . . .[11]

Although several different terms can be used to describe the two clauses above, the first, section (i), is typically referred to as the "elements clause," and the second, section (ii), is referred to as the "enumerated clause."[12] The final qualifier in the enumerated clause is known as the "residual clause."[13] However, the residual clause ("or otherwise involves conduct that presents a serious potential risk of physical injury to another….") was ruled unconstitutional in *Johnson v. United States* for being unconstitutionally vague.[14] As a result, we have two distinct clauses: elements and enumerated.[15]

### *B. United States Sentencing Guidelines Manual*

Similarly, the Guidelines prescribe a classification for crimes of violence.[16] The Guidelines are published by the United States Sentencing Commission every

10. Armed Career Criminal Act of 1984 § 1802 (covering only robbery and burglary); 18 U.S.C. § 924(e) (covering robbery, burglary, and violent felonies); *see also* United States v. Turner, 47 F.4th 509, 514 (7th Cir. 2022).

11. 18 U.S.C. § 924(e)(2)(B).

12. *See* Beeman v. United States, 871 F.3d 1215, 1218 (11th Cir. 2017).

13. *See id.*

14. 18 U.S.C. § 924(e)(2)(B)(ii); 576 U.S. 591, 606 (2015) ("We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process.").

15. *Id.* ("[This] decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.").

16. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2024).

few years, as needed.[17] The Commission was created in 1984 in response to disparities in federal sentencing.[18] Judges use these Guidelines in the process of determining a sentence.[19]

Prior to sentencing for a federal offense, a federal probation officer completes a presentencing report (PSR).[20] Taking into account several factors—the facts of the case, prior convictions, and generally an interview with the convicted—the probation officer submits a recommended sentencing range for federal judges.[21] The parties may then dispute what is in the report and may make objections.[22] Although the Guidelines ranges were originally considered to be mandatory, when a range is created, judges have discretion to deviate from those Guidelines.[23] The Guidelines classify a crime of violence as:

> [A]ny offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
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> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
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> (2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm . . . or explosive material . . . .[24]

Similar to the ACCA, part one is often referred to as the "elements clause," and part two is referred to as the "enumerated offenses" clause.[25]

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17. *See About*, U.S. SENT'G COMM'N, https://www.ussc.gov/about [https://perma.cc/4U2E-WDEA].

18. *Id.*

19. *See, e.g.*, Terry v. United States, 593 U.S. 486, 490 (2021).

20. U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS 10 (2020), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/202009_fed-sentencing-basics.pdf [https://perma.cc/S56J-VTP5].

21. *Id.* at 9–10.

22. *Id.* at 10.

23. Mark T. Doerr, Note, *Not Guilty? Go to Jail. The Unconstitutionality of Acquitted-Conduct Sentencing*, 41 COLUM. HUM. RTS. L. REV. 235, 235 (2009).

24. U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2024).

25. *See, e.g.*, United States v. Martin, 15 F.4th 878, 883 (8th Cir. 2021); United States v. McMillan, 863 F.3d 1053, 1056 (8th Cir. 2017).

### *C. Interchangeability of the Terms "Violent Felony" and "Crime of Violence"*

In federal courts, and for the sake of this Note, the terms "violent felony" and "crime of violence" are essentially interchangeable.[26] As a result, cases interpreting the definitions of the two are also generally considered interchangeable by federal courts.[27] Similar language is also used in immigration cases.[28] Although the Supreme Court has not formally recognized the two terms as interchangeable, it is generally recognized throughout the federal court system that they are.[29] In addition, both terms are used throughout the criminal law practice and academic community.[30] There is no need to distinguish between the two, except for the fact that one is derived from the U.S. Code, and the other from the Guidelines.[31]

## III. THE BASICS OF THE ELEMENTS AND ENUMERATED OFFENSES CLAUSES

### *A. The Elements Clause*

The elements clause details exactly what classifies as violent.[32] "Under the elements clause, a crime of violence is a felony that 'has as an element the use, attempted use, or threatened use of physical force against the person or property of another.'"[33]

Over the decades, there have been many appeals on whether a previous conviction qualifies as a crime of violence that would subject a defendant to the mandatory minimum sentence in the ACCA.[34] It may seem more efficient for

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26. *See, e.g.*, United States v. Taylor, 596 U.S. 845, 865 (2022) (Thomas, J., dissenting); Porter v. United States, 959 F.3d 800, 801 (6th Cir. 2020).

27. *See, e.g.*, United States v. Brown, 916 F.3d 706, 708 (8th Cir. 2019) (per curiam); United States v. Tiger, 538 F.3d 1297, 1298 (10th Cir. 2008).

28. *See, e.g.*, Shuti v. Lynch, 828 F.3d 440, 446–47 (6th Cir. 2016).

29. *See* United States v. Herrick, 545 F.3d 53, 58 (1st Cir. 2008); United States v. Gray, 535 F.3d 128, 130 (2d Cir. 2008).

30. *See, e.g.*, Meaghan Geatens, Comment, *Correcting Corrections: Discrepancies in Defining State Manslaughter as a "Crime of Violence" for Federal Sentencing Purposes*, 64 VILL. L. REV. 309, 314–15 (2019).

31. *See* Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 2185; 18 U.S.C. § 924(e)(2)(B); U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2024).

32. 18 U.S.C. § 924(e)(2)(B)(i); U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a) (U.S. SENT'G COMM'N 2024).

33. United States v. Morris, 61 F.4th 311, 316 (2d Cir. 2023) (quoting 18 U.S.C. § 924(c)(3)(A)).

34. *See, e.g.*, Borden v. United States, 593 U.S. 420, 423 (2021); Johnson v. United States, 576 U.S. 591, 593 (2015).

federal courts to rely on an enumerated list of offenses that classify as crimes of violence.[35] But, instead of limiting crimes of violence to an enumerated list, Congress decided to add the elements clause so other crimes that were violent in their very nature would count toward a sentencing enhancement.[36] This is particularly relevant when considering prior state convictions that may not be organized or labeled similarly, both to each other and to federal statutes.[37]

### *B. The Enumerated Clause*

Although not the primary emphasis of this Note, the enumerated clause is worth discussing. Unlike the elements clause, the language of the enumerated clause differs between the ACCA and the Guidelines.[38] Often, the longer enumerated list under the Guidelines is used.[39]

Appeals can be made on the enumerated clause, although it is less common as it is not always clear whether a past conviction falls under one of the crimes outlined.[40] For example, in an Eleventh Circuit opinion, *United States v. Harrison*, the government appealed a sentencing decision, arguing that, under Georgia law, robbery by intimidation should be considered "robbery" under the enumerated clause, establishing it as a crime of violence.[41] The court agreed with the government, stating that if a crime fit within the generic definition of the offense, it was a crime of violence under the enumerated clause.[42] Due at least in part to the

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35. *See* Jondavid S. DeLong, Annotation, *What Constitutes "Violent Felony" for Purpose of Sentence Enhancement under Armed Career Criminal Act (18 U.S.C.A. § 924(e)(1))*, 119 A.L.R. Fed. 319, §§ 10–21.5 (originally published in 1994) (examining the scope of enumerated and non-enumerated offenses classified as violent felonies under 18 U.S.C. § 924(e)(2)(B)).

36. *See id.*

37. *See, e.g.*, *Morris*, 61 F.4th at 320–21.

38. *Contrast* 18 U.S.C. § 924(e)(2)(B)(ii) (defining a "violent felony" to include a crime that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . . ."), *with* U.S. SENT'G GUIDELINES MANUAL § 4B1.2(a)(2) (U.S. SENT'G COMM'N 2024) (defining a "crime of violence" to include a crime that "is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm…or explosive material . . . .").

39. *See, e.g.*, United States v. Harrison, 56 F.4th 1325, 1330–31 (11th Cir. 2023).

40. *See id.*

41. *Id.* at 1330.

42. *Id.* at 1336.

generic definition standard, it can be quite difficult to contest a sentence based on the enumerated clause.[43]

## IV. Analysis of Prior Convictions and Statutes

### *A. The Categorical Approach*

In determining whether a particular past conviction qualifies as a crime of violence, federal courts apply the categorical approach.[44] In *Moncrieffe v. Holder*, the Supreme Court outlined the categorical approach: "Under this approach we look 'not to the facts of the particular prior case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony."[45] In short, a court "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."[46]

So, in analyzing a prior conviction under the ACCA or the Guidelines, a court must consider the minimum statutory action that may be required to reach a conviction under the state law.[47] In other words, "[i]t makes no difference that [the defendant] may have acted knowingly or intentionally . . . when he committed the

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43. *See id.* (stating that a "generic definition of [an offense] with only minor variations" or a narrower definition constitutes a crime of violence for the purposes of the enumerated clause. (quoting United States v. Lockley, 632 F.3d 1238, 1242 (11th Cir. 2011) (alteration in original)).

44. *See, e.g.*, *id.* at 1331.

45. 569 U.S. 184, 190 (2013) (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 186 (2007)).

46. *Id.* at 190–91 (alterations in original) (quoting Johnson v. United States, 559 U.S. 133, 137 (2010)). *See also* Off. of Gen. Couns., U.S. Sent'g Comm'n, Primer on Categorical Approach 13–14 (2025) [hereinafter Primer on Categorical Approach], https://www.ussc.gov/sites/default/files/pdf/training/primers/2025_Primer_Categorical_Approach.pdf [https://perma.cc/VG6G-HRSZ] ("A categorical match means that the least culpable method of violating the statute is no broader than (in other words, is narrower than or equivalent to) the relevant definition. If a statute reaches more conduct than the definition, then it is overbroad and categorically does not qualify.").

47. *See id.*; *see also* United States v. Turner, 47 F.4th 509, 514 (7th Cir. 2022) ("If the elements of the crime of conviction sweep more broadly than the definition . . . in the ACCA, . . . 'then a conviction under the statute cannot serve as a predicate . . . under the ACCA.'" (quoting United States v. Williams, 931 F.3d 570, 575 (7th Cir. 2019))).

[act]."[48] Therefore, the actual acts resulting in the prior conviction play no role in determining whether it was a crime of violence.[49] Rather, the determination is based on the criminal statute alone.[50] This approach has been applied to both the elements clause and the enumerated clause.[51]

The categorical approach is also used in immigration removal proceedings.[52] In many immigration cases, however, the term "aggravated felony" is used to determine whether a crime may result in a deportation.[53] But, an aggravated felony under federal code is defined as "a crime of violence . . . for which the term of imprisonment [is] at least one year[,]" so the application of the categorical approach in those cases is essentially the same.[54]

This has yielded controversy as to what particular *actus reus* or *mens rea* can be categorized as "violent."[55] This came to a head in *Borden v. United States*.[56] In *Borden*, the Court was left to decide whether a defendant's prior conviction for reckless aggravated assault under Tennessee law qualified as a crime of violence.[57] The Court looked specifically at crimes with a *mens rea* of recklessness and whether they would suffice as violent felonies or crimes of violence for the purpose of sentencing.[58] In a narrow decision, the plurality determined that crimes of recklessness did not suffice as crimes of violence.[59]

The plurality in *Borden* pointed to the purpose of the ACCA in targeting violent crimes against other people, particularly as described in the elements

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48. United States v. Hoxworth, 11 F.4th 693, 696 (8th Cir. 2021); *see also* Mathis v. United States, 579 U.S. 500, 509 (2016) ("[A] sentencing court [has] no special warrant to explore the facts of an offense, rather than to determine the crime's elements and compare them with the generic definition.").

49. *See* sources cited *supra* note 48.

50. *See* sources cited *supra* note 48.

51. *See, e.g.*, United States v. Harrison, 56 F.4th 1325, 1331 (11th Cir. 2023).

52. *See* Kurtis A. Kemper, Annotation, *What Constitutes "Aggravated Felony" for Which Alien Can Be Deported or Removed Under § 237(a)(2)(A)(iii) of Immigration and Nationality Act (8 U.S.C.A. § 1227(a)(2)(A)(iii))*, 168 A.L.R. Fed. 575, §§ 15–17 (originally published in 2001).

53. *Id.* §§ 1–2.

54. *See* 8 U.S.C. § 1101(a)(43)(F) (footnote omitted).

55. *See, e.g.*, Borden v. United States, 593 U.S. 420, 423 (2021) (answering the question of "whether a criminal offense can count as a 'violent felony' if it requires only a *mens rea* of recklessness").

56. *See id.*

57. *Id.* at 424–25.

58. *Id.* at 427–29.

59. *Id.* at 429.

clause.[60] Also, the plurality decision pointed to the fact that recklessness is not compatible with the ordinary meaning of the term "violent crime."[61] Since violence needs to be directed at others, or at the very least needs to be an "active" crime, recklessness is not considered to rise to the level of violence required.[62] The dissent, on the other hand, pointed to the enactment of the ACCA, arguing that, regardless of the *mens rea*, it was designed to address the very crime addressed in that case: assault.[63]

As a result of the Court's groundbreaking decision in *Borden*, lower courts struggle with a fine line when applying the categorical approach.[64] Courts can no longer consider crimes with a *mens rea* of recklessness as violent felonies or crimes of violence.[65] However, some states recognize a state of mind in between recklessness and knowledge.[66] This is often called "depraved heart" or "extreme recklessness."[67] The Court in *Borden* declined to consider this issue.[68] So, lower courts have been left to decide how a depraved heart or an extreme recklessness *mens rea* fits into the categorical analysis.[69]

Following *Borden*, lower courts have, at least in some cases, a clearer line from which to draw a conclusion.[70] In *United States v. Hoxworth*, the Eighth

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60. *Id.*

61. *Id.* at 438.

62. *Id.* at 445.

63. *Id.* at 450 (Kavanaugh, J., dissenting) ("Congress ensured that the prototypical felonies involving physical force against a person—in particular, assault, homicide, rape, and robbery—would qualify as predicate offenses under ACCA.").

64. *See, e.g.*, United States v. Ash, 7 F.4th 962, 963 (10th Cir. 2021) ("*Borden* definitively foreclosed counting . . . reckless aggravated assault as a crime of violence" (citing *Borden*, 593 U.S. at 445)).

65. *See id.*

66. *Borden*, 593 U.S. at 429 n.4 ("Some States recognize mental states (often called 'depraved heart' or 'extreme recklessness') between recklessness and knowledge.").

67. *Id.*; *see also* United States v. Henderson, 80 F.4th 207, 212 n.5 (3d Cir. 2023) ("*Borden* left open the question of whether offenses requiring a mental state of 'extreme recklessness' satisfy the elements clause." (citing *Borden*, 593 U.S. at 429 n.4)).

68. *Borden*, 593 U.S. at 429 n.4 ("We have no occasion to address whether offenses with those mental states [called 'depraved heart' or 'extreme recklessness'] fall within the elements clause.").

69. *See, e.g.*, United States v. Brasby, 61 F.4th 127, 142–43 (3d Cir. 2023) (holding a crime of "extreme indifference recklessness" could be considered a crime of violence under the Sentencing Guidelines).

70. *See, e.g.*, United States v. Hoxworth, 11 F.4th 693, 695–96 (8th Cir. 2021) ("Given that Texas's version of aggravated assault criminalizes 'recklessly caus[ing] bodily injury,'

Circuit dismissed arguments from the government that a prior conviction out of Texas for aggravated assault should be classified as a crime of violence under the Guidelines.[71] The court held that under the Supreme Court's decision in *Borden*, the prior conviction was not a crime of violence because it criminalized "intentionally, knowingly, or *recklessly* caus[ing] bodily injury to another."[72] The panel determined although the defendant may have committed aggravated assault in Texas intentionally or knowingly, it does not qualify as a crime of violence because one could be convicted for *recklessly* committing the crime.[73] In essence, under the categorical approach, "the means by which the defendant, in real life, committed his crimes" is irrelevant.[74] Instead, a sentencing judge must look only to the elements of the defendant's offense.[75]

### *B. The Modified Categorical Approach*

Another adjustment to the categorical approach is the Supreme Court's creation of the modified categorical approach.[76] In *Shepard v. United States*, the Supreme Court held that federal courts can utilize a modified categorical approach when the conviction may include additional conduct not included in the statute's definition.[77] In using the modified categorical approach, courts look beyond the scope of the statute itself, looking "to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information."[78]

However, the standard for when to employ this modified categorical approach was too vague.[79] In *Mathis v. United States*, the Court more specifically outlined this standard.[80] The Court in *Mathis* determined that "[t]he comparison of elements that the categorical approach requires is straightforward when a statute sets out a single (or 'indivisible') set of elements to define a single crime. The court

there is no question that Hoxworth's crime does not count as a violent felony under *Borden*." (alteration in original) (citation omitted)).

71. *Id.*

72. *Id.* (alteration in original) (emphasis added) (citation omitted).

73. *Id.*

74. Mathis v. United States, 579 U.S. 500, 509–10 (2016).

75. *Id.*

76. PRIMER ON CATEGORICAL APPROACH, *supra* note 46, at 2; *see* Shepard v. United States, 544 U.S. 13, 17 (2005).

77. 544 U.S. at 17.

78. *Id.* at 26.

79. *See id.* at 17.

80. *See Mathis*, 579 U.S. at 517.

then lines up that crime's elements alongside those of the generic offense and sees if they match."[81]

Sometimes, however, it is not so "straightforward."[82] As Justice Kagan explained:

> Some statutes, however, have a more complicated (sometimes called "divisible") structure, making the comparison of elements harder. A single statute may list elements in the alternative, and thereby define multiple crimes. Suppose, for example, that [a law] had prohibited "the lawful entry or the unlawful entry" of a premises with intent to steal, so as to create two different offenses, one more serious than the other. If the defendant were convicted of the offense with unlawful entry as an element, then his crime of conviction would match generic burglary and count as an ACCA predicate; but, conversely, the conviction would not qualify if it were for the offense with lawful entry as an element. A sentencing court thus requires a way of figuring out which of the alternative elements listed—lawful entry or unlawful entry—was integral to the defendant's conviction (that is, which was necessarily found or admitted). To address that need, this Court approved the "modified categorical approach" for use with statutes having multiple alternative elements.[83]

Specifically in *Mathis*, the defendant was guilty under a statute with one set of elements, but also had alternative factual means by which someone could be convicted.[84]

The Court in *Mathis* determined that Iowa's burglary statute is broader than the generic offense of burglary.[85] The Iowa Code does not define burglary merely as unlawful entry into a "building or other structure" as the generic definition does.[86] Instead, Iowa's statute is more broad, naming "any building, structure, [*or*] *land, water, or air vehicle*" as a place where a burglary could be committed.[87] In this case, the Court merely determined that the elements of the Iowa conviction were too broad.[88]

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81. *Id.* at 504–05.
82. *Id.*
83. *Id.* at 505 (internal citations omitted).
84. *Id.* at 506.
85. *Id.* at 507.
86. *Id.* (quoting Taylor v. United States, 495 U.S. 575, 598 (1990)).
87. *Id.* (quoting IOWA CODE § 702.12 (2013)).
88. *Id.* at 520.

The Court stated, however, if there are alternative elements instead of alternative means, then and only then could a modified approach be employed.[89] Alternative means would be examples illustrating additional circumstances where one could be convicted, like a vehicle in this case, rather than elements that are "divisible."[90] Specifically, the problem with the conviction in *Mathis* was that a vehicle was not a list of alternative elements altogether, making it unnecessary to look at any of the facts of conviction under the modified categorical approach.[91]

A test used by many courts to clarify the distinction made in *Shepard* and in *Mathis* is determining whether a statute is divisible, meaning "statutes that 'list elements in the alternative[] and thereby define multiple crimes.'"[92] Thus, in essence, the modified categorical approach allows for courts to review limited documents to determine which set of elements an individual was found guilty under or pled guilty to when there are more than one set of elements.[93] Simply put, it is possible one set of elements would be properly classified as a crime of violence, while another set under the same statute might not.[94] The modified categorical approach will be revisited later on in this Note.[95]

### *C. The Realistic Probability Principle and Test*

In determining whether a statute can be classified as a violent felony or a crime of violence, federal courts employ what has been known as the "realistic probability principle" or the "realistic probability test."[96] This means that if a defendant wants to argue that someone could be convicted under the categorical approach for a lesser *actus reus* or *mens rea*, they must point to a realistic scenario in which someone could be convicted for those lesser actions.[97] The Supreme Court articulated this principle in *Gonzales v. Duenas-Alvarez*:

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89. *Id.* at 517; *see also* PRIMER ON CATEGORICAL APPROACH, *supra* note 46, at 3 ("For this threshold inquiry, courts must inquire if the statute lists alternative *elements* or, instead, lists alternative *means* of committing the offense.").

90. *See Mathis*, 579 U.S. at 505 ("Some statutes, however, have a more complicated (sometimes called 'divisible') structure, making the comparison of elements harder."); *id.* at 518.

91. *Id.* at 507, 519.

92. United States v. Dozier, 848 F.3d 180, 183 (4th Cir. 2017) (alteration in original) (quoting *Mathis*, 579 U.S. at 505).

93. *See Mathis*, 579 U.S. at 505.

94. *See id.*

95. *See infra* Part V.

96. *See* United States v. Minter, 80 F.4th 406, 412–13 (2d Cir. 2023) (quoting Williams v. Barr, 960 F.3d 68, 77 (2d Cir. 2020)); United States v. Bragg, 44 F.4th 1067, 1078 (8th Cir. 2022).

97. *See Minter*, 80 F.4th at 412–13; Moncrieffe v. Holder, 569 U.S. 184, 191 (2013).

> Moreover, in our view, to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It 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.[98]

Thus, a defendant can argue that a past conviction may not have risen to the level of being considered a crime of violence by pointing to their own case or another precedent case but cannot simply invent a theoretical possibility to try to prove such.[99]

In light of *Borden*, the realistic probability principle applies when determining whether a crime can be committed recklessly.[100] Even where it may be theoretically possible for someone to be convicted under a statute for acting recklessly, it may mean that the conviction is for a crime of violence.[101] Applying the realistic probability principle alongside the categorical approach helps federal courts determine whether a conviction is a crime of violence, particularly in light of *Borden*.[102]

### *D. Traversing Murky Waters*

However, what if the statute seems a bit unclear? What if there is a new statute with little to no case precedent? What if the statute is seldom utilized? How should courts approach unfamiliar territory? These are the questions this Note is aimed at answering.

From time to time, state legislatures and Congress may draft new criminal statutes or amend old ones.[103] The number of criminal statutes is vast.[104] In the 1980s, the Justice Department launched a project to determine the total number of

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98. 549 U.S. 183, 193 (2007).

99. *See id.*

100. *See* United States v. Rice, 36 F.4th 578, 586–87 (4th Cir. 2022) (holding that North Carolina's crime of assault is a crime of violence because there is not a realistic possibility that it could be committed recklessly).

101. *See id.*

102. *See id.*

103. *See, e.g.*, United States v. Pulley, 75 F.4th 929, 931 (8th Cir. 2023).

104. Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), https://www.wsj.com/articles/SB10001424052702304319804576389601079728920?reflink=desktopwebshare_permalink.

federal criminal laws in the United States.[105] After digging through 23,000 pages of criminal law, the project stalled.[106] The Justice Department's best guess was about 3,000 criminal offenses at the time.[107] In drafting new pieces of legislation, state legislators may not necessarily consider the implications of their criminal statutes on federal sentencing. Because the categorical approach requires judges to analyze the elements of a statute and determine whether they rise to the level of a crime of violence, difficult cases can require breaking ground where no precedent exists.[108] Even a minor change in a statute's language could yield a different result.[109]

## V. Applying the Categorical Approach to Federal Convictions

As opposed to state convictions, federal convictions can be easier to apply the categorical approach because there is one body of law,[110] and it is therefore more likely that precedent exists.[111] State convictions, on the other hand, vary between the states. Also, state legislatures do not typically have the Guidelines in mind when enacting criminal statutes.

Although one would think that federal statutes would circumscribe to the sentencing process and avoid ambiguity under the ACCA, there are cases where ambiguity has been an issue.[112] One of the more prominent examples of this is in *United States v. Taylor*.[113] In *Taylor*, the Supreme Court considered whether a robbery in violation of the Hobbs Act classified as a crime of violence.[114] Originally passed in 1948, the Hobbs Act criminalized acts or threats of violence that interfered with commerce, namely robbery and extortion.[115]

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105. *Id.*

106. *Id.*

107. *Id.*

108. *See id.* at 931–32.

109. *See id.* at 931.

110. *See* United States v. McCollum, 885 F.3d 300, 304 (4th Cir. 2018) (applying categorical approach by defining enumerated offenses according to their generic, contemporary meaning rather than common law).

111. *See id.* at 310–11.

112. *See, e.g.*, United States v. Ordunez, No. 21-50869, 2023 WL 4015265, at *2 (5th Cir. June 14, 2023) (arguing, for the defendant, that broader definitions of a controlled substance than the generic offense should prevent the crime being considered a crime of violence under the categorical approach); *McCollum*, 885 F.3d at 305.

113. 596 U.S. 845, 848 (2022).

114. *Id.*

115. Act of June 25, 1948, ch. 645, § 1951, 62 Stat. 793, 793–94; 18 U.S.C. § 1951.

In *Taylor*, an individual was shot by the accused's accomplice during an attempted robbery.[116] But, the facts and circumstances of that case do not matter when applying the categorical approach.[117] In determining that the accused's conviction for attempted robbery under the Hobbs Act was not a crime of violence, the majority articulated that the Model Penal Code explained: "[T]here will be cases, appropriately reached by a charge of attempted robbery, where the actor does not actually harm anyone or even threaten harm."[118] Thus, attempted robbery was not to be considered a crime of violence.[119]

In *Taylor*, the Court explained that it is possible to commit an attempted robbery without actually threatening someone or acting violently.[120] The Court articulated their position on this assertion with a hypothetical:

> Suppose Adam tells a friend that he is planning to rob a particular store on a particular date. He then sets about researching the business's security measures, layout, and the time of day when its cash registers are at their fullest. He buys a ski mask, plots his escape route, and recruits his brother to drive the getaway car. Finally, he drafts a note—"Your money or your life"—that he plans to pass to the cashier. The note is a bluff, but Adam hopes its implication that he is armed and dangerous will elicit a compliant response. When the day finally comes and Adam crosses the threshold into the store, the police immediately arrest him. It turns out Adam's friend tipped them off.
>
> There is little question the government could win a lawful conviction against Adam for attempted Hobbs Act robbery.[121]

Federal statutes are not always uniform and may require the categorical approach and the realistic probability test to determine whether they are crimes of violence.[122] However, it can be easier under federal law than under state law because only federal case law applies and there is generally some case law from other circuits to use as persuasive authority.[123]

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116. *Taylor*, 596 U.S. at 848.
117. *See supra* Part IV.
118. *Taylor*, 596 U.S. at 851 (citation omitted).
119. *Id.* at 851.
120. *Id.* at 852.
121. *Id.* at 851–52.
122. *See id.* at 848–52. *See generally* DeLong, *supra* note 35.
123. *See Taylor*, 596 U.S. at 853.

## VI. Applying the Categorical Approach to State Convictions

But, how does one approach statutes that perhaps are not created with the Model Penal Code in mind?[124] Of course, one should apply the categorical approach, but doing so is not always as straightforward as it may seem.[125] With 4 territories, Washington, D.C., and 50 states each having their own code and judicial precedent, this is a complicated system.[126] In addition, each judicial circuit has its own precedent.[127]

### *A. Generally Applying the Categorical Approach*

When applying the categorical approach to a state conviction, one's actual conduct does not play a role in the inquiry.[128] Instead, just as with federal statutes, for the defendant to prevail, they must satisfy the realistic probability test.[129] The difference, however, is when the state statute is broad and does not fit within a specific federal offense from the enumerated clause, federal courts need to look to both federal and state precedent to determine whether the crime is a crime of violence under the elements clause.[130]

### *B. Actually Applying the Categorical Approach*

Perhaps the best way to explain the categorical approach and the realistic probability test is to demonstrate how it is applied to state convictions. One such example is a line of cases involving vehicular hijacking from the Seventh and Eighth Circuits.[131]

In *United States v. Sykes* from the Eighth Circuit, the defendant was given a sentencing enhancement under the ACCA.[132] Sykes challenged that enhancement,

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124. *See* Michael A. Foster, Cong. Rsch. Serv., R46836, *Mens Rea*: An Overview of State-of-Mind Requirements for Federal Criminal Offenses i (2021) (noting under the Model Penal Code, "federal *mens rea* requirements largely fall into loose categories that may include . . . 'intent,' 'knowledge,' or . . . 'recklessness' and 'negligence[.]'").

125. *See supra* Part IV.

126. *See Court Role and Structure*, U.S. Cts., https://www.uscourts.gov/about-federal-courts/court-role-and-structure [https://perma.cc/2JZY-X69T] (explaining the structure of the federal court system).

127. *See id.*

128. Vazquez v. Sessions, 885 F.3d 862, 870–71 (5th Cir. 2018), *abrogated by*, Alejos-Perez v. Garland, 93 F.4th 800 (5th Cir. 2024).

129. *Id.* at 866.

130. *See, e.g.*, *id.* at 866, 870–71; United States v. Pulley, 75 F.4th 929, 932 (8th Cir. 2023).

131. *Pulley*, 75 F.4th at 931; United States v. Norris, 835 F. App'x 892, 893 (7th Cir. 2021); United States v. Sykes, 914 F.3d 615, 619 (8th Cir. 2019).

132. *Sykes*, 914 F.3d at 619–20.

arguing his past conviction for aggravated vehicular hijacking from Illinois did not have "as an element the use, attempted use, or threatened use of physical force against the person of another."[133] The language of the Illinois vehicular hijacking statute stated (and currently states): "A person commits vehicular hijacking when he or she knowingly takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force."[134]

The defendant argued that because the vehicular hijacking statute and the robbery statute in Illinois were so similar and there were precedential cases indicating that robbery may be committed with nonviolent force, his vehicular hijacking conviction should not be classified as a crime of violence.[135] However, the Eighth Circuit ruled that because Congress intended for common law robbery to be a crime of violence, Sykes's argument did not hold.[136]

Aside from the robbery argument, Sykes also argued it was possible to commit vehicular hijacking without using violent force.[137] He argued that "force" in the vehicular hijacking statute in Illinois did not require any amount of violent force.[138] But, when applying the categorical approach, the panel in Sykes pointed to Illinois case law to show that: "[A]n Illinois court could not 'conceive of[] a situation in which a defendant could commit vehicular hijacking without using or threatening the use of physical force or violence.'"[139] Therefore, Sykes' sentencing enhancement was upheld.[140]

Another example of applying the categorical approach and the realistic probability test to an Illinois conviction for vehicular hijacking can be found when the Eighth Circuit revisited a different, older version of the statute in 2023.[141] Illinois updated its vehicular hijacking statute in 2013, and Sykes' conviction had

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133. *Id.* at 619 (citation omitted).

134. 720 ILL. COMP. STAT. 5/18-3(a) (2025).

135. *Sykes*, 914 F.3d at 619–20.

136. *Id.* at 620; *see also* Stokeling v. United States, 586 U.S. 73, 87 (2019) (holding robbery "qualifies as a 'violent felony' under [the] ACCA's elements clause.").

137. *Sykes*, 914 F.3d at 620.

138. *Id.*

139. *Id.* at 620–21 (alteration in original) (quoting People v. Wooden, 16 N.E.3d 850, 855 (Ill. App. Ct. 2014)); *see also* People v. McDaniel, No. 1–13–2679, 2015 WL 6460052, at *9–10 (Ill. App. Ct. Dec. 14, 2015) (explaining unlike the crime of vehicular hijacking, the crime of vehicular invasion can be committed "without the use of physical force or violence against an individual.").

140. *Sykes*, 914 F.3d at 621.

141. United States v. Pulley, 75 F.4th 929, 931 (8th Cir. 2023).

been under this version.[142] But, in *Pulley*, the Eighth Circuit was faced with an older version of the statute from 2005.[143] Instead of stating that the crime had to be committed "knowingly," the statute stated, "A person commits vehicular hijacking when he or she takes a motor vehicle from the person or the immediate presence of another by the use of force or by threatening the imminent use of force."[144] This was especially important because of the line established in *Borden*.[145] Prior to *Borden*, as in *Sykes*, courts did not apply the "recklessness" standard, unlike in *Pulley*.[146]

In *Pulley*, the Eighth Circuit determined that vehicular hijacking could not be committed recklessly, and therefore, was not a crime of violence under the *Borden* standard.[147] Pointing to the same case cited in *Sykes*, the panel in *Pulley* concluded that vehicular hijacking requires the use of or at least a threat of violence.[148] Further, in applying the realistic probability principle, the panel stated there was no realistic probability that one would be convicted for vehicular hijacking for merely reckless actions.[149] In taking a vehicle by force one would not be acting recklessly, but would have to do so knowingly or intentionally.[150] Similarly, the Seventh Circuit also concluded that a conviction under the 2005 version of the statute constituted a crime of violence.[151]

### *C. Applying the Modified Categorical Approach*

A recent case addressing the modified categorical approach is *United States v. Martinez-Rodriguez*.[152] In *Martinez-Rodriguez*, the Fifth Circuit considered whether the defendant's prior conviction in Texas for the offense of causing injury

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142. *See id.*; *Sykes*, 914 F.3d at 619–20.

143. *Pulley*, 75 F.4th at 931.

144. *Id.* (quoting 720 ILL. COMP. STAT. 5/18-3(a) (2005)).

145. *Id.*; *see* Borden v. United States, 593 U.S. 420, 438 (2021).

146. *Pulley*, 75 F.4th at 931–32; *see Sykes*, 914 F.3d at 619–20.

147. *Pulley*, 75 F.4th at 931–32.

148. *Id.* at 932 ("Moreover, defendant has not suggested, nor can we conceive of, a situation in which a defendant could commit vehicular hijacking without using or threatening the use of physical force or violence." (quoting People v. Wooden, 16 N.E.3d 850, 855 (Ill. App. Ct. 2014))).

149. *Id.* at 931–32; *see also* United States v. Bragg, 44 F.4th 1067, 1078 (8th Cir. 2022) (articulating the realistic probability principle).

150. *Pulley*, 75 F.4th at 932.

151. United States v. Norris, 835 F. App'x 892, 893 (7th Cir. 2021) ("[T]here would be no point in arguing that vehicular hijacking in Illinois is not a violent felony.").

152. 857 F.3d 282, 285 (5th Cir. 2017).

to a child was a crime of violence under the Guidelines.[153] Here, the Fifth Circuit determined that under Texas case law, language convicting the defendant for either an act or an omission was considered to constitute the means to satisfy an element of which one could be convicted instead of being an element themselves.[154] Specifically, an act or omission described how a child could be injured, rather than a prong by which one would be convicted.[155] Accordingly, the Fifth Circuit determined the statute was indivisible and thus the modified categorical approach was not appropriate.[156]

An example of employing the modified categorical approach can be found in *United States v. Walker* from the Second Circuit.[157] In *Walker*, the Second Circuit stated, "[T]he modified categorical approach [is] applicable in this circuit to prior convictions for statutory offenses [and] also applies to prior convictions for state common law crimes."[158] The panel then analyzed whether the modified categorical approach applied to a prior "strong arm robbery" conviction out of South Carolina.[159]

Looking at prior case law in South Carolina, "[S]trong armed robbery is defined as the felonious or unlawful taking of money, goods, or other personal property of any value from the person of another or in his presence by violence or by putting such person in fear."[160] The panel determined that since the statute's elements were fully articulated the modified categorical approach applied.[161]

The defendant in *Walker* argued the crime he pled guilty to was attributable to the threat of violence and not the element of violence itself, pointing to South Carolina case law.[162] Using the case law he cited, the court ruled that under South Carolina case law, this conviction was a crime of violence.[163] In *State v. Rosemond,*

153. *Id.* at 283.

154. *Id.* at 286.

155. *Id.*

156. *Id.*

157. 595 F.3d 441, 442 (2d Cir. 2010); *see also* United States v. Martinez-Lopez, 864 F.3d 1034, 1044 (9th Cir. 2017) (en banc) (holding that the modified categorical approach was applied correctly to a divisible drug statute from California when considering a drug enhancement); United States v. Spence, 661 F.3d 194, 198–99 (4th Cir. 2011) (holding that the modified categorical approach was correctly applied to a South Carolina conviction for assault and battery of a high and aggravated nature when considering a sexual abuse enhancement).

158. *Walker*, 595 F.3d at 442.

159. *Id.*

160. State v. Rosemond, 589 S.E.2d 757, 758 (S.C. 2003).

161. *Walker*, 595 F.3d at 444–45.

162. *See id.* at 446; *Rosemond*, 589 S.E.2d at 759.

163. *Walker*, 595 F.3d at 446–47.

the South Carolina Supreme Court ruled that given the circumstances, a convenience store employee "would have felt a threat of bodily harm from petitioner's acts."[164] The Second Circuit stated that *Rosemond* confirmed acts needed for "strong arm robbery" include a threat of bodily harm.[165] As a result, the crime was considered a crime of violence as it met the generic definition of robbery, resulting in a sentencing enhancement.[166]

Of course, there are a multitude of other examples of applying the categorical approach to state convictions.[167] As laws change and new precedent is created, the categorical approach remains the standard for determining whether convictions warrant sentencing enhancements under the ACCA.[168] The categorical approach is an important component to better understanding the broader issue of sentencing enhancements.

## VII. The Final Result: How Sentencing Concludes

Sentencing enhancements under the ACCA greatly affect final sentences, namely because they change one's "offense level" when calculating a sentencing range under the Guidelines.[169] That offense level has a direct impact on the guideline range for sentencing provided to federal judges by probation officers in their presentencing report.[170] Specifically, judges are provided with a recommended range to consider when sentencing.[171] Judges have the discretion to consider possible reasons for a departure or variance from the range.[172]

In light of the acts committed and the individual's criminal history (which may include crimes of violence), judges must decide on a reasonable sentence.[173] On appeal, sentencing is reviewed under an abuse of discretion standard.[174] This is

164. *Rosemond*, 589 S.E.2d at 759.

165. *Walker*, 595 F.3d at 447.

166. *Id.*

167. *See, e.g.*, United States v. Chaires, 88 F.4th 172, 177 (2d Cir. 2023) (per curiam) (applying the categorical approach to a prior state conviction to determine whether it is a controlled substance offense); United States v. Roblero-Ramirez, 716 F.3d 1122, 1125 (8th Cir. 2013) (applying the categorical approach to a prior conviction for killing during a sudden quarrel).

168. *See, e.g.*, United States v. Pulley, 75 F.4th 929, 930 (8th Cir. 2023).

169. *See* U.S. Sent'g Guidelines Manual § 4B1.1 (U.S. Sent'g Comm'n 2023).

170. U.S. Sent'g Comm'n, Federal Sentencing: The Basics, *supra* note 20, at 21–22.

171. *Id.*

172. *Id.* at 28.

173. *Id.* at 31.

174. Holguin-Hernandez v. United States, 589 U.S. 169, 174 (2020).

more commonly referred to as a standard for reasonableness.[175] Thus, federal judges are given plenty of leeway when arriving at a final sentence.[176]

## VIII. Conclusion

Navigating the world of federal sentencing can be rather difficult, especially when analyzing both federal and state law.[177] Understanding the categorical approach and realistic probability test helps explain how judges look at prior convictions and determine whether they fit into federal sentencing categories like crimes of violence.[178] With 50 states in the Union with different statutes, federal courts must often pave the way for new precedent.[179]

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175. *Id.*; *see also* United States v. Booker, 543 U.S. 220, 261 (2005); U.S. SENT'G COMM'N, FEDERAL SENTENCING: THE BASICS, *supra* note 20, at 31.

176. *See* United States v. Pond, No. 21-51232, 2023 WL 2240459, at *4 (5th Cir. Feb. 27, 2023).

177. *See, e.g.*, PRIMER ON CATEGORICAL APPROACH, *supra* note 46, at 9 (noting that ACCA includes both federal and state offenses in defining a "serious drug offense").

178. *Id.* at 1.

179. *See id.* at 2.

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