



# Categorical Approach

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**2023 National Seminar**

August 30, 2023

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# Sacramento

1. Press the “**Channel**” button.
2. Press “**55.**”
3. Press the “**Channel**” button again.



# Ross Thomas

Senior Attorney

[rthomas@ussc.gov](mailto:rthomas@ussc.gov)

Office of Education and Sentencing Practice

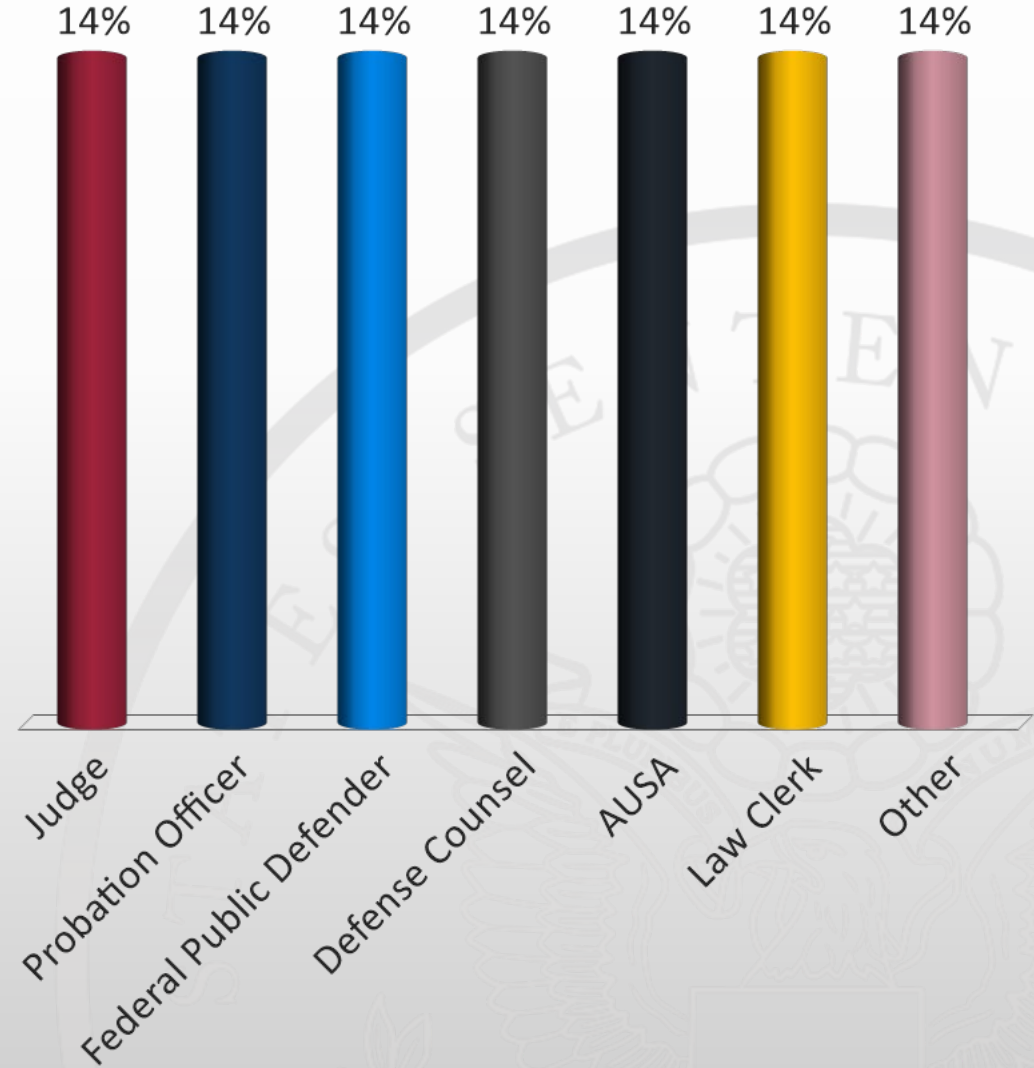
HelpLine: (202) 502-4545

[Online HelpLine Form](#)



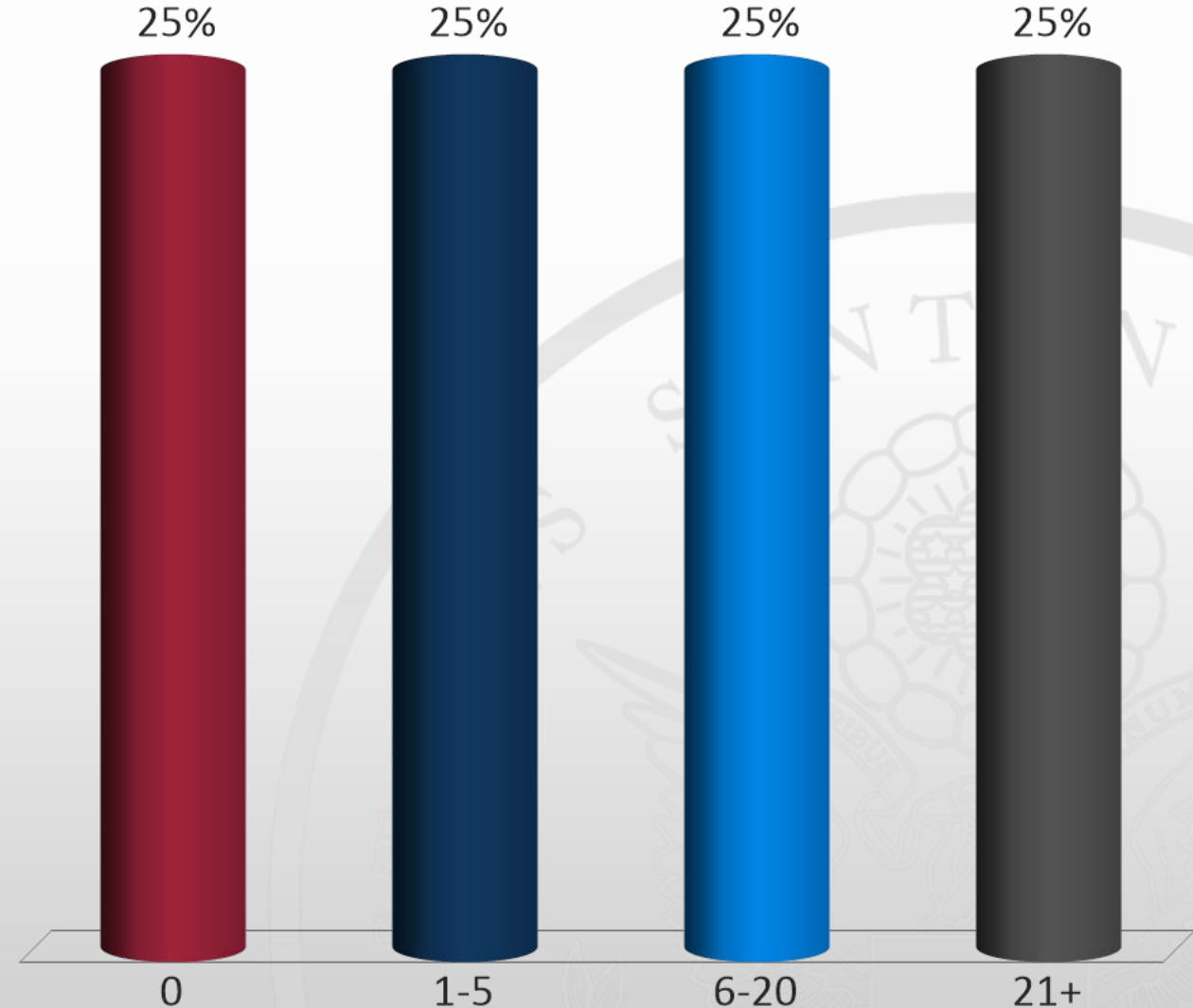
# What is your current position?

- A. Judge
- B. Probation Officer
- C. Federal Public Defender
- D. Defense Counsel
- E. AUSA
- F. Law Clerk
- G. Other



# How long have you been working in the field of federal sentencing?

- A. Less than 6 months
- B. 6 months to 1 year
- C. 2 to 5 years
- D. 6 to 10 years
- E. 11 years or more



# Which of the following options best describes your opinion of the categorical approach?

- A. Confusing
- B. Unfair
- C. Necessary
- D. Easy
- E. I don't even have words!



# Learning Objectives

Your active engagement in this session will empower you to:

**Describe** the categorical approach;

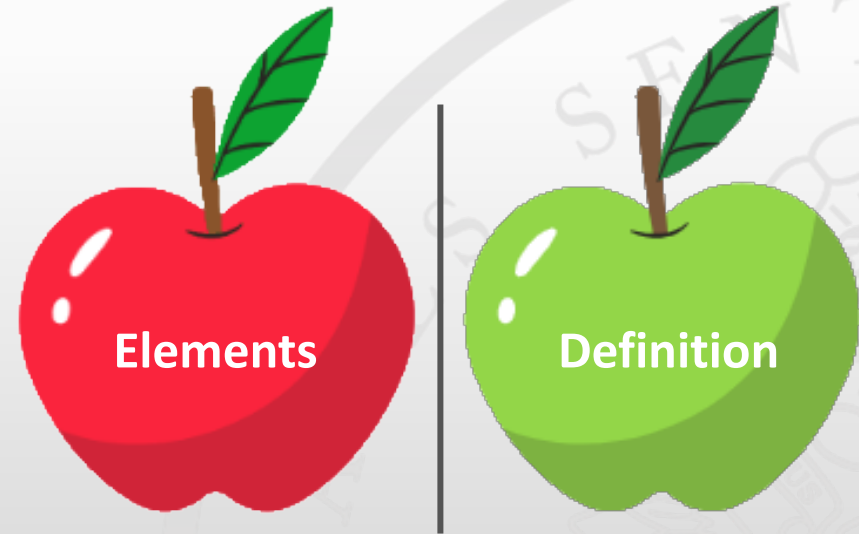
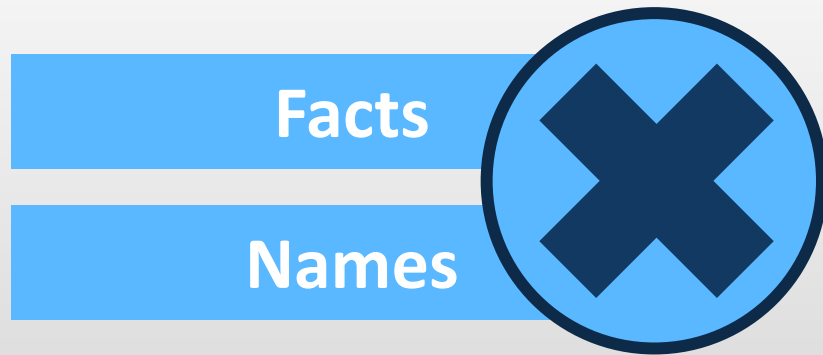
**Analyze** key issues in the terms “crime of violence” and “violent felony”;

**Utilize** a four-step process to apply the categorical (and modified) approach; and

**Identify** advanced categorical approach issues, such as the treatment of drug and inchoate offenses.

# What's the Categorical Approach?

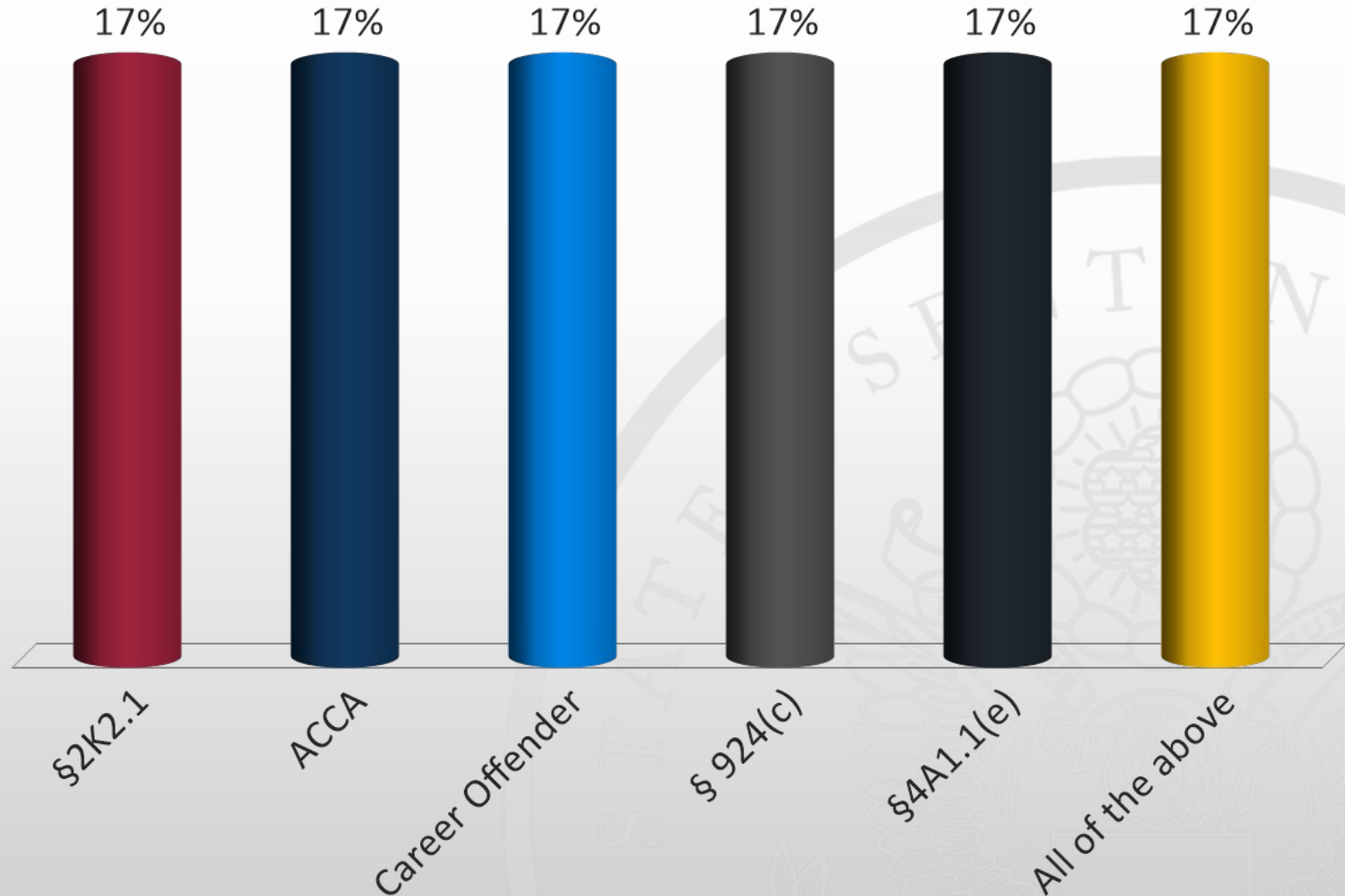
A method for determining whether an offense meets a given definition, such as “crime of violence” or “controlled substance offense.”





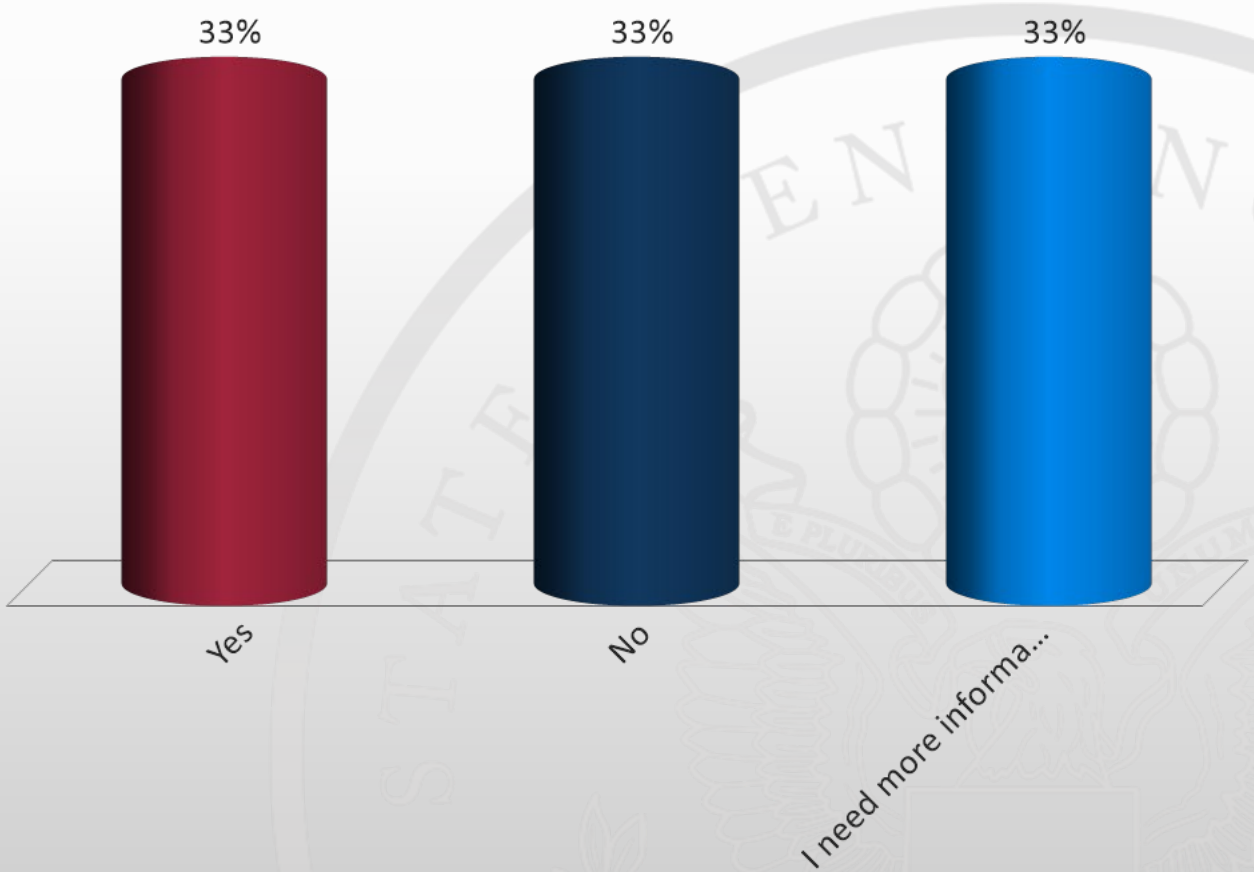
# The categorical approach is used to apply which of the following guideline and statutory provisions?

- A. §2K2.1
- B. ACCA
- C. Career Offender
- D. § 924(c)
- E. §4A1.1(e)
- ✓ F. All of the above



# The defendant has a prior conviction for North Dakota aggravated assault. Is this a crime of violence under the guidelines?

- A. Yes
- B. No
- ✓ C. I need more information!



# Crime of Violence

## Section 4B1.2(a) (p. 398)

Any offense under federal or state law punishable by imprisonment for a term exceeding one year, that . . .

### Force Clause

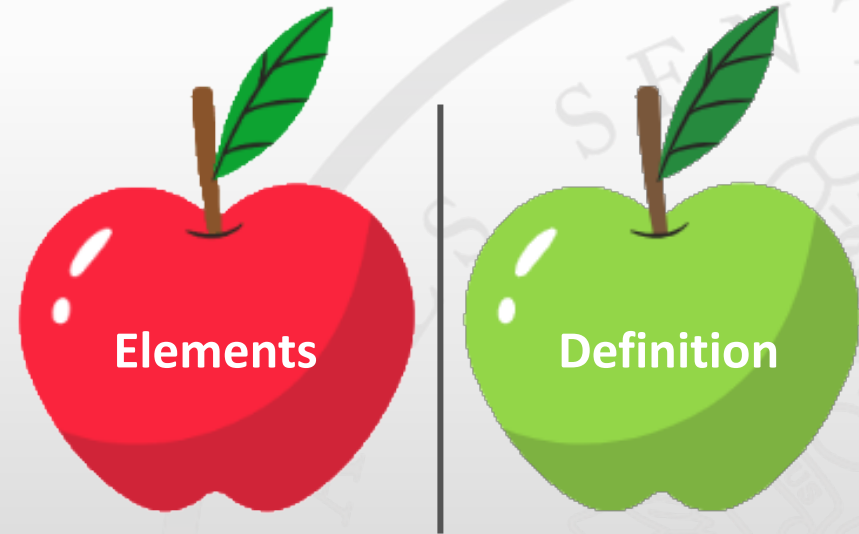
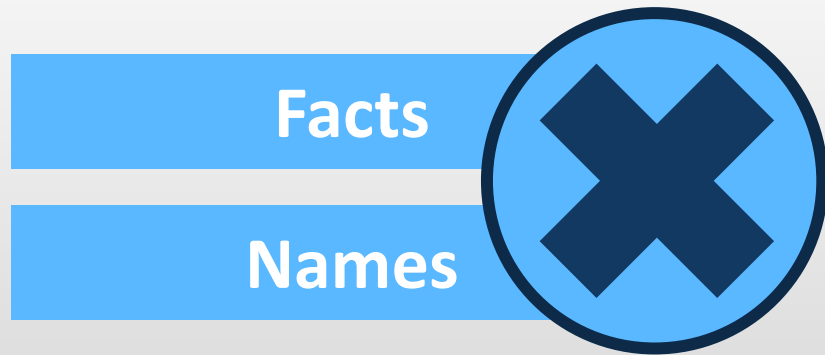
has as an element the use, attempted use, or threatened use of physical force against the person of another, or

### Enumerated Clause

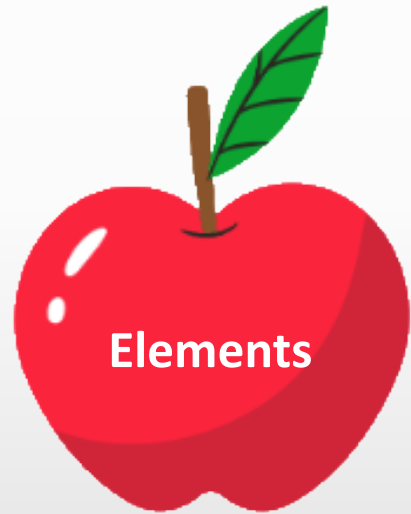
is murder, manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or possession of certain explosive materials or firearms

# What's the Categorical Approach?

A method for determining whether an offense meets a given definition, such as “crime of violence” or “controlled substance offense.”



# Force Clause: Key Issues



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**Force Definition**

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**Persons vs. Property**

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**Mental State**

# What's Physical Force (Generally)?

*Johnson v. United States, 559 U.S. 133 (2010)*

A substantial degree of force:



**Capable of Causing  
Physical Pain or Injury**



*De Minimis Force*

# What's Physical Force (Robbery)?

*Stokeling v. United States*, 139 S. Ct. 544 (2019)



Force sufficient to **overcome a victim's resistance**

# Who or What Is Force Directed Against?

## ACCA & Guidelines

Has as an element the use, attempted use, or threatened use of physical force against **the person of another**

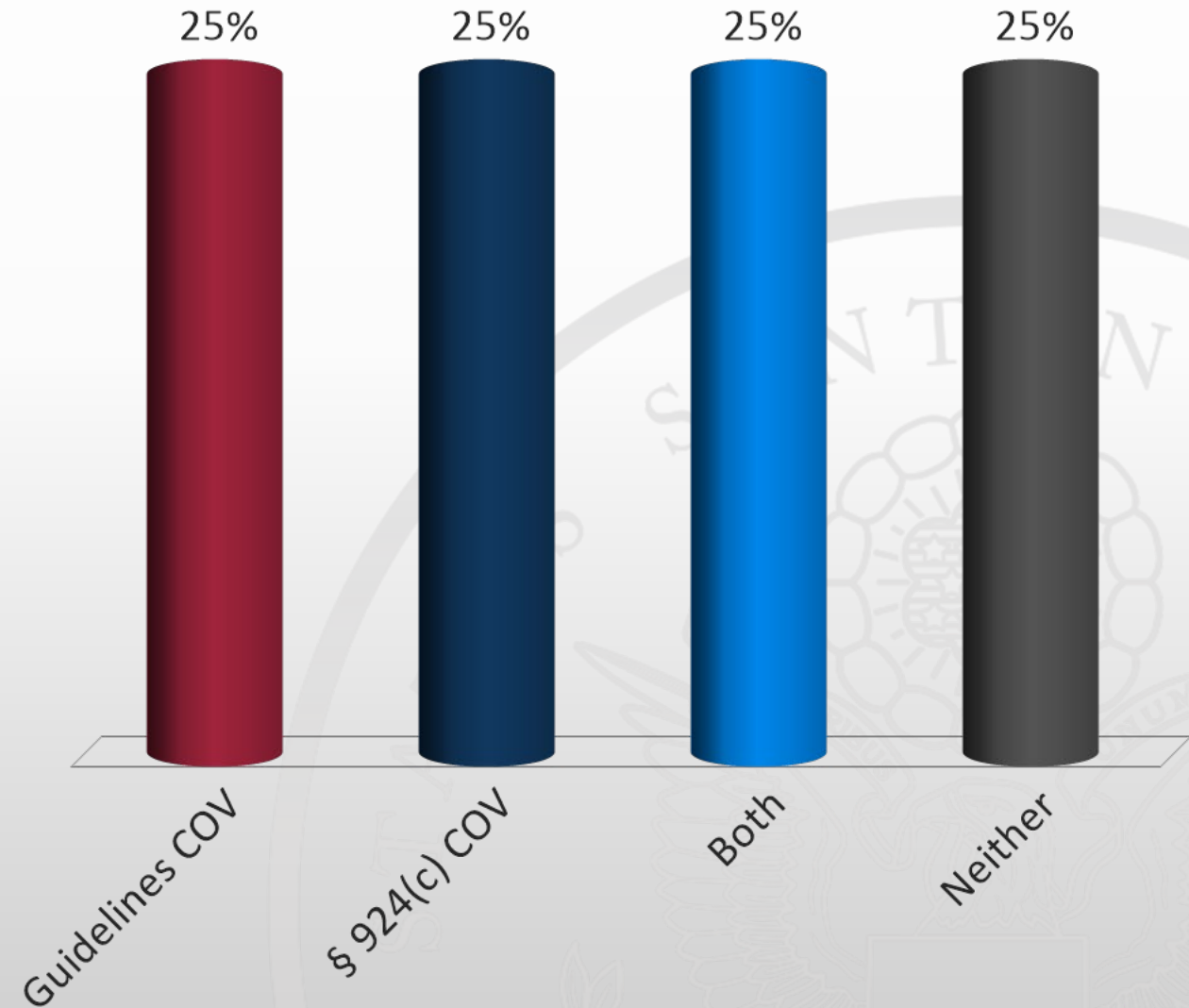
## § 924(c)

Has as an element the use, attempted use, or threatened use of physical force against **the person or property of another**



# Hobbs Act robbery, which may be committed against a person or property, is a . . .

- A. Guidelines COV
- ✓ B. § 924(c) COV
- C. Both
- D. Neither



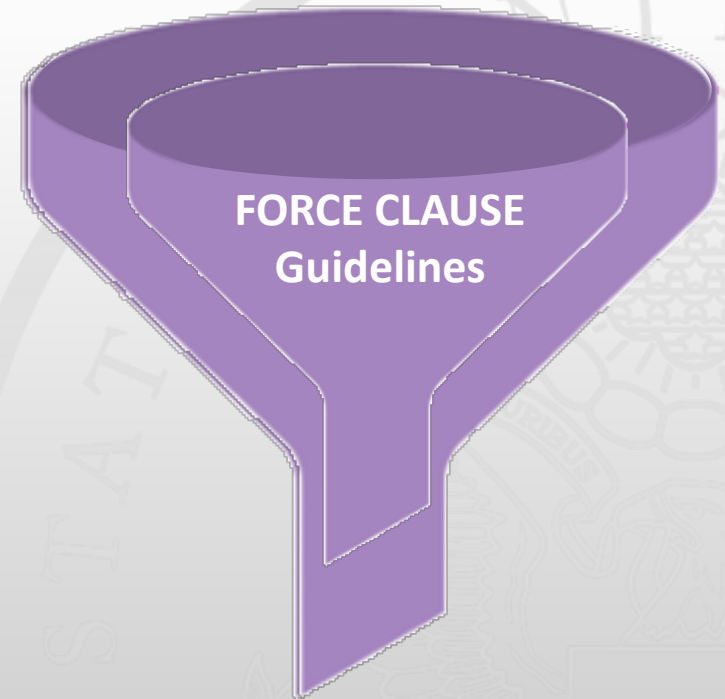
# Hobbs Act Robbery



Crime of Violence  
§ 924(c)



Crime of Violence  
Guidelines



# Career Offender Amendments

## Proposed §4B1.2(e)(3)

### New Robbery Definition

“‘Robbery’ is the unlawful taking or obtaining of personal property from the person . . . by means of actual or threatened force . . . to his person or property. . . .”

**(Future) Hobbs Act Robbery**

Guidelines Crime of Violence



# What Mental State Is Required?



**Intentional or Knowing**



**Negligence / None**



**Recklessness**



# *United States v. Borden*

141 S. Ct. 1817 (2021)



## Question Presented:

Does the force clause encompass crimes with a *mens rea* of recklessness?



# *United States v. Borden*

141 S. Ct. 1817 (2021)



## Holding:

An offense is **NOT** a violent felony under the ACCA's force clause if it requires a mental state of recklessness.

# *Borden* and Other Force Clauses



# *Borden*: Additional Implications

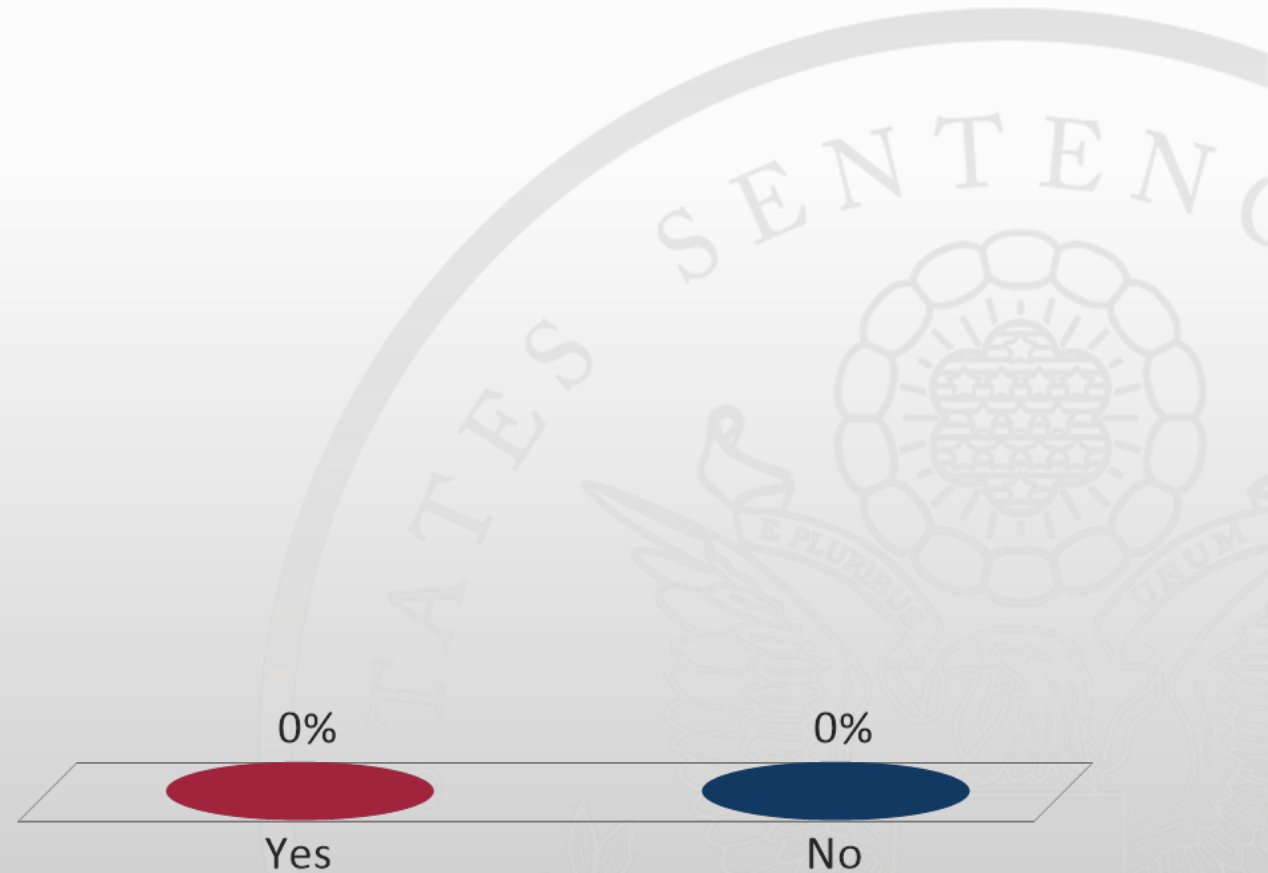


Does the ACCA and other similar force clauses encompass crimes with a *mens rea* greater than recklessness but less than knowledge?



# Does the ACCA and other similar force clauses encompass crimes with a *mens rea* greater than recklessness but less than knowledge?

- A. Yes
- B. No



# Recklessness+

**“Depraved heart”** or **“Extreme recklessness”** offenses counts under § 924(c).

*United States v. Manley*, 52 F.4th 143 (4th Cir. 2022)

*Janis v. United States*, 73 F.4th 628 (8th Cir. 2023)

*United States v. Begay*, 33 F.4th 1081 (9th Cir. 2022) (en banc)

*United States v. Kepler*, 74 F.4th 1292 (10th Cir. 2023)

**“Extreme indifference to human life”** offenses count under § 3559.

*United States v. Harrison*, 54 F.4th 884 (6th Cir. 2022)

**“Implied-malice murder”** offenses count under § 924(c).

*Alvarado-Linares v. United States*, 44 F.4th 1334 (11th Cir. 2022)

# Force Clause: Key Issues



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**Force Definition**



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**Persons vs. Property**



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**Mental State**



# What about the Enumerated Clause?

Any offense under federal or state law punishable by imprisonment for a term exceeding one year, that . . .

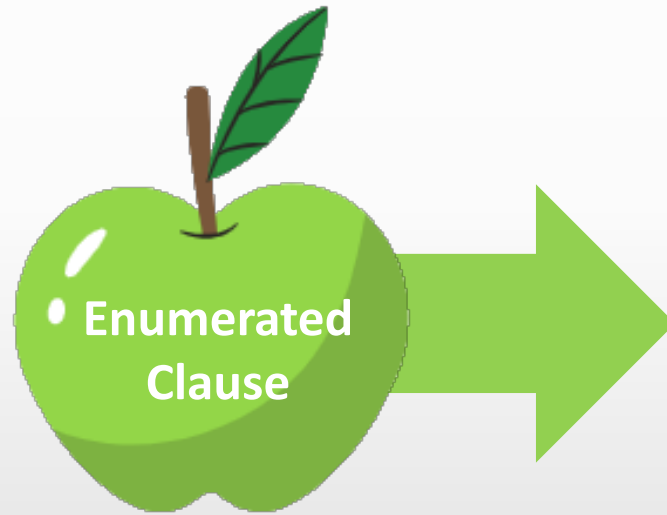
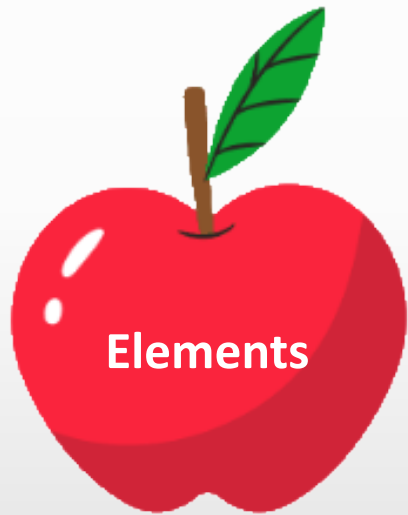
## Force Clause

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

## Enumerated Clause

is murder, manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or possession of certain explosive materials or firearms

# Enumerated Clause Basics



Use definition from statute  
or guidelines;

or

If none, use "generic  
definition"

# Where do I find generic definitions?



Case  
Law

The icon depicts a book with a white outline on a dark red background. The text 'Case Law' is centered on the cover, with two horizontal white lines below it.



Model  
Penal Code

The icon depicts a book with a white outline on a dark blue background. The text 'Model Penal Code' is centered on the cover, with two horizontal white lines below it.



State  
Surveys

The icon depicts a book with a white outline on a bright blue background. The text 'State Surveys' is centered on the cover, with two horizontal white lines below it.

# Categorical Approach: Four-Step Process

1

## Determine

the statute of conviction.

2

## List

the elements of the statute of conviction.\*

3

## Identify

the definition at issue.

4

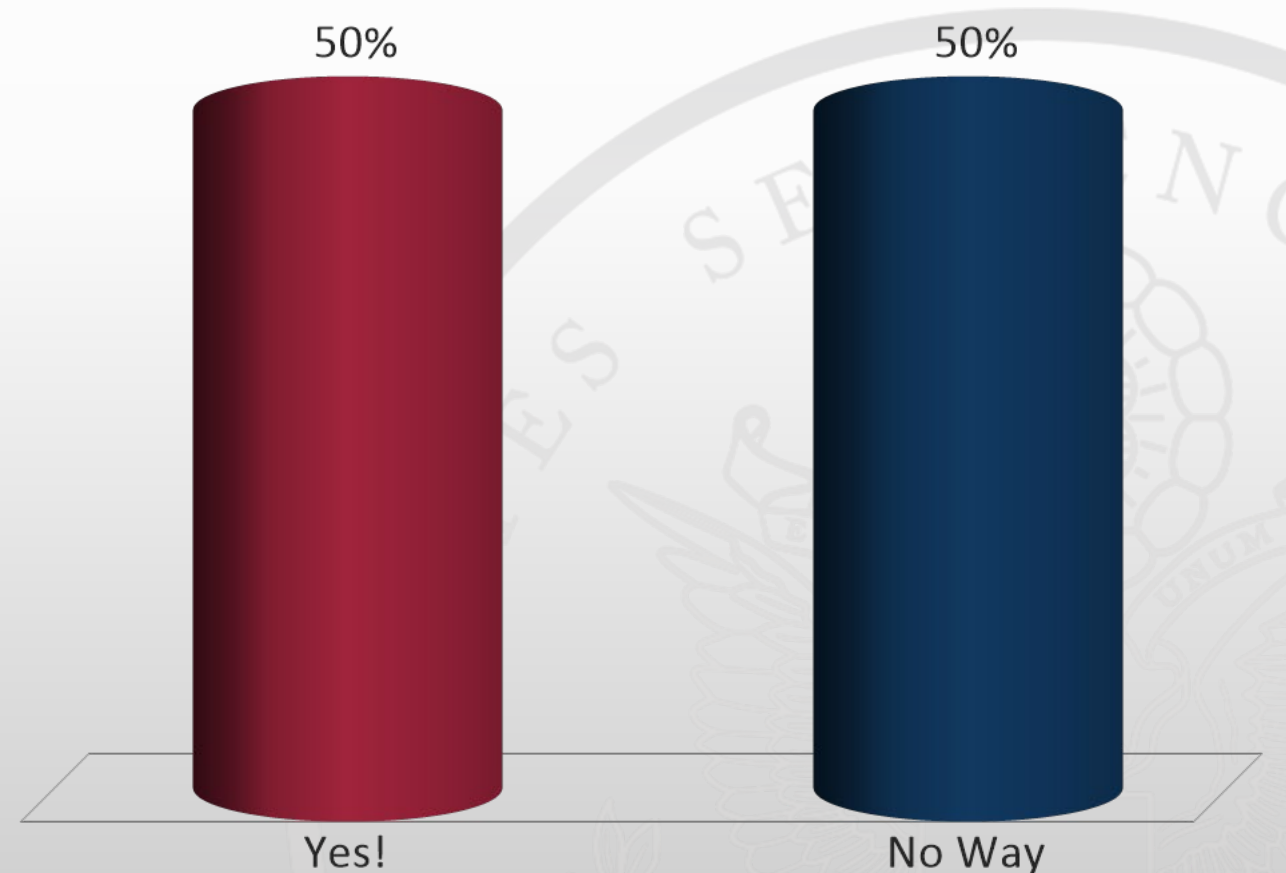
## Compare

the elements in the statute of conviction to the definition.

\*May Require  
Divisibility

The defendant has a prior North Dakota aggravated assault conviction. Are you ready to tackle whether this is a guidelines crime of violence?

- ✓ A. Yes!
- B. No Way





# What's Step 1?

1

## Determine

the statute of conviction.

**12.1-17-02**

## Aggravated assault

A person is guilty of a class C felony if that person:

- a. Willfully causes serious bodily injury to another human being;

# What's Step 2?

2

## List

the elements of the statute of conviction.\*

\*May Require  
Divisibility

willfully  
cause

serious bodily  
injury to  
another  
person

# What Does “Willfully” Mean?



willfully  
cause

North Dakota defines “willfully” as acting “intentionally, knowingly, or recklessly.”

# What's Step 3?

3

**Identify**

the definition  
at issue.

SENTEN

Enumerated  
Clause

ST



# What's Step 4?



intentionally  
or knowingly

A green apple with a brown stem and a single green leaf. The text is written in white on the green surface of the apple.

4

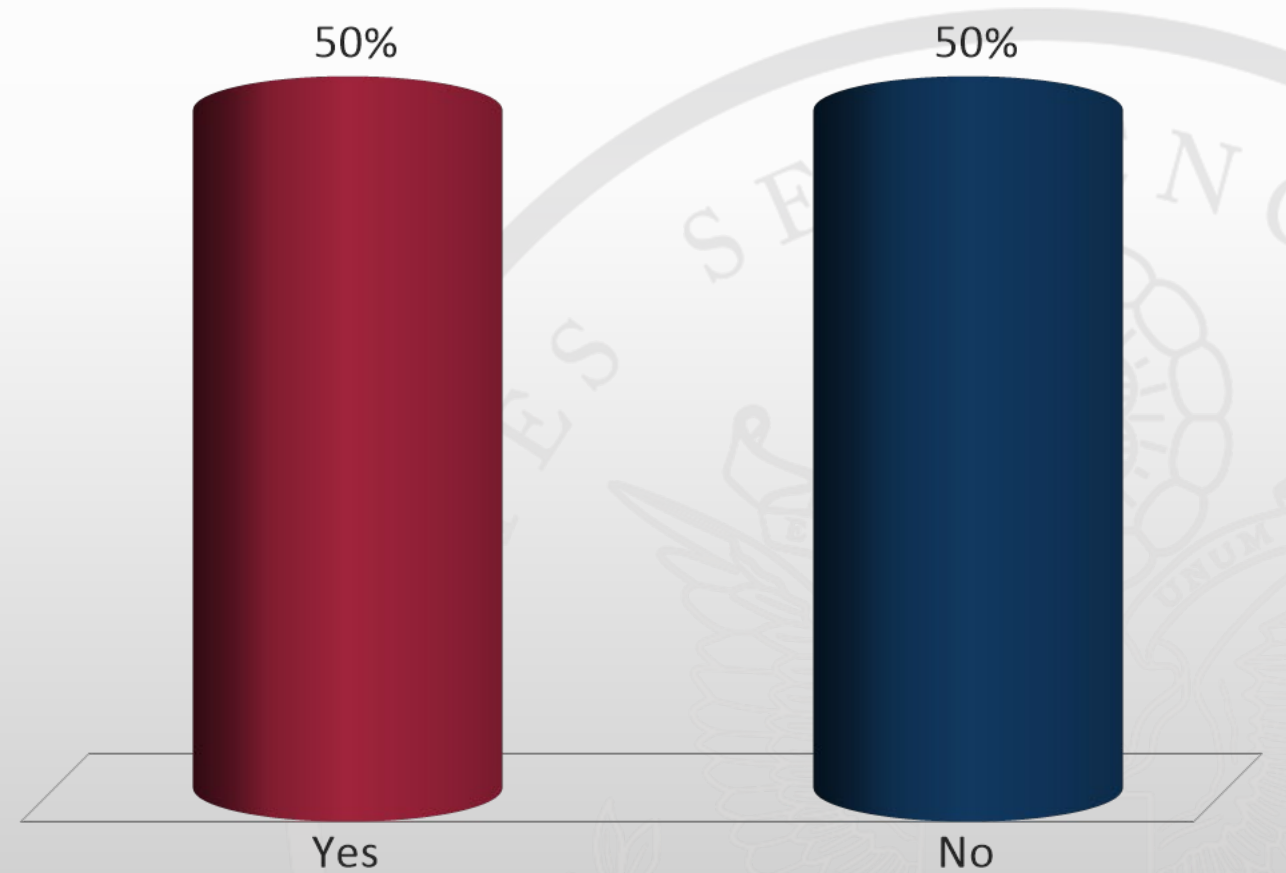
A dark blue circle with a white border containing the number 4 in white.

## Compare

the elements in  
the statute of  
conviction to  
the definition.

# Are we done?

- A. Yes
- ✓ B. No



# What's Step 3?

3

## Identify

the definition  
at issue.

Force Clause

Enumerated  
Clause

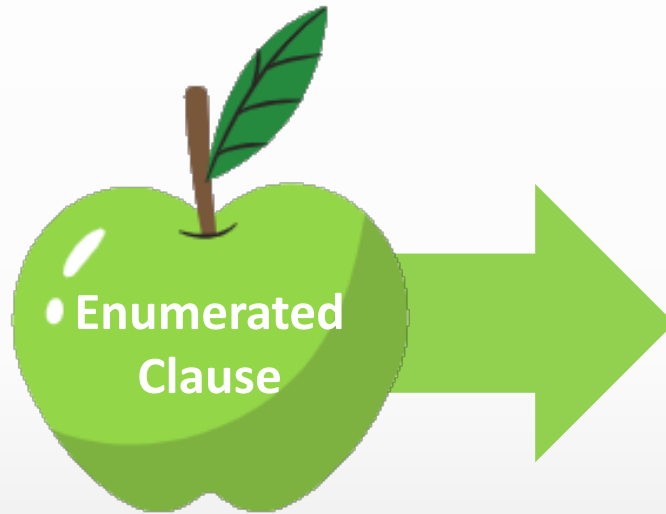
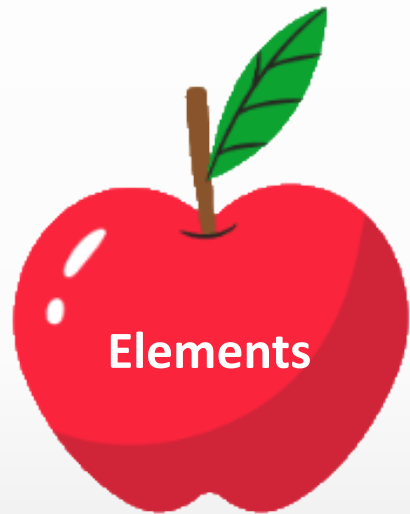
# What's Step 3?

## Enumerated Clause

is murder, manslaughter, kidnapping, **aggravated assault**, a forcible sex offense, robbery, arson, extortion, or the use or possession of certain explosive materials or firearms



# What is the definition of aggravated assault?



Use definition from statute  
or guidelines;

or

If none, use "generic  
definition"

The **"generic, contemporary"** meaning of the offense, a "uniform definition independent of the labels employed by the various state codes."

# Generic, Contemporary Meaning of Aggravated Assault

The least culpable mental state listed in the Model Penal Code's definition of aggravated assault is **“reckless[ness] under circumstances manifesting extreme indifference to the value of human life.”** Model Penal Code § 211.1(2)(a).

Most jurisdictions draw the line in the same place.

Use definition from statute  
or guidelines;

or

If none, use “generic  
definition”

# What's Step 4?

4

## Compare

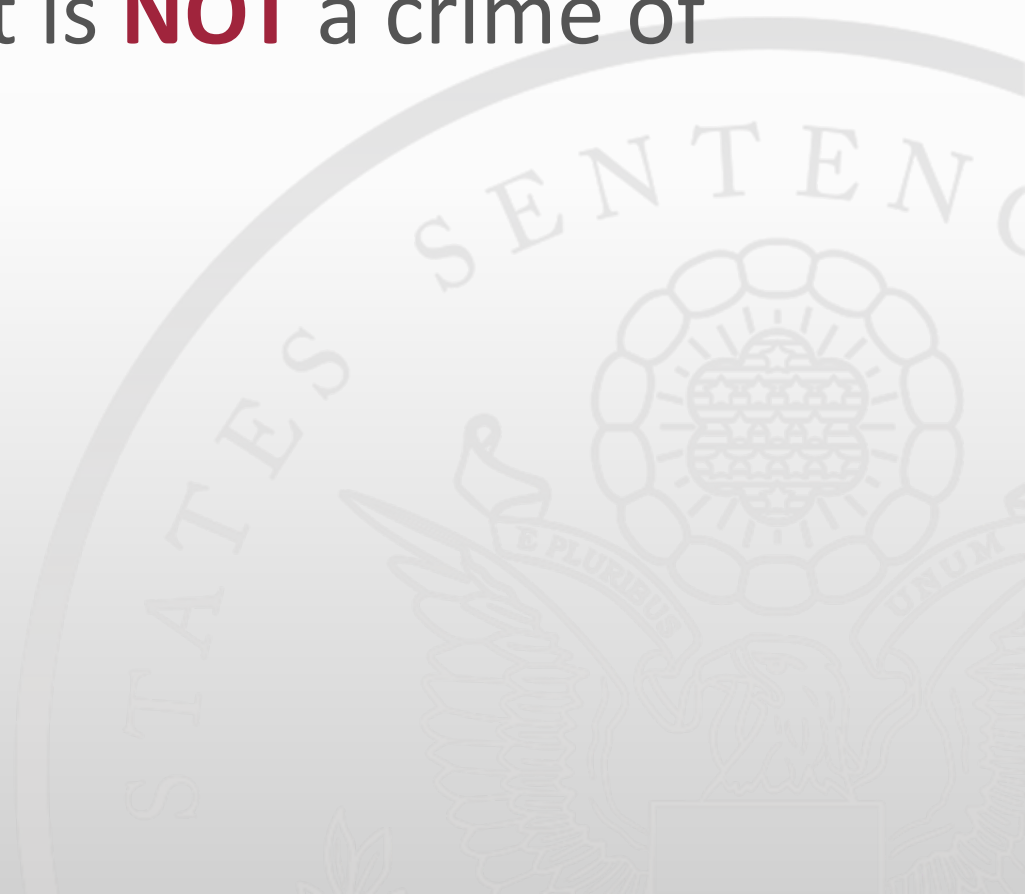
the elements in the statute of conviction to the definition.



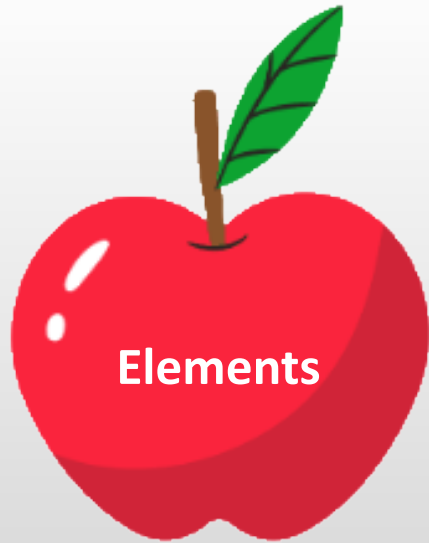
# *United States v. Schneider*

**905 F.3d 1088 (8th Cir. 2018)**

North Dakota aggravated assault is **NOT** a crime of violence under the Guidelines.



# *But I Heard You Can Examine Some Documents!*



Use Documents  
to Discover:

Never:



Facts

# Divisibility in a Nutshell

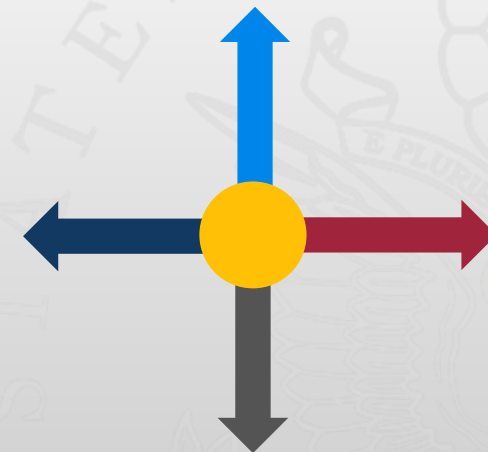
*Mathis v. United States*, 579 U.S. 500 (2016)

Does the statute list:

multiple crimes?

or

multiple ways to commit  
one crime?



# Don't Be Fooled!

The word **“or”**

**Subsections**

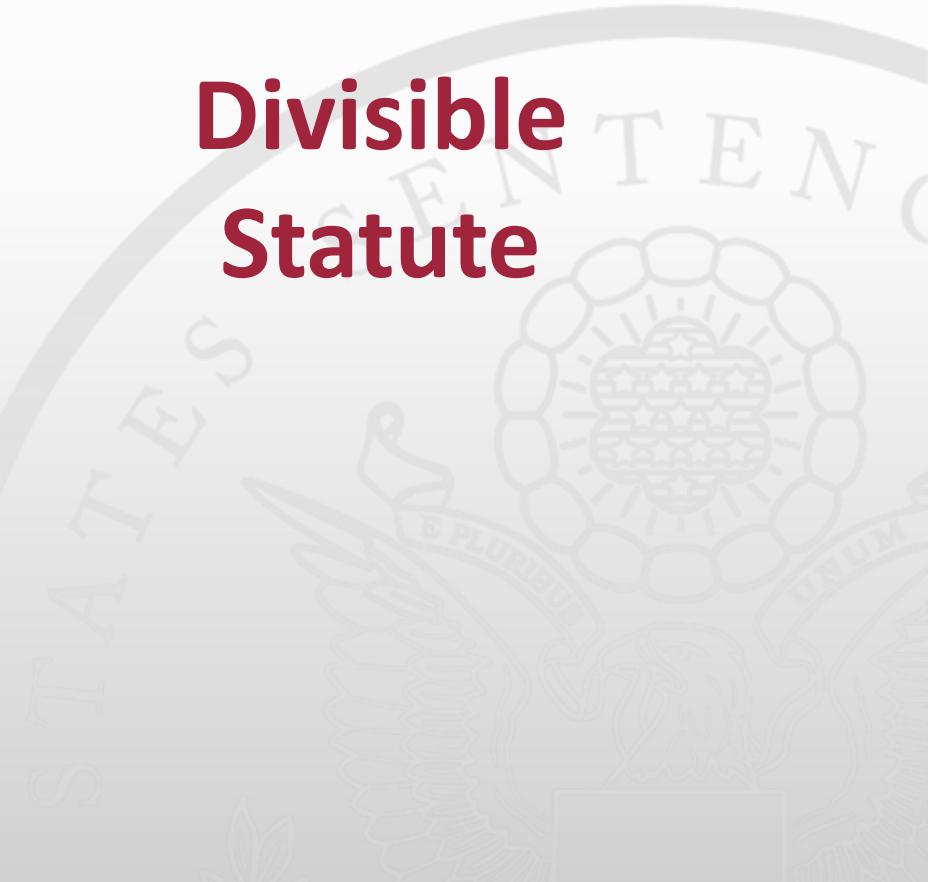
(e.g., “(a), (b), (c)”)



**Divisible  
Statute**

**Multiple *mens rea* options**

(e.g., “intentionally, recklessly,  
negligently”)





Statutory  
Penalties



Jury  
Instructions



State Supreme  
Court Decisions

**Tools to Determine Divisibility**



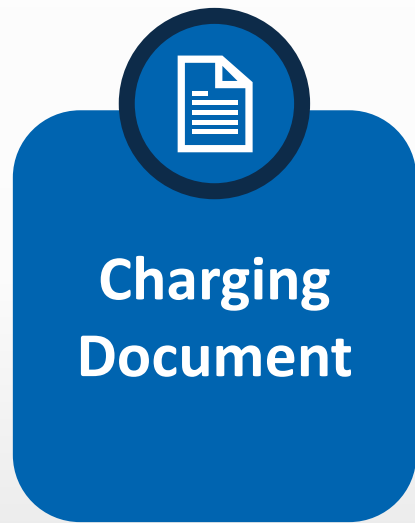
# Why Does it Matter if a Statute is Divisible?

If the statute is divisible, then you can use **the modified categorical approach**, that is, you may look at certain documents to determine what crime the defendant was convicted of.



# Modified Categorical Approach Documents




*Shepard v. United States, 544 U.S. 13 (2005)*



# Hawaii Second-Degree Robbery

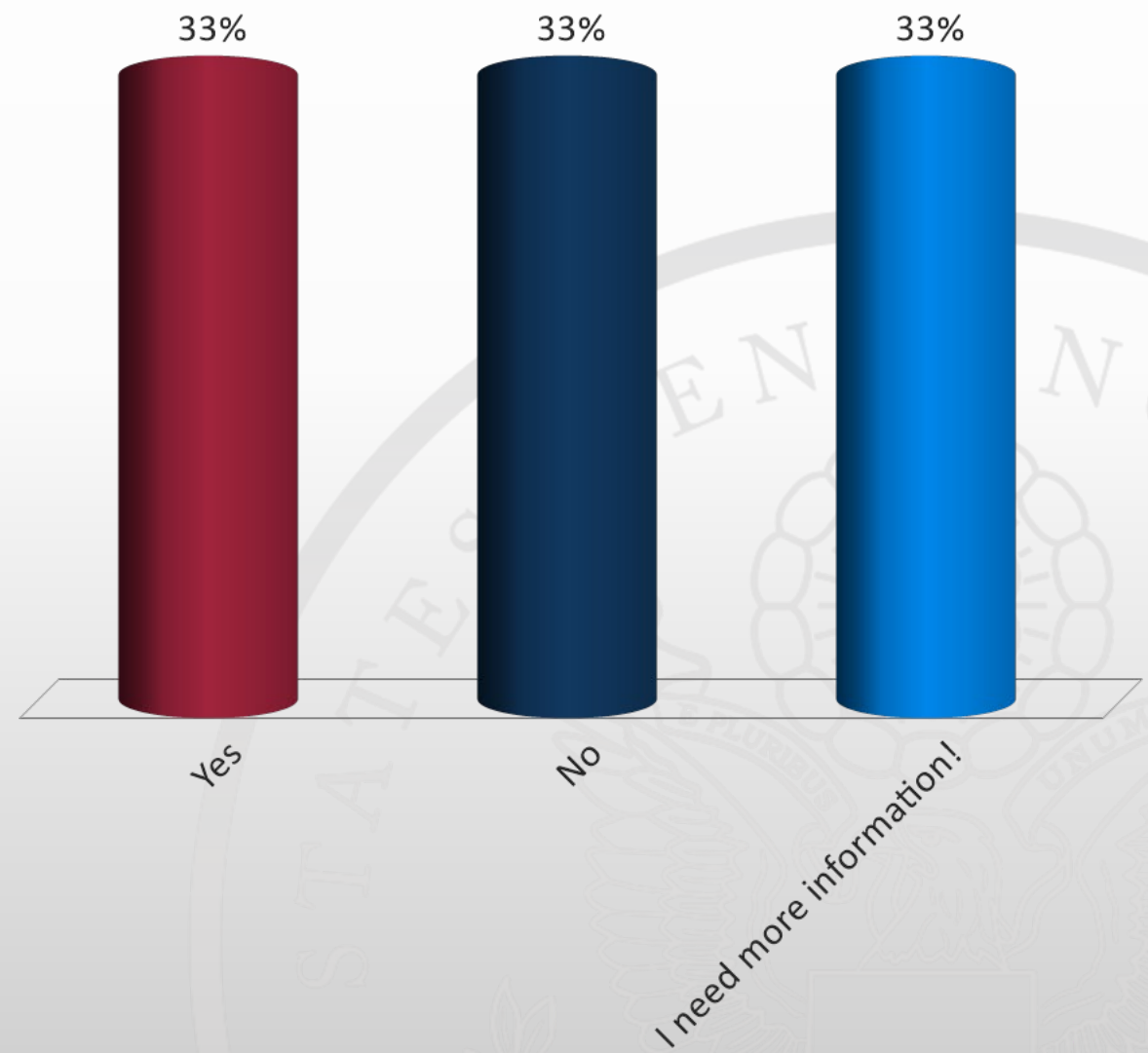
## Section 708-841

If during a theft a person . . .

-  (a) uses force against the person . . . with the intent to overcome that person's physical resistance;
-  (b) threatens the imminent use of force against the person . . . with intent to compel acquiescence to the taking of or escaping with the property; or
-  (c) recklessly inflicts serious bodily injury upon another.

# Is Hawaii Second-Degree Robbery Divisible?

- A. Yes
- B. No
- C. I need more information!



# Tools to Determine Divisibility



**Statutory  
Penalties**



**Jury  
Instructions**



**State  
Supreme  
Court  
Decisions**

# Tools to Determine Divisibility



## Statutory Penalties

Subsections (a), (b), and (c) | Class B Felony  
HRS § 708–841

Class B Felony | 10 years' imprisonment  
HRS § 706–660(1)

**Nothing on Divisibility Here**

# Tools to Determine Divisibility



**Statutory  
Penalties**

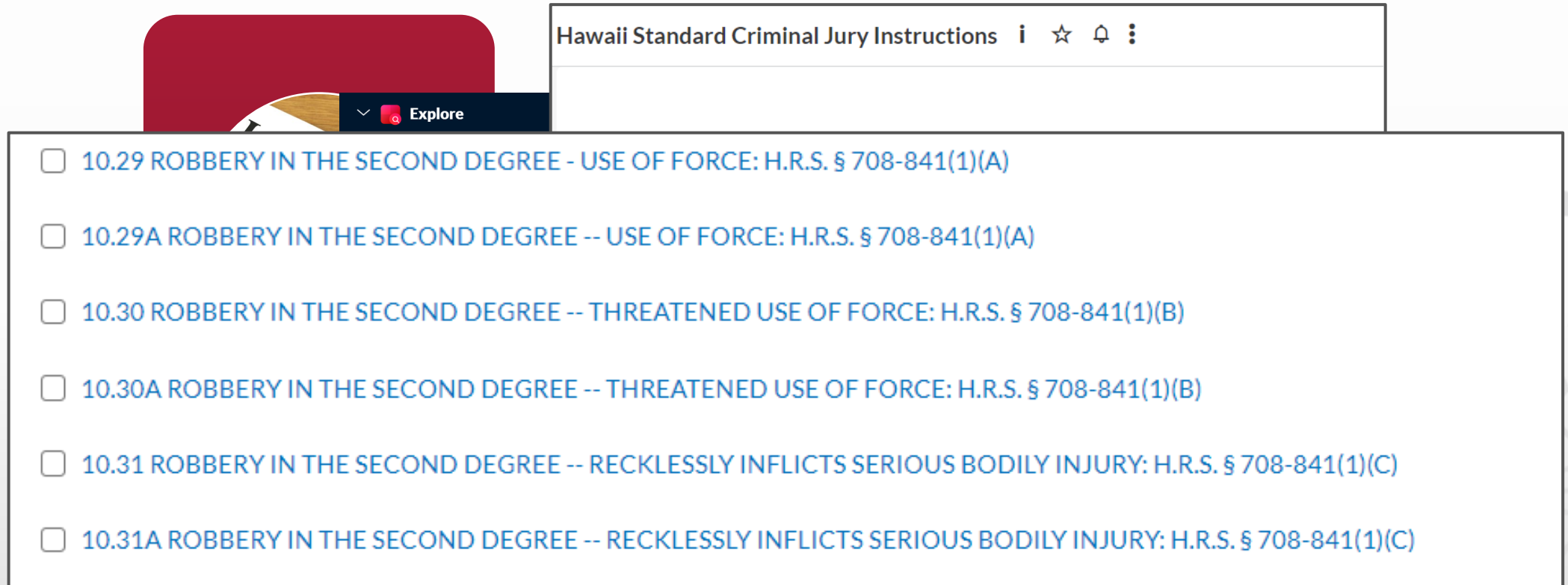


**Jury  
Instructions**



**State  
Supreme  
Court  
Decisions**

# Tools to Determine Divisibility



The screenshot shows a web browser window with the title "Hawaii Standard Criminal Jury Instructions". The browser's address bar contains a search icon, a star icon, a bell icon, and a menu icon. Below the browser window, a list of six jury instruction options is displayed, each with a checkbox and a blue link text. The options are:

- [10.29 ROBBERY IN THE SECOND DEGREE - USE OF FORCE: H.R.S. § 708-841\(1\)\(A\)](#)
- [10.29A ROBBERY IN THE SECOND DEGREE -- USE OF FORCE: H.R.S. § 708-841\(1\)\(A\)](#)
- [10.30 ROBBERY IN THE SECOND DEGREE -- THREATENED USE OF FORCE: H.R.S. § 708-841\(1\)\(B\)](#)
- [10.30A ROBBERY IN THE SECOND DEGREE -- THREATENED USE OF FORCE: H.R.S. § 708-841\(1\)\(B\)](#)
- [10.31 ROBBERY IN THE SECOND DEGREE -- RECKLESSLY INFLICTS SERIOUS BODILY INJURY: H.R.S. § 708-841\(1\)\(C\)](#)
- [10.31A ROBBERY IN THE SECOND DEGREE -- RECKLESSLY INFLICTS SERIOUS BODILY INJURY: H.R.S. § 708-841\(1\)\(C\)](#)

**Different Jury Instructions for Each Subsection**



# Tools to Determine Divisibility



**Statutory  
Penalties**



**Jury  
Instructions**



**State  
Supreme  
Court  
Decisions**

# Tools to Determine Divisibility



State  
Supreme  
Court  
Decisions

“The material elements of **HRS § 708–841(1)(a)** that the prosecution must prove beyond a reasonable doubt are . . . (2) the conduct (that the defendant used **force against a person** who was present with intent to overcome that person’s physical resistance or physical power of resistance).”

*State v. Iuli*, 101 Haw. 196, 206 (2003)

**Discrete Elements for Each Subsection**

# *United States v. Tagatac*

**36 F.4th 1000 (9th Cir. 2022)**

Hawaii second-degree robbery is a divisible statute, and second-degree robbery by threatened use of force is a crime of violence under the guidelines.



# Controlled Substance Offenses

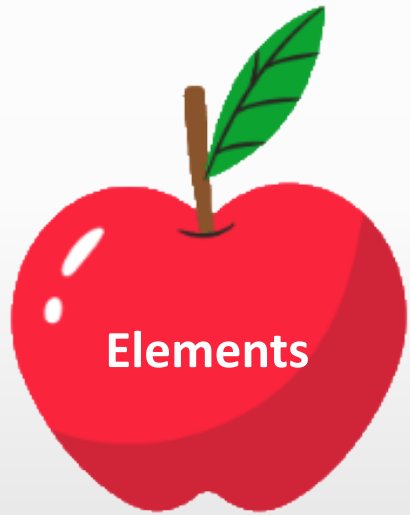
## Section 4B1.2(b) (p. 398)

Any offense under federal or state law punishable by imprisonment for a term exceeding one year, that . . .

### Controlled Substance Offense

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.

# Drug Crime Issues



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State or Federal Schedules

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Time of Drug Schedules

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Guideline Amendments

# State or Federal Schedules

## Guidelines

an offense . . . 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.

## ACCA

an offense . . . 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

# Section 4B1.2(b): State or Federal Schedules?

## State or Federal Schedules

*United States v. Lewis*, 58 F.4th 764 (3d Cir. 2023)  
*United States v. Ward*, 972 F.3d 364 (4th Cir. 2020)  
*United States v. Ruth*, 966 F.3d 642 (7th Cir. 2020)  
*United States v. Henderson*, 11 F.4th 713 (8th Cir. 2021)  
*United States v. Jones*, 15 F.4th 1288 (10th Cir. 2021)

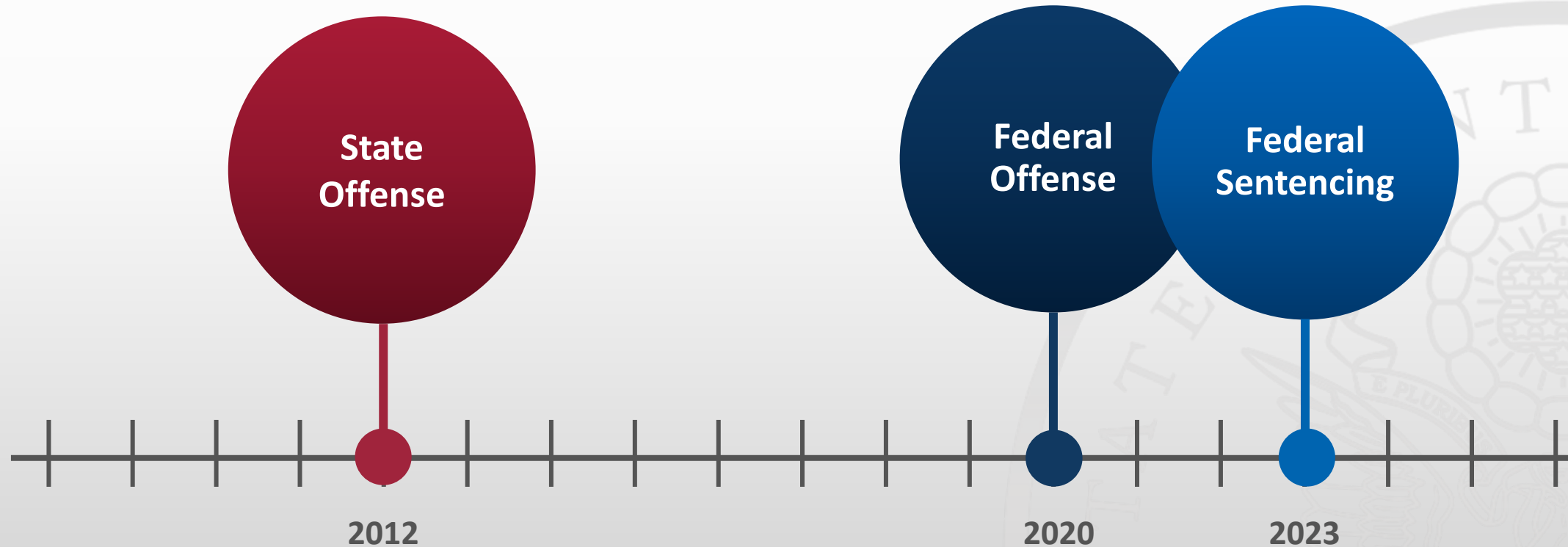
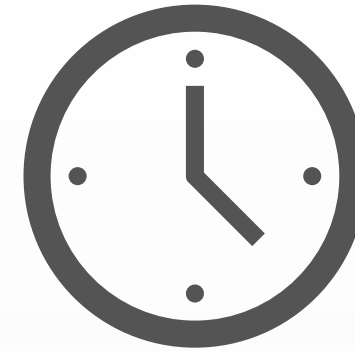
## Federal Schedules

*United States v. Townsend*, 897 F.3d 66 (2d Cir. 2018)  
*United States v. Bautista*, 989 F.3d 698 (9th Cir. 2021)

## Likely Federal Schedules

*United States v. Crocco*, 15 F.4th 20 (1st Cir. 2021)  
*United States v. Gomez-Alvarez*, 781 F.3d 787 (5th Cir. 2015)

# Drug Schedules Timing





# ACCA: Time of Comparison

## Time of State Drug Offense

*United States v. Jackson*, 55 F.4th 846 (11th Cir. 2022)

## Time of Federal Firearms Offense or Sentencing

*United States v. Brown*, 47 F.4th 147 (3d Cir. 2022)

\**United States v. Hope*, 28 F.4th 487 (4th Cir. 2022)

*United States v. Perez*, 46 F.4th 691 (8th Cir. 2022)

*United States v. Williams*, 48 F.4th 1125 (10th Cir. 2022)

# *United States v. Brown*

2023 WL 3440566 (2023)

# *United States v. Jackson*

2023 WL 3440568 (2023)



## Question Presented:

Does the definition of “serious drug offense” incorporate the federal drug schedules in effect at the time of the prior state drug offense, federal firearm offense, or federal sentencing?

# Section 4B1.2(b): Time of Comparison

## Time of State Drug Offense

*United States v. Lewis*, 58 F.4th 764 (3d Cir. 2023)

*United States v. Clark*, 46 F.4th 404 (6th Cir. 2022)

*United States v. Perez*, 46 F.4th 691 (8th Cir. 2022)

## Time of Federal Offense or Sentencing

*United States v. Abdulaziz*, 998 F.3d 519 (1st Cir. 2021)

\**United States v. Gibson*, 55 F.4th 153 (2d Cir. 2022)

*United States v. House*, 31 F.4th 745 (9th Cir. 2022)

# Career Offender Amendments

## Proposed §4B1.2(b)(2)

### New Controlled Substance Offenses

46 U.S.C. § 70503(a) (“covered vessel” offenses)

46 U.S.C. § 70506(b) (attempts and conspiracy)



# Drug Crime Issues



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**State or Federal Schedules**



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**Time of Drug Schedules**

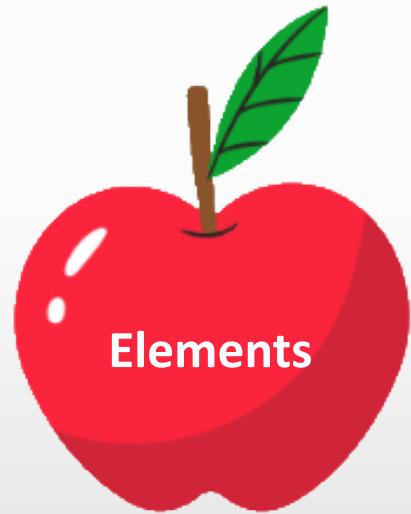


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**Guideline Amendments**



# Advanced Issues

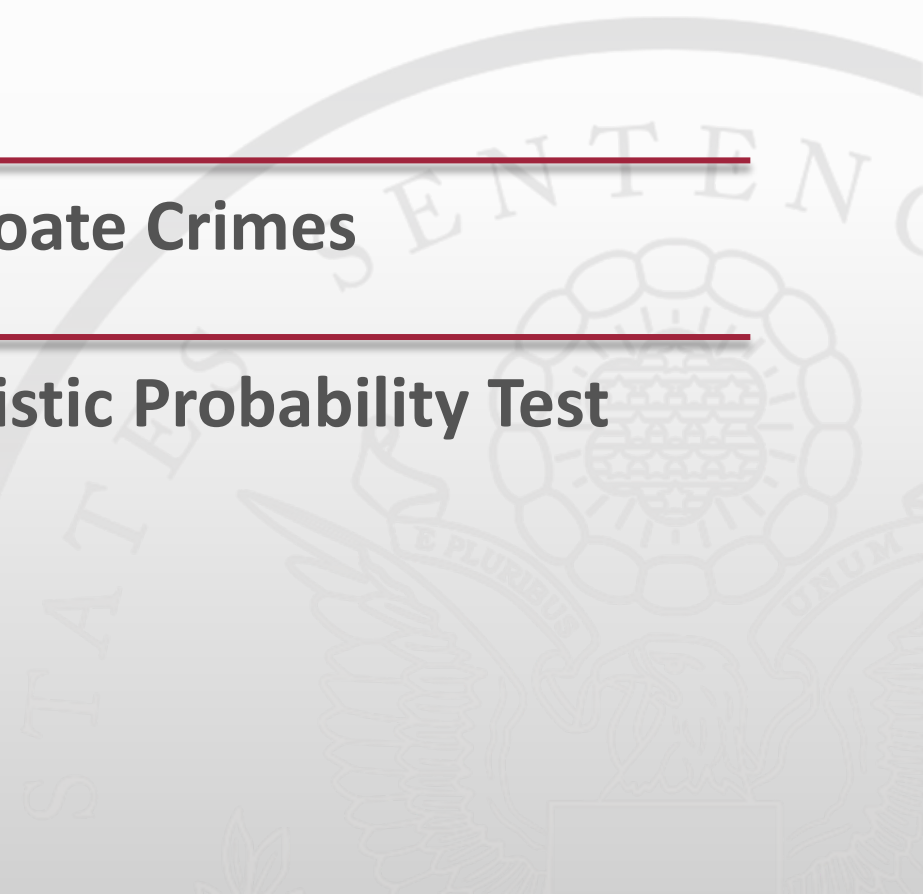


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**Inchoate Crimes**

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**Realistic Probability Test**



# Inchoate Offenses under the Guidelines

## Section 4B1.2, App. Note 1 (p. 399)

“Crime of violence” and “controlled substance offense” includes the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.



# Is Application Note 1 Valid?

## Held Invalid

*United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020)

*United States v. Campbell*, 22 F.4th 438 (4th Cir. 2022)

*United States v. Havis*, 927 F.3d 382 (6th Cir. 2019)

*United States v. Castillo*, 69 F.4th 648 (9th Cir. 2023)

*United States v. Dupree*, 57 F.4th 1269 (11th Cir. 2023)

*United States v. Winstead*, 890 F.3d 1082 (D.C. Cir. 2018)

## Held Valid

*United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020)

*United States v. Tabb*, 949 F.3d 81 (2d Cir. 2020)

*United States v. Vargas*, 74 F.4th 673 (5th Cir. 2023) (en banc)

*United States v. Smith*, 989 F.3d 575 (7th Cir. 2021)

*United States v. Maloid*, 71 F.4th 795, 813 (10th Cir. 2023)



# Career Offender Amendments

## Moves Commentary to Guidelines



App. Note 1 (Inchoate Offenses)

§4B1.2(c)

App. Note 1 (Forcible Sex Offense)

§4B1.2(e)(1)

App. Note 1 (Extortion)

§4B1.2(e)(2)

**\*Resolves Circuit Split**

# *United States v. Taylor*

142 S. Ct. 2015 (2022)

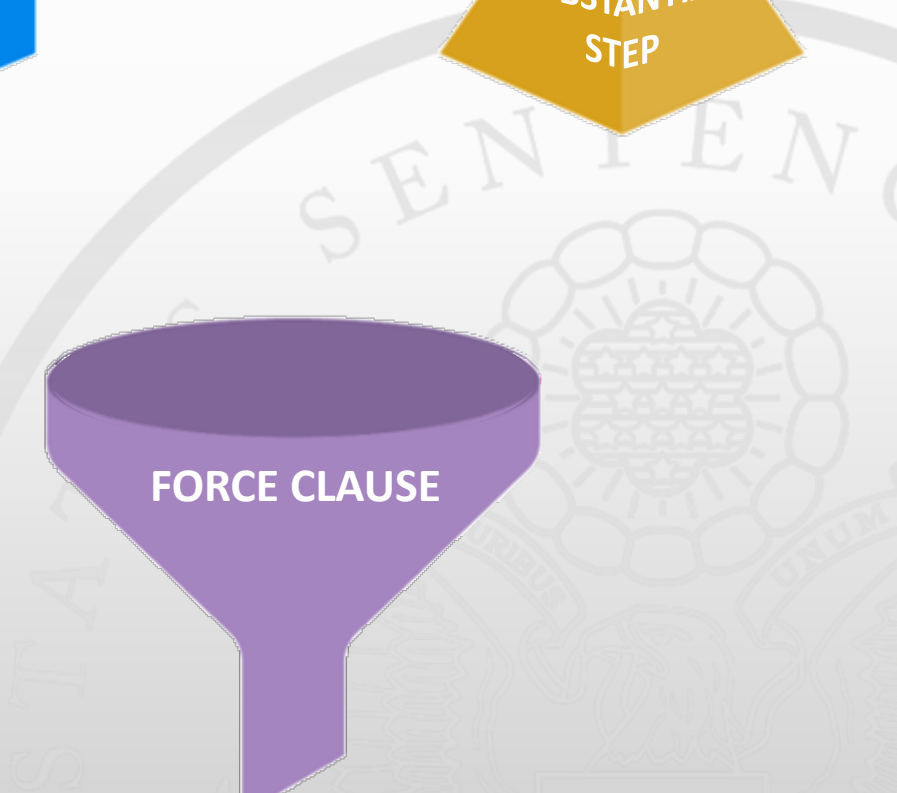
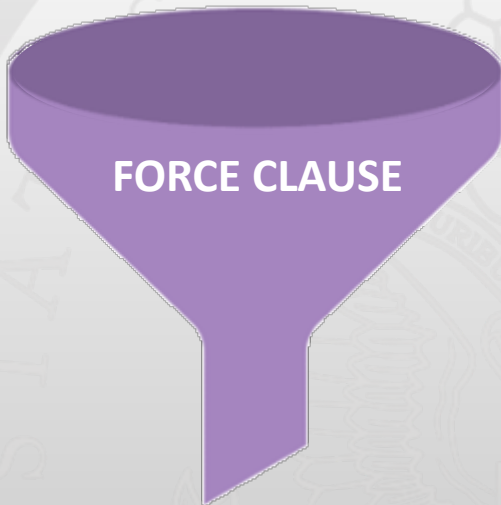
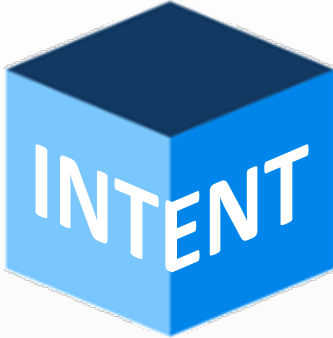


## Question Presented:

Is **attempted** Hobbs Act robbery a crime of violence under § 924(c)?

# Attempted Hobbs Act Robbery

Crime of Violence  
§ 924(c)



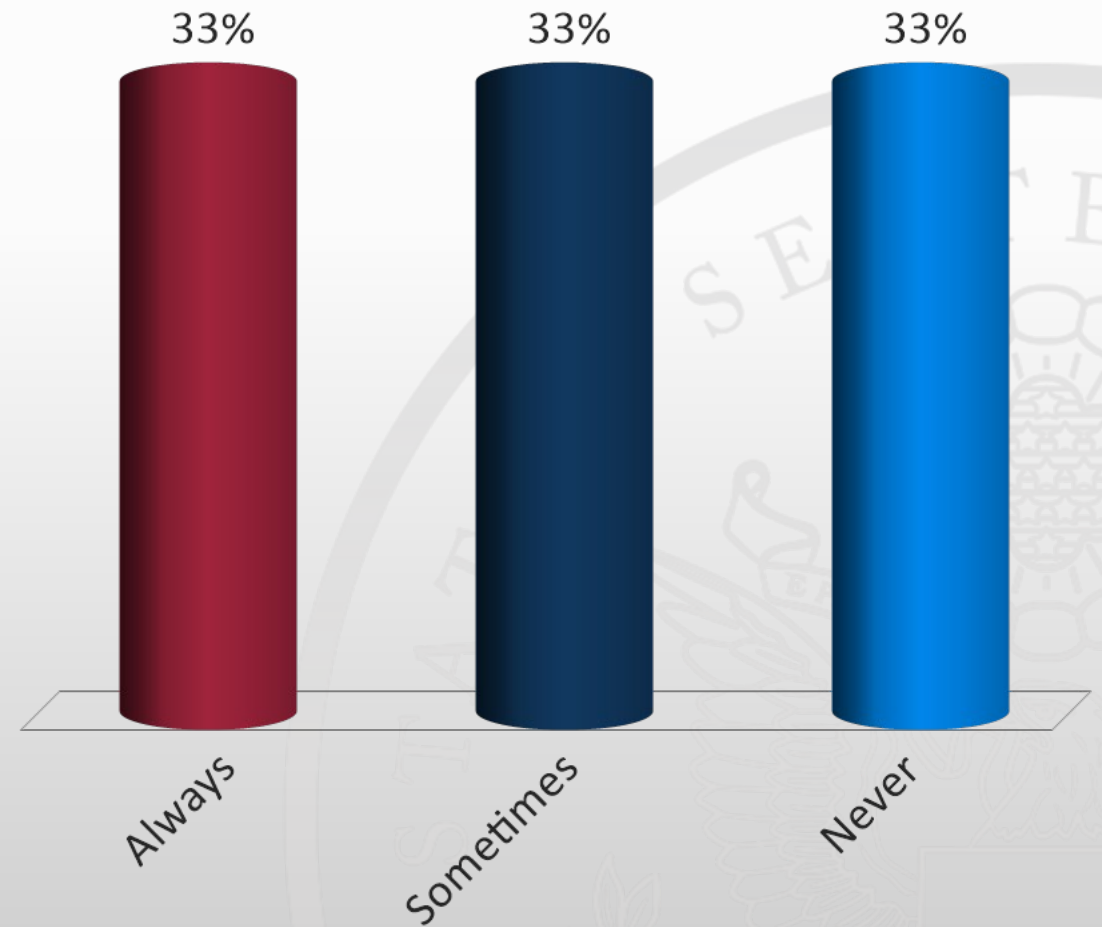
# Possible Effects of *Taylor*

**Other  
Inchoate Offenses**

**“Realistic Probability”  
Test**

# Does the realistic probability test survive *Taylor*?

- A. Always
- B. Sometimes
- C. Never



# Realistic Probability After *Taylor*

## State Burglary | Enumerated Clause (ACCA)

*United States v. Paulk*, 46 F.4th 399 (6th Cir. 2022)

## State Robbery | Force Clause (ACCA)

*United States v. Bragg*, 44 F.4th 1067 (8th Cir. 2022)



# Noting *Taylor*'s Impact on Realistic Probability

**“The reasoning in the Supreme Court’s recent decision in *Taylor* could change the contours of the realistic probability test.”**

*United States v. Turner*, 47 F.4th 509 (7th Cir. 2022)

**“*Taylor* casts substantial doubt on use of the ‘realistic probability’ test to determine whether a statute applies to conduct that falls outside the force clause.”**

*United States v. Hari*, 67 F.4th 903 (8th Cir. 2023)

# Advanced Categorical Approach Issues



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**Inchoate Crimes**



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**Realistic Probability Test**





# Learning Outcomes

You should now be able to:

**Describe** the categorical approach;

**Analyze** key issues in the terms “crime of violence” and “violent felony”;

**Utilize** a four-step process to apply the categorical (and modified) approach; and

**Identify** advanced categorical approach issues, such as the treatment of drug and inchoate offenses.