



Legal Challenges to the Use of Prior Convictions as Predicates and Sentencing Enhancements

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Overview

- I: The Categorical Approach
- II: RICO State Predicates
- III: Challenging Controlled Substance Offenses
- IV: Crimes of Violence Post-*Johnson*



I: The Categorical Approach



The Categorical Approach: Refresher

- ▶ Compare the elements of the state statute to the generic federal definition.
- ▶ “[C]ompare the elements of the statute forming the basis of the defendant’s conviction with the elements of the ‘generic’ crime—*i.e.*, the offense as commonly understood.”

Descamps v. United States, 570 U.S. 254, 257 (2013)



The Categorical Approach: Refresher

- ▶ Only elements matter, not facts.
- ▶ “[L]ook[] only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.”

Taylor v. United States, 495 U.S. 575, 600 (1990)

- ▶ “[A]ctual conduct is irrelevant to the inquiry.”
Mellouli v. Lynch, 135 S. Ct. 1980, 1985 (2015)



The Categorical Approach: Refresher

- ▶ Consider only the minimum conduct.
- ▶ “[W]e must presume that the conviction rested upon nothing more than the least of the acts criminalized.”
Moncrieffe v. Holder, 569 U.S. 184, 190-91 (2013)



The Categorical Approach: Refresher

- ▶ If the state statute is broader, it doesn't count, *no matter what the defendant actually did.*
- ▶ “[I]f the statute sweeps more broadly than the generic crime, a conviction under that law cannot count . . . , even if the defendant actually committed the offense in its generic form.”

Descamps v. United States, 570 U.S. 254, 261 (2013)



Example 1: California Burglary Under ACCA

- ▶ “Every person who enters” a house, shop, or store, among other locations, “with intent to commit grand or petit larceny or any felony is guilty of burglary.”

Cal. Penal Code § 459



Example 1: California Burglary Under ACCA

- ▶ California burglary does not require the entry to have been unlawful. Rather, California burglary covers a shoplifter who enters a store, like any customer, during normal business hours—for example, a shoplifter. *Descamps v. United States*, 570 U.S. 254, 259 (2013).
- ▶ Generic burglary under ACCA is narrower because it does require unlawful or unprivileged entry. *Taylor v. United States*, 495 U.S. 575, 598 (1990).



Example 1: California Burglary Under ACCA

- ▶ ACCA defines “violent felony” to include “burglary.” 18 U.S.C. § 924(e)(2)(B)(ii).
- ▶ ACCA “burglary” “must have some uniform definition independent of the labels employed by the various States’ criminal codes.” *Taylor v. United States*, 495 U.S. 575, 592 (1990).
- ▶ “[T]he generic, contemporary meaning of burglary contains at least the following elements: 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.



Example 1: California Burglary Under ACCA

- ▶ California burglary is not “ACCA” burglary.
- ▶ “[A] defendant can receive an ACCA enhancement for burglary only if he was convicted of a crime having ‘the basic elements’ of generic burglary—*i.e.*, ‘unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.’ . . . § 459 does not fit that bill because California defines burglary so broadly as to include shoplifting.”

Descamps v. United States, 570 U.S. 254, 261 (2013)



Example 2: New York Third-Degree Burglary Under ACCA

- ▶ “A person is guilty of burglary in the third degree when he knowingly enters or remain unlawfully in a building with intent to commit a crime therein.”
N.Y. Penal Law § 140.20.
- ▶ “‘Building’ . . . Includes . . . an inclosed motor truck, or an inclosed motor truck trailer.”
N.Y. Penal Law § 140.00(2).



Example 2: New York Third-Degree Burglary Under ACCA

- ▶ New York burglary is not ACCA “burglary.”
- ▶ “[I]n *Taylor*, the Supreme Court drew a distinction between statutes that rely on the generic definition of burglary, . . . and statutes that define burglary more broadly, e.g., by . . . including places, such as automobiles and vending machines, other than buildings. New York Penal Law § 140.20 falls into the latter category in light of the state's expansive definition of ‘building’ to include ... ‘an inclosed motor truck, or an inclosed motor truck trailer.’”

United States v. Lynch, 518 F.3d 164, 170 n.8 (2d Cir. 2008)

- ▶ N.B.: *United States v. Stitt*, 139 S. Ct. 399 (2018) (ACCA burglary includes “burglary of a structure or vehicle that has been adapted or is customarily used for overnight accommodation”), does not affect this conclusion.



Exploiting The Categorical Approach: Methodology

- ▶ **Step One: Identify the elements of the applicable state statute.**
 - ▶ Consult the version in effect at the time of the defendant's conviction, not the current version.
 - ▶ Consider state-court interpretations of statutory elements.
 - ▶ For New York, check McKinney's compilation and Donnino's practice commentaries.



Exploiting The Categorical Approach: Methodology

- **Step Two: Identify the generic federal definition.**
- “[T]he generic definition of an offense is the ‘contemporary understanding’ of the term. In many instances, the generic definition will be the ‘sense in which the term is now used in the criminal codes of most States.’ But courts also consult other sources, including federal criminal statutes, the Model Penal Code, scholarly treatises, and legal dictionaries.”

United States v. Castillo, 896 F.3d 141, 150 (2d Cir. 2018)



Exploiting The Categorical Approach: Methodology

- ▶ Case law has defined some generic federal offenses:
- ▶ Burglary: “[A]n unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.” *Taylor v. United States*, 495 U.S. 575, 598 (1990).
- ▶ Extortion: “[O]btaining 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).
- ▶ Robbery: “[T]he 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).



Exploiting The Categorical Approach: Methodology

- ▶ For undefined offenses:
- ▶ Compile a 50-state survey, or, for a shortcut, check LaFave's *Substantive Criminal Law* treatise for a list of state statutes.
- ▶ Check analogous federal-law offenses.
- ▶ Check the *Model Penal Code*, *Black's Law Dictionary*, *Am. Jur. 2d*, etc.



Exploiting The Categorical Approach: Methodology

- **Step Three: Find the daylight.**
- Go element-by-element, looking for a mismatch. *E.g.*, California burglary (lawful versus unlawful entry); New York burglary (truck trailers versus buildings or structures).
- Look for outlier cases: “State cases that examine the outer contours of the conduct criminalized by the state statute are particularly important.” *United States v. Strickland*, 860 F.3d 1224, 1226-27 (9th Cir. 2017).



II: RICO State Predicates



RICO State Predicates: Definitions

- ▶ All RICO offenses require a “*pattern of racketeering activity*.” 18 U.S.C. § 1962.
- ▶ A “*pattern of racketeering activity*” “requires at least two acts of *racketeering activity*, . . . the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of *racketeering activity*.” 18 U.S.C. § 1961(5).



RICO State Predicates: Definitions

- ▶ “Racketeering activity” means “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in Section 102 of the Controlled Substances Act), which is chargeable under state law and punishable by imprisonment for more than one year.” 18 U.S.C. § 1961(1)(A).



RICO State Predicates

- ▶ The enumerated RICO offenses take generic definitions. To qualify as a RICO predicate, a state offense must match that generic definition.
- ▶ “[F]or a state offense to be an ‘act or threat involving . . . extortion, . . . which is chargeable under State law,’ as RICO requires, the conduct must be capable of being generically classified as extortionate.”

Scheidler v. National Organization for Women, Inc.,
537 U.S. 393, 409 (2003)



RICO State Predicates

- ▶ The comparison between a state statute and a generic enumerated RICO offense looks to elements, not facts.
- ▶ “[T]he determination of whether a state statutory offense falls within the generic definition of state crimes . . . in 18 U.S.C. § 1961(1)(A) involves a pure issue of statutory construction that can be resolved prior to indictment and turns on whether the statutory elements of the offense, and not the factual circumstances of the specific case, substantially correspond to the generic definition of the crime as of 1970 when RICO was enacted.”

Dep’t of Justice, *Criminal RICO: 18 U.S.C. §§ 1961-68: A Manual for Federal Prosecutors* (6th. rev. ed. May 2016), available at <https://www.justice.gov/usam/file/870856/download>.



Example 3: New York Robbery

- ▶ “A person is guilty of robbery in the third degree when he forcibly steals property.”
N.Y. Penal Law § 160.05.
- ▶ “A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:
 1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
 2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.”
N.Y. Penal Law § 160.00.



Example 3: New York Robbery

- ▶ New York robbery does not correspond to the generic definition of “robbery” in 18 U.S.C. § 1961(1)(A) because New York does not require a taking of property from the person or presence of another.
- ▶ “[T]he generic definition of robbery includes, as an element, that the stolen property be taken ‘from the person or in the presence of’ the owner or victim. . . . New York, however, deliberately revised its robbery statute to eliminate the presence element. . . . Under New York law, robbery can now be committed through the use or threat of force to compel another ‘to deliver up’ property not in his presence Because generic robbery contains an element not found in New York’s robbery statute, the New York statute ‘sweeps more broadly than the generic crime.’”

United States v. Pereira-Gomez, 903 F.3d 155, 163-64 (2d Cir. 2018)



Example 4: New York Fifth-Degree Criminal Sale of a Controlled Substance

- “A person is guilty of criminal sale of a controlled substance in the fifth degree when he knowingly and unlawfully sells a controlled substance.” N.Y. Penal Law § 220.31.
- “Controlled substance” includes “chorionic gonadotrophin,” or HCG. N.Y. Pub. Health Law § 3306.
- See *also* N.Y. Penal Law §§ 220.06(1) (fifth-degree criminal possession of a controlled substance); 220.34(7) and (8) (fourth-degree criminal sale of a controlled substance).



Example 4: New York Fifth-Degree Criminal Sale of a Controlled Substance

- ▶ New York fifth-degree criminal sale of a controlled substance is not “dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act),” in 18 U.S.C. § 1961(1)(A) because New York criminalizes the sale of HCG, a substance not scheduled under the federal CSA.
- ▶ “N.Y. Pub. Health Law § 3306, which supplies the drug schedules that permit conviction under § 220.31, includes chorionic gonadotropin as a controlled substance. Chorionic gonadotropin is not a controlled substance under the CSA. . . . § 220.31 can [therefore] punish conduct that is not criminal under the CSA.”

Harbin v. Sessions, 860 F.3d 58, 68 (2d Cir. 2017)



III: Challenging Controlled Substance Offenses



“Serious Drug Offense” Under ACCA

- ▶ **ACCA, 18 U.S.C. § 924(e)(2)(A):**

- ▶ “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,” § 924(e)(2)(A)(i);
- ▶ “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), for which a maximum term of imprisonment of ten years or more is prescribed by law,” § 924(e)(2)(A)(ii).



“Serious Drug Felony” Under The CSA

- ▶ Section 401 of the First Step Act changes the triggering offenses for the enhanced mandatory minimums under 21 U.S.C. §§ 841 and 851.
 - ▶ The FSA replaces the prior trigger, “felony drug offense,” with a new term, “serious drug felony,” and incorporates ACCA’s definition:
 - ▶ “The term ‘serious drug felony’ means 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.”
- 21 U.S.C. § 802(57).



“Controlled Substance Offense” Under The Guidelines

- ▶ U.S.S.G. § 4B1.2(b):
- ▶ “[A]n 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.”
- ▶ Includes attempts and conspiracies. § 4B1.2 cmt. n.1.
- ▶ “[C]ontrolled substance” refers exclusively to substances in the CSA. *United States v. Townsend*, 897 F.3d 66, 75 (2d Cir. 2018).
- ▶ See also U.S.S.G. § 2L1.2 cmt. n.2 (“drug trafficking offense”).



Overbroad State Drug Schedules: Recent Second Circuit Wins

- ▶ All three definitions require that a state offense involve a federally scheduled drug. But many state schedules are overbroad because they criminalize more.
- ▶ “[N.Y. Penal Law § 220.31] criminalizes sale of a drug, **HCG**, that is not included in the CSA, and [§ 220.31] therefore cannot be a predicate offense for an enhanced sentence under U.S.S.G. § 2K2.1(a).”

United States v. Townsend, 897 F.3d 66, 75 (2d Cir. 2018).

- ▶ “The Arizona statute defining “narcotic drug” for purposes of the statute of conviction lists two substances, **benzylfentanyl** and **thenylfentanyl**, . . . that do not appear on the federal list of controlled substances. . . . Consequently, Guerrero’s 2013 Arizona state drug conviction does not qualify as a “drug trafficking offense” under § 2L1.2 of the 2014 Guidelines.”

United States v. Guerrero, 910 F.3d 72, 77 (2d Cir. 2018) (discussing Ariz. Rev. Stat. § 13-3408)



Overbroad State Drug Schedules: New York “Narcotic Drugs”

- ▶ Convictions for New York state offenses involving a “narcotic drug” are open to overbreadth challenge. *E.g.*, N.Y. Penal Law §§ 220.16(1) (third-degree criminal possession of a controlled substance), 220.39(1) (third-degree criminal sale of a controlled substance).
- ▶ N.Y. Pub. Health Law § 3306, Schedule II(b)(1), defines “narcotic drug” to include: “any . . . derivative . . . of opium or opiate, excluding apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone.”
- ▶ The corresponding provision of federal law differs: “any derivative . . . of opium or opiate excluding apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, naldemedine, nalmefene, ***naloxegol***, naloxone, and naltrexone.” 21 C.F.R. § 1308.12(b)(1).



Overbroad State Drug Schedules: New York “Narcotic Drugs”

- ▶ New York defines “narcotic drug” to include all derivatives of opium, except those substances expressly excluded. This definition encompasses naloxegol, which is a derivative of opium.
- ▶ Federal law also schedules all derivatives of opium, but since January 23, 2015, has expressly excluded naloxegol. See Schedules of Controlled Substances: Removal of Naloxegol from Control, 80 Fed. Reg. 3468–01 (Jan. 23, 2015), *available at* 2015 WL 273535.
- ▶ That is, New York criminalizes naloxegol, but federal law does not.
 - ▶ N.B.: This challenge works best for post-January 23, 2015 state convictions.



Nongeneric Elements: 21 U.S.C. § 846

- ▶ The federal drug conspiracy statute, 21 U.S.C. § 846, has been held not to count as a Guidelines “controlled substance offense.” Sent’g Tr. 9-12, *United States v. Wilson*, 18 Cr. 12 (JPO) (S.D.N.Y. July 19, 2018), ECF No. 21; see also *United States v. Whitley*, 737 F. App’x 147 (4th Cir. 2018); *United States v. Martinez-Cruz*, 836 F.3d 1305, 1314 (10th Cir. 2016) (under U.S.S.G. § 2L1.2’s definition of “drug trafficking offense”).

Nongeneric Elements: 21 U.S.C. § 846

- ▶ Section 846 conspiracy has no overt act requirement. *United States v. Shabani*, 513 U.S. 10, 11 (1994). But *generic* conspiracy under Application Note 1 to U.S.S.G. § 4B1.2, defined under the *Castillo* methodology, does.
- ▶ “[T]he definition of ‘conspiracy’ in the laws of 36 of the 50 states, the general federal conspiracy statute, the Model Penal Code, and Black’s Law Dictionary all include an overt act requirement for conspiracy.”
Sent’g Tr. 11-12, *Wilson*.
- ▶ “Because the generic term ‘conspiracy’ as used in [U.S.S.G. § 4B1.2] based on the categorical approach does include an overt act requirement, it follows that 21 U.S.C. § 846 proscribes a broader set of controlled substance offenses.”
- ▶ Sent’g Tr. 12, *Wilson*.



IV: Crimes of Violence Post-*Johnson*



“Violent Felony” Under ACCA

- ▶ **ACCA, 18 U.S.C. § 924(e)(2)(B):**
- ▶ A felony offense that:
 - ▶ “has as an element the use, attempted use, or threatened use of physical force against the person of another,” § 924(e)(2)(B)(i);
 - ▶ “is burglary, arson, or extortion, [or] involves use of explosives,” § 924(e)(2)(B)(ii).
 - ▶ “physical force” means “violent force—that is, force capable of causing physical pain or injury to another person.” *Johnson v. United States*, 559 U.S. 133, 140 (2010).



“Crime of Violence” Under The Guidelines

- ▶ U.S.S.G. § 4B1.2(a):
- ▶ A felony offense that:
 - ▶ “has as element the use, attempted use, or threatened use of physical force against the person of another,” § 4B1.2(a)(1);
 - ▶ “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),” § 4B1.2(a)(2).
 - ▶ This force clause is the same as ACCA’s.
 - ▶ This definition includes attempts and conspiracies. § 4B1.2 cmt. n.1.



“Crime of Violence” Under § 924(c)

- ▶ **18 U.S.C. § 924(c)(3):**
- ▶ “‘[C]rime of violence’ means an offense that is a felony and—
 - ▶ “has as an element the use, attempted use, or threatened use of physical force against the person or property of another,” § 924(c)(3)(A);
 - ▶ “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,” § 924(c)(3)(B).
 - ▶ This force clause is *broader* than ACCA’s and the Guideline’s because it encompasses the use of force against *property*. An offense that satisfies this force clause does not necessarily satisfy ACCA’s or the Guideline’s.
 - ▶ The Supreme Court has granted certiorari to review the constitutionality of this residual clause. *United States v. Davis*, No. 18-431.



Second Circuit Post-*Johnson*: What Counts?

- ▶ All degrees of New York robbery and attempted robbery under ACCA's and the Guideline's force clause. *United States v. Pereira-Gomez*, 903 F.3d 155, 166 (2d Cir. 2018).
- ▶ All degrees of Connecticut robbery under ACCA's and the Guideline's force clause. *United States v. Shabazz*, ___ F.3d ___, 2019 WL 97355, at *5 (2d Cir. Jan. 4, 2019).
- ▶ Connecticut first-degree assault (intentionally causing serious bodily injury with a deadly weapon), Conn. Gen. Stat. § 53a-59(a)(1), under ACCA's and the Guideline's force clause. *Villanueva v. United States*, 893 F.3d 123, 124-25 (2d Cir. 2018).



What Should You Preserve?

- ▶ *Stokeling v. United States*, S. Ct. No. 17-5554 (argued Oct. 9, 2018) (Florida robbery under ACCA).
- ▶ Preserve objections to any offense under ACCA's or the Guideline's force clause, including New York robbery, pending *Stokeling*.
 - ▶ Florida robbery is equivalent to New York robbery. *People v. Sailor*, 65 N.Y.2d 224, 236-37 (1985).



Second Circuit Post-*Johnson*: What Counts?

- ▶ Hobbs Act robbery, 18 U.S.C. § 1951, under § 924(c)(3)(A)'s force clause. *United States v. Hill*, 890 F.3d 51, 60 (2d Cir. 2018).
- ▶ Conspiracy to commit Hobbs Act robbery, under § 924(c)(3)(A)'s force clause together with § 924(c)(3)(B)'s residual clause, and under the residual clause alone. *United States v. Barrett*, 903 F.3d 166, 185 (2d Cir. 2018).



Barrett's Take on § 924(c)(3)

- ▶ *Barrett*: conspiracy to commit Hobbs Act robbery is a § 924(c)(3) crime of violence.
- ▶ Alternative Holding #1: conspiracy to commit an offense that is a categorical crime of violence under § 924(c)(3)(A)'s force clause is *itself* a categorical crime of violence under § 924(c)(3)(A) "together with" § 924(c)(3)(B).
- ▶ Alternative Holding #2: § 924(c)(3)(B) is not void for vagueness, notwithstanding *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), because it can be construed to warrant conduct-specific application by the jury.
- ▶ The government is not defending Alternative Holding #1. See *United States v. Douglas*, 907 F.3d 1 (1st Cir. 2018).



What Should You Preserve?

- ▶ *United States v. Davis*, No. 18-431 (cert. granted Jan. 4, 2019) (constitutionality of 18 U.S.C. § 924(c)(3)(B)).
- ▶ Preserve objections to any offense, including conspiracy to commit Hobbs Act robbery, under either of *Barrett's* alternative holdings, both of which depend on § 924(c)(3)(B)'s constitutionality.
- ▶ In trial cases, object to instructing the jury according to *Barrett's* Alternative Holding #2.



Second Circuit Post-*Johnson*: What Doesn't Count?

- ▶ Connecticut second-degree assault (recklessly causing serious physical injury with a deadly weapon), Conn. Gen. Stat. § 53a-60(a)(3). *United States v. Moreno*, 821 F.3d 223, 228 (2d Cir. 2016).



Second Circuit Post-*Johnson*: What's Pending?

- ▶ New York first-degree manslaughter, N.Y. Penal Law § 125.20(1) (with intent to cause serious bodily injury, causes death) under ACCA and the Guidelines. *United States v. Scott*, No. 18-163 (argued Jan. 9, 2019).
 - ▶ *Scott* will likely control New York second-degree assault, N.Y. Penal Law § 120.05(1) (with intent to cause serious bodily injury, causes such injury).