

Sentencing: Shooting Holes in the ACCA

Seminar by the Federal Defender
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18 U.S.C. 924(e)(2)(B)

- Armed Career Criminal Act
- Convicted under 18 U.S.C. 922(g) and:
- Three prior convictions for a:
 - “violent felony” or
 - “serious drug offense”
- Mandatory minimum sentence of 15 years

“Violent Felony”

Any crime punishable by a term of imprisonment of more than one year that:

- (i) “has as an element the use attempted use or threatened use of physical force against the person of another;” or
- (ii) “is burglary, arson, extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”

Chief Judge Breyer got it right

- *United States v. Doe*, 18 F.3d 41 (1st Cir. 1994)
- “We must read the definition in light of the term to be defined, ‘violent felony,’ which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence” *than does, for example, being a felon in possession of a firearm.*
- FBI: murder, rape, robbery, assault

So did Justice Oliver Wendell Holmes

- *McBoyle v. United States*, 283 U.S. 25 (1931)
- “Although it is not likely that a criminal will carefully consider the text of the law before he murders and steals, it is reasonable that fair warning should be given to the world in language that the common world will understand.”
- The Rule of Lenity. *United States v. Bass*, 404 U.S. 336 (1971)

Most Courts of Appeals didn’t

- “Violent felony” includes, e.g.:
- Failure to report for prison term
 - Reckless endangerment, etc.
 - DUI
 - Offensive touching
 - Auto theft
 - Simple possession of prohibited weapons

Leocal v. Ashcroft, 543 U.S. 1 (2004)

- Cites to *Doe* and to Rule of Lenity
- 18 U.S.C. 16 “crime of violence”
- “active” use of force
- The definition “most naturally suggests a higher degree of intent than negligent or merely accidental conduct.”
- *United States v. Portela*, 469 F.3d 496 (6th Cir. 2006) (reckless offenses are not COV’s)

FAST FORWARD FIVE YEARS
Clause (i)

- (i) Has as an element the [intentional, not merely reckless] use, attempted use, or threatened use of physical [and violent, not merely offensive] force against the person of another
- E.g., armed robbery, most intentional assaults

Clause (ii)

- Is burglary [of a building], arson, or extortion, involves the use of explosives, or otherwise involves [intentional and active, not merely reckless or passive] conduct that [as provable by reference to empirical data] presents a serious potential risk of physical injury to another [provided that the risk and misconduct are similar in nature to that involved in a burglary, arson, extortion, or use-of-explosives offense]

Johnson v. U.S., ___ U.S. ___ (2010)

- Defines “physical force” as used in Clause (i)
- “The phrase ‘physical force’ means violent force – that is, force capable of causing physical pain or injury to another person”
- Offensive touching type of battery is a “comical misfit” with the term “violent felony”

U.S. v. McFalls, 592 F.3d 707
(6th Cir. 2010)

- 18 USC 16 “crime of violence” must involve a mens rea higher than recklessness to satisfy the “has as an element the use . . . of force” clause. *Portela, supra*.
- That rule applies to the same “use of force” clause found in Clause (i) of “violent felony” definition, and in USSG 4B1.2 COV definition. *McFalls, supra*.

Begay v. U.S., 553 U.S. 137 (2008)

- Assumes DUI “presents serious potential risk of physical injury to another.”
- *Ejusdem generis*: “Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words”

Begay (cont.)

1. The enumerated offenses "all typically involve purposeful, violent, and aggressive conduct."
2. So the residual clause includes only crimes that, like burglary and arson, involve purposeful, violent, and aggressive conduct.
3. Result: Clause (ii) does not reach offenses with a mens rea of recklessness or less. *McFalls, supra*.

Chambers v. U.S., 129 S.Ct. 687 (2009)

- Failure to return "escape" is not violent felony
- "[T]he crime amounts to a form of inaction, a far cry from the purposeful, violent, and aggressive conduct" required by *Begay*.
- Walkaway escape is not COV. *U.S. v. Ford*, 560 F.3d 420 (6th Cir. 2009). Failure to obey command is not COV. *U.S. v. Mosely*, 567 F.3d 241 (6th Cir. 2009). Possession of sawed-off shotgun is not violent felony. *U.S. v. Amos*, 501 F.3d 524 (6th Cir. 2007).

Chambers (cont.)

- Rejects "powder keg" rationale.
- Government failed to muster empirical proof that walkaway escapes presented a serious potential risk of injury.

Taylor v. U.S., 495 U.S. 575 (1990)

- The enumerated offenses: burglary, arson, etc
- Court determines the generic, contemporary meaning of the term for federal sentencing purposes. The offense's label does not control.
- "Burglary": "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."

Not Violent Felonies

- Mens rea of recklessness, negligence, or less, including causing serious injury or death
- Escape from a nonsecure setting
- Passive failure to submit to authority
- Simple possession of prohibited weapons (maybe)
- DUI, other regulatory offenses
- Burglary of car, boat, etc.

The Categorical Approach

- "Look only to the fact of conviction and the statutory definition of the prior offense," and "not the particular facts underlying those convictions." *Taylor, supra*.
- If statute is divisible, can look to "record of conviction" to determine whether the offense is categorically a violent felony.

Record of Conviction

- Pled guilty: the judgment, the charging document, a written plea agreement, a plea colloquy, or other “comparable judicial record” *Shepard v. U.S.*, 544 U.S. 13 (2005)
- Convicted at trial: the judgment, the charging document, jury instructions, jury verdict, or bench-trial judge’s findings. *Taylor, supra*

The Point of the Categorical Approach

- Plea context: To determine what misconduct the defendant necessarily admitted in order to establish the conviction. Not to determine what misconduct the defendant actually or likely committed. *U.S. Medina-Almaguer*, 559 F.3d 420, 425 (6th Cir. 2009).
- Trial: What Def. was necessarily convicted of.

The Easy Way to Apply It

1. Assemble the Record of Conviction. (But generally don’t file these documents.)
2. Determine what is the “least objectionable conduct” to which your client admitted guilt. *Amos, supra*.
 - No police reports, complaints, etc. *Shepard*.
 - Generally no facts from presentence reports. *U.S. Jones*, 453 F.3d 777, 780 (6th Cir. 2006); *U.S. v. Rosa*, 507 F.3d 142, 156-57 (2d Cir. 2007)

The Easy Way (cont.)

- no facts recited yet not admitted.
 - no charging papers where pled to lesser included offense. *U.S. v. Armstead*, 467 F.3d 943, 947 (6th Cir. 2007).
3. Look at the proper jurisdiction’s case law through the prism of the “realistic possibility” test. *Gonzales v. Duenas-Alvarez*, 127 S.Ct. 815, 822 (2007).
 4. Find a safe harbor – i.e., one of the “Not Violent Felonies” zones listed above.

Turn Bad Case Law into Good

- South Carolina offense “Assault and Battery of a High and Aggravated Nature”
- ROC: showed Def. caused a “violent injury” “by striking the victim about the face with an unknown object,” requiring “medical treatment”
- 1929: South Carolina Supreme Court upheld ABHAN conviction where jury was instructed on “gross negligence” and Defendant had hit a pedestrian with car.
- 2010: Sixth Circuit decides ABHAN is not a violent felony b/c mens rea could be negligence

Recap

- Don’t rely on labels or old federal case law.
- Find a way to minimize the misconduct admitted to as part of the conviction.
- Find “bad” case law from the jurisdiction and turn the tables.

"Serious drug offense"

- An offense "involving manufacturing, distributing, or possessing with intent to distribute" a federal controlled substance "for which a maximum term of imprisonment of ten years or more is prescribed by law."
- *U.S. v. Rodriguez*, 553 U.S. 377 (2008) Ten year mark includes recidivist enhancements. Does not mean a sentencing guideline maximum.

U.S. v. Morton, 17 F.3d 911 (6th Cir. 1994)

- Ten year maximum is assessed under current law of the jurisdiction for the offense. *Accord U.S. v. Darden*, 539 F.3d 116 (2d Cir. 2008)
- For Tennessee drug offenses. The "maximum" for ACCA purposes is the maximum penalty allowed given the offender's Range (e.g., Range I for a Class C felony has a 6-year max). Consider *Rodriguez*; *U.S. v. Pruitt*, 545 F.3d 416, 422-24 (6th Cir. 2008) (on similar North Carolina system).

