

Descamps Outline

I. The problem: We often need to figure out if and when a defendant's prior state conviction satisfies the generic definition of a federal crime. This requires precision, to avoid Constitutional problems.

A. When do we face this problem? In general: with recidivist enhancements.

1. At **charging** and before a **plea decision** when the charging statute uses predicate offenses (*see, e.g.*, Armed Career Criminal Act, 18 U.S.C. § 924(e); *Descamps v. United States*, 133 S.Ct. 2276 (2013))
2. In **immigration** cases (*see* Immigration and Nationality Act §101(a)(43), www.defensenet.org/immigration-project, www.nationalimmigrationproject.org)
3. At **sentencing**: Sentencing Guidelines use predicate offenses (*see* U.S.S.G. § 2K2.1, § 2L1.2, § 4B1.1)

Note: We probably do not face this problem in the revocation context, in which the categorical approach does not apply. *See, e.g., United States v. Carter*, 730 F.3d 187, 192 (3d Cir. 2013); *cf. United States v. Jones*, 696 F.3d 932, 937 (9th Cir.2012) (“[U]ncharged conduct ... can form the basis of a supervised release violation even when the defendant has not been charged or convicted.”)

B. Constitutional (and administrative) problems.

1. The rock: The Constitution, as interpreted in *Apprendi*.

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). Why the exception? Because a previous crime has already been proved by a reasonable doubt. But then the question becomes what elements were actually proved beyond a reasonable doubt, and how can we tell?

2. The hard place: Administration. Courts must “avoid the impracticality of mini-sentencing-trials featuring opposing witnesses perusing lengthy transcripts of prior proceedings.” *Shepard v. United States*, 544 U.S. 13, 36 (2005) (Thomas, J., concurring).

II. The Supreme Court's solution: Be as objective as possible.

- A. The **categorical approach**. Once the generic federal crime is defined, compare it to the state statute of conviction. “[L]ook only to the fact of [the state] conviction and the statutory definition of the prior offense.” *Taylor v. United States*, 495 U.S. 575, 602 (1990). Determine if the state statute is broader than the federal.

If the state statute is broader than the federal, go on to the next step. If it is identical to or narrower than the federal statute, you may use the conviction as a predicate and end your inquiry.

Do not get tricked by the title of the state conviction. Only the elements matter.

1. Categorical match: If a jury would have to find, unanimously, that each element of the federal generic offense was proven beyond a reasonable doubt in order to convict a defendant of the state offense, the state statute is a categorical match for the federal generic offense. End inquiry.
2. Overbroad state statute: If a jury would not have to find, unanimously, that each element of the federal generic offense was proven beyond a reasonable doubt, the state statute is not a categorical match for the federal generic offense. Continue inquiry.

- B. Determine if the state statute is **divisible** or **indivisible**.

If the state crime is not categorically a generic federal crime, the court then determines if the state statute is divisible because it “list[s] potential offense elements in the alternative.” *Descamps*, 133 S. Ct. at 2283.

1. To be divisible, the state statute must list elements in the alternative. Otherwise, there is no way to know the element was proved beyond a reasonable doubt in the state case.
 - a. The items listed in the alternative in the state statute must be elements!
 - b. Alternative methods of proof are not alternative elements. Thus, a statute is not divisible simply because it lists options.
 - c. Confirm that the alternative is an element that must be found beyond a reasonable doubt by a unanimous jury through caselaw research, statutory construction, and common sense.
2. If the state legislature did not list alternative elements, the statute is indivisible and the analysis ends.

- C. The **modified categorical approach** -- permits the court to identify the specific statutory elements of the defendant's particular state conviction. Uses certain documents from the state conviction to see if a particular alternative element was proved. Then, compares the elements of state conviction to the elements of the federal generic offense.

Use if: 1. the categorical approach shows that the state statute is broader than the federal generic, and 2. the state statute of conviction is divisible.

1. Look to certain documents (called *Shepard* documents) to decide if the state "prior conviction 'necessarily' involved (and a prior plea necessarily admitted) facts equating to [the federal] generic [crime]." *Shepard v. United States*, 544 U.S. 13, 24 (2005).

Shepard document include:

the charging document,
jury instructions,
terms of a plea agreement,
transcript of colloquy between judge and defendant
Descamps, 133 S. Ct. at 2284-85 (summarizing cases).
judgment
abstract of judgment
minute order
bench trial findings
stipulations

Shepard documents do not include:

police reports
presentence reports

Note: Be careful with *Alford* pleas or similar no contest pleas where the defendant is not admitting facts as part of the colloquy.

2. Compare the narrowed elements actually proved to the federal generic elements.
3. If *Shepard* documents do not prove which statutory elements were used in the defendant's conviction, the conviction cannot be used as a predicate. *Johnson v. United States*, 559 U.S. 133, 144 (2010). To honor the Sixth Amendment right to a jury trial, the documents must show what elements a jury found or to what elements a Defendant pleaded. *Shepard v. United States*, 544 U.S. 13, 24 (2005).

D. The Ninth Circuit’s now-rejected gloss: an “excessively” modified approach. *See Descamps*, 133 S. Ct. at 2289.

1. Between 2011 and 2013, the Circuit applied the modified categorical approach even to indivisible statutes – i.e., statutes that use one broad term (like “weapon” instead of specific terms, like “gun, knife, or bomb”) – if *Shepard* documents established that the defendant’s actual conduct satisfied the federal generic. *See Aguila-Montes de Oca*, 655 F.3d 915, 927-28 (9th Cir. 2011) (en banc), *overruled by Descamps v. United States*, 133 S. Ct. 2276 (2013).

Practice tip: Look carefully at Ninth Circuit cases decided before 2013, when *Descamps* overruled *Aguila-Montes de Oca*. Be sure to determine if any case in that time period was over-applying the modified categorical approach. If it was, do not rely on it.

2. The Supreme Court’s Correction: the modified categorical approach may only be applied to divisible statutes. Indivisible statutes are out. *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013). It’s not enough that the defendant *committed* the actual conduct, the jury had to be required to find that defendant committed the conduct.
3. The modified approach thus acts not as an exception, but as a tool. It retains the categorical approach’s central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach’s basic method: comparing those elements with the generic offense’s. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates “several different ... crimes.”

Descamps v. United States, 133 S. Ct. 2276, 2285 (2013) (quoting *Nijhawan*, 557 U.S. 29, 41 (2009)).

4. Bottom line: Ignore the facts! Look to the elements.

Descamps may (or may not) have broken and entered, and so committed generic burglary. Section 459—the crime of which he was convicted—does not require the factfinder (whether jury or judge) to make that determination. Because generic unlawful entry is not an element, or an alternative element, of § 459, a conviction under that statute is never for generic burglary. And that decides this case in *Descamps*’ favor; the District Court should not have enhanced his sentence under ACCA.

Descamps v. United States, 133 S. Ct. 2276, 2293 (2013).

- E. Why not a more factual approach? Two reasons: the Constitution (see above) and Administration.

[T]he practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of burglary, the trial court would have to determine what that conduct was. In some cases, the indictment or other charging paper might reveal the theory or theories of the case presented to the jury. In other cases, however, only the Government's actual proof at trial would indicate whether the defendant's conduct constituted generic burglary. Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? Could the defense present witnesses of its own and argue that the jury might have returned a guilty verdict on some theory that did not require a finding that the defendant committed generic burglary? If the sentencing court were to conclude, from its own review of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial? Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.

Taylor v. United States, 495 U.S. 575, 601-02 (1990)

A factual approach is also unfair to the defendant. It rewrites history and changes a prior state conviction into a generic federal offense, punishing the defendant for failing to defend against federal elements that were not relevant to the state crime. In addition, it deprives the defendant of the benefit of plea negotiations by eviscerating at least part of the bargain where the defendant pleaded guilty to a lesser offense rather than going to trial on the greater offense.

III. The method

Example: A defendant has pleaded guilty to illegal reentry (8 U.S.C. § 1326) and is set for sentencing.

Is his prior conviction under California Health and Safety Code § 11360(a) a drug trafficking offense under U.S.S.G. § 2L1.2?

A. **Identify the elements of both the federal generic offense and the state offense of conviction.**

1. **Federal Generic Offense:** What are the federal generic elements?

- a. Requires caselaw research -- many federal predicates have been defined by now (*see* Some Federal Predicates chart)
- b. Start with the Ninth Circuit and Supreme Court cases (CTA9 and SCT in Westlaw) and then expand to other courts of appeals, using the statute and particular terms within your search.
- c. Remember that while the method of analysis is the same, the definition of a predicate federal generic offense can vary from one statute or sentencing provision to another. In addition, especially in the Guidelines, the definition may have changed over time.

Confirm the nuances of the definition in your statute or provision. For example, burglary under ACCA (18 U.S.C. § 924(e)) is broader than burglary in the career offender guideline (U.S.S.G. § 4B1.2).

- d. Example: A *drug trafficking offense* is one that “prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or counterfeit substance) or the possession of a controlled substance (or counterfeit substance) with intent to manufacture, import, export, distribute or dispense.” U.S.S.G. § 2L1.2 cmt. n.1(B)(iv)

2. **State statute of conviction:** What are the elements of the state statute?

- a. Look at the statute, jury instructions, state cases, and federal cases (make sure they are still valid) to determine the elements of the statute. Distinguish factual means, which do not need to be proven beyond a reasonable doubt, from elements.
- b. Note: *Descamps* leaves open the question of whether (and when) we look to state case law interpreting – and possibly narrowing –

the elements. The Ninth Circuit allows the use of state case law, however. *See, e.g., United States v. Gonzalez-Monterroso*, 745 F.3d 1237, 1244 n.4 (9th Cir. 2014).

c. Example: California Health and Safety Code § 11360(a) provides:

Every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three, or four years.

This statute thus covers transportation of marijuana for personal use, the solicitation of the enumerated acts, and nonprofit activities. *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001) (superseded on other grounds as stated in *United States v. Narvaez-Gomez*, 489 F.3d 970, 977 (9th Cir. 2007)).

- B. **Try the Categorical Analysis:** Compare the state elements to the federal generic offense.
1. If the state elements match the federal elements (or are narrower), then the state statute is a categorical match and the prior conviction can be used as a predicate.
 2. If the state elements are broader or more numerous than the federal elements – i.e., the statute covers more conduct than the federal, then the state statute is not a categorical match. It is broader. Proceed to the next step.
 3. Example: California Health and Safety Code § 11360(a) is broader than USSG § 2L1.2 drug trafficking because it encompasses transporting marijuana for personal use. It is not a categorical match.
- C. **Determine whether the state statute is divisible:** Determine if the state statute can be divided into alternative elements, some of which may be a categorical match to the federal elements.
1. To be divisible, the statute must list alternative elements. And those alternative elements must be proved beyond a reasonable doubt.
 - a. Just because the statute includes the word “or” does not mean it is divisible. *See United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013) (finding the element of “offensive physical contact with, or

harm to, the victim” described a single element since jurors need not agree whether the defendant caused harm or offensive physical contact).

- b. Alternatives must be exhaustive—a non-exhaustive list of alternatives are simply examples, not potential offense elements. *See United States v. Hemingway*, 734 F.3d 323, 334 (4th Cir. 2013).
 - c. Do not be confused by alternative factual means listed in the statute. The alternative must be an element that must be proven to the jury beyond a reasonable doubt in order to be divisible.
2. If the statute is not divisible into alternative elements, i.e. it is indivisible. The analysis stops and the prior conviction cannot be used as a predicate.
 3. If the statute lists alternative elements, some of which would match the federal generic offense, then the statute is divisible and could potentially be used as a predicate. Proceed to the next step.
 4. Example: California Health and Safety Code § 11360(a) is divisible.

California Health and Safety Code § 11360(a) provides:

Every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three, or four years.

- a. It lists several offenses – including transportation of marijuana and sale of marijuana – with independent elements.
- b. A jury would have to find that a defendant transported marijuana to convict for the transportation offense, or that the defendant sold marijuana for the sale offense.
- c. A conviction under § 11360 for the *transportation* of marijuana would never be a federal drug trafficking generic offense. But a conviction under § 11360(a) for the sale of marijuana would be. The “sale” offense has the same elements that the federal generic offense has.
- d. Because § 11360(a) has divisible, alternative elements, the modified categorical approach can be applied.

- D. **If the statute is divisible, try the modified categorical approach:** Identify the elements of which the defendant was actually convicted using certain documents.

Remember: After *Descamps*, we only use this approach with DIVISIBLE statutes.

1. Collect *Shepard* documents

Shepard v. United States, 544 U.S. 13, 24 (2005) documents include:

the charging document,
jury instructions,
terms of a plea agreement,
transcript of colloquy between judge and defendant
Descamps, 133 S. Ct. at 2284-85 (summarizing cases).
judgment
abstract of judgment
minute order
bench trial findings
stipulations

Shepard documents do not include:

police reports
presentence reports

Remember: a factual basis cannot necessarily be used if the defendant pleaded no contest and did not stipulate to any facts.

2. Ask: Do the *Shepard* documents show us that a narrower set of elements was proved?
 - a. **Do not look at the facts!** Only elements matter.
 - b. The documents must prove which elements were necessarily proved beyond a reasonable doubt in the defendant's case.
 - i. If the charging document tracks the statutory language and lists all the alternative elements, it will not help narrow the statute.
 - ii. If the documents do not narrow the elements completely, *e.g.* two or more alternative elements exist, then the prior conviction is not a categorical match.

3. If the *Shepard* documents prove that the defendant was convicted of a smaller set of elements that match the federal generic offense, then the prior conviction is a predicate.
4. Example: The only *Shepard* document in the record is an abstract of judgment that lists the conviction as “11360(a) TRANSPORTATION/IMPORT/SALE.” This does not narrow the conviction to clearly show that the defendant was found guilty of the federal generic offense of drug trafficking. Thus, his prior conviction does not qualify as a drug trafficking offense under USSG § 2L1.2.

IV. Rationale: Why does the Supreme Court make us do this analysis and how does *Descamps* interact with *Booker*, *Alleyne*, and *Apprendi*?

- A. Statutory interpretation – When a sentence is increased based on a prior “conviction,” the sentencing court should look only at the fact of conviction, not the facts underlying the conviction. *Descamps*, 133 S. Ct. at 2287; *Taylor*, 495 U.S. at 600. A prior crime should qualify as a predicate in all cases or in none.
- B. *Alleyne* and *Apprendi* – The *Descamps* analysis is narrow and strict in order to avoid violating the Sixth Amendment. In situations where the prior conviction affects the mandatory minimum or maximum sentence (or both), looking at facts other than the conviction itself would violate the defendant’s Sixth Amendment right to have facts submitted to the jury and found unanimously and beyond a reasonable doubt. *Descamps*, 133 S. Ct. at 2288. Only facts found by a jury, or where the jury determination was waived through a guilty plea, can be used to increase punishment. This means elements of the crime. *Id.* at 2289.
- C. Administration and Fairness – Looking at the facts involved in the prior conviction would be even messier since it would involve making a different determination (whether the conduct fit the federal offense) than the original case (where the parties were only concerned with whether the facts supported the state conviction). *Id.* This would also punish the defendant for failing to “squabble[e] about superfluous factual allegations” and would “deprive some defendants of the benefits of their negotiated plea deals” by imposing a sentencing enhancement as if the defendant was convicted of a more serious crime than the one to which he pleaded guilty. *Id.*
- D. *Booker* – Taking these concerns into consideration, a sentencing court could still decide to impose a greater or lesser sentence under *Booker*. If a sentencing judge determines that the defendant’s actual conduct was less serious than a typical crime of violence, the judge could impose a lower sentence. Conversely, if the sentencing judge determines that the defendant’s actual conduct was aggravating, the judge could impose a higher sentence based on the sentencing factors in 18 U.S.C. § 3553.