

# Descamps Symposium Main Event



Presenters:

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Civil and Appellate Chief

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Federal Defender Services of Idaho  
Research and Writing Specialist

with special thanks to

**David Morse**

# Overview



- ❧ Presentation: *Descamps*
  - ❧ The problem
  - ❧ The Supreme Court's solution
  - ❧ A method + example
- ❧ Work through one example together
- ❧ Groups work through a second example
- ❧ Discussion
- ❧ Outline
- ❧ Charts
- ❧ Example materials

# What Is The Descamps Problem?



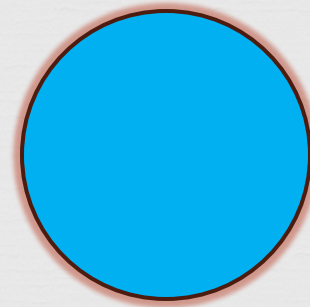
- ⌘ Federal statutes and Sentencing Guidelines use state offenses as predicates
- ⌘ State offenses may or may not contain the elements envisioned by the federal statutes and Guidelines

# Federal and state statutes

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∞ Federal statute

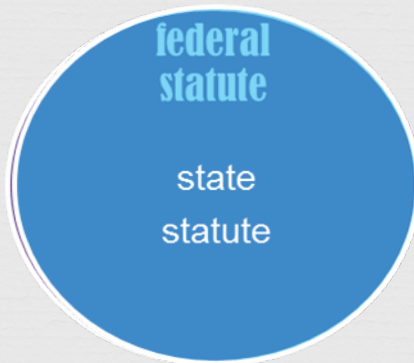
State statute



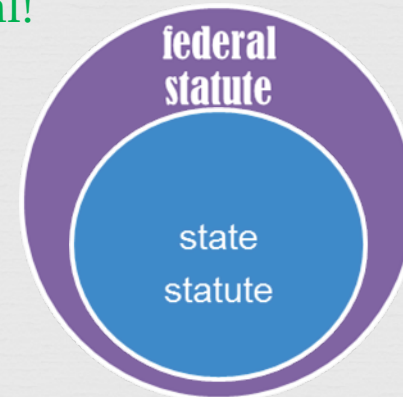
# Possible Relationships Between State Statutes and Federal Statute



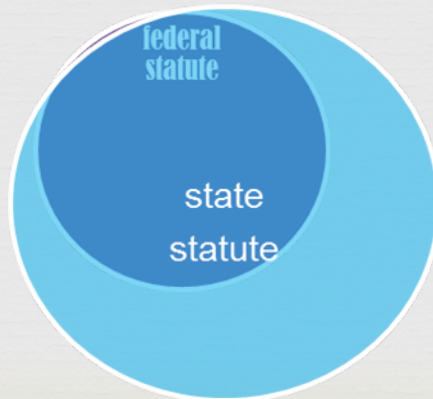
Categorical Match!



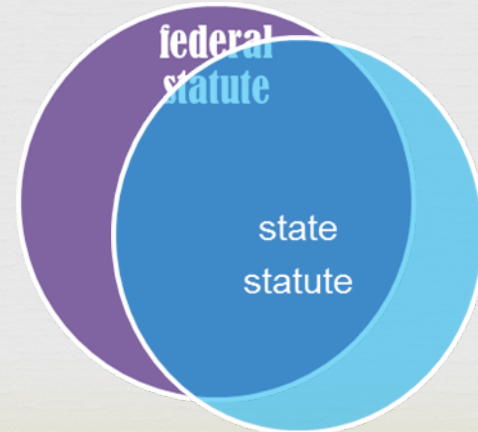
State completely encompassed by federal!



State statute overbroad



State statute both over and under broad



# When Do We Face The Descamps Problem?

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- ⌘ At **Charging** and before a **plea decision** (e.g. Armed Career Criminal Act 18 U.S.C § 924 (e))
- ⌘ In **immigration** cases (e.g. I.N.A. § 101(a)(43))  
(websites in outline)
- ⌘ At **sentencing** when looking to use predicate offenses (e.g. U.S.S.G. § 2K2.1, § 2L1.2, § 4B1.1)

# Why is this a problem?



- ⌘ Congress sweeps with a broad brush
- ⌘ But the Constitution demands precision when it comes to using prior convictions

# Why is this a problem?



- ❧ The Rock: The Constitution, as interpreted in *Apprendi* and *Alleyne*.
  - ❧ *Other than the fact of a prior conviction. . .*
- ❧ The Hard Place: Administration and impracticality.
  - ❧ How do we establish what was proved?



# The Supreme Court's Solution

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☞ Be as objective as possible

# S. Ct. Solution:



- ⌘ Don't ask what actually happened, in the real world.
- ⌘ Ask what had to be proved, and what was proved, in a court of law.

# S. Ct. Solution:

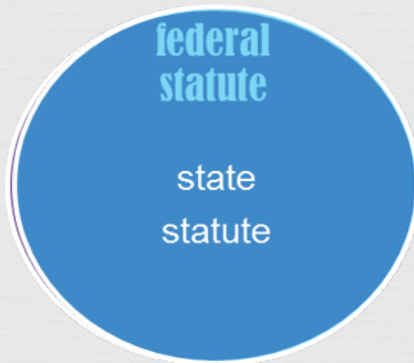


- ❧ **Categorical Approach - compare federal statute to state statute**
- ❧ Divisibility of State Statute – look closely at state statute
- ❧ Modified Categorical Approach – compare federal statute to state, using the elements of which the defendant was actually convicted
  - ❧ Use *Shepard* documents. *Shepard v. United States*, 544 U.S. 13, 24 (2005).

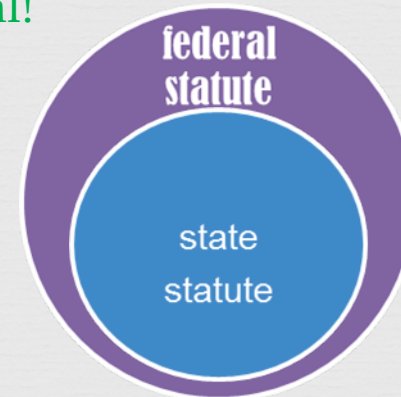
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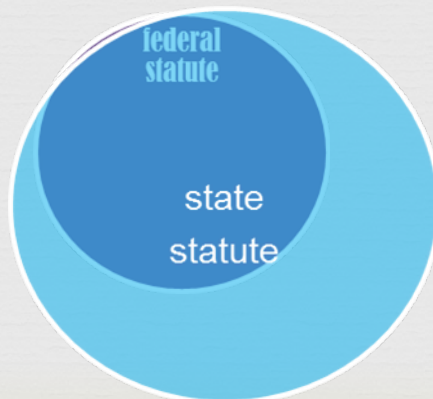
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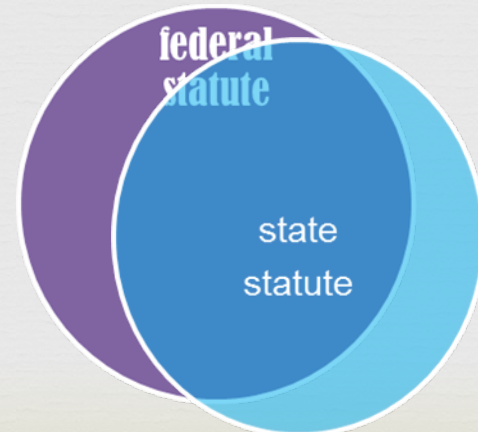
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# S. Ct. Solution:



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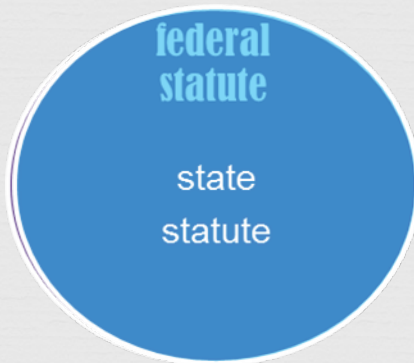


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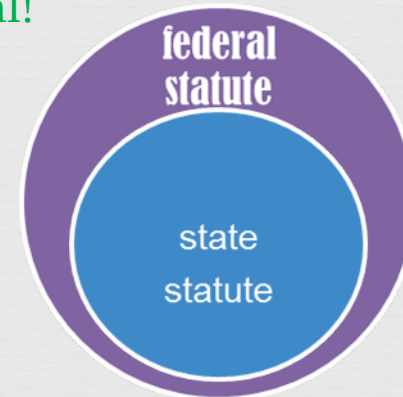
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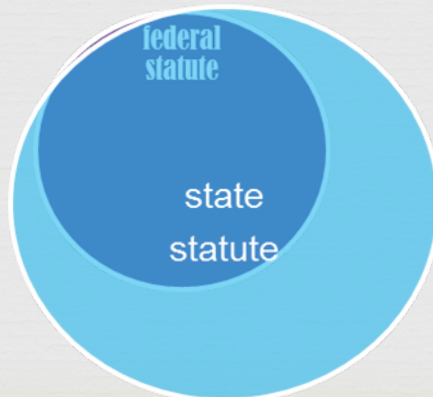
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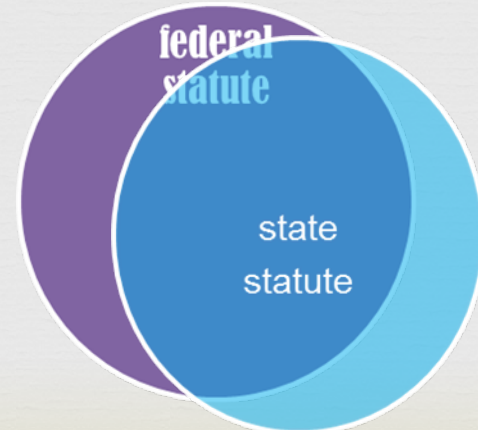
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# The Method





# Ex. case



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

Is his prior conviction

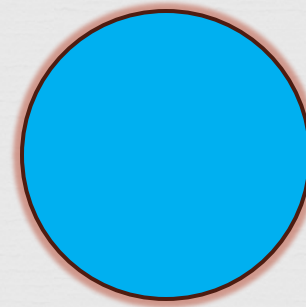
under California Health and Safety Code § 11360(a) a drug trafficking offense under U.S.S.G. § 2L1.2?

# Method: Define federal and state statutes' elements



⌘ Federal statute

State statute



# How to define?



☞ Federal:

☞ Statute/Guidelines

☞ Caselaw

Ex.: Define federal generic elements of “drug trafficking offense” in § 2L 1.2



Case Law Research:

(a) illegal drugs or counterfeits

(b) sold, possessed with intent to sell, manufactured, etc. by defendant

(simplified)

# How to define state statute's elements?



- ❧ statute, jury instructions, caselaw – state and federal
- ❧ Descamps has left open the question of whether we look to state case law interpreting – and possibly narrowing or broadening – the elements. But the Ninth Circuit allows us to do this.

## Ex.: Define state statute's elements



- ❧ 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.
- ❧ California caselaw allows conviction for transporting marijuana for personal use.

# Method: Categorical analysis



- ❧ Compare the federal generic offense's elements to the state elements.
  - ❧ If the state elements are always a match to the federal elements or are narrower, then the state statute is a categorical match and the prior conviction can be used as a predicate.
  - ❧ If the state elements are broader and encompass more conduct than the federal elements, then the state statute is not a categorical match. Proceed to the next step.

# Ex.: Categorical analysis – Compare federal and state



Federal generic “drug trafficking” requires

- (a) Illegal drugs or counterfeits
- (b) Sale, possession with intent to sell, manufacture, or import by defendant

☞ State statute covers:

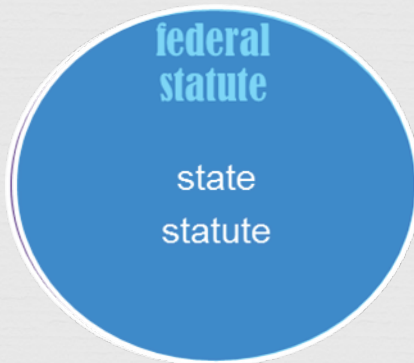
- ☞ transport, import, sale, furnishing, administering, or giving away, and
- ☞ offers to transport, import, sell, furnish, administer, or give away,
- ☞ and attempts to import or transport
- ☞ An illegal drug - marijuana



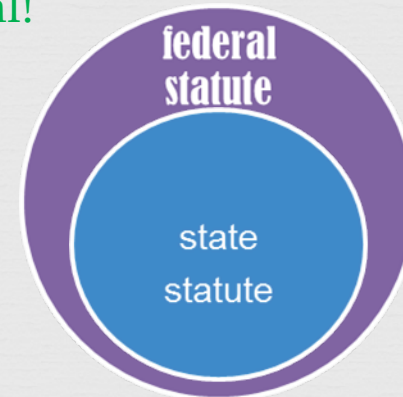
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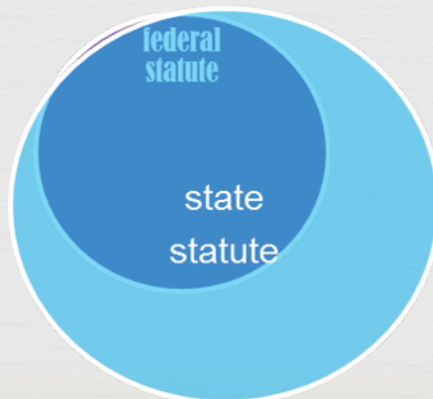
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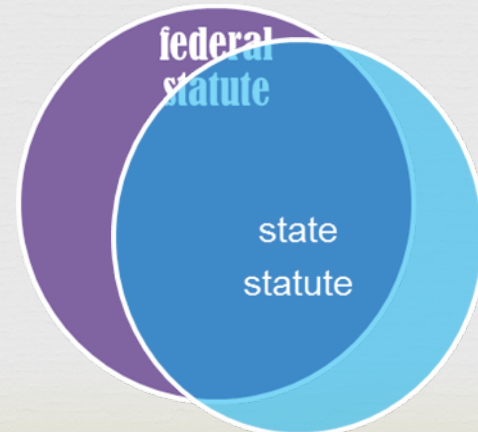
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State statute both over and under broad



# Ex. Conclusion of categorical approach



- ☞ California Health and Safety Code § 11360(a) is broader than the federal generic offense of drug trafficking in USSG § 2L1.2
- ☞ The California statute includes, for example, simple transportation of marijuana for personal use
- ☞ No categorical match exists. Continue inquiry.

# The Method (cont.)



☞ **Divisibility:** Determine if the state statute can be divided into alternative elements.

☞ The statute lists elements in the alternative

☞ Remember: “OR” does not make the statute divisible – factual means don’t count

☞ Alternatives must be exhaustive (not merely examples)

☞ If the statute is not divisible, the analysis stops

☞ If it is divisible, continue inquiry

# Ex. of divisibility inquiry



☞ 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.*

# Ex. (cont.)



- ❧ California Health and Safety Code § 11360(a) is divisible.
- ❧ Transportation of marijuana is a different offense than the sale of marijuana.
- ❧ A California jury would have to find unanimously that the defendant transported marijuana to convict for that offense.
- ❧ Similarly, a jury would have to find that a defendant sold marijuana for a sale offense.
- ❧ The statute lists alternative elements. Continue with inquiry.

# The Method (cont.)



- ❧ **Modified Categorical Approach:** Identify the elements of defendant's actual conviction
  - ❧ Collect *Shepard* documents
  - ❧ Ask if the documents narrow the elements
    - ❧ Remember: We don't care what happened in real life, we care what was charged and proved in a court of law, beyond a reasonable doubt.
  - ❧ If *Shepard* documents narrow elements to match federal generic offense, the prior conviction is a predicate.

# Ex.: Modified Categorical Approach applied



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 limit the elements. Thus, his prior conviction does not qualify as a drug trafficking offense under USSG § 2L1.2.

# More documents!



- ❧ California belatedly sends more documents!
- ❧ Now, you have the transcript from the plea colloquy at the change of plea hearing.
  - ❧ The Defendant acknowledged that he knowingly transported 200 lbs of marijuana across the border  
BUT
  - ❧ He actually pleaded to transport/import/sale

Can you use the conviction?



# No!



- ❧ We don't care about the facts, we care about the elements that were actually proved or to which the defendant admitted.
- ❧ The only thing *necessary* for his conviction was transportation, which is overbroad.

# Rationale



- ❧ Why does the Supreme Court make us do this analysis and how does *Descamps* interact with *Booker*, *Alleyne*, and *Apprendi*?
  - ❧ Statutory Interpretation
  - ❧ *Alleyne* and *Apprendi* – Sixth Amendment concerns.
  - ❧ Administration and Fairness
  - ❧ *Booker*

# Alternative ending. . .



- ✎ In the plea colloquy, the defendant acknowledges transport for sale and sale, and he pleads guilty to sale.
- ✎ Can we use the conviction?

# Yes!



œ He pleaded guilty to elements that are identical to the federal generic elements.

# Example # 2



- ❧ **Defendant:** has pleaded guilty to illegal reentry (8 U.S.C. § 1326) and is being sentenced using USSG § 2L1.2
- ❧ **Defendant's Record:** Nevada conviction for conspiracy to commit first degree arson.
- ❧ **Prosecutor:** wants to increase the offense level for a prior "crime of violence"



# USSSG § 2L1.2



- ⌘ 16-level enhancement for “a conviction for a felony that is . . . (ii) a crime of violence”
- ⌘ “Crime of violence” defined in the commentary

# USSSG § 2L1.2



☞ “Crime of violence” means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, **arson**, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

# USSSG § 2L1.2



⌘ Aiding and Abetting, Conspiracies, and Attempts. —  
Prior convictions of offenses counted under  
subsection (b)(1) include the offenses of aiding and  
abetting, **conspiring**, and attempting, to commit  
such offenses.



# Case Law



## ∞ Arson:

“The modern generic definition of arson includes a ‘willful and malicious burning’ of property.”

*United States v. Velasquez-Reyes*, 427 F.3d 1227, 1230 (9<sup>th</sup> Cir. 2005)

## ∞ Conspiracy:

“an overt act is an element of the generic definition of conspiracy.”

*United States v. Garcia-Santana*, 743 F.3d 666, 675 (9<sup>th</sup> Cir. 2014)

# Federal Elements



## ☞ Arson:

☞ Willful and Malicious Burning of Property

## ☞ Conspiracy:

☞ Agreement to Commit a Crime and an Overt Act

# State Statutes



☞ Arson: Nev. Rev. Stat. 205.010

☞ Conspiracy: Nev. Rev. Stat. 199.480

# Nevada Arson



## ☞ Nev. Rev. Stat. § 205.010 First Degree

A person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any:

1. Dwelling house or other structure or mobile home, whether occupied or vacant; or
2. Personal property which is occupied by one or more persons,  
whether the property of the person or of another, is guilty of arson in the first degree . . .

# Nevada Conspiracy



☞ Nev. Rev. Stat. § 199.480

1. Except as otherwise provided in subsection 2, whenever two or more persons conspire to commit murder, robbery, sexual assault, kidnapping in the first or second degree, arson in the first or second degree, involuntary servitude in violation of NRS 200.463 . . . each person is guilty of a category B felony and shall be punished . . .

☞ Nev. Rev. Stat. § 199.490

In any such proceeding for violation of NRS 199.480, it shall not be necessary to prove that any overt act was done in pursuance of such unlawful conspiracy or combination.

# Nevada Elements



## Arson:

Willful and malicious setting fire, burning, or causing to burn, or aiding, counseling or procuring the burning of any (1) dwelling house or other structure or mobile home, whether occupied or vacant; or (2) personal property which is occupied by one or more persons

## Conspiracy:

Agreement between two or more persons for an unlawful purpose

# Categorical Comparison



Is the state statute overbroad?

# Categorical: Arson



## Federal Arson

- ❧ Willful and Malicious
- ❧ Burning of
- ❧ Property

## Nevada Arson

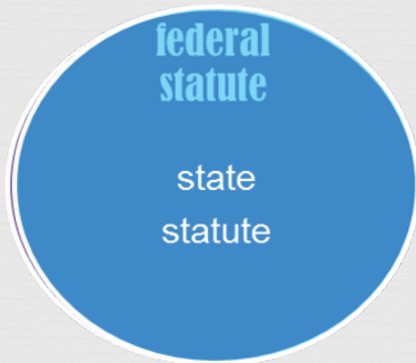
- ❧ Willful and Malicious
- ❧ Burning of
- ❧ Dwelling House or  
Occupied Personal  
Property



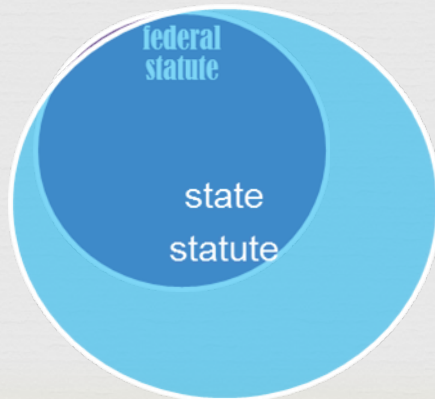
# Relationship Between Federal Arson and Nevada Arson



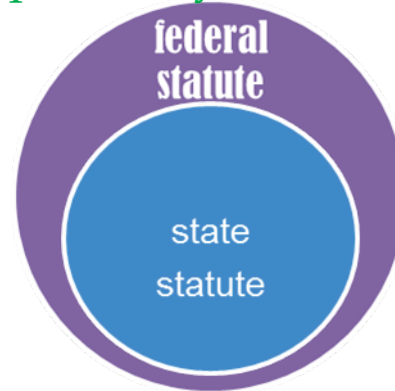
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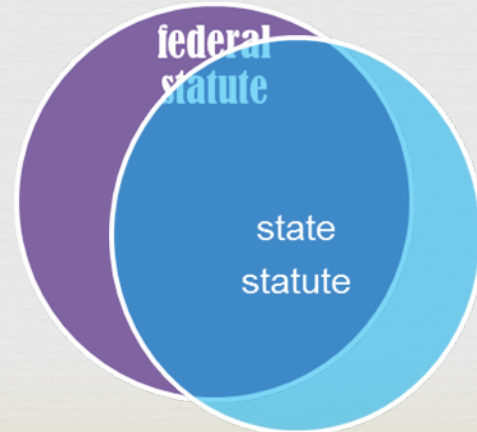
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Nevada arson completely encompassed by federal!



State statute both over and under broad



# Categorical: Conspiracy



## Federal

- ❧ Agreement
- ❧ To commit a crime, and
- ❧ Overt act

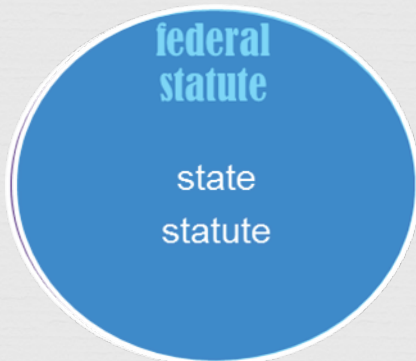
## Nevada

- ❧ Agreement between two or more persons
- ❧ For an unlawful purpose

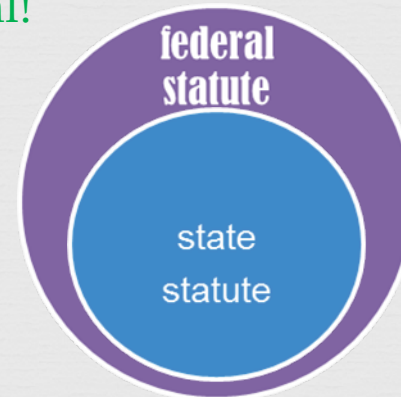
# Relationship Between Federal Conspiracy and Nevada Conspiracy



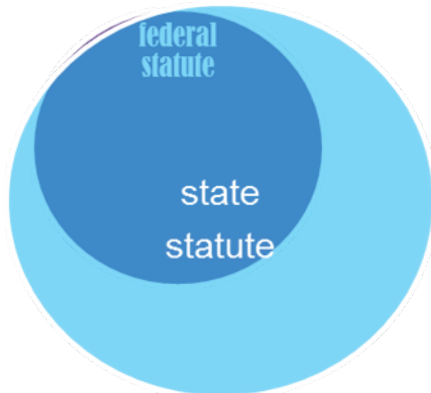
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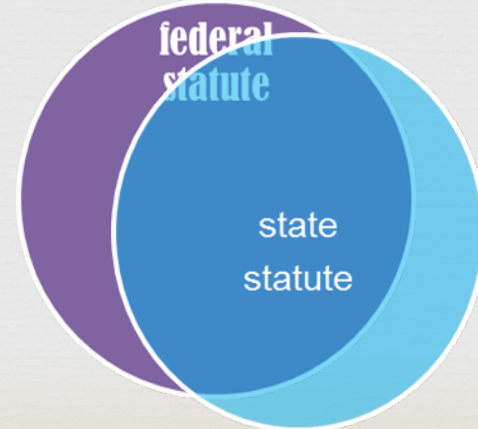
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Nevada conspiracy overbroad



State statute both over and under broad



# Divisibility



Is the Nevada statute divisible?

# Nevada Arson



## ☞ Nev. Rev. Stat. § 205.010 First Degree

A person who willfully and maliciously sets fire to or burns or causes to be burned, or who aids, counsels or procures the burning of any:

1. Dwelling house or other structure or mobile home, whether occupied or vacant; or
2. Personal property which is occupied by one or more persons,  
whether the property of the person or of another, is guilty of arson in the first degree . . .

# Nevada Arson



∞ Divisible

∞ Prosecutor must prove:

∞ (1) Willful or malicious (2) burning of (3) dwelling house or structure

OR

∞ (1) Willful or malicious (2) burning of (3) personal property which is occupied by one or more persons

# Nevada Arson



✧ BUT since Nevada Arson was a categorical match to federal generic arson, no need to do divisibility analysis

\*Unless you think it is fun and you want the practice

# Nevada Conspiracy



☞ Nev. Rev. Stat. § 199.480

1. Except as otherwise provided in subsection 2, whenever two or more persons conspire to commit murder, robbery, sexual assault, kidnapping in the first or second degree, arson in the first or second degree, involuntary servitude in violation of NRS 200.463 . . . each person is guilty of a category B felony and shall be punished . . .

☞ Nev. Rev. Stat. § 199.490

In any such proceeding for violation of NRS 199.480, it shall not be necessary to prove that any overt act was done in pursuance of such unlawful conspiracy or combination.



# Nevada Conspiracy



∞ Indivisible

∞ Overt act is never an element. A prosecutor never needs to prove an overt act to obtain a conviction for conspiracy in Nevada

# Conclusion



- Based on the existing facts, the prior conviction for conspiracy to commit first degree arson is not a categorical match to generic federal conspiracy to commit arson
  - No modified categorical approach

# Alternative



✧ BUT, what if you find a Nevada Supreme Court decision that says an overt act is required for conspiracy convictions under subsection (1) of Nev. Rev. Stat. § 199.480?

# Alt. Divisibility



☞ Nev. Rev. Stat. § 199.480:

- ☞ (1) Agreement between two or more persons to commit . . . arson in the first or second degree . . . and an overt act
- ☞ (2) Agreement between two or more persons to commit a crime under NRS 207.400
- ☞ (3) Agreement between two or more persons to (a) commit a crime other than those set forth in subsections (1) and (2); (b) falsely and maliciously procure another to be arrested; (c) falsely to institute or maintain an action or proceeding; (d) cheat or defraud another out of any property; (e) prevent another from exercising lawful trade or employment; (f) commit any act injurious to public health or morals; (g) accomplish any criminal or unlawful purpose.

# Alt. Divisibility



- ❧ Now Nevada Conspiracy is Divisible
- ❧ Why? Each subsection lists a different offense
- ❧ In order to obtain a conviction under subsection one, the following elements would need to be proven beyond a reasonable doubt:
  1. Agreement between two or more persons
  2. To commit a listed offense (including arson) and
  3. An overt act

# Modified Categorical



Was the defendant convicted under Nev. Rev. Stat. § 199.480(1) or a different subsection?

# Documents



☞ Newspaper article – Defendant Firebrand and two others burn ex-wife's residence to the ground on Christmas Eve

“Mr. Firebrand, a Canadian citizen who has been living in Castle City for seven years, testified against his co-defendant, Mr. Ringer, earlier this week. He said that he and Ms. Danger were drinking with Mr. Ringer when Mr. Ringer started ‘going off’ about his ex-wife and became belligerent. ‘He wanted to teach her a lesson,’ Mr. Firebrand testified. He says Mr. Ringer concocted the plan to make Molotov cocktails and throw them at Ms. Ringer’s home. When the first Molotov cocktail did not break the window, Mr. Firebrand said that Mr. Ringer started breaking windows and tossing lit Molotov cocktails inside. “

# Documents



## ☞ Complaint

### COUNT 1 - CONSPIRACY TO COMMIT ARSON

Defendants did meet with each other and between themselves, and each of them with the other, willfully and unlawfully conspire and agree to commit a crime, to-wit: first degree arson, and in furtherance of said conspiracy, Defendants did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein.

### COUNT 2 - FIRST DEGREE ARSON

Defendants did willfully and maliciously set fire to the home of Velma Ringer, located at 334 E. Widmore Lane, by throwing Molotov cocktails at the residence, by breaking the windows, and causing the home to burn.



# Modified Categorical



⌘ Amended Complaint – Defendant charged with conspiracy to commit first degree arson, NRS 199.480(1), 205.010

## COUNT 1 – CONSPIRACY TO COMMIT ARSON

Defendants did meet with each other and between themselves, and each of them with the other, willfully and unlawfully conspire and agree to commit a crime, to-wit: first degree arson, and in furtherance of said conspiracy, Defendants did commit the acts as set forth in Count 2, said acts being incorporated by this reference as though fully set forth herein.

# Modified Categorical



∞ Police Report – Defendant admits to throwing Molotov cocktails into the ex-wife's residence, ex-wife was home

“Officer Bloodhound and I returned to the residence the next day. The house was completely charred and was not safe to enter. I searched the perimeter and found several pieces of broken beer bottles. In the southeast corner of the lot, about 20 feet from the house, I located an identification card with the name William Firebrand. The card did not look weathered and appeared to have been dropped recently. I called Velma Ringer, who said that she did not think William Firebrand had been to her home since before she divorced Mike Ringer, at least a year ago.”

# Modified Categorical



☞ Plea Agreement – Defendant agrees to cooperate and to plead guilty to conspiracy to commit first degree arson

The elements of the crime to which I am pleading and that the District Attorney must prove beyond a reasonable doubt are:

1. That on or about December 23, 1997, I conspired with Debbie Danger and Michael Ringer
2. To commit the crime of first degree arson, to willfully and maliciously set fire to a dwelling house or other structure or mobile home.

# Modified Categorical



⌘ Judgment -

Defendant is sentenced to 3 years for conspiracy to commit first degree arson, NRS 199.480, 205.010

# *Shepard* Documents



Which documents are *Shepard* approved?

## ❧ NO

- ❧ Newspaper article
- ❧ Police report

## ❧ YES

- ❧ Amended Complaint +
- ❧ Plea Agreement +
- ❧ Judgment

# Modified Categorical



- ⌘ Do the *Shepard* documents narrow the offense?
- ⌘ Yes, the amended complaint plus the plea agreement plus the judgment demonstrates that the defendant was convicted of the following elements:
  1. Agreement between two or more persons
  2. To commit the crime of first degree arson, and
  3. An overt act

# Modified Categorical



## Federal Conspiracy to Commit Arson

- ❧ Agreement
- ❧ To commit
  - ❧ The willful and malicious burning of property
- ❧ Overt Act

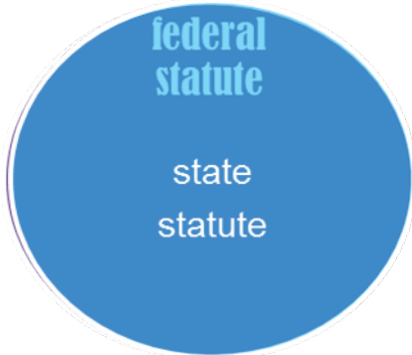
## Nevada Alt. Conspiracy to Commit Arson

- ❧ Agreement between two or more persons
- ❧ To commit
  - ❧ The willful and malicious burning of a dwelling house or occupied personal property
- ❧ Overt Act

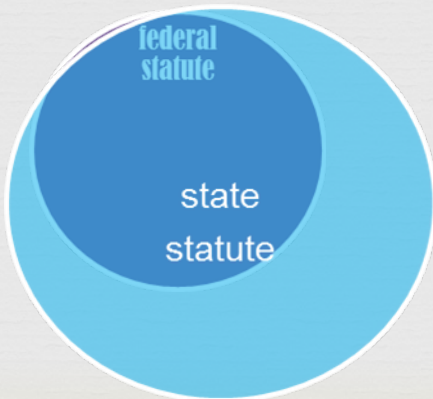
# Federal Conspiracy to Commit Arson v. Alt. Nevada Conspiracy to Commit Arson



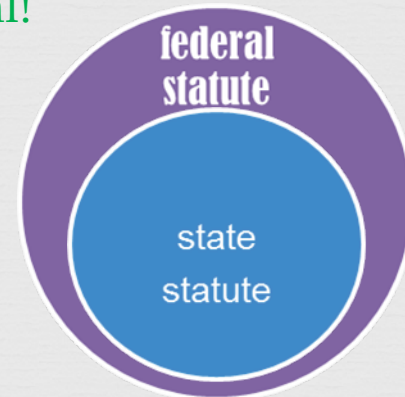
Categorical Match!



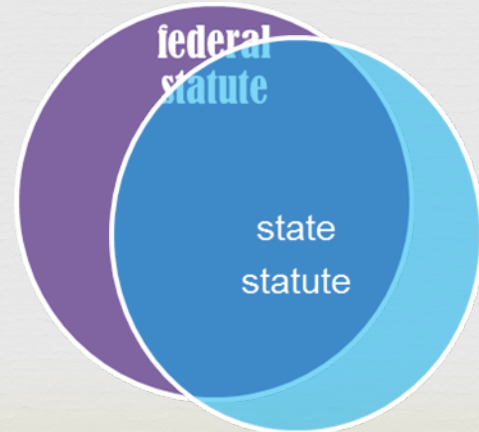
State statute overbroad



State completely encompassed by federal!



State statute both over and under broad





# Group Exercise



- ❧ **Defendant:** charged with being a felon in possession of a firearm under 18 U.S.C. § 922(g).
- ❧ **Prosecutor:** wants to increase sentencing recommendation under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924 (e).
- ❧ **Defendant's Record:** 2 crimes that definitely qualify under ACCA. 3rd you must evaluate:
  - ❧ Idaho Burglary: 18 I.C. § 1401.

# ACCA



⌘ (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a **violent felony** or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than **fifteen years**, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

# ACCA: Violent Felony



(2) As used in this subsection –

(B) the term “**violent felony**” means

any crime punishable by imprisonment for a term exceeding 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, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

# Justice Scalia



Congress forced the court into this situation by writing  
“an unintelligible criminal statute.”

*James v. United States*

550 U.S. 192, 230 (2007) (Scalia, J., dissenting)

“We should admit that ACCA’s residual clause is a  
drafting failure and declare it void for vagueness.”

*Sykes v. United States*

131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting)

What is the federal generic definition of Burglary?



❧ Burglary is the unlawful or unprivileged entry into, or remaining in a building structure with intent to commit a crime.

# Idaho Burglary



☞ I.C. § 18-1401:

Every person who

☞ enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, vehicle, trailer, airplane or railroad car, with intent to commit any theft or any felony, is guilty of burglary.

# Categorical comparison



Is the state statute overbroad?

# Categorical comparison



## ⌘ Federal burglary:

the unlawful or unprivileged entry into, or remaining in a building structure with intent to commit a crime.

## ⌘ ID burglary:

Every person who

enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, vehicle, trailer, airplane or railroad car, with intent to commit any theft or any felony, is guilty of burglary.



# Categorical comparison



## ∞ Federal burglary:

- (1) the unlawful or unprivileged entry into, or remaining in
- (2) a building or structure
- (3) with intent to commit a crime.

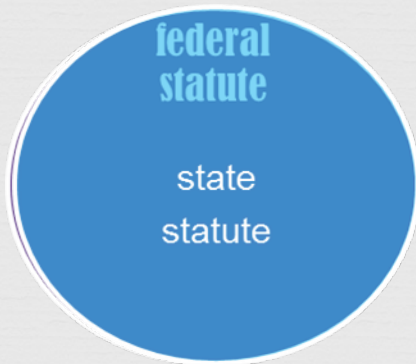
## ∞ ID burglary:

- (1) Entry into
- (2) any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, vehicle, trailer, airplane or railroad car,
- (3) with intent to commit any theft or any felony.

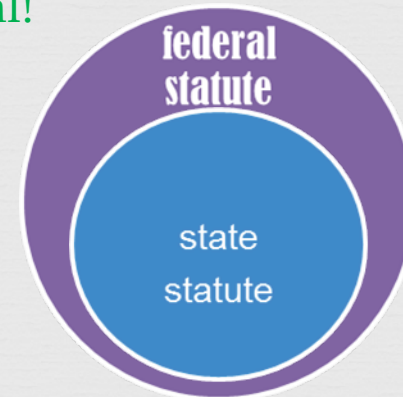
# Relationship Between State Statute and Federal Statute



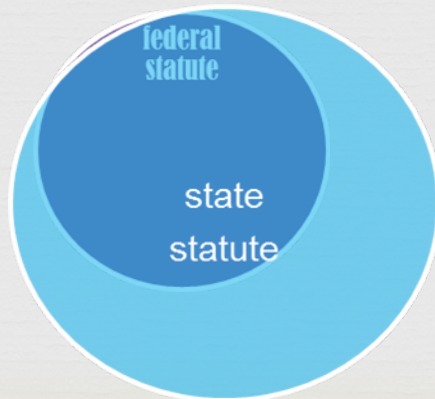
Categorical Match!



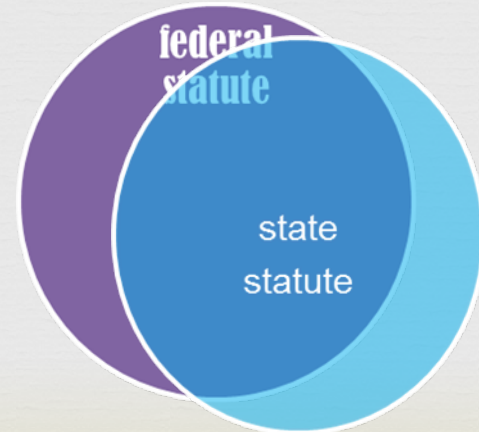
State completely encompassed by federal!



State statute overbroad



State statute both over and under broad



# Divisibility



☞ **Step Three:** Is the state statute divisible?

# State statute



∞ ID burglary elements:

- (1) Entry into
- (2) any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, vehicle, trailer, airplane or railroad car,
- (3) with intent to commit any theft or any felony.

# Example Solution



- ✧ The statute's "entry" element is indivisible. It covers more entries than the federal generic definition. Specifically, it covers both lawful and unlawful entries. End.

# You made it!



☞ And it wasn't easy.

# Justice Alito



“I write separately . . . to emphasize that only Congress can rescue the federal courts from the mire into which ACCA’s draftsmanship and *Taylor’s* “categorical approach” have pushed us.”

*Chambers v. United States*

555 U.S. 122, 132 (2009) (Alito, J., dissenting)



The end.