

The Categorical and Modified Categorical Approach

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One of the most horrifying aspects of federal criminal practice is the application of sentencing enhancements, which subject our clients to much greater sentences if they have certain priors. How do you determine whether someone's prior conviction qualifies as one of these "certain" convictions? That's the question that the categorical approach tries to answer. Different jurisdictions define crimes differently. It may be, for example, that State X does not require its robbery statute to place another in some form of fear. If State X's statute is so different from all other robbery statutes, should someone convicted of robbery in State X be subject to a federal enhancement? The categorical approach establishes a procedure for determining whether a prior qualifies because it acknowledges that different jurisdictions might define crimes, or elements, or theories of liabilities, in different ways. So the categorical approach requires a comparison of the prior statute to the federal enhancement to make sure it matches. The goal is to argue that prior predicate conviction is "overbroad." Essentially, that there is some way for a person to be convicted of the prior predicate in ways not contemplated by the enhancement.

In *Taylor v. U.S.*, 495 U.S. 575 (1990), the Supreme Court first laid the groundwork for this. It examined whether a prior Missouri state burglary conviction qualified Taylor for treatment under the Armed Career Criminal Act ("ACCA"). ACCA is a particularly vicious statute, which subjects a person to a fifteen-year minimum mandatory if he or she has three priors that qualify as predicates--and these potential predicate offenses explicitly include "burglary." The Eighth Circuit's approach was to not question the wisdom of Missouri in calling Taylor's conviction a burglary. In its view, if Missouri called what Taylor did a burglary, then the feds had to defer to that characterization. The problem, of course, is that states define crimes differently. In California, for example, before the recent Proposition 47, walking into a store in the middle of the day was a "burglary" if that person intended to steal stuff worth over a certain amount of money. In most places, that's shoplifting, not burglary. In *Taylor*, the Supreme Court established a procedure to deal with this scenario by first determining what the consensus is about the terminology used by the federal sentencing enhancement. Finding that consensus (or in *Taylor* terms, the "generic" offense) is the first step in doing this analysis. So, in *Taylor*, the question became, what did the ACCA mean when it used the word "burglary" and do the elements of the Missouri burglary offense match?

Anytime we are faced with an enhancement, whether it's statutory or guidelines-based, we need to think about whether the prior statute of conviction is overbroad and thus, not a categorical match. We have to find ways to make these arguments. The good news is that after *Taylor*, much of the litigation surrounding the categorical approach has been incredibly defense-friendly. Unlike many areas of our practice, we have the opportunity to be really successful.

Determining whether there is a categorical match

- I. Identify the federal enhancement and the language it uses.
 - a. Does it reference an enumerated “generic” definition of an offense or reference some specific statutory language? If it enumerates an offense, determine the “generic” definition. It has likely already been defined either by the Supreme Court, your circuit, or outside the circuit so it should be easy to figure out the generic definition for an enumerated offense. If it is not, take a look at legal treatises or how most cases define the particular enumerated offense.
- II. Compare the elements of “prior” statute to the federal enhancement.
 - a. What does the “prior” statute mean? How broad is it? Take a look at statutory language, state jury instructions, and case law, to figure out how broadly its elements are defined. Most importantly: Is there any way to commit the prior offense in a way not contemplated by the federal enhancement?
 - i. If there is no way to commit the prior in a way not contemplated by the federal enhancement, then there is a categorical match and your client gets the enhancement. To put it another way, if everything that could be prosecuted by the prior statute could also be prosecuted under the enhancement then there is a categorical match. So the goal is always, always, always, to argue that there is no match.
 - ii. If there is a way to commit the prior offense in a way not contemplated by the federal enhancement, then it is “overbroad” and it is not a categorical match. This is where your argument really should end. It is up to the government to articulate that the “modified categorical approach” applies, which would allow the judge to look beyond the elements of the offense.
- III. Keep in mind
 - a. This is an elements-based test. The actual facts of your client’s prior conviction are simply irrelevant to the question of whether your client’s prior is a categorical match. They might matter later but not here.
 - b. What we see is that different jurisdictions are constantly expanding the definition of what constitutes a particular crime. As they stretch the law to encompass more activities, they are moving away from the original core definition of the offense to prosecute a greater number of people. The categorical approach ensures that the enhancement only apply to people who **necessarily** were convicted of the behavior encompassed by the enhancement.

Modified Categorical Approach

The modified categorical approach applies in very limited circumstances. It does not apply when the offense is merely overbroad. **Rather it applies when the offense is overbroad and divisible.** Once you determine that the statute is overbroad, the inquiry ends unless the government can articulate how the statute is divisible. *See Descamps v. U.S.*, 133 S.Ct. 2276 (2013) (holding that the modified categorical approach only applies if the overbroad statute is also divisible).

- I. Is the statute overbroad because it is missing an element or because it sets forth alternatives elements for committing the offense?
 - a. *Descamps* offered a great example of this. The generic definition for burglary requires the entry into a home to be without permission, while California burglary does not. So California's burglary statute is missing the element required of the federal enhancement that the entry be unlawful/unprivileged. Because it is missing an element, then the statute is not divisible, and thus, the courts can never use the modified categorical approach.
 - b. Divisibility: A divisible statute lists different ways to commit the crimes, one of which would qualify. A non-divisible statute is structured in such a way that you cannot rule out the overbroad part from the statute. To determine the divisibility of the prior statute, take a look at the elements, jury instruction, and case law. Is it clear that a person has to be charged under separate sections of the statute and the jury has to be unanimous as to the way that the client was convicted? In that case, the statute is much more likely to set forth elements, and thus, be divisible. You always want to argue that the statute sets forth alternative means and not elements, and thus, is not divisible.
- II. If the statute **is** divisible, there are a limited number of documents that the government can use.
 - a. To prove that your client was convicted of part of the statute that is a categorical match, government can use the charging document (not exclusively—if the government uses the charging document then it also has to provide the judgment), transcript of guilty plea colloquy, plea agreement, jury findings, or some other comparable court document.
 - b. Government cannot rely on probation reports, police reports or preliminary hearing transcripts unless the client adopted them formally (by, for example, stipulating to the police reports as a factual basis in a plea agreement). If the client did adopt those documents, do the facts **necessarily** establish that the client committed a part of the statute that is not categorically overbroad? If not, then, the enhancement does not apply.

III. Keep in mind

- a. There was a great deal of confusion about the application of the modified categorical approach for many years after *Taylor* so be aware of that as you do your research because it may be that your circuit employed the modified categorical approach any time the statute was merely overbroad. Between *Taylor* and *Descamps*, be careful about any analysis because *Descamps* changes things dramatically.
- b. Unless the offense is overbroad and divisible, you never have to worry about any prior court document. Even if you reach the modified categorical approach, it does not matter what your client actually did, it only matters what the part of the statute he was convicted of—that's the only thing that the judge can use the admissible court documents to determine.

Some Cases

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

In determining the application of a federal enhancement, courts are to compare the elements of the prior conviction to those of the federal enhancement. The fact that the prior conviction was labeled as a “burglary” offense under state law was insufficient to establish that the state offense “matched” the federal enhancement definition.

***Descamps v. U.S.*, 133 S.Ct. 2276 (2013)**

Court clarifies that the modified categorical approach is reserved for overbroad statutes that are also divisible. A divisible statute is one that “comprises multiple, alternative versions of the crime,” some of which may be overbroad. The modified categorical approach is reserved for determining whether the client was convicted of a part of the statute that is a categorical match.

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

The court limits the types of documents that can be used when doing the modified categorical approach. It specifically excluded police reports or any other type of document that the client had not relied on to establish the guilty plea. The courts can consider charging documents (though not alone), guilty plea forms, written plea agreements, a jury or judge’s specific findings of facts after a trial, or any other comparable record. Note that the court can consider police reports if the client adopted them, as if, for example, he stipulated to them as the factual basis.

***Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)**

If we identify a way in which the statute is overbroad, we have to show that that theory of liability is realistically probable. “Moreover, in our view, to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.”