

FEDERAL DEFENDER SERVICES OF IDAHO
Boise, Idaho

TO: Robert Bradley

FROM: Tom Monaghan

DATE: July 1, 2013

RE: Descamps v. United States – Applying the Categorical Approach

Robert, I am responding to your recent inquiry as to how to interpret and apply Descamps to determine whether a defendant's prior conviction(s) qualifies as an enhancement under the categorical approach. I believe that the following provides a roadmap of how to do that in light of the Supreme Court's decision:

1. Identify the elements of the “generic offense”

The generic offense will be the offense specified in the enhancing statute or Guideline. For example, let's use “burglary,” for simplicity's sake, given that this was the generic offense specified in ACCA that was addressed in Descamps

Identifying the elements of the generic offense may require research on Westlaw to find precedent establishing what those elements are. For burglary, the generic offense is specified as having the following elements:

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

See Taylor v. United States, 495 U.S. 575, 598 (1990)

2. Identify the elements of the statute forming the basis for the defendant's conviction

Let's use Idaho's burglary statute, I.C. § 18-1401:

- (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

3. Match the elements of the statute of conviction to the elements of the generic offense

Do the elements match?

Put another way, is it possible to violate the statute of conviction in a way that is not covered by the generic offense?

If NO – then you have a categorical match and the statute of conviction qualifies as an enhancing predicate conviction – **at this point, the analysis need go no further.**

If YES, the state statute covers criminal conduct that is beyond what the generic offense covers, then you do not have a categorical match and the statute of conviction cannot at this point qualify as an enhancing conviction.

Reviewing Idaho’s burglary statute (which is similar to the California burglary addressed in Descamps), the Idaho burglary is not a match to the elements of generic burglary. The reason is that Idaho’s burglary statute does not require an unlawful or unprivileged entry. Thus, Idaho’s burglary statute covers conduct that the generic offense does not. For example, a shoplifter who enters a store during normal business hours with the intent to steal would be guilty of burglary under Idaho law but not guilty under the generic offense, which would require an unlawful/unprivileged entry.

4. Is the statute of conviction DIVISIBLE OR INDIVISIBLE?

This is the critical question that will determine whether the modified categorical approach can be applied. In Descamps, the Court held, “[S]entencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.” Descamps, at *2

What is a divisible statute? A divisible statute “sets out one or more elements of the offense in the alternative” where at least one of those alternatives matches the generic offense.

An example of a divisible statute would be the following:

It is burglary where the defendant:

- (1) unlawfully entered
- (2) (a) a car; (b) building; (c) tent; (d) boat
- (3) with intent to commit a felony

In this example, the statute would not be a categorical match to generic burglary because it covers burglary of things other than a building or structure, BUT it would be divisible because it sets forth the elements of what can be the subject of burglary in the alternative. Specifically, if the defendant was convicted of unlawfully entering (2)(b) -- a building -- that would qualify as generic burglary, whereas the other parts of (2) would not.

What is an indivisible statute? That is “one not containing alternative elements – that criminalizes a broader swath of conduct than the relevant generic offense” Descamps, at *2.

An example of an indivisible statute would be Idaho’s burglary statute because it defines burglary in a way that does not comprise multiple alternative ways of committing the crime – some of which qualify as/match the generic offense and some which do not. Rather, Idaho’s burglary statute, by lacking the required element of unlawful or unprivileged entry, always is broader than the generic offense.

- 5. If the statute of conviction is overbroad/not a categorical match with the generic offense AND it is INDIVISIBLE – then STOP, the inquiry is over and the defendant’s conviction does not qualify as an enhancing offense.**

This is the case with Idaho’s burglary statute: “Because generic unlawful entry is not an element or an alternative element, of [I.C. § 18-1401], a conviction under that statute is never for generic burglary.” Descamps, at *22 (emphasis added).

If the statute of conviction is not a categorical match with the generic offense BUT is DIVISIBLE – then the modified categorical approach can be applied

This allows the Court to look at a “limited class of documents to determine which of a statute’s alternative elements formed the basis of the defendant’s conviction.” Descamps at *6.

As Descamps puts it, “Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines [the crime] not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not.” Descamps at *9.

The purpose of looking at the modified categorical approach documents is NOT to determine “what the defendant and state judge must have

understood as the factual basis of the prior plea,' but only to assess whether the plea was to the version of the crime in the [statute of conviction that] correspond[s] to the generic offense." Descamps at *7.

What this means is that, for example, as to Idaho's burglary statute, the Court CANNOT use the modified categorical approach to look at the facts underlying the conviction to conclude that it qualified as a generic offense. Rather, the modified categorical approach can only be used when the statute of conviction is divisible – i.e., has alternative elements, one or more of which satisfy the generic offense – to determine whether the defendant pleaded guilty to the generic offense.

Put another way, the modified categorical approach cannot be used to look at the factual basis of the defendant's guilty plea to see whether the facts satisfy the generic offense; rather, the modified approach can only be used to determine which part of a divisible statute the defendant pleaded guilty to: the part that matches the elements of the generic offense or a different part. The inquiry is NOT what the defendant did or admitted he did; the inquiry is what element of the statute of conviction was the defendant convicted of.

Bottom line: Many state and federal statutes are not a categorical match with the enhancing generic offense; therefore, a lot of focus will be on whether a defendant's statute of conviction is divisible or indivisible. Descamps makes clear that the modified categorical approach will be used only sparingly for those statutes that are divisible. This will result in fewer statutes of conviction qualifying as enhancing generic offenses.

As a side note, I attach a copy of the government's motion to dismiss an appeal by the defense of the district court's denial of a motion to dismiss the indictment. It shows how Descamps limits the analysis the Court may conduct under the modified categorical approach.