DECONSTRUCTING *Descamps*

Presented by

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THREE QUESTIONS:

- **What triggers the enhancement?**
- **What, exactly, was my client convicted of?**
- **Is his prior offense of conviction a qualifying offense?**

WHAT TRIGGERS THE ENHANCEMENT?

- **If qualifying offense is defined, go by the definition.**

- ***E.g.*, "has as an element" clauses, other residual clauses ("risk of injury"/ "risk of use of force")**

A heads-up

- ***Johnson v. United States*, *cert. granted*, 134 S. Ct. 1871 (Apr. 21, 2014) (No. 13-7120) (granting cert. to *United States v. Johnson*, 526 Fed. Appx. 708 (8th Cir. 2013) (unpublished))**

- **Should mere possession of a short-barreled shotgun be treated as a "violent felony" under the Armed Career Criminal Act, 18 U.S.C. § 924(e)?**

Undefined offenses

- Given their "GENERIC, CONTEMPORARY MEANING"
- Common-law vs. non-common-law offenses
- Don't go by labels!

WHAT, EXACTLY, WAS MY CLIENT CONVICTED OF?

- **CATEGORICAL APPROACH: Fact of conviction and statutory definition of prior offense**

- **MODIFIED CATEGORICAL APPROACH: Narrowing statute of conviction using judicially noticeable, reliable documents**

Under the categorical/ modified categorical approach . . . .

- **The focus is always on the ELEMENTS,**
- **NOT the facts,**

of the prior offense of conviction.

Divisible/ indivisible statutes

- A **divisible statute** is one that
  - "list[s] potential offense elements in the alternative"
  - "comprises multiple alternative versions of the crime"

The modified categorical approach applies ONLY to divisible statutes

- **THIS IS SO IMPORTANT THAT IT BEARS REPEATING:**

- **The modified categorical approach applies ONLY to divisible statutes! It is NOT used on indivisible statutes. (*Descamps*)**

Descamps is an example of this.

- The California burglary statute lacked an element of generic burglary.
- But the government used the modified categorical approach to show that, in fact, D had admitted to that missing element in the state proceeding.
- HELD: Doesn't matter – the statute is indivisible, so modified categorical approach is not used; and, because indivisible statute doesn't match generic burglary, no enhancement!

Another example:

Your client was previously convicted under a state statute that says: "It shall be unlawful to burglarize any building."

- **He pleaded guilty to an indictment that said: "MR. CLIENT did then and there burglarize a building, to-wit, the dwelling-house of MR. VICTIM."**

- **Was he convicted of "burglary of a dwelling" under USSG § 2L1.2?**

Answer: NO

- **The statute is indivisible: it talks about only one type of "building," and the modified categorical approach can't be used to granulate down below the level of the statutory element ("building"); and**

- **Because the statutory element ("building") includes both dwellings and non-dwelling buildings, the statute is overbroad and does not qualify as "burglary of a dwelling.**

Using the modified categorical approach on a divisible statute

What can you use to narrow under the MCA?

- **Jury trial: charging paper and jury instructions (*Taylor*)**
- **Bench trial: judge's conclusions of law and findings of fact (*Shepard*)**

Using the MCA where the prior resulted from a plea

- **In addition to statutory definition, look at "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." (*Shepard*)**

- **But remember: as *Descamps* makes clear, you're looking for admissions to ELEMENTS, not just any facts.**

The MCA mirrors the *Apprendi* rule

You're looking for the elements either

- **Found by the factfinder in the verdict, in the case of a trial; or**
- **Admitted by the D pursuant to his plea.**

Quick notes about the charging instrument

- **Use only the charging instrument to which the defendant entered his plea!**

- **Be careful of conjunctive allegations in the charging instrument. Sometimes under state law a plea constitutes an admission to all of those allegations; but sometimes it doesn't.**

Remember: the government has the burden of proof

- So, the government's inability to get prior documents for narrowing should mean that the enhancement will not be applied.

IS MY CLIENT'S PRIOR OFFENSE A QUALIFYING OFFENSE?

- **Once all narrowing is done, then you must assume that the D was convicted of the LEAST CULPABLE ACT remaining.**

- **If the elements of that act don't correspond to those of the qualifying offense, NO ENHANCEMENT!**

IMPORTANT PRACTICE NOTE

- **When you're comparing your client's offense of conviction to the generic offense, make sure that you look at the statute as it existed at the time of the client's prior offense.**

- **Westlaw and Lexis have pretty good coverage of historical state statutes.**

Duenas-Alvarez and "Legal Imagination"

- **Some courts have interpreted the Supreme Court's decision in *Duenas-Alvarez* as meaning that you have to actually show a real-life case in which the state of conviction got a conviction for the particular nonqualifying conduct that you say is included in the state state.**

- **This is NOT a correct interpretation of *Duenas-Alvarez*. *See* Keller, *Causing Mischief . . .* (cited in paper).**

- **At a minimum, *Duenas-Alvarez* should not preclude relief where the overbreadth of the statute is clear from the text of the statute or from the pronouncements of the state's highest court.**

So, again . . . .

- If after narrowing under the MCA, and application of the least-culpable-act rule,
- The elements of your client's offense of conviction do not necessarily correspond to those of the qualifying offense,
- NO ENHANCEMENT!