

The Force Clause Post-*Borden*: Going Forward

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Overview

- I. ACCA/U.S.S.G. § 4B1.2(a)/18 U.S.C. § 3559(c)
Force Clause Challenges

- II. 18 U.S.C. §924(c)/18 U.S.C. §16
Force Clause Challenges

Armed Career Criminal Act (ACCA) (18 U.S.C. § 924(e))

ACCA “violent felony” =

1. **Force Clause:** Has as an element the use, attempted use, or threatened use of physical force against the person of another.
2. **Enumerated Offenses Clause:** burglary, arson, extortion, use of explosives (determined by generic definition).
3. ~~**Residual clause:** otherwise involves conduct that presents a serious potential risk of physical injury to another.~~ **Void**
under *Johnson v. United States*, 576 U.S. 591 (2015).

U.S.S.G. § 4B1.2(a)

“crime of violence”

1. **Force Clause:** Has as an element the use, attempted use, or threatened use of physical force against the person of another.
2. **Enumerated Offenses Clause:** murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a), or explosive material as defined in 18 U.S.C. § 841(c).

Note: Incorporated in career offender guideline (§ 4B1.2), § 2K2.1, and § 7B1.1.

U.S.S.G. § 3559(c)
(Three Strikes)
(21 U.S.C. § 841(b)(1)(A) & (B))

(“serious violent felony”)

1. **Force Clause:** offense punishable by a maximum term of ten years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another.
2. **Enumerated Offenses Clause:** See list in notes
3. **Residual Clause:** ~~by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.~~ **Void under *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018)**

ACCA/§ 4B1.2/3559(c)

Categorical approach applies: If “most innocent conduct” or “full range of conduct” or “minimum conduct” or “least culpable conduct” covered by the elements of the statute does not match these definitions, prior offense cannot qualify as “crime of violence”/“violent felony.”

Beware: realistic probability test

ACCA/4B1.2/3559(c)

Force Clause:

Eight Requirements

ACCA/4B1.2/3559(c) Force Clause: Eight Requirements

1. Violent physical force
2. Intentional use of violent force
3. Force must be directed at a person
4. Force must be directed at a person of another
5. Affirmative force (act of omission does not suffice)
6. Must have formal force element (intentional causation of physical injury does not suffice)
7. Actual threat of force (not attempted threat)
8. Attempts/Aiding and Abetting must be generic

Requirement #1 – Violent Force

The Force Clause requires “**violent force**” (“**strong physical force**” or “substantial degree of force” that is “**capable of causing injury or pain**”).

Johnson v. United States, 559 U.S. 133 (2010)

NOT: “*De minimis*” force or unwanted/offensive touching

Requirement #1 – Violent Force

BEWARE:

Stokeling v. United States
139 S. Ct. 154 (Jan. 15, 2019)

- HELD: state robbery, which requires force **sufficient to overcome victim's resistance** qualifies under the ACCA's force clause
- WARNING: Court said offense qualifies if it contains element that requires force that **"potentially" causes physical injury or pain**
- LIMIT: *Stokeling* should be limited to robberies that require: (1) victim resistance; and (2) force (even slight) to overcome that resistance
- But note **bad dicta**: Says **"hitting, slapping, shoving, grabbing, pinching, biting, hair pulling"** qualify as violent force.

Requirement #1 – Violent Force

Examples of offenses that can be violated by **de minimis** force or **no physical force**:

- Assault/Battery(even aggravated with dangerous weapon)
- Resisting arrest
- Kidnapping/False Imprisonment/Hostage Taking/
Witness tampering
- Sex offenses (including rape)
- Robbery/Armed Robbery
- Murder for Hire
- Conspiracy/Aggravated RICO conspiracy
- Riot

Requirement #2 – Intentional Violent Force

Reckless use force or less does not suffice:

Borden v. United States, 141 S. Ct. 1817 (2021)

Requirement #2 – Intentional Violent Force

General intent does not suffice:

Meaning that offense criminalizes general intent to engage in act that happens to put a reasonable person in fear of injury or causes injury, but requires no **intent to injure or put the person in fear of injury (i.e., frighten the victim)**

See government concession in Tenth Circuit on New Mexico aggravated assault with a dangerous weapon:
***United States v. Francisco Gonzales*, Case No. 21-2022**

Requirement #2 – Intentional Violent Force

Extreme Recklessness:

Borden did not conclusively resolve issue,
but argue reasoning of *Borden* excludes
extreme recklessness offenses.

Requirement #2 – **Intentional** Violent Force

Examples of offenses that can be violated with *unintentional* force:

- Assault/Battery (even aggravated assault and assault with a dangerous weapon)
- Arson
- Robbery
- Felony Murder
- Second Degree Murder
- Manslaughter
- Resulting in Death offenses
- Brandishing Firearms
- Reckless Endangerment/Drive-by shooting
- Child Abuse
- Continuing Criminal Enterprise
- VICAR aggravated assault
- VICAR second degree murder

Requirement #3 –
Force must be directed against **a person**

Force against *property* will not suffice

Requirement #3 – Force must be directed against a person

Examples of offenses that can be violated with force or threat of force against property:

- Arsons
- Robberies
- Extortion
- Witness retaliation
- Firearm offenses
- Riot offenses

Requirement #4 –
Force must be directed against a person *of another*

Force against *one's self* will not suffice

Requirement #4—

Force must be directed against a person **of another**

Examples of offenses that can be violated by inflicting **self harm or threatening self harm**:

- Intimidation offenses
- Aggravated sexual abuse

Requirement #5—
Force must be affirmative

Acts of omission (failing to provide food, medicine) should not suffice.

Requirement #5— Force must be affirmative

Examples of offenses that can be violated by acts of omission:

- Assaults
- Murders
- Child abuse

Requirement #5– Force must be affirmative: Circuit Split

Favorable omission cases:

- *United States v. Mayo*, 901 F.3d 218 (3d Cir. 2018) (Pa. aggravated assault)
- *United States v. Gomez*, 690 F.3d 194 (4th Cir. 2012) (Maryland child abuse)
- *Dunlap v. United States*, 784 F. App'x. 379 (6th Cir. 2019) (Tenn. failing to protect child from aggravated assault)

Unfavorable omission cases:

- *United States v. Rumley*, 952 F.3d 538 (4th Cir. 2020) (Va. unlawful wound.) -
argue dicta
- *United States v. Scott*, 990 F.3d 94 (2d Cir. 2020) (N.Y. 1st degree manslaughter)*
- *United States v. Peebles*, 879 F.3d 282 (8th Cir. 2016) (Iowa attempted murder)
- *United States v. Ontiveros*, 879 F.3d 533 (10th Cir. 2017) (Colorado second degree assault)
- *United States v. Waters*, 823 F.3d 1062 (7th Cir. 2016) (Illinois advanced domestic battery conviction)
- *United States v. Baez-Martinez*, 950 F.3d 119 (1st Cir. 2020) (attempted Puerto Rico second degree murder)

Requirement #6— Must have **formal** force element

Intentional causation of physical injury
does not suffice because physical injury is
just **a result that does not require the**
conduct of force.

Requirement #7—
Actual threat of force required

Attempted threats do not suffice.

Issue pending in the Supreme Court in
United States v. Taylor
(Case No. 20-1459)

Case was just argued Dec. 7, 2021.

Requirement #7– Actual threat of force required

Examples of offenses that can be violated by attempting the threat of force:

- Attempted robbery
- Attempted bank robbery
- Attempted carjacking
- Witness retaliation (18 U.S.C. § 1513(b))
- Witness tampering (18 U.S.C. § 1512(a)(2))
- Aggravated sexual abuse (18 U.S.C. § 2241(a))
- Religious obstruction (18 U.S.C. § 247(a)(2))

Requirement #8—
Attempts/Aiding and Abetting must be generic

*Non-generic aiding and
abetting/attempts do not suffice.*

Generic Attempt

Requirements:

- (a) intent to commit the underlying offense,
- (b) an overt act constituting a “substantial step,”
- (c) “probable desistance,” meaning actions unequivocally demonstrate the crime will take place unless interrupted by independent circumstances

See United States v. Gonzalez-Monterroso, 745 F.3d 1237 (9th Cir. 2014) (Delaware attempt is not generic because no **real “substantial step”** required); *United States v. Garcia-Jimenez*, 807 F.3d 1079 (9th Cir. 2015) (generic attempt requires “**probable desistance**” – defendant’s actions indicate that crime will take place unless interrupted by independent circumstances).

Generic Aiding and Abetting

Requirements:

- (a) an affirmative act in furtherance of the underlying offense
- (b) with the intent of facilitating the commission of the offense.

Intent requirement satisfied only when the government proves the person “actively participate[d] in a criminal venture with full knowledge of the circumstances constituting the charged offense.” That is, defendant must have knowledge of every element comprising offense.

The required knowledge must be “advance knowledge,” which means “knowledge at a time the accomplice can do something with it—most notably, opt to walk away.”

See Rosemond v. United States, 134 S. Ct. 1240, 1245 (2014); *United States v. Franklin*, 904 F.3d 793 (9th Cir. 2018); *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017).

18 U.S.C. § 16/

18 U.S.C. § 924(c)

“Crime of violence” definition

- Bail Reform Act (18 U.S.C. § 3156(a)(4)(B));*
- Extradition (18 U.S.C. § 3181)
- Failure to register under SORNA (18 U.S.C. § 2250(c))
- Money laundering (18 U.S.C. § 1956(c)(7)(B)(ii))
- Violent crime in aid of racketeering (18 U.S.C. § 1959)
- Body armor (18 U.S.C. § 931(a)(1))
- Use of minors in crimes of violence (18 U.S.C. § 25)
- Armor-piercing ammunition enhancement (18 U.S.C. § 929(a)(1))

- Protection of individuals performing certain duties (18 U.S.C. § 119(b)(3))
- Explosive materials (18 U.S.C. § 844(o) and 18 U.S.C. § 842(p))
- Interstate Domestic Violence (18 U.S.C. § 2261)
- Aggravated felony enhancements under unlawful re-entry (18 U.S.C. § 1326(b)(2))
- Juvenile delinquency proceedings (18 U.S.C. § 5032)
- Mandatory Victims Restitution Act (18 U.S.C. § 3663A(c)(1)(A)(i))
- Travel Act (18 U.S.C. § 1952)

18 U.S.C. § 16/18 U.S.C. § 924(c) “Crime of violence” definition

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2. ~~**Residual Clause**: by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.~~ **Void under *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018); *United States v. Davis*, 139 S. Ct. 2319 (2019).**

Note: Categorical approach applies

18 U.S.C. § 16/18 U.S.C. § 924(c): Force Clause Challenges

Force Clause challenges:

Same as ACCA/§4B1.2/3559(c) Force Clause, but includes crimes with force against **property**. However, still requires:

1. **Violent physical force** (economic harm and de minimis force do not suffice)
2. Against the property **of another** (force or threat of force against one's own property does not suffice).

NOTABLE § 924(c) FORCE CLAUSE WINS



§ 924(c) Force Clause Wins

- Conspiracy/Aggravated RICO conspiracy
- Attempted Hobbs Act robbery
- Witness retaliation (property damage type)
- Sex Trafficking/Sex Trafficking of children
- Kidnapping
- Hostage Taking
- Arson and Arson resulting in death
- Second Degree Murder
- Murder for Hire
- Involuntary Manslaughter
- Simple Assault
- Robbery of government property
- VICAR offense with state reckless aggravated assault
- VICAR California and federal second degree murder
- Extortion

§ 924(c) Force Clause Losses in the Circuits

- Bank robbery*
- Hobbs Act robbery
- Assault with a dangerous weapon/resulting in serious bodily injury (111(b), 113(a)(3), 113(a)(6))*
- Witness tampering (killing or attempting to kill)
- Witness retaliation (intent to physically injure)
- Armed postal robbery
- Second degree murder*
- Carjacking*
- Mailing threatening communications (threat to injure)
- Pharmacy robbery*
- Resulting in death offenses*
- Drive-by shooting*

§ 924(c) Force Clause: Keep fighting!

- Attempted Hobbs Act robbery, bank robbery, carjacking
- Bank robbery/pharmacy robbery/carjacking
- Witness retaliation (18 U.S.C. § 1513(b))
- Witness tampering (18 U.S.C. § 1512(a)(2))
- Assault resulting in serious physical injury (113(a)(6))
- Assault with a dangerous weapon (111(b))
- Unarmed postal robbery
- Aggravated sexual abuse
- Second degree murder/felony murder
- Resulting in death offenses
- Hate Crimes Act
- Religious Obstruction
- Interstate domestic violence
- VICAR
- Mailing threatening communications (threat to kidnap)
- Mailing injurious articles
- Drive-by shooting

Questions?





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