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Legal Sidebar

Murderous Schemes Are Not Violent Crimes?

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The U.S. Court of Appeals for the Fourth Circuit (Fourth Circuit) recently held in *U.S. v. McCollum* that conspiracy to murder is not a violent crime for federal sentencing purposes. The comments of a concurring judge seem to capture the frustration of the panel with the result: "The dissent ends with the … lament, 'Heaven help us.' Frankly, I would be satisfied if Congress or the Supreme Court would help us. The law in this area, which Judge Duncan faithfully follows, leads to some seemingly odd results with which I do not think any of us are particularly happy."

The case marks the latest judicial effort to identify what constitutes a crime of violence for purposes of federal law. The task has been complicated by the multiplicity of state statutes that often serve as predicates for federal sentencing enhancements. Congress has made adjustments. For example, it established a general definition to permit uniform application through the federal criminal code, 18 U.S.C. § 16. Yet the difficulties persist.

The Armed Career Criminal Act (ACCA) is primarily responsible for the more than a dozen instances when the Supreme Court has addressed the "violent crime" question. The ACCA calls for a 15-year mandatory minimum term of imprisonment for those convicted of unlawful firearm possession that have three or more prior federal or state serious drug felony or violent felony convictions. A felony is an ACCA "violent felony" if it qualifies under any of the three categories of offenses. One category includes crimes that involve the actual, attempted, or threatened use of physical force against another individual. A second consists of specific crimes, such as burglary, arson, and extortion. A third, the so-called residual clause, encompasses offenses that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."

Beginning with *Taylor v. United States*, the Supreme Court developed a "categorical" approach to determine whether a particular federal or state crime conviction constitutes a violent felony conviction for ACCA purposes. However, after trying four times, from *James v. United States* through *Sykes v. United States*, to apply the approach to residual clause cases, the Court gave up. In *Johnson v. United States,* it declared the ACCA's residual clause unconstitutionally vague. *Johnson* raised questions of the continued validity of the remaining categories of the ACCA violent felony definition, as well as the validity of the

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general definition in Section 16 and the sentencing enhancing definition in the Sentencing Guidelines. The Supreme Court has, or soon will, address these issues.

The Court has two "crime of violence" cases pending. One, *Sessions v. Dimaya*, addresses the Section 16 issue and the other, *Stokeling v. United States*, the "use of physical force" category of the ACCA definition. The Court has already held, in *Beckles v. United States*, that the Sentencing Guideline's crime of violence definition is not *unconstitutionally* vague, even though it was modeled after the definition found unconstitutional in *Johnson*. The Court in *Beckles* explained that the constitutional void-for-vagueness doctrine did not apply to the Guidelines because they are not binding on a sentencing court, although failure to accurately account for the Guidelines' recommendations constitutes reversible error. All of which left the Fourth Circuit with the task of applying the *Taylor* categorical approach in *McCollum*.

McCollum pleaded guilty to possession of a firearm by a convicted felon. In the calculation of McCollum's sentence, the U.S. District Court for Western District of North Carolina added in a "crime of violence" enhancement based on the McCollum's prior conviction for conspiracy to murder in aid of racketeering. The Fourth Circuit held that was a mistake. The court determined that the enhancement was not appropriate because the conspiracy-to-murder statute imposed no overt act requirement.

The Fourth Circuit's analysis relied on the "categorical" approach, which the Supreme Court first established in *Taylor v. United States* and which the Supreme Court and lower courts have used since in "crime of violence" cases. The approach involves comparing the elements of an offense at issue, here conspiracy to murder, with the elements of a "crime of violence" as defined in the statute or Guidelines. The crime at issue is not a crime of violence unless it matches or is narrower than the crime envisioned in the statute or Guidelines, that is, unless it falls within the same category as the statute or Guideline description of a crime of violence.

The Sentencing Guidelines define a crime of violence as an "offense under federal or state law" that "(1) has an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is murder … or [3] is an offense of … conspiring … to commit such offenses." (USSG 4B1.2). The Fourth Circuit concluded that the *Taylor* line of cases compels use of the generic, contemporary meaning of "conspiracy" and noted that thirty-six states, the District of Columbia, three U.S. territories, and the general federal conspiracy statute all define "conspiracy" to include an overt act element. The conspiracy to commit murder in aid of racketeering statute, however, does not have an overt act requirement. The Fourth Circuit consequently held that "[b]ecause [the conspiracy statute] does not require an overt act, it criminalizes a broader range of conduct than that covered by generic conspiracy. McCollum's [conspiracy] conviction therefore cannot support his enhanced sentence because it is not categorically a crime of violence."

Unless the Supreme Court or Congress clarifies what constitutes a violent crime, results like those in *McCollum* are likely to continue to occur.