THE OFFICE OF THE FEDERAL PUBLIC DEFENDER
FOR THE EASTERN DISTRICT OF VIRGINIA

PRESENTS A CJA PANEL TRAINING PROGRAM

INVESTIGATION
(AND OTHER MATTERS)
IN FEDERAL CRIMINAL CASES

Wednesday, November 14, 2018, 10:30 a.m. - 4:00 p.m.
Omni Richmond Hotel, 100 South 12th Street, Richmond
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PROGRAM SCHEDULE

10:00  Program check-in begins

10:30  Component Method of Investigation and Case Management  Brandon A. Perron, LPI  Stuart, Florida

12:30  Lunch (on your own)

1:45   The Ethics of Social Media Investigation  Kevin A. Tate  AFPD, WDNC

2:45   Break

3:00   The Categorical Approach and Common Virginia Offenses  Joseph S. Camden  AFPD, ED Va

4:00   Complete evaluations and adjourn
FACULTY INFORMATION

JOSEPH S. CAMDEN

Assistant Federal Public Defender, Eastern District of Virginia

Education: University of Maryland, B.A. 2003; Washington and Lee University School of Law, J.D. 2009

Professional: Trial attorney, Federal Defenders of San Diego, Inc., 2009-17; assistant federal public defender, Richmond, Virginia, 2017-present

BRANDON A. PERRON

Licensed Private Investigator, CCDI, CFI-FTER, Stuart, Florida


KEVIN A. TATE

Assistant Federal Public Defender (Senior Litigator), Western District of North Carolina

Education: B.A., 1993, Concordia University Wisconsin; J.D., 1999, Indiana University School of Law

defender, Las Vegas, Nevada, 2000-05; assistant federal public defender, Charlotte, North Carolina, 2005-present (senior litigator since 2017)
THE COMPONENT METHOD OF CRIMINAL DEFENSE INVESTIGATION AND CASE MANAGEMENT

Brandon A. Perron, LPI, CCDI, CFI-FTR

NOTES
CRIMINAL DEFENSE INVESTIGATION

The Component Method of Criminal Defense Investigation and Case Management

A Comprehensive Methodology to Facilitate a Fact Driven Investigation that Encourages a Due Diligence Effort Consistent with the Due Process Model

Presented by: Brandon A. Perron, CCDI, CFI-FTER
Licensed Private Investigator – Florida
Board Certified Criminal Defense Investigator
Certified Forensic Interview – FTER Method
TRAINING OBJECTIVES

➢ Navigate the complex criminal defense arena.

➢ Develop legal defense theories based upon facts and evidence.

➢ Plan and Execute a Comprehensive Investigation.

➢ Elevate Fundamental Skills and Develop Advanced Skills and Strategies.

➢ Manage the course of investigation and all facts, data, and evidence recovered.

➢ Identify, develop, pursue, track and confirm leads.

➢ Effectively defend the 6th Amendment of the United States Constitution.
The 6th Amendment

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

‘to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.”

Why Should Attorneys and Investigators Use a Methodology?
THE DUTY TO INVESTIGATE
AMERICAN BAR ASSOCIATION
STANDARDS
Standard 4-4.1 DUTY TO INVESTIGATE

(a) Defense counsel should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused’s admissions, or statements to defense counsel of facts constituting guilt or the accused’s stated desire to plead guilty.

The Importance of Prompt Investigation
Facts form the basis of effective representation. Effective representation consists of much more than the advocate’s courtroom function per se. Indeed, adequate investigation may avert the need for courtroom confrontation. Considerable ingenuity may be required to locate persons who observed the criminal act charged or who have information concerning it. After they are located, their cooperation must be secured. It may be necessary to approach a witness several times to raise new questions stemming from facts learned from others.

The lawyer’s duty to investigate is not discharged by the accused’s admission of guilt to the lawyer or by the accused’s stated desire to enter a guilty plea. The accused’s belief that he or she is guilty in fact may often not coincide with the elements that must be proved in order to establish guilt in law. In many criminal cases, the real issue is not whether the defendant performed the act in question but whether the defendant had the requisite intent and capacity. The accused may not be aware of the significance of facts relevant to intent in determining criminal responsibility.
The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant’s background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions. Such information may lead the prosecutor to defer or abandon prosecution and will be relevant at trial and at sentencing.

Effective investigation by the lawyer has an important bearing on competent representation at trial, for without adequate investigation the lawyer is not in a position to make the best use of such mechanisms as cross-examination or impeachment of adverse witnesses at trial or to conduct plea discussions effectively. The lawyer needs to know as much as possible about the character and background of witnesses to take advantage of impeachment. If there were eyewitnesses, the lawyer needs to know conditions at the scene that may have affected their opportunity as well as their capacity for observation. The effectiveness of advocacy is not to be measured solely by what the lawyer does at the trial; without careful preparation, the lawyer cannot fulfill the advocate’s role. Failure to make adequate pretrial investigation and preparation may also be grounds for finding ineffective assistance of counsel.

The NLADA also states ... National Legal Aid and Defender Association

Counsel has a duty to investigate a case before recommending that a guilty plea be taken or sought. Counsel may not sit idly by, thinking that investigation would be futile.

Investigation is necessary for proper legal advice to the client.

Investigators have special training that allows them to do a better job.
Key Areas of Study - “The Fundamentals”

- Attorney-Client Privilege – Agent of Counsel protections and concerns.
- Work-Product Doctrine – application and rules.
- The Legal Defenses that are available.
- The Elements of the Crime.
- Due Process – Traffic Stops, Search & Seizure, etc.
- Criminal Investigation Philosophy & Methodology.
- Aggravating and Mitigating Factors
- Types of Criminal Defenses - Consider the facts recovered and reference them to potential defense theories
FOUR BROAD CATEGORIES OF DEFENSE THEORIES

- ALIBI
- JUSTIFICATIONS
- EXCUSES
- PROCEDURAL DEFENSES

Uncovering Reasonable Doubt: The Component Method

An impartial and objective method of uncovering and evaluating all available evidence and facts related to the question of guilt or innocence. A method that promotes due diligence in order to provide due process.

The Component Method combines “old school” investigative techniques with “new school” technologies.

However, “old school” is primary and remains the very foundation of an effective investigation.

The Art of Investigation Vs. the Science of Documentation.

The Component Method adheres to the concept that the investigative process is an art as opposed to a science. Therefore, it demands critical and creative thinking while at the same time promoting a methodical and strategic methodology.
Documenting Vs. Investigating

The criminal justice system has altered its general approach. Documentation has replaced Investigation. The system encourages a facts based recovery process as opposed to a probing investigative inquiry process.

The Component Method is an Investigative Process.

A Management Tool

A case management system, which provides for creative thinking and maximum efficiency.

A Field Guide & Reference Tool

Developed as a basic guide and reference source for the novice and experienced investigator.

A Comprehensive Approach

The Component Method is presented as a case management tool and formula for conducting a successful comprehensive criminal defense investigation.
The Component Method - How does it work?

Each component of the investigative process is designed to uncover leads and develop questions leading to the next component. The subsequent components support efforts to track leads and answer questions developed in previous components.

The Six Components

1. Forensic Case Review & Analysis
2. The Defendant Interview
3. Crime Scene Inspection
4. Background Impeachment Investigations
5. Witness Interviews & Statements
6. Reporting & Testifying

Note – Reports can be generated progressively as the investigation unfolds

Nothing is carved in stone!

The six components are not “carved in stone”. While engaged in the process – one or more of the components may be revisited dependent upon the needs of the case.

Objective & Impartial Investigation

Remain objective and impartial without forming preconceived opinions. A fact driven investigation dismisses bias and does not allow baseless opinions to navigate the course of the investigation.

Theories should be formed from the facts recovered and evaluated. Theories should not be formed in advance with the investigation focused upon the recovering of facts to support a theory.
Planning & Preparation

Organizational and case-specific priorities must be established and objectives developed to ensure that individual case tasks are performed efficiently and effectively.

Individual Case Planning

Upon receipt, each case must be evaluated against the investigative functions, priorities, and guidelines: Develop a Plan of Action

Consult and discussion with defense counsel

- Primary nature and complexity of the allegations
- Planned focus and objectives of the investigation
- Possible defense theories and the corresponding elements of proof
- Steps necessary to meet investigative objectives; and
- Resources necessary to meet investigative requirements.

EXECUTING INVESTIGATIONS

Investigations must be conducted in a timely, efficient, thorough, and objective manner.

The investigator is a fact-gatherer and should not allow conjecture, unsubstantiated opinion, bias, or personal observations or conclusions to affect work assignments. He or she also has a duty to pursue evidence that is exculpatory and be aware of evidence that is incriminating. The investigator should collect and analyze evidence through a number of techniques, including, but not limited to, interviews of the defendant, witnesses, victims, crime scene inspections, collection & review of records; and the use of computer technology.
COMPONENT ONE – The Forensic Review & Analysis

Approach documentary evidence from a forensic perspective. Break it Down for simple analysis. The police reports contain leads as well as testimonial, physical, and tangible evidence reflecting the foundation of the prosecution’s case.

- Don’t Drink the Kool-Aide! - Question the Narrative
- Line by Line Analysis - Detect Leads, Inconsistencies and issues
- Beware of the false narrative
- Extract the facts from the narrative
- Independent evaluation allows analysis without the influence of storytelling
- Separate fact from opinion
- Note that the facts will provide a foundation for opinions

Identify Inconsistencies ....

Assume a Forensic Approach to the analysis of documentary evidence.

Consider the source, the creation, and the content to determine the credibility.
Identify, Pursue & Track Leads - A Lead, a Clue, a point of departure

The Component Method is based upon a fundamental principle of investigation.

The development and pursuit of leads.

Identify, Track, & Pursue Leads

- A lead is nothing more than a question to be answered or an investigative task to be performed.
- Identify the point of interest.
- Form it into a question or task.
- It is now a lead.

Information & Lead Tracking

Classify questions and leads uncovered during the course of analysis by cross-referencing the lead with the component that will best answer the question.

How do we track our leads? We must develop a system to effectively track leads.

This is a fundamental principle that the investigator must accept and apply.

Lead Tracking System

Identify the lead and classify by the Component that will likely develop the lead

A Progressive Process - Each Component will develop new leads to be answered in subsequent Components.

Therefore, the leads will evolve with the investigation.
What about unanswered leads?

- Provides grounds for a continuance.
- Justification for additional funds.
- Clarifies focus of investigation and needs.
- Allows for Transfer to another investigator.
- Documents file for Post-Conviction Relief and Appellate Review.

Documentation of Leads

The defendant’s case may not end with the trial process. It is the duty of the investigator to properly note and document all leads that were identified. The defendant should continue to benefit from your insight and knowledge of the case.

A Forensic Approach

A step by Step Methodical Process

- Prepare an inventory of all documents.

- Implement an internal tracking system to reference documents and evidence as the investigation progresses.

- Review the statutory elements of the crime prior to analysis.

- Study the charges/statue and clearly understand the elements of the crime.
  
  - What must the prosecution prove in order to secure a conviction?

- Engage in a comparative study of their case facts. Do they have what they need?
Are the foundational facts of their theory subject to an alternative interpretation? Subject the Prosecution’s Case to Analysis

- Highlight and extract leads and data of specific interest – extract and assign to component.

- Highlight dates, times, and references to times – extract and construct time-line.

- Highlight names – extract and generate cast of characters – name, identifying data, contact information, and details of involvement/potential testimony. Classify them as Prosecution witnesses, law enforcement officers, lab personnel, eye-witnesses, fact witnesses, and sources as well as persons of interest who have were contacted but reflect no information regarding potential testimony.

- Identify, Extract & Classify

- Highlight and extract compelling facts and classify as supporting or in conflict with the elements.

- Highlight and extract compelling facts and classify as incriminating, exculpatory, aggravators, and mitigators.

- Highlight and extract facts & evidence that support or dismiss theories as well as due process issues such as questionable traffic stops and searches.

- Identify Inconsistencies & Discrepancies – Extract and summarize.

- Verify and Analyze Evidence

- Compare transcripts to audio/video tapes.

- Cross-reference to reports attributing statements to witnesses.
• Note omissions, inconsistencies, and discrepancies.

• Note use of terms or jargon inconsistent with the nature of the witness.

• Identify specific testimonial and physical evidence that may require further analysis.

Additional Considerations

During the Review & Analysis consider the need for forensic Science and other Experts.

If possible, personally examine physical evidence maintained by law enforcement and compare to the evidence list and facts presented.

Generate Reports Progressively as Information is developed

➤ Inventory of Discovery Report.
➤ Witness Summary Report (cast of characters).
➤ Time-Line of Events Report.
➤ Fact Classification & Summary Report
➤ Inconsistencies, Errors, and Omissions Report.

- Remember, the time line will evolve with the investigation.
COMPONENT TWO –

The Defendant Interview

The Forensic Approach

Aggressively explain the need to be truthful and cooperate with the defense team.

The investigator should take time to ensure that the defendant understands the ramifications of not cooperating.

Maintain control of the interview at all times!

Don’t become overly aggressive.

The purpose is to ask questions – not answer them.

Document the File and Probe for Facts

Obtain all of the defendant’s personal data and background information. Use to document file and measure baseline for Kinesic Interviewing.

Question the defendant thoroughly focusing upon details. Use the interviewing technique of “visual imagery” and reconstruct the time line.
DEFENDANT INTERVIEW PLAN

Designed for Optimal Results

1. Introduction

   a. Introduce yourself as an investigator retained to assist Defense Counsel and that you are an agent of counsel.

2. Define Purpose of the Interview.

   a. Explain the importance of the investigative interview.

3. Explain Attorney-Client Privilege and parameters.

4. Explain the NEED to be truthful and cooperative relative to facts.

5. Recover Background Information and History.

   b. Mitigation Facts
   b. Identify baseline of truthful non-stress communication.


   a. Review arrest affidavit or offense report with the defendant.
   b. Line by line, ask to the defendant to note discrepancies or conflicts.

7. Reconstruct the Events leading up to the incident and arrest.

   a. Recover facts using a time-line reconstruction.
   b. Utilize visual imagery to facilitate the memory process.
   c. Walk them through the incident and events focused upon details and facts.

8. Identify eyewitnesses and fact witness.
a. Seek those who may be able to provide additional information relative to the incident.

Question the defendant thoroughly focusing upon details.

Use the interviewing technique of “visual imagery” and reconstruct the time line. Use to identify the baseline of normal behavior to facilitate Kinesic Interviewing.

Develop the Time-Line

Recover the before, during, and after surrounding the events.
COMPONENT THREE –
The Crime Scene Inspection

- Compare scene to evidence & testimony.
- Identify the location of witnesses at the time of the crime and reference to evidence & testimony.
- Lock a witness into specific testimony.
- Identify Evidence missed or dismissed.

The Defense Perspective

The Correspondence Method in Action

Diagrams, photographs, and video can all be used to test the veracity of evidence.

Does the evidence correspond with the scene?

General Crime Scene Rules

- Observe – Do not disturb anything at the scene.
- Record – Take notes, measurements, accomplish photographs and diagrams.
- Collect – Identify, process, and mark evidence.
- Preserve – document and preserve observations and evidence uncovered at the scene.
Negative Evidence - Based on the facts, what should be present?

Canvass the Crime Scene - Utilize your time at the crime scene to identify and interview potential witnesses.

**Reports to be generated**

COMPONENT FOUR –
The Impeachment background investigation

Criminal Records

Historically this has been the beginning and end of what is commonly referred to as a background investigation.

A felony conviction is not a definitive reflection of a person's reputation for honesty.
Look at the bigger picture
Focus upon the theme of impeachment evidence. A felony conviction is only part of the equation.

Is the witness credible? Should they be believed? If not, why not?

Who may impeach?


(a) Who May Impeach. The credibility of any witness may be attacked by any party, including the party calling the witness.

(b) Evidence to Impeach. The credibility of a witness may be impeached by any evidence relevant to that issue, except as otherwise provided by statute or these Rules.
METHODS OF IMPEACHMENT

(a) His demeanor while testifying and the manner in which he testifies.
(b) The character of his testimony.
(c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
(d) The extent of his opportunity to perceive any matter about which he testifies.
(e) His character for honesty or veracity or their opposites.
(f) The existence or nonexistence of a bias, interest, or other motive.
(g) A statement previously made by him that is consistent with his testimony at the hearing.
(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
(i) The existence or nonexistence of any fact testified to by him.
(j) His attitude toward the action in which he testifies or toward the giving of testimony.
(k) His admission of untruthfulness.

A witness may generally be questioned about criminal convictions only if the convictions are for felonies and the witness has not been pardoned for innocence.

If the witness denies a criminal conviction, it may only be proved by offering a certified record of the conviction.

What about prior bad acts?

Prior bad acts may be acceptable since the credibility of any witness depends upon his or her powers of perception, capacity to remember, ability to communicate accurately and honesty or integrity, it may always be attacked by showing shortcomings in any of those areas.

What is the witness’ reputation for honesty within the community?
Obtain from records – criminal & civil

Identify & Interview persons who know witness.
Identify community. For example, neighborhood, employers, clubs, bars, hangouts, current and past.
Questions to ask
What is their reputation for honesty?
Follow rumors to source of information.
Use canvassing to facilitate and identify impeachment material.
Build a Profile on Each Witness

National Databases
Federal Criminal Records
State Criminal Records
Civil Records – Law Suits
Public Recordings
Social Media Searches
General Google Search
Other records and sources
All Public Record Sources
Friends, Associates, neighbors, employers

Use a National Database

To locate witnesses

Identify jurisdictions where the subject has resided in the past.

Develop information leading to potential impeachment evidence.

Use to test the credibility of potential witnesses.

You never know what you may find.
Access all Sources of Available Information
Federal Criminal Records - Freedom of Information Act:
Wants & Warrants
Federal Bureau of Prisons - (www.bop.gov/inmate.html)
U.S. District Courthouses
Federal Agencies – Administrative Actions

    Military Records
    International Records
    State Agencies – Open Records Laws?
    Licensing Agencies, etc.
    City and Local Agencies
    County Government

Identify all law enforcement contact in any capacity

Identify jurisdictions where the subject as resided and worked and contact local law enforcement.

Pursue reputation for honesty, violence, and/or past experiences as a witness or a victim in similar cases.

Social Media Research

Reports to be generated

Reports for each individual witness.
Criminal Records – Certified Copies of Convictions.
Provide a Dossier for each witness reflecting all data and facts recovered.
COMPONENT FIVE – Witness Interviews and Statements

Understanding Witnesses

Planning is crucial to success!

Plan Witness Interviews

1. Categorize witnesses
   a. Confirmed
   b. Unconfirmed

What is the difference?

Confirmed Witnesses have been identified by the prosecution. They are listed within the police reports. In addition, it is expected that they will be listed by the prosecution and will testify to support their case. Their basic testimony is known and dependent upon the jurisdiction may be pursued via deposition.

Unconfirmed Witnesses are merely potential witnesses who have not been interviewed. They are a lead.

Confirmed Witness Considerations

Keep in mind that defense counsel may specifically request that confirmed witnesses be interviewed. This is especially true when depositions are not allowed via the rules of procedure.
To confirm or challenge their testimony

To identify inconsistencies or changes

To pursue additional information and questions that were not covered by the law enforcement interviews

Protect Defense Counsel ...

The Investigator should seek to interview unconfirmed witnesses as soon as possible. Never assume witness testimony will be as stated by a third party. Once the witness is listed it is too late. Failure to confirm may provide the prosecution with an additional witness against the defendant.

Importance of Unconfirmed Witnesses
Unconfirmed witness are crucial to developing a defense theory.

The may provide testimony that challenges, contradicts, or provides alternatives to the prosecution’s evidence.

Unconfirmed witnesses can fundamentally change the equation of the prosecution’s case and demonstrate reasonable doubt.

Classify by Expectation

Unconfirmed

Level 1 - Friends & Family – existing relationship suggests high level of cooperation

Level 2 - Based upon leads cooperation expected

Level 3 - Based upon lack of insight cooperation level is unknown
Preparing for the Interview

Review prior statements subject to analysis in Component 1. Review background information developed in Component 4. Review questions and leads generated in prior Components. Prepare question guide in advance.

Conducting the Interview

Attempt to control the environment of the interview as much as possible.

Conducting the Interview

Utilize prepare questions as a guide only.

Location, Location, Location!

Their home; time and place convenient for them.

Trojan Horse Approach – invited in with the ability to gain control.

Their defenses are lowered when in their own home.

Kitchen is best as it promotes conversation on multiple levels including cultural.

Avoid the living room and couch. It is not an environment that promotes conversation.

Thinks about it? Is your office really designed to facilitate cooperation or designed to intimidate? Avoid using your office.

Ask what did you see as opposed to “what happened?”
Conducting the Interview

Obtain complete details – utilize the technique of “visual imagery” to reconstruct the actions and observations of witness.

Reconstruct the Time-Line

Listen & Observe Carefully ..... 

Listen to the answers, hesitations, verbal cues, and body language indicating confusion and possible deception.

It is the responsibility of the interviewer to recover the data not the responsibility of the witness to provide it.
COMPONENT 6 –
The Report of Investigation

The written report of investigation is the foundation of every legal action.

A weak foundation will reveal a weak case.

Therefore, it should be clear, concise, and accurate, ensuring evidence in being communicated effectively.

An investigation is a puzzle. The facts are pieces that must be organized and put together to form an image of the truth.

Avoid “Story Telling” ..... 

Story telling encourages and facilitates embellishment, exaggeration, and distortion of the facts. 
The investigator should be focused upon a historically accurate reporting of an event as opposed to a “Hollywood” version.

Easy Access to Facts

A fact driven investigations should produce Fact Driven Report!

Consider the three phase process of selecting, organizing and interpreting information.
Use it to organize the facts that demand emphasis. Draw readers to the facts and encourage universal interpretation.

The written report should be more than an information report but in fact a “tool” that counsel can use throughout the process..

Proper Formatting - The Narrative is too busy but the Bullet Points Invite Review

Narrative Reports VS. Bullet Format Reports

Report Writing Guidelines

Add sections to accommodate new data.

Stick to the facts that can be verified and corroborated

Do not express opinions within the report – if comments are necessary provide a comments section or generate a memorandum.

Review for accuracy!

Preserve The Record

Benefits of Employing the Component Method
The Component Method is more than a simplified and comprehensive approach to the discipline of criminal defense investigation.

Managing a heavy case load.

Utilizing the Component Method will allow the investigator to manage cases more effectively. The Component Method may be applied comprehensively or as individual components.

Allows for Efficiency & Creativity

It provides case managers and independent field investigators with a case management and lead tracking system.

A system designed to provide guidance while also allowing independence and creative thinking.

A SOUND DEFENSE THEORY

The Component Methodology can provide defense counsel with the opportunity to develop a defense based upon facts and not abstract theory. Upon reviewing the evidence, defense counsel may request additional investigation based upon initial findings, recommendations, or supplemental discovery.
THE ETHICS OF SOCIAL MEDIA INVESTIGATION

Kevin A. Tate, AFPD, WDNC

NOTES

See separate hand-out for materials
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THE CATEGORICAL APPROACH AND COMMON VIRGINIA OFFENSES

Joseph S. Camden, AFPD, ED Va.

NOTES
What is the Categorical Approach?

Justices and lower court judges have repeatedly pointed out that the categorical approach and divisibility have turned into a spectacular failure for American law.

What is the Categorical Approach?

- Instead of enumerating which prior convictions qualify for an effect under federal law, Congress established categories such as “crimes of violence” and “controlled substance offenses.”

- The Categorical Approach compares the elements of the prior conviction with the elements of the generic category.
What is the Categorical Approach?

What is the Categorical Approach NOT?

Contrast with the circumstance-specific approach. 
We Can and Do Win These Cases

- Heavily policed by SCOTUS:
  - See Mathis v. United States, 136 S.Ct. 2243, 2254 (2016) (government’s argument is that in prior cases “[so they say] when we talked about ‘elements we did not really mean it’”); id. (“But a good rule of thumb for reading our decisions is that what they say and what they mean are one and the same.”);
  - Descamps v. United States, 133 S.Ct. 2276, 2287 (2013) (“[T]he Ninth Circuit’s ruling strikes out swinging.”); id. (“Here is the only conclusion in [the Circuit precedent] we agree with: It is difficult, if not impossible to determine which is which” between overbroad and missing-element statutes);
  - Moncrieffe v. Holder, 569 U.S. 184, 206, 133 S. Ct. 1678, 1693 (2013) (“This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as ‘illicit trafficking in a controlled substance,’ and thus an ‘aggravated felony.’ Once again we hold that the Government’s approach defies ‘the commonsense conception’ of these terms.”);
  - Johnson v. United States, 559 U.S. 133, 145, 130 S. Ct. 1265, 1274 (2010) (calling government’s argument to broaden definition of violent felony to include simple batteries a “comical misfit with the defined term ‘violent felony’”);
  - Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010) (rejecting an attempt to rely on extra-elemental facts to classify drug offense as an aggravated felony);
  - Lopez v. Gonzales, 549 U.S. 47, 56-57 (2006) (“But before this provision is given the Government’s expansive treatment, it makes sense to ask whether it would have some use short of wrenching the expectations raised by normal English usage”);
  - Leocal v. Ashcroft, 543 U.S. 1, 13 (2004) (“Drunk driving is a nationwide problem, as evidenced by the efforts of legislatures to prohibit such conduct and impose appropriate penalties. But this fact does not warrant our shoe-horning it into statutory sections where it does not fit.”)

A Cautionary Tale

**Holdings:** The Court of Appeals, Barbara Milano Keenan, Circuit Judge, held that:
1. defendant’s prior felony conviction under Virginia law, for assault and battery of a police officer (ABPO), was not categorically a crime of violence, as predicate for career offender sentencing under Sentencing Guidelines, but
2. district court’s error in treating the prior conviction as a crime of violence was not plain error.

Affirmed.
A Cautionary Tale

UNITED STATES of America, Plaintiff-Appellee,
v.
Jolon Devon CARTHORNE, Sr., Defendant-Appellant.

No. 16-6515
Argued: October 24, 2017
Decided: December 21, 2017

Holdings: The Court of Appeals, Barbara Milano Keenan, Circuit Judge, held that:
1 counsel’s failure to object to defendant’s designation as career offender constituted
deficient performance, and
2 counsel’s failure to object to defendant’s designation as career offender prejudiced
defendant.

Vacated and remanded.

Virginia Larceny

Not a Theft Offense

Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014)
Conspiracy to Commit Murder in Aid of Racketeering

*United States v. McCollum*, 885 F.3d 300 (4th Cir. 2018)

Virginia Statutory Burglary

Virginia Robbery

*Not ACCA Crime of Violence*

*United States v. Winston, 850 F.3d 677 (4th Cir. 2017)*

When Does the Categorical Approach Apply?

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<td>4B1.2 (Career Offender)</td>
<td>Aggravated Felony</td>
<td>Predicates: 42 USC 16911</td>
<td>Exception for Felon-in-Possession, 18 USC 921(a)(20)(A)</td>
</tr>
<tr>
<td>924(e) (ACCA)</td>
<td>2K2.1</td>
<td>Crimes Involving Moral Turpitude</td>
<td>Tiers (per DOJ, 73 Fed. Reg. 38030)</td>
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<tr>
<td>851</td>
<td></td>
<td>Crimes Relating to a Controlled Substance</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Step by Step Categorical Analysis

1) Overbreadth
   Does the statute cover conduct beyond the generic definition?
   - Yes
   - No
      Categorical Match

2) Divisibility
   Is the statute divisible? That is, must the jury agree unanimously on a statutory alternative that falls exclusively within the generic definition?
   - Yes
   - No
      Categorically Overbroad STOP HERE

3) Modified Categorical Analysis
   Do judicially noticeable documents establish that the person was convicted of the generic elements, as opposed to the overbroad elements?
   - Yes
   - No
      Not a Categorical Match
      Categorical Match
Prior

Generic

Overbreadth

Does the statute cover conduct beyond the generic definition?

No

Yes

Categorical Match

Stop here

Divisibility

Must the state allege and prove, and the jury agree unanimously, on a statutory alternative that falls exclusively within the generic definition?

Unclear

No

Yes

Not a Match

Not a Match

Modified Categorical

Stop here

Do judicially noticeable documents establish that the client was convicted of the generic elements, as opposed to the overbroad elements?

No

Stop here

Yes

Categorical Match

Stop here

Not a Match

Stop here

EXAMPLE

GENERIC BURGLARY
(from Taylor)

• unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime

Generic
EXAMPLE

STATE BURGLARY

• entry into a ship, vessel, railroad car, automobile (if used as a dwelling) with intent to commit theft, is statutory burglary under Virginia law
Overbreadth: Does the statute cover conduct beyond the generic definition?

Categorical Match: Stop here

Divisibility: Must the state allege and prove, and the jury agree unanimously, on a statutory alternative that falls exclusively within the generic definition?

Not a Match: Stop here

Modified Categorical: Stop here

Yes

No

Unclear

Do judicially noticeable documents establish that the client was convicted of the generic elements, as opposed to the overbroad elements?

Categorical Match: Stop here

Not a Match: Stop here

Yes

No

Generic

Prior

- CJA 47 -
Overbreadth: Does the statute cover conduct beyond the generic definition?

Categorical Match

Divisibility: Must the state allege and prove, and the jury agree unanimously, on a statutory alternative that falls exclusively within the generic definition?

Not a Match

Modified Categorical

Do judicially noticeable documents establish that the client was convicted of the generic elements, as opposed to the overbroad elements?

Categorical Match

Not a Match

Yes

No

Stop here

Prior

X

Not X

X or Y

Generic
EXAMPLE — what if the jury must decide?

- CJA 49 -
**Overbreadth**

Does the statute cover conduct beyond the generic definition?

- Yes
  - Must the state allege and prove, and the jury agree unanimously, on a statutory alternative that falls exclusively within the generic definition?

- No
  - Not a Match
  - Not a Match
  - Modified Categorical

**Categorical Match**

Stop here

**Divisibility**

Unclear

- Yes
  - Not a Match
  - Not a Match
  - Modified Categorical

- No
  - Categorical Match
  - Modified Categorical

**Generic**

**Prior**

- X
- Not X
- X or Y

**Divisibility**

- Categorical Match
- Not a Match

**Modified Categorical**

Stop here

**No**

**Stop here**

**US v. Degeare, 884 F.3d 1241 (10th Cir. 2018)**

**Generic Offense Elements**

- Do judicially noticeable documents establish that the client was convicted of the generic elements, as opposed to the overbroad elements?

**Prior Offense Elements**

- Do judicially noticeable documents establish that the client was convicted of the generic elements, as opposed to the overbroad elements?

**Compare**

- Must the state allege and prove, and the jury agree unanimously, on a statutory alternative that falls exclusively within the generic definition?
How to Determine the Generic Category

- Risk-based Definition
- Generic Term
- Elements-based Definition
- Statutory Reference

Prior

Generic

How to Determine the Generic Category

- Generic Definition
- Statutory Reference

- Easy: convictions under referenced statute count
- Typically for prior federal convictions
- e.g. “any felony punishable under the Controlled Substances Act” 18 U.S.C. 924(c)(2)
Element-based definition

- Defines category by a single element
- Examples:
  - “has as an element the use, attempted use, or threatened use of physical force against the person or property of another” 18 U.S.C. 924(c)(3)(A)
  - a crime “relating to a controlled substance”
- Look for implicit limitations on the element.

How to Determine the Generic Category

- **Generic Definition**
  - Examples:
    - “burglary”
    - “a theft offense”
    - “sexual abuse of a minor”
  - “robbery”
  - “conspiracy” and “attempt”

- **Generic Term**

---

**Aiding and Abetting**
- Can be implicit in every charge
- Part of every generic definition.

- **Conspiracy**
  - Overt act?
  - Conspiracy with LE?
  - Attempt
  - Substantial step?

---

§4B1.2

(c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least one of these convictions were imposed in a single term of imprisonment.

“Crime of violence” and “controlled substance offense” include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.

Application Notes:
1. Definitions.—For purposes of this guideline—

How to Determine the Generic Category

United States v. McCollum, 885 F.3d 300 (4th Cir. 2018)
How to Determine the Generic Category

Generic Attempt
- Intent
- Substantial Step

Delaware Attempt
- Intent
- Preparation

United States v. Gonzalez-Monterroso, 745 F.3d 1237 (9th Cir. 2014)

How to Determine the Generic Category

Generic Attempt
- Intent
- Act

Washington Accomplice
- Knowledge
- Act

Generic Aiding/Abetting
- Intent
- Act

United States v. Valdivia-Flores, 876 F.3d 1201 (9th Cir. 2017)
(3) For purposes of this subsection the term “crime of violence” means an offense that is a felony and—
(B) that 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.

Sessions v. Dimaya

- Ordinary case?
- “in the course of committing”
- Level of Risk?
Sessions v. Dimaya

- Ordinary case?
- “in the course of committing”
- Level of Risk?

**Generic Definition**

**Statutory Reference**

**Risk-Based**
Research Note: NEVER GIVE UP

808 F.3d 972
United States Court of Appeals,
Fourth Circuit.

UNITED STATES of America, Plaintiff–Appellee,

v.

Gregory McLEOD, Defendant–Appellant.

No. 14–4766.

of generic burglary. *Id. at 266. That passing comment, however, never discussed whether § 16–11–312(A) was broader than generic burglary in light of the definition of “dwelling” given by the statute; the defendant conceded the fact that “homes” were involved. In these circumstances, we conclude that the government can draw little comfort from our passing observation that the statutory language tracked the definition of burglary as given in Taylor. See *978 United States v. Hemingway, 734 F.3d 323, 335 (4th Cir. 2013) (applying a similar analysis of Wright).

Research Note: NEVER GIVE UP

I can do this all day.
How to Determine the Elements of the Prior Conviction

- State Law Controls
  - similar to *Erie*
- State Court Decisions
  - Sufficiency of the evidence
  - Sufficiency of the indictment
  - Double Jeopardy
  - Merger / Lesser included
  - Witness impeachment
  - 8th Amendment
  - Harmlessness / Alternative holdings

- Jury instructions
  - (particularly unanimity instructions)
- Statutory Range
- Actual cases / common practice
  - *Duenas-Alvarez*

Federalism!
How to Determine the Elements of the Prior Conviction

Comparing Elements

- Least culpable conduct
- Different outcomes on same facts
- Missing elements
- Overbroad elements
- Illustrative case (Duenas-Alvarez)
  - Split: 1st, 3d, 4th, 6th, 10th, 11th vs. 5th, 8th, BIA

Moncrieffe, Descamps, Duenas-Alvarez
Divisibility

Issue: Whether an identified ground of overbreadth is an element

- What is an element?
  - Alleged in the indictment
  - Proven beyond a reasonable doubt
  - Unanimous jury
  - Facts that affect statutory range for sentencing (min/max)
- State Law (Still) Controls
- State Court Decisions
- Jury instructions (particularly unanimity instructions)
- Charging instruments
- Statutory Range
- Actual cases / common practice
  - Duenas-Alvarez
### Divisibility

<table>
<thead>
<tr>
<th>Means</th>
<th>Element</th>
</tr>
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<tbody>
<tr>
<td>“OR”</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Need not allege (but can)</th>
<th>Indictment</th>
<th>Must allege</th>
</tr>
</thead>
<tbody>
<tr>
<td>Does not affect</td>
<td>Stat Max/Minman</td>
<td>Raises minman/stat max</td>
</tr>
<tr>
<td>No lesser included or double jeopardy for overbroad conduct</td>
<td>Lesser included / Double jeopardy</td>
<td>Can have lesser included or double jeopardy for overbroad conduct</td>
</tr>
<tr>
<td>Frequently harmless</td>
<td>Harmlessness</td>
<td>Rarely harmless</td>
</tr>
<tr>
<td>Jury need not agree</td>
<td>Jury unanimity</td>
<td>Jury must agree</td>
</tr>
<tr>
<td>Sometimes subject to affirmative defense for overbroad conduct</td>
<td>Burden</td>
<td>Burden on government beyond a reasonable doubt, not subject of affirmative defense</td>
</tr>
</tbody>
</table>

---

**Argue:** Tie goes to the defendant

- If “state law fails to provide clear answers” and the “record materials [don’t] speak plainly,” government is not “able to satisfy Taylor’s demand for certainty”
- *Mathis*, 136 S.Ct. 2256; *United States v. Degeare*, 884 F.3d 1241 (10th Cir. 2018)
Example

It shall be unlawful for any person to willfully or without lawful cause point a shotgun, rifle or pistol, or any deadly weapon, whether loaded or not, at any person or persons for the purpose of threatening or with the intention of discharging the firearm or with any malice or for any purpose of injuring, either through physical injury or mental or emotional intimidation, or for purposes of whimsy, humor or prank.

First, willfully; Second, pointing a shotgun/rifle/pistol/(deadly weapon), whether loaded or unloaded; Third, at any person(s); Fourth, without lawful cause; Fifth, (for the purpose of threatening)/(with the intention of discharging the firearm)/(with any malice)/(for any purpose of injuring, either through physical injury or mental or emotional intimidation)/(for purposes of whimsy/humor/[a prank]/(in anger or otherwise)


United States v. Titties, 852 F.3d 1257 (10th Cir. 2017)

The Modified Categorical Approach

Overbreadth

Does the statute cover conduct beyond the generic definition?

No

Yes

Categorical Match

Stop here

Divisibility

Must the state allege and prove, and the jury agree unanimously, on a statutory alternative that falls exclusively within the generic definition?

No

Unclear

Yes

Not a Match

Not a Match

Stop here

Modified Categorical

Do judicially noticeable documents establish that the client was convicted of the generic elements, as opposed to the overbroad elements?

No

Yes

Not a Match

Categorical Match

Stop here

Stop here

Stop here
Modified Categorical Approach
ONLY AFTER DIVISIBILITY ESTABLISHED

But if instead [the alternatives] are means, the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.

_Mathis v. United States_, 136 S. Ct. 2243, 2256 (2016)

### Modified Categorical Approach

**Standard:** elements (not facts) that defendant “necessarily admitted”

<table>
<thead>
<tr>
<th></th>
<th>Yes</th>
<th>No</th>
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</thead>
<tbody>
<tr>
<td><strong>Purpose:</strong></td>
<td>Determine the <em>elements</em></td>
<td>Determine client’s prior <em>conduct</em></td>
</tr>
<tr>
<td><strong>Documents:</strong></td>
<td>Judgment</td>
<td>Unadopted police reports</td>
</tr>
<tr>
<td></td>
<td>Plea colloquy</td>
<td>Pre-sentence reports</td>
</tr>
<tr>
<td></td>
<td>Minutes</td>
<td><em>Alford/Nolo pleas*</em></td>
</tr>
</tbody>
</table>

_Shepard v. United States_, 544 U.S. 13 (2005); _see also United States v. Alston_, 611 F.3d 219 (4th Cir. 2010)
Example: Virginia PWID vs. 841/851

- (Re)read the statute
- Remember: Labels Don’t Matter!

21 U.S. Code § 841 - Prohibited acts A

other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if

- CJA 65 -
Example: Virginia PWID vs. 841/851

- (Re)read the statute
- Remember: Labels Don’t Matter!

(44) The term “felony drug offense” means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

Example: Virginia PWID vs. 841/851

- (Re)read the statute
- Remember: Labels Don’t Matter!

(44) The term “depressant or stimulant substance” means:

(A) a drug which contains any quantity of barbituric acid or any of the salts of barbituric acid, or
(B) a drug which contains any quantity of (I) amphetamine or any of its optical isomers; (II) any salt of amphetamine or any salt of an optical isomer of amphetamine; or (III) any substance which the Attorney General, after investigation, has found to be, and by regulation designated as, habit forming because of its stimulant effect on the central nervous system; or
(C) hyseric acid diethylamide; or
(D) any drug which contains any quantity of a substance which the Attorney General, after investigation, has found to have, and by regulation designated as having, a potential for abuse because of its depressant or stimulant effect on the central nervous system or its hallucinogenic effect.

(9) The term “narcotic drug” means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) opium, opium derivatives, eserine salts, and nitrogen derivatives of ergot, and salts of any of the substances referred to in subparagraphs (A) through (E).

- CJA 66 -
UNITED STATES of America, Plaintiff-Appellee,  
v.  
Matthew ELDER, Defendant-Appellant.  

No. 17-2207  
Argued May 22, 2018  
Decided August 15, 2018  

Synopsis  
Background: Defendant was convicted of conspiring to distribute methamphetamine, and he appealed. The Court of Appeals, 840 F.3d 455, affirmed in part, vacated in part, and remanded. On remand, the United States District Court for the Southern District of Indiana, No. 3:13-cr-00017-RLY-CMM-8, Richard L. Young, Jr., resentenced defendant, and defendant appealed.  

Holdings: The Court of Appeals, Ripple, Circuit Judge, held that:  
1 categorical approach applied in determining whether defendant’s prior state conviction qualified as predicate “felony drug offense”;  
2 defendant’s prior Arizona conviction for possession of equipment or chemicals for manufacture of dangerous drugs did not qualify as predicate “felony drug offense”; and  
3 limited remand was warranted to permit sentencing judge to determine whether he would reimpose his original sentence.  

Remanded.
Example: Virginia PWID vs. 841/851

§ 18.2-248. Manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute a controlled substance.

C. Except as provided in subsection C1, any person who violates this section with respect to a controlled substance classified in Schedule I or II shall upon conviction be imprisoned for not less than five nor more than 40 years and fined not more than $500,000. Upon a

A. Except as authorized in the Drug Control Act (§ 54.1-3400 et seq.), it shall be unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give, or distribute a controlled substance or an imitation controlled substance.

Overbreadth

Does the statute cover conduct beyond the generic definition?

No

Yes

Categorical Match

Stop here

Divisibility

Must the state allege and prove, and the jury agree unanimously, on a statutory alternative that falls exclusively within the generic definition?

Unclear

No

Yes

Not a Match

Not a Match

Modified Categorical

Stop here

Do judicially noticeable documents establish that the client was convicted of the generic elements, as opposed to the overbroad elements?

Yes

No

Categorical Match

Stop here

Not a Match

Stop here
Salvia Takes a Starring Role

Salvinorin A;

Feds: No!
California: No!
Virginia: Yes!
Prior

Generic

Overbreadth

Does the statute cover conduct beyond the generic definition?

No

Yes

Categorical Match

Stop here

Divisibility

Must the state allege and prove, and the jury agree unanimously, on a statutory alternative that falls exclusively within the generic definition?

Unclear

No

Yes

Not a Match

Not a Match

Modified Categorical

Stop here

Do judicially noticeable documents establish that the client was convicted of the generic elements, as opposed to the overbroad elements?

Yes

No

Categorical Match

Stop here

Not a Match

Stop here

---

In the Circuit Court of the City of Richmond
John Marshall Courts Building
January 3, 2017

17-F-296/BBC

The GRAND JURY charges that:

On or about September 30, 2016, in the City of Richmond,

did feloniously and unlawfully manufacture, sell, give, distribute or possess with the intent to manufacture, sell, give, or distribute, a controlled substance listed in Schedule I or Schedule II of the Drug Control Act, in violation of §§ 18.2-248, 54.1-3446 through 54.1-3452 of the Code of Virginia (1950) as amended.

Virginia Code Ann. 18.2-248
Manufacture, Sell, Distribute or Possess a Controlled Substance with Intent to Manufacture, Sell or Distribute

VCC: NAR-3042-Fv
Real-world Obstacles:

We have reviewed the record and conclude that the district court did not err in finding that Pritchett's Virginia convictions for possession of cocaine with intent to distribute in violation of Va. Code Ann. § 18.2-248 were controlled substance offenses under USSG §§ 2K2.1(a)(2); 4B1.2(b). See Dozier, 848 F.3d at 187-88; Mills, 485 F.3d at 224; cf. Hernandez-Noiasco v. Lynch, 807 F.3d 95, 96, 98 (4th Cir. 2015) (holding that conviction for possession with intent to distribute cocaine under Va. Code § 18.2-248 was aggravated felony under the Immigration and Nationality Act). We further conclude the district court adequately addressed and considered Pritchett's sentencing arguments.

Keep an Eye Out . . .
Example: Virginia Attempt

Virginia, unlike some states, has adopted the "slight acts" test in attempt crimes:

"Whenever the design of a person to commit crime is clearly shown, slight acts in furtherance of this design will constitute an attempt, and this court will not destroy the practical and commonsense administration of the law with subtleties as to what constitutes preparation and what an act done toward the commission of a crime. Too many subtle distinctions have been drawn along these lines for practical purposes. Too many loopholes have been made whereby parties are enabled to escape punishment for that which is known to be criminal in the worst sense." See, Sizemore v. Commonwealth, 218 Va. 980 at 985, 243 S.E.2d 212 at 215 (1978).
Example: Virginia Attempt

Generic Attempt

Virginian Attempt

Example: Virginia Aiding and Abetting

Generic Aid/Abet
Example: Virginia Aiding and Abetting

To establish Virginia as a principal in the second degree, the Commonwealth was required to prove that she was present, either actually or constructively, when the rape was committed. See *Spradlin v. Commonwealth*, 195 Va.

It is certain that proof that a person is present at the commission of a crime without disapproving or opposing it, is evidence from which, in connection with other circumstances, it is competent for the jury to infer that he assented thereto, lent to it his countenance and approval, and was thereby aiding and abetting the same.

*Commonwealth*, 225 Va. 533, 536, 303 S.E.2d 903, 904 (1983). Virginia Sutton's actions meet these requirements for a principal in the second degree to rape as that crime is now defined by Code § 18.2–61.

Example: Virginia Aid/Abet

**Intent**  
**Act**  
**Presence and Failure to Object**

Generic Aid/Abet  
Virginia Aid/Abet
Example: Virginia Malicious Wounding

<table>
<thead>
<tr>
<th>Crime of Violence (Force Clause)</th>
<th>Virginia Unlawful and Malicious Wounding</th>
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</thead>
<tbody>
<tr>
<td><strong>18 U.S.C. 16(a), ACCA, Career Offender</strong></td>
<td><strong>If any person maliciously shoot, stab, cut, or wound any person or by any means cause him bodily injury, with the intent to maim, disfigure, disable, or kill, he shall, except where it is otherwise provided, be guilty of a Class 3 felony. If such act be done unlawfully but not maliciously, with the intent aforesaid, the offender shall be guilty of a Class 6 felony.</strong></td>
</tr>
<tr>
<td>the use, attempted use, or threatened use of physical force</td>
<td><strong>Va. Code 18.2-51</strong></td>
</tr>
</tbody>
</table>