HOW VAGUE IS TOO VAGUE?: RESURRECTING THE VOID-FOR-VAGUENESS DOCTRINE IN THE CONTEXT OF THE ARMED CAREER CRIMINAL ACT

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INTRODUCTION

In Georgia, Shawntrail Lee was convicted of possessing a firearm as a felon,[1]—a crime that warranted a sentence of roughly three to four years in prison under the Federal Sentencing Guidelines.[2] However, Lee's prescribed sentencing range increased to a minimum of fifteen years under the Armed Career Criminal Act ("ACCA")[3] because his criminal history included three other crimes that the district court classified as "violent felon[ies]."[4] Lee appealed his sentence, arguing that his predicate conviction of conspiracy to commit armed robbery did not constitute a "violent felony," and the Eleventh Circuit Court of Appeals agreed, vacating his sentence.[5]

Conversely, in North Carolina, Demontrell White was convicted of possessing a firearm as a felon and was sentenced to fifteen years in prison after the Fourth Circuit Court of Appeals determined that his prior conviction of conspiracy to commit robbery with a dangerous weapon was a "violent felony" under the ACCA.[6]

Although both defendants committed the same crime and had similar criminal histories,[7] White was subjected to a prison sentence that was

1. United States v. Lee, 631 F.3d 1343, 1345 (11th Cir. 2011).

2. U.S. SENTENCING GUIDELINES MANUAL § 2K2.6 & ch. 5, pt. A, sentencing tbl. (U.S. SENTENCING COMM'N 2008), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2008/manual/GL2008.pdf. In the District Court for the Southern District of Georgia, Lee was convicted in 2007 of being a felon in possession of a firearm and sentenced in 2008. *See* United States v. Lee, 586 F.3d 859, 863 (11th Cir. 2009).

3. 18 U.S.C. § 924(e) (2012) (mandating that a person who had previously committed three separate violent felonies or serious drug offenses and found to be in violation of 18 U.S.C. § 922(g) for possessing a firearm be sentenced to a minimum of fifteen years in prison).

4. *Lee*, 586 F.3d at 861.

5. *Lee*, 631 F.3d at 1345–46, 1350.

6. United States v. White, 571 F.3d 365, 365–66, 373 (4th Cir. 2009).

7. *Compare id.* at 366–67 (explaining that White was convicted of possessing a firearm in violation of 18 U.S.C. § 922(g)(1) and was categorized as an armed career criminal under the ACCA for three prior felony convictions, one of which was conspiracy to commit robbery with a dangerous weapon), *with Lee*, 631 F.3d at 1345 (stating that Lee's conviction of possessing a firearm in violation of 18 U.S.C. § 922(g)(1) in conjunction with his three prior crimes of escape, eluding the police in the second degree, and conspiracy to commit armed robbery did not classify him as an armed career criminal under the ACCA).

potentially four times higher than Lee's[8] because of the ambiguity of the term "violent felony" under the ACCA and the way different courts have classified conspiracy crimes using that term.

The ACCA imposes a sentencing enhancement for felons convicted of possessing a firearm in violation of 18 U.S.C. § 922(g)[9] when their criminal histories include at least three prior violent felonies or serious drug crimes.[10] For this purpose, the ACCA defines "violent felony" as any crime that is punishable by at least one year in prison and that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[11]

The phrase "or otherwise involves conduct that presents a serious potential risk of physical injury to another"[12] has become known as the "residual clause,"[13] and has sparked controversy among federal district courts as to which specific crimes fall under this category of conduct.[14] Over the course of twenty-five years, the Supreme Court attempted to create a comprehensible test for lower courts to apply in determining whether a crime qualified as a violent felony under the ACCA.[15] The resulting array of tests from the Court only caused more confusion, disparate treatment of specific crimes across jurisdictions, and a waste of judicial resources in forcing appellate courts to expressly rule on how to categorize each particular crime under the ACCA.[16] These inconsistencies

8. *See Lee*, 631 F.3d at 1350 (vacating Lee's ten-year sentence and remanding for resentencing without the armed career criminal classification, which would render his sentencing range significantly lower under the Federal Sentencing Guidelines); *White*, 571 F.3d at 373 (affirming White's fifteen-year sentence).

9. 18 U.S.C. § 922(g) (2012) ("It shall be unlawful for any person who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.").

10. 18 U.S.C. § 924(e)(1) (2012).

11. 18 U.S.C. § 924(e)(2)(b) (2012).

12. *Id.*

13. Sykes v. United States, 131 S. Ct. 2267, 2287 (2011), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).

14. *See infra* Part I.D.

15. *See infra* Part I.D.

16. *See* Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 78 (2015) ("Federal sentencing reports estimate the average sentence for offenders who qualified as armed career criminals but were not subject to the ACCA's enhancement was 122 months' imprisonment, whereas offenders who

not only contradicted Congress's stated purposes in revising the criminal code in 1984 to include the ACCA,[17] but they also restricted defendants' liberty rights and impeded the plea bargaining process by drawing arbitrary lines as to which crimes constituted violent felonies and creating unpredictable outcomes for defendants.[18] Finally, in June of 2015, when the fifth case concerning the interpretation of the residual clause in seven years reached the Court,[19] the Justices abandoned their attempts to interpret the clause and declared it void for vagueness while leaving the rest of the definition of "violent felony" intact.[20]

Congress can now respond to the Court's ruling by either leaving the ACCA as it stands without the residual clause or resurrecting the clause in one of three ways: (1) by amending the Constitution so that the clause is no longer unconstitutional; (2) by amending the ACCA; or (3) by repealing the ACCA and passing new legislation.[21] It is highly unlikely that Congress will amend the Constitution,[22] or repeal the entire ACCA and pass a new act in order to save one clause that is unconstitutionally vague. It is also unlikely that Congress will simply leave the definition of "violent felony" as any crime punishable by at least one year in prison that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (ii) is burglary, arson, extortion, or involves use of explosives,"[23] as the list of enumerated crimes in the second clause was originally written to be an exemplary rather than an exhaustive list.[24] It is most likely, therefore, that Congress will amend the residual clause.

received the enhancement were sentenced to an average 210 months' imprisonment—a difference of over seven years."). *See also infra* Part I.D–II.A.

17. 28 U.S.C. § 991(b)(1)(B) (2012) (delineating the Sentencing Commission's purposes, which included "avoiding unwarranted sentencing disparities"); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(1)(3) (U.S. SENTENCING COMM'N 2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf (explaining that one of the purposes of the Guidelines was to create "reasonable uniformity in sentencing").

18. *See infra* Part II.C.

19. Rory Little, *Argument Analysis: Justices Unhappily Consider Whether Sawed-off Shotguns Are Inherently Violent*, SCOTUSBLOG (Nov. 6, 2014, 2:44 PM), http://www.scotusblog.com/2014/11/argument-analysis-justices-unhappily-consider-whether-sawed-off-shotguns-are-inherently-violent.

20. Johnson v. United States, 135 S. Ct. 2551, 2563 (2015) (8-1 decision).

21. J. Mitchell Pickerill, *The Supreme Court and Congress: What Happens in Congress After the Court Strikes Down Legislation?*, INSIGHTS ON L. & SOC'Y, Fall 2006, at 11, http://apps.americanbar.org/publiced/constitutionday/SupremeCourtCongress.pdf.

22. *See id.*

23. 18 U.S.C. § 924(e)(2)(b) (2012).

24. *See* Taylor v. United States, 495 U.S. 575, 581–87 (1990) (explaining the history of the residual clause).

In amending the ACCA, Congress should follow the example of the Federal Sentencing Guidelines, which has a specific definition for the similar phrase "crime of violence"[25] that serves the same function as the ACCA's "violent felony" in targeting career criminals for sentencing enhancements, as this would lead to more consistent rulings regarding essentially the same terminology across criminal statutes. Symmetry between the definitions of "violent felony" and "crime of violence" would also protect defendants' constitutional rights and allow for transparency and predictability in sentencing procedures.

This Note will seek to explain the recent Supreme Court ruling that voided the residual clause, recommend a new definition of "violent felony," and analyze the potential effects that new definition would have in the context of resolving a recent circuit split over whether a conspiracy to commit a violent crime constitutes a violent felony. In arriving at a comprehensible definition, Part I will delineate the sentencing procedures in the United States by recounting the traditional purposes of sentencing and analyzing the Comprehensive Crime Control Act of 1984, which included in its provisions the Sentencing Reform Act that created both the ACCA and the commission that oversees the Federal Sentencing Guidelines. Part II will then illustrate the inconsistencies the residual clause created by examining the circuit split that arose over conspiracy crimes; analyze why the residual clause was rendered void for vagueness; and compare the language of the ACCA to that of the Federal Sentencing Guidelines. Lastly, Part III will recommend a new definition for "violent felony" that would respect the purposes of sentencing, establish parallel language between the ACCA and the Sentencing Guidelines, and resolve the dispute over whether conspiracies to commit violent crimes are violent felonies under the ACCA.

I. SENTENCING PROCEDURES IN THE UNITED STATES

This Part will discuss the justifications that Congress and the legal community have used for imposing criminal punishments. The Note will later consider the purposes of sentencing in Part III in drafting a more specific definition of "violent felony" for the ACCA.[26] Then, this Part will explain how the federal sentencing system has evolved throughout history,

25. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENTENCING COMM'N 2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf (including conspiracy crimes in the definition of "crime of violence").

26. *See infra* Part III.

culminating in the passage of the Comprehensive Crime Control Act of 1984, which substantially revised the criminal code and included the ACCA within its provisions.

A. THE PURPOSES OF SENTENCING

Under what legal scholars characterize as the traditional view, a criminal sentence serves one of three main purposes: retribution, deterrence, or rehabilitation.[27] The retributive theory of punishment holds that a criminal deserves to be punished for committing a moral wrong against another person;[28] the maxim "an eye for an eye" reflects this theory. Embedded in the retributive view is the idea that relying on the law and society to punish someone in proportion to the crime committed is preferable to allowing private individuals to seek vengeance against that person independent of the law.[29] Deterrence encompasses both preventing others from committing similar crimes and preventing particular defendants from offending again.[30] This theory is based on the notion that people are rational and are less likely to commit an act if the cost, including the potential consequences, of doing so outweighs the potential benefit.[31] Finally, rehabilitation seeks to correct the characteristics in a defendant that led to criminal behavior so that the offender can be reintroduced into society with a reduced probability of reoffending.[32]

Recently, an "inclusive theory of punishment," which argues that a criminal sentencing system should promote the application of multiple or all of the categories of purpose, has increased in popularity in the legal community.[33] Along with the traditional purposes of criminal punishment, this theory considers other justifications, such as restraining dangerous persons to separate them from the rest of society for the safety of others;[34] educating the public about society's definition of immoral behavior and the distinction between legal and illegal conduct;[35] and restoring victims of a crime by allowing them to confront the offender and vocalize how that offender has affected their lives.[36]

27. WILLIAM J. STUNTZ & JOSEPH L. HOFFMANN, DEFINING CRIMES 8–9 (2011).
28. *Id.* at 9; WAYNE R. LAFAVE, CRIMINAL LAW 30–31 (5th ed. 2010).
29. LAFAVE, *supra* note 28, at 31.
30. *Id.* at 27, 29.
31. STUNTZ & HOFFMANN, *supra* note 27, at 9.
32. *Id.*; LAFAVE, *supra* note 28, at 28.
33. LAFAVE, *supra* note 28, at 33 (quoting J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 308 (2d ed. 1960). S*ee also* STUNTZ & HOFFMANN, *supra* note 27, at 9.
34. LAFAVE, *supra* note 28, at 28.
35. *Id.* at 30.
36. *Id.* at 32–33.

B. CRIMINAL SENTENCING BEFORE 1984

The U.S. Constitution does not specifically delegate the power to create and impose a federal sentencing system to any one branch of government.[37] Historically, the legislature and judiciary have largely shared this obligation, with the branch holding the lion's share of the power alternating depending on the politics and main policy considerations of the time period.[38]

Between the late 1700s and early 1900s, the United States employed a federal system of fixed, rigid periods of incarceration for particular crimes as determined by the legislative branch.[39] This system was focused on retribution and restraint, and established punishments based on the crime committed without room for consideration of a defendant's particular circumstances or the unique facts of a case.[40] Toward the end of the nineteenth century, proponents of using sentencing for rehabilitation rather than merely punishment started a reform movement to modify federal sentencing procedures.[41] This movement led to a "three-way sharing" system among all three branches of government: Congress determined a mandatory sentencing range for certain crimes, the judiciary set a definite sentence within that range based on the facts of a case with the option of utilizing probation in lieu of prison, and corrections personnel within the Executive Branch reviewed individual cases and mandated how much of the sentence imposed by the judiciary a particular defendant would actually serve in prison.[42] This was referred to as an "indeterminate-sentence

37. *E.g.*, Mistretta v. United States, 488 U.S. 361, 364 (1989) ("Historically, federal sentencing . . . never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government."); Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 185 (1993) ("The Constitution of the United States does not exclusively assign the responsibility for federal sentencing—the function of determining the scope and extent of punishment for federal offenses—to any one of the three branches of government."). *See also* U.S. CONST. art. I–III (listing the powers of each branch of government but not including the ability to determine appropriate punishment for particular crimes).

38. *See Mistretta*, 488 U.S. at 364–65 (delineating the history of federal sentencing procedures since the founding of the United States). *See generally* Hatch, *supra* note 37 (explaining how the legislative role in sentencing has dwindled since the twentieth century with Congress delegating more authority to the judicial branch).

39. United States v. Grayson, 438 U.S. 41, 45 (1978); Robert J. Anello & Jodi Misher Peikin, *Evolving Roles in Federal Sentencing: The Post*-Booker/Fanfan *World*, 1 FED. CTS. L. REV. 301, 305 (2006).

40. *Grayson*, 438 U.S. at 45–46.

41. *Id.* at 46; Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 227 (1993).

42. *Mistretta*, 488 U.S. at 364–65; Stith & Koh, *supra* note 41, at 227.

system" by the legal community because of the uncertainty surrounding the sentencing length within a prescribed range a particular judge would deem appropriate for a defendant and the proportion of that sentence the defendant would serve in reality.[43] With the implementation of the indeterminate-sentence system, judicial discretion began to play an increasingly large role in sentencing over the course of the twentieth century.[44]

The general public and the legal community criticized the high level of discretion left to an individual judge and the unpredictability it created in criminal sentencing hearings.[45] Opponents of the indeterminate-sentence system asserted that it allowed judicial bias for or against certain races, social statuses, and economic backgrounds to play a role in sentencing.[46] The purpose of rehabilitation of defendants in sentencing lost support, and the public began to doubt that the indeterminate-sentence system fulfilled that goal anyway.[47] Society began to lose faith in the judicial system due to the uncertainty and apparent unfairness created by this system.[48]

C. THE COMPREHENSIVE CRIME CONTROL ACT OF 1984

With public concern mounting that granting judges such broad discretion created wide discrepancies among sentences and was substantially unfair, Congress concluded that the flaws in the indeterminate-sentence system necessitated reform.[49] It passed the Comprehensive Crime Control Act in 1984,[50] which included the Sentencing Reform Act[51] ("SRA") and the Armed Career Criminal Act[52] ("ACCA"). In passing the SRA, Congress's focus was on deterrence, restraint, education, and retribution rather than on the rehabilitation of

43. *Mistretta*, 488 U.S. at 365.

44. Anello & Peikin, *supra* note 39, at 306.

45. *Mistretta*, 488 U.S. at 365–66; Anello & Peikin, *supra* note 39, at 309; Stith & Koh, *supra* note 41, at 227–29.

46. Anello & Peikin, *supra* note 39, at 303, 309.

47. *Mistretta*, 488 U.S. at 365; Anello & Peikin, *supra* note 39, at 309; Stith & Koh, *supra* note 41, at 227.

48. *Mistretta*, 488 U.S. at 366; Anello & Peikin, *supra* note 39, at 309.

49. *Mistretta*, 488 U.S. at 366–67; Hatch, *supra* note 37, at 187–88.

50. Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.).

51. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in 18 U.S.C. §§ 3551–3556 (2012)).

52. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185 (repealed in 1986 by Pub. L. No. 99-308, § 104(b), 100 Stat. 459) (codified as amended in 18 U.S.C. § 924(e)).

offenders.[53] The SRA created and delegated authority to the United States Sentencing Commission[54] ("USSC") as an independent entity under the judicial branch to establish mandatory sentencing ranges for particular crimes, taking into account specific aggravating and mitigating factors that would increase or lower the standard ranges, respectively.[55] The USSC finalized its project with the Federal Sentencing Guidelines (the "Guidelines"), which went into effect in 1987.[56] Although proposals for various sentencing regimes were considered by Congress, it rejected one that specified an exact sentencing period based on the crime committed as well as another proposal that would have made the Guidelines merely advisory.[57] The mandatory nature of the Guidelines[58] and availability of review by appellate courts based on a clearly erroneous standard[59] were intended to create clarity, fairness, and uniformity in federal sentencing across the nation.[60]

Opponents of the mandatory sentencing scheme argued that it resulted in overly harsh sentences, deprived the judiciary of its independence, and granted too much power to prosecutors.[61] In 2005, in *United States v. Booker*,[62] the Supreme Court rendered the Guidelines merely advisory by invalidating two sections in the SRA[63]: (1) § 3551(b)(1), which had mandated that district court judges sentence a defendant within the prescribed Guidelines range,[64] and (2) § 3742(e), which had set the

53. 18 U.S.C. § 3553(a)(2) (2012); 28 U.S.C. § 994(k) (2012) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . . .").

54. 28 U.S.C. §§ 991–998. *See also* 18 U.S.C. § 3553.

55. 28 U.S.C. § 991.

56. U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 1987), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1987/manual-pdf/1987_Guidelines_Manual_Full.pdf.

57. Mistretta v. United States, 488 U.S. 361, 367 (1989).

58. 18 U.S.C. § 3551(b)(1).

59. 18 U.S.C. § 3742(e).

60. Anello & Peikin, *supra* note 39, at 310.

61. *Id.* at 314–17.

62. United States v. Booker, 543 U.S. 220 (2005).

63. *Id.* at 245. The Supreme Court held that the SRA, as originally written, violated defendants' Sixth Amendment right to a jury trial because it allowed a judge in a sentencing hearing to apply an enhanced sentencing range after finding additional aggravating facts by a preponderance of the evidence that had not been found beyond a reasonable doubt by a jury. *Id.* In consideration of the SRA's language, purpose, and history, the Court determined that Congress would have preferred two provisions be severed and excised to the Court "superimposing" the Sixth Amendment into the Act or invalidating the entire Act. *Id.* at 247–58.

64. 18 U.S.C. § 3551(b)(1). "[E]veryone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the provisions that make the Guidelines binding on district judges." *Booker*, 543 U.S. at 233. "So modified, the federal

standard of review for appellate courts when reviewing departures from the Guidelines.[65]

D. THE ARMED CAREER CRIMINAL ACT

The ACCA,[66] part of the Comprehensive Crime Control Act of 1984,[67] was enacted to target and punish more severely those criminals deemed most likely to offend again and cause physical injury to others based on their prior convictions.[68] As it currently stands, the Act mandates that a defendant with three past convictions of violent felonies or serious drug crimes under federal or state law warranting imprisonment for at least one year each[69] who transports, ships, receives, or possesses ammunition or a firearm in interstate or foreign commerce[70] be sentenced to a minimum term of fifteen years in prison without the opportunity for probation or parole.[71] However, the original version of the ACCA, as it was enacted, used "robbery or burglary" in place of "violent felony or serious drug offense."[72] It also defined burglary in specific terms to supersede state law definitions, preventing defendants from evading the sentencing enhancement on a technicality and uniformly punishing the same type of conduct at the federal level.[73]

In 1986, Congress removed the definition of burglary and replaced "robbery or burglary" with "violent felony or a serious drug offense" to

sentencing statute makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges but it permits the court to tailor the sentence in light of other statutory concerns as well." *Id.* at 245–46 (citations omitted).

65. 18 U.S.C. § 3742(e). "We concede that the excision of § 3553(b)(1) requires the excision of a different, appeals-related section, namely, § 3742(e), which sets forth standards of review on appeal. That section contains critical cross-references to the (now-excised) § 3553(b)(1) and consequently must be severed and excised for similar reasons." *Booker*, 543 U.S. at 260 (citation omitted). The Court went on to explain that without § 3742(e), the Act implicitly set forth a reasonableness standard of review. *Id.* at 260–64.

66. Armed Career Criminal Act of 1984, Pub. L. No. 98–473, ch. 18, 98 Stat. 2185 (repealed in 1986 by Pub. L. No. 99-308, § 104(b), 100 Stat. 459) (codified as amended in 18 U.S.C. § 924(e)).

67. Comprehensive Crime Control Act of 1984, Pub. L. No. 98–473, 98 Stat. 1976 (codified as amended in scattered sections of 18 U.S.C.).

68. Begay v. United States, 553 U.S. 137, 146 (2008); Taylor v. United States, 495 U.S. 575, 581 (1990).

69. 18 U.S.C. § 922(g)(1).

70. 18 U.S.C. § 922(g).

71. 18 U.S.C. § 924(e)(1).

72. *Taylor*, 495 U.S. at 581.

73. *Id.* at 581–82 (explaining that in 1984, the ACCA defined burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense" (quoting Armed Career Criminal Act of 1984, Pub. L. 98-473, ch. 18, 98 Stat. 2185 (repealed in 1986 by Pub. L. 99-308, § 104(b), 100 Stat. 459) (codified as amended in 18 U.S.C. § 924(e)).

expand the scope of the ACCA.[74] It defined "violent felony" by dividing it into two categories:[75] any crime that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another [Clause One]; or (ii) [any crime that] is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another [Clause Two]."[76]

Courts refer to the phrase "or otherwise involves conduct that presents a serious potential risk of physical injury to another"[77] in the amended ACCA as the "residual clause,"[78] and this clause became the subject of much controversy over the years due to its vagueness. Specifically, the word "conduct" and the phrase "serious potential risk" presented ambiguities, especially in the context of inchoate crimes that potentially require an overt act depending on the particular state's law under which a defendant was convicted for a predicate crime.[79] In states that do not require an overt act, merely agreeing to commit a crime is sufficient for a conspiracy conviction, but is an agreement "conduct" that involves "serious potential risk" of violence? Does an overt act—taking an additional step in furtherance of executing a crime—increase the "serious potential risk" of injury to another and make a defendant more likely to commit violent acts in the future? What level constitutes "serious" and how close to actual violence does a crime have to get to have "potential"? Doesn't the definition of "risk" inherently encompass "potentiality"?[80] These questions have been essential to federal district courts' and courts of appeals' determinations of whether conspiracies to commit specific crimes fall within the meaning of the ACCA's definition of "violent felony," and different jurisdictions have arrived at a wide variety of conclusions,[81] evincing the vagueness of the residual clause and need for a more specific definition of "violent felony."

74. *Id.* at 582.

75. *Id.* at 582–86.

76. 18 U.S.C. § 924(e)(2)(B)(i)–(ii).

77. 18 U.S.C. § 924(e)(2)(B)(ii).

78. Sykes v. United States, 131 S. Ct. 2267, 2273 (2011), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).

79. *Compare* United States v. White, 571 F.3d 365, 366 (4th Cir. 2009) (holding that conspiracy to commit strong arm robbery was a violent felony), *with* United States v. Whitson, 597 F.3d 1218, 1223 (11th Cir. 2010) (holding that conspiracy to commit strong arm robbery was not a violent felony).

80. James v. United States, 550 U.S. 192, 207–08 (2007), *overruled by Johnson*, 135 S. Ct. 2551 ("[T]he combination of ['potential' and 'risk'] suggests that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty.").

81. *See infra* Part II.B.

Interpreting the ACCA has been complicated further by Congress's removal of the specific definition of burglary and silence on how the judiciary should classify predicate convictions under state law. In deciding whether a predicate crime is violent, should a federal court only consider the fact that the defendant was found guilty of a "violent felony," consider the specific facts underlying the conviction, adopt a federal standard definition for each crime, or look to the relevant state's definition of a crime? For instance, the definitions of burglary are so varied depending on the state of conviction that simply relying on the fact that a defendant had a prior burglary conviction without considering the relevant state's definition would lead to absurd results with the potential of two defendants who had completed the exact same acts receiving widely different treatment at federal sentencing as a result of how their respective states label such conduct.[82] To answer these questions and provide clarity to lower courts in applying the residual clause to specific crimes, the Supreme Court attempted to establish a comprehensible test between 1990 and 2015.[83] Over those twenty-five years, the Court modified a test known as the "categorical approach," which, in its latest form, categorizes crimes based on the risk of violence their elements pose as defined by state law and then applies either the "purposeful, violent, and aggressive" test, or the "levels of risk" test, depending on the degree of intent required for conviction.[84]

1. The "Categorical Approach"

In *Taylor v. United* States, Arthur Taylor had pled guilty for possession of a firearm as a felon with a criminal history of four prior felonies: robbery, assault, and two second-degree burglary convictions under Missouri law.[85] The Eastern District of Missouri sentenced him to fifteen years without parole under the ACCA, and he appealed on the

82. Taylor v. United States, 495 U.S. 575, 591 (1990). *E.g., compare* TEX. PENAL CODE ANN. § 30.02 (West 2011) (defining burglary as "(1) enter[ing] a habitation . . . with intent to commit a felony, theft, or an assault; or (2) remain[ing] concealed, with intent to commit a felony, theft, or an assault, in a building or habitation; or (3) enter[ing] a building or habitation and commit[ting] or attempt[ing] to commit a felony, theft, or an assault"), *with* CAL. PENAL CODE § 459 (West 2010) (defining burglary as "enter[ing] any [habitation] . . . with intent to commit grand or petit larceny or any felony").

83. *See Taylor*, 495 U.S. at 600–02; *Johnson*, 135 S. Ct. 2551 (holding that the residual clause was void for vagueness).

84. *See* Sykes v. United States, 131 S. Ct. 2267, 2273–75 (2011), *overruled by Johnson*, 135 S. Ct. 2551 (stipulating that the "levels of risk" test applied to all crimes that were not strict liability, reckless, or negligent offenses); Begay v. United States, 553 U.S. 137, 144–45 (2008) (creating the "purposeful, violent, and aggressive" test for strict liability, reckless, and negligent crimes); *Taylor*, 495 U.S. at 600–02 (adopting the "categorical approach" in applying 18 U.S.C. § 924(e) (2012)).

85. *Taylor*, 495 U.S. at 578.

grounds that burglary did not "involve 'conduct that presents a serious potential risk of physical injury to another.'"[86] Taylor's argument hinged on the fact that in his specific commission of the predicate crime, he had not committed an act of violence.[87] The Supreme Court granted certiorari to determine how lower courts should define "burglary" for purposes of applying the ACCA.[88]

Because Congress had not made its intent clear, the Court first deliberated whether to use a uniform definition of burglary by adopting either the common law or Model Penal Code's definition, or whether to leave it variable by requiring lower courts to use the definition of the state in which the defendant was convicted of burglary.[89] The Court reasoned that the residual clause's use of the word "potential" was meant to target specific categories of crimes in which violence was likely because of the conduct inherently involved and which implied a disregard for the safety of others.[90] Congress did not mean to limit the definition to defendants who had actually exhibited violent behavior but instead wanted to extend it to include defendants who had been ready and willing to commit violent acts in the interest of completing the relevant predicate offense.[91] In other words, Congress sought to use uniform, categorical definitions to encompass all crimes with certain characteristics regardless of the conduct underlying that crime in a particular case and regardless of how that conduct was labeled under state law.[92]

In the interest of consistency in federal sentencing, the Court formally adopted a method called the "categorical approach," which several of the courts of appeals had been using in applying the ACCA.[93] This approach (1) considered the fact that the defendant had been convicted of a predicate felony, (2) looked at the statutory definition of that offense under the relevant state law, and (3) analyzed the elements of that offense as set out in general terms—the "ordinary case" rather than the specific conduct underlying a particular defendant's conviction—to determine whether those elements fell into the category of conduct or level of risk that the term

86. *Id.* at 579 (quoting 18 U.S.C. § 924(e)(2)(B)(ii)).
87. *See id.* at 579–80.
88. *Id.*
89. *Id.* at 580.
90. *Id.* at 588.
91. *Id.*
92. *Id.* at 588–90.
93. *Id.* at 600.

"violent felony" was intended to capture.[94] Further, in applying the third prong of the categorical approach, a sentencing court would compare the elements of the crime under the relevant state law to the elements of the closest enumerated crime in Clause Two using its generic definition—"the generally accepted contemporary meaning."[95] The Court clarified that because the defendant had already been convicted of each of the statutory elements of the predicate offense in a prior trial, the sentencing court generally would not be permitted to reexamine the defendant's actual prior conduct nor the specific facts that led to conviction;[96] this restriction on sentencing courts' analysis to "statutory interpretation" rather than "judicial fact finding" preserves a defendant's rights to a trial by jury and against double jeopardy under the Sixth Amendment.[97] The Court vacated Taylor's sentence and remanded the case for the trial court to analyze the statutory definition of burglary under Missouri law.[98]

In 2007, the Supreme Court applied the categorical approach in *James v. United States* when defendant Alphonso James pled guilty to the federal offense of possessing a firearm as a felon[99] but objected to his enhanced sentence under the ACCA.[100] James's criminal history included a conviction under Florida state law for attempted burglary of a dwelling, and he contended that attempted burglary did not "involve[] conduct that presents a serious risk of physical injury to another"[101] and so was not a violent felony.[102] The Supreme Court disagreed,[103] noting that nothing in the language of the ACCA excluded "attempt" from the violent felony definition.[104] Because the ACCA lists specific offenses that classify as violent felonies in the same provision as the residual clause, the Court interpreted that clause to mean crimes "similar" to the enumerated offenses.[105] The Court determined that the most important and relevant similarity among the enumerated crimes was not that they constituted

94. *Id.* at 600–02; James v. United States, 550 U.S. 192, 202 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).
95. *Taylor*, 495 U.S. at 596, 598.
96. *James*, 550 U.S. at 202; *Taylor*, 495 U.S. at 601.
97. *James*, 550 U.S. at 213–14; *Taylor*, 495 U.S. at 601–02.
98. *Taylor*, 495 U.S. at 602.
99. 18 U.S.C. § 922(g)(1) (2012).
100. *James*, 550 U.S. at 195–96.
101. 18 U.S.C. § 924(e)(2)(B)(ii).
102. *James*, 550 U.S. at 195.
103. *Id.* at 214.
104. *Id.* at 198.
105. *Id.* at 199.

"completed" acts but that they all posed a high level of risk of injuring others.[106]

Then, the Court assessed the risk level associated with attempted burglary through the categorical approach.[107] As the Court had already established in *Taylor*, this approach does not require that every conceivable case involving the crime present a risk of violence, only the "ordinary case" by considering the elements of the crime under state law in general terms.[108] The Court first looked at Florida's definition of "attempt," which included an overt act requirement.[109] Then, to assess whether the crime fell into the level of risk encompassed by the residual clause, it compared attempted burglary to its closest related enumerated offense: burglary.[110] The Court noted that the underlying risk of violence in burglary arises from the possibility that an innocent third party might interrupt or intervene;[111] the Court reasoned that without looking into the particular facts of conviction, it was even more likely that a third party had been injured in the course of a burglary if it had been merely attempted rather than completed because of the strong inference that something had interfered with the attempt.[112] The Court also stated that this conclusion was particularly true under Florida law because of the overt act requirement, meaning that the defendant had engaged in more than just preparations for the burglary.[113] Concluding that the elements of attempted burglary under Florida law in general terms present at least as high a risk of potential harm to others as completed burglary, the Court held that it constituted a violent felony.[114]

2. The "Violent, Purposeful, and Aggressive" Test

In 2008, the Supreme Court again used the categorical approach in *Begay v. United States* to hold that driving while under the influence of alcohol as defined by New Mexico state law is not a violent felony under the ACCA.[115] This time, however, the Court interpolated a standard into the third prong of the approach so that a particular crime had to be "purposeful, violent, and aggressive" to categorically fit into the "violent

106. *Id.*
107. *Id.* at 202.
108. *Id.* at 208.
109. *Id.* at 203.
110. *Id.*
111. *Id.*
112. *Id.* at 204.
113. *Id.* at 205–06.
114. *Id.* at 214.
115. Begay v. United States, 553 U.S. 137, 148 (2008).

felony" definition.[116] The Court arrived at this standard by first analyzing the elements of New Mexico's DUI offense in general terms.[117] After reasoning that Clause One of the violent felony definition did not encompass DUI and that DUI was not similar enough to the enumerated felonies in Clause Two to be included under that provision, the Court turned to the categorical approach to determine whether DUI fell under the residual clause.[118] The Court explained that in interpreting a statute, the judiciary must regard each word Congress chooses as important and necessary and not discount any language as superfluous or irrelevant.[119] To satisfy that purpose, the Court read the residual clause to include all crimes that present a similar risk of harm in kind as well as in degree to the enumerated offenses in Clause Two.[120] Therefore, to rise to the level of risk posed by the enumerated offenses in kind and degree, a crime had to be "purposeful, violent, and aggressive."[121] While the Court acknowledged that drunk driving does present a serious risk of physical injury to others, it concluded that Congress did not intend the ACCA to cover all dangerous activities within its purview, as evidenced by the language of the "violent felony" definition in citing specific examples of crimes in Clause Two and separating the definition into Clause One and Clause Two.[122] The Court also noted that the legislative history supported this reading because in expanding the definition of violent crime in 1986 from only encompassing burglary and robbery, Congress specifically rejected a proposal to incorporate all crimes that posed a potential risk of injury to other persons.[123] The Court differentiated DUI from the enumerated crimes because it is not a "purposeful, violent, and aggressive" crime.[124] DUI is a strict liability offense that does not require intent; the Court held that negligent or reckless conduct does not fall under the definition of "violent felony" because a conviction for a crime in which the defendant did not intend to risk physical injury to another is not indicative of the type of offender who is likely to cause harm if in possession of a gun, which was the type of offender Congress sought to target in enacting the ACCA.[125]

116. *Id.* at 144–45 (internal quotations omitted).
117. *Id.* at 141–42.
118. *Id.*
119. *Id.* at 143.
120. *Id.*
121. *Id.* at 144–45 (internal quotations omitted).
122. *Id.* at 142.
123. *Id.* at 143–44.
124. *Id.* at 144–45.
125. *Id.* at 145.

3. The "Levels of Risk" Test

In 2011, once again, an appeal concerning the definition of "violent felony" under the ACCA reached the Supreme Court,[126] this time over whether the residual clause encompassed fleeing from law enforcement in a vehicle.[127] In *Sykes v. United States*, the Court began its analysis with the categorical approach to determine if the elements of intentionally fleeing from police in a vehicle under Indiana state law were similar in kind and degree to the enumerated offenses in Clause Two.[128] The Court revised its prior holding by limiting the "purposeful, violent, and aggressive" standard to strict liability, reckless, and negligent crimes.[129] For all other crimes, the Court changed the analysis to a "levels of risk" test because the "purposeful, violent, and aggressive" standard did not have a "precise textual link to the residual clause" and was "an addition to the statutory text."[130] Sentencing courts would now have to determine whether a crime as defined by the relevant state law was similar in kind and in degree to an enumerated offense by comparing the "level of risk" it posed to that of the enumerated offense to which that crime was closest.[131] The Court employed this new test in analyzing fleeing from law enforcement in a vehicle because under Indiana law the crime required "knowing" and so was not a strict liability, reckless, or negligent crime.[132] The Court concluded that the risk level of fleeing in a vehicle from police is similar to arson as it purposefully creates a dangerous situation with indifference to the safety of others, and is also similar to burglary because it is likely to end violently in a confrontation with others.[133] Therefore, the Court held that fleeing as defined by Indiana law is a violent felony.[134]

While the Supreme Court tried to provide guidance to lower courts by prescribing the categorical approach, levels of risk test, and "purposeful, aggressive, and violent" standard to determine whether a crime qualified as a violent felony under the residual clause of the ACCA, the Court only

126. Sykes v. United States, 131 S. Ct. 2267 (2011), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).

127. *Id.* at 2270.

128. *Id.* at 2272–73.

129. *Id.* at 2275–76.

130. *Id.* at 2273–75. *See also* Begay v. United States, 553 U.S. 137, 159 (2008) (Alito, J., dissenting) ("Requiring that an offense must also be 'purposeful,' 'violent,' or 'aggressive' amounts to adding new elements to the statute, but we 'ordinarily resist reading words or elements into a statute that do not appear on its face.'" (citation omitted)).

131. *Sykes*, 131 S. Ct. at 2273–74.

132. *Id.* at 2275–76.

133. *Id.* at 2273.

134. *Id.* at 2277.

succeeded in creating an intricate web of disarray by dividing crimes into two categories based on intent and applying different tests for each.[135] Discrepancies still arose among jurisdictions about which crimes presented the same "level of risk" as the enumerated offenses under the Act.[136] In particular, controversy over conspiracy crimes has resulted in a circuit split over the past decade.[137] Some lower federal courts have sought guidance from a parallel provision in the Federal Sentencing Guidelines that explicitly defines conspiracy as a "crime of violence;"[138] however, this definition is not binding on courts,[139] and the vagueness of the ACCA's definition has resulted in defendants who commit substantially the same crimes serving vastly different sentences among jurisdictions.[140]

135. *Id.* at 2277–78 (Thomas, J., concurring) ("[T]he majority errs by implying that the 'purposeful, violent, and aggressive' test may still apply to offenses 'akin to strict liability, negligence, and recklessness crimes' . . . . [T]he majority's partial retreat from *Begay* only further muddies ACCA's residual clause."); Chambers v. United States, 555 U.S. 122, 132 (2009) (Alito, J., concurring) ("[O]nly Congress can rescue the federal courts from the mire into which ACCA's draftsmanship and *Taylor*'s 'categorical approach' have pushed us."). *See also Sykes*, 131 S. Ct. at 2272–77 (outlining the most current test adopted by the Supreme Court in determining whether a crime is a "violent felony" under the ACCA).

136. *See Chambers*, 555 U.S. at 133–34 (Alito, J., concurring) ("After almost two decades with *Taylor*'s 'categorical approach,' only one thing is clear: ACCA's residual clause is nearly impossible to apply consistently. Indeed, the 'categorical approach' to predicate offenses has created numerous splits among the lower federal courts, the resolution of which could occupy this Court for years. What is worse is that each new application of the residual clause seems to lead us further and further away from the statutory text." (footnote omitted)).

137. United States v. Chandler, 743 F.3d 648, 661 (9th Cir. 2014) (Bybee, J., concurring) (noting that at least five circuit courts have held a conspiracy to commit a violent crime is a violent felony and two have held it is not). Judge Bybee continued:

> The circuit split shows that there are valid reasons to believe the Supreme Court's ACCA cases did not 'clearly' overrule [our prior] holding that conspiracy to commit robbery categorically is a crime of violence (and thus a violent felony). But in light of . . . intervening Supreme Court precedent, I submit that whether conspiracy can qualify as a violent felony is a difficult issue that warrants our en banc consideration.

Id. at 662 (Bybee, J., concurring).

138. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENTENCING COMM'N 2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf ("For the purposes of this guideline 'crime of violence' and 'controlled substance offense' include the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.").

139. *See* James v. United States, 550 U.S. 192, 206 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015) (holding that the Federal Sentencing Guidelines's inclusion of attempt in its definition of "crime of violence" lent support to interpreting the ACCA's definition of violent felony as encompassing attempt even though the Guidelines were not binding on the Court); United States v. Booker, 543 U.S. 220, 227 (2005) (amending the Federal Sentencing Guidelines to be advisory instead of mandatory).

140. For example, in *United States v. Whitson*, the Eleventh Circuit Court of Appeals concluded that the defendant's prior conviction of conspiracy to commit strong arm robbery was not a violent felony under the ACCA, reducing her potential sentencing range for possessing a firearm from 188 to 235 months to 57 to 71 months. United States v. Whitson, 597 F.3d 1218, 1223 (11th Cir. 2010); Brief

II. THE VAGUENESS OF THE ACCA

This Part will discuss how courts of appeals in different circuits have applied the tests set forth by the Supreme Court in determining whether a crime was a "violent felony" under the residual clause of the ACCA. As a result of the vague language in the ACCA's definition and the muddle the Supreme Court made in interpreting it, a circuit split has developed over whether a conspiracy to commit a violent felony qualifies as a "violent felony." The different treatment of defendants who committed the same crime with similar criminal histories across jurisdictions has been exacerbated more by the various ways states' laws define "conspiracy," particularly by whether or not a state's law requires an overt act for conviction. The Note will then discuss how these discrepancies have interfered with defendants' due process rights, which has led to the Court's ruling that the residual clause is void under the void-for-vagueness doctrine.

A. AN OVERVIEW OF CONSPIRACY CRIMES

Although each state has its own definition of conspiracy and the elements required for conviction of conspiracy crimes vary by jurisdiction,[141] conspiracy is generally defined as an agreement between two or more persons to commit an unlawful act or to commit a lawful act by unlawful means.[142] The mens rea for conspiracy is specific intent, meaning the conspirator must have knowingly entered into the agreement with the purpose of completing the object crime.[143] Some jurisdictions also have an "overt act" requirement, which means at least one of the conspirators took a step, whether lawful or not, toward completing the object crime that amounts to more than mere planning.[144] For jurisdictions without the overt act requirement, simply agreeing to commit an object crime is sufficient for conviction.[145] Further, many jurisdictions enforce the Pinkerton Doctrine, which holds each conspirator responsible for the acts

of the Appellant at 3, 6, United States v. Whitson, 597 F.3d 1218 (2010) (No. 09-10521-GG), 2009 WL 6900164, at *3, 6. However, in *United States v. White*, the Fourth Circuit Court of Appeals held that a conspiracy to commit armed robbery with a dangerous weapon was a violent felony and affirmed the fifteen-year enhancement of the defendant's sentence for a previous conviction of that conspiracy crime in conjunction with possessing a firearm. United States v. White, 571 F.3d 365, 373 (4th Cir. 2009).

141. *See* LAFAVE, *supra* note 28, at 657.

142. *Id.*

143. STUNTZ & HOFFMANN, *supra* note 27, at 444, 608.

144. LAFAVE, *supra* note 28, at 661–62.

145. *Id.* at 661.

of every other co-conspirator made in furtherance of the conspiracy.[146] For example, if A and B conspire to rob a bank and during the course of the robbery A shoots C, then B is criminally liable for C's murder, despite the fact that it was not part of the original plan, in addition to the crime of conspiracy to commit robbery. For a conspirator to successfully withdraw from a conspiracy once the agreement has been made, he must make an "'affirmative act bringing home the fact of his withdrawal to his confederates,' made in time for his companions to effectively abandon the conspiracy."[147] Some jurisdictions even require a conspirator to prevent the object crime from happening in order to withdraw.[148]

B. DOES A CONSPIRACY CONSTITUTE A "VIOLENT FELONY" UNDER THE ACCA?

The Courts of Appeals for the First, Third, Fourth, Fifth, and Ninth Circuits have held that a conspiracy to commit a violent crime does constitute a violent felony under the ACCA, but the Courts of Appeals for the Eighth, Tenth, and Eleventh Circuits have held that an agreement to commit a violent felony without more does not by itself qualify.[149] For defendants convicted of possessing a firearm with at least three prior convictions of violent felonies, at least one of which being a conspiracy crime, this can mean the difference between a few years in prison and upward of fifteen years.[150] The Supreme Court has declined the opportunity to resolve this disparity.[151]

In 1992, when the Federal Sentencing Guidelines carried more weight, the First Circuit Court of Appeals relied on the Guidelines's definition of "crime of violence" to analyze "violent felony" under the ACCA.[152] In *United States v. Hawkins*, the court held that a conspiracy to commit armed robbery was a "violent felony" because the Federal Sentencing Guidelines had classified conspiracy to commit a violent crime as a "crime of

146. STUNTZ & HOFFMANN, *supra* note 27, at 444. *See also* Pinkerton v. United States, 328 U.S. 640, 646–48 (1946) (holding the defendant criminally liable for his co-conspirators' crimes even though he was in prison at the time the object crime was committed).

147. LAFAVE, *supra* note 28, at 687–88 (footnotes omitted).

148. *Id.* at 689.

149. *See* United States v. Chandler, 743 F.3d 648, 661–62 (9th Cir. 2014) (Bybee, J., concurring).

150. *See* 18 U.S.C. § 924(e)(1) (2012) (mandating that a criminal who has been convicted of three violent felonies in the past and who is found to be in possession of a firearm used in interstate commerce will be sentenced to at least fifteen years in prison).

151. *See* Lee v. United States, 564 U.S. 1030 (2011), *denying cert. to* 631 F.3d 1343 (11th Cir. 2011); Boaz v. United States, 562 U.S. 874 (2010), *denying cert. to* 598 F.3d 936 (8th Cir. 2010).

152. United States v. Hawkins, 139 F.3d 29, 34 (1st Cir. 1992).

violence."[153] The court determined that a conspiracy carried the same risk of harm to others as the object crime.[154] Since the ACCA categorized the underlying offense of armed robbery as a violent felony under Clause Two, conspiracy to commit armed robbery in its generic form under the categorical approach also qualified as a violent felony.[155]

While some circuits applied the definition of "violent crime" in the Federal Sentencing Guidelines to the ACCA, others did not, holding that the definition was merely a recommendation in the comments of the Guidelines and not binding on the courts.[156] These other courts utilized the categorical approach to look beyond the Guidelines and the ACCA itself to the elements of the crime as defined by statute in the relevant state.[157] In *United States v. Preston*, the Third Circuit Court of Appeals held that conspiracy to commit robbery was a violent felony under the ACCA because in Pennsylvania, a conspiracy conviction required the jury to find the elements of the underlying crime.[158] As the statutory definition of robbery in Pennsylvania included an act of violence, a prior conviction of conspiracy to commit robbery would have required an element of violence and was automatically a violent felony.[159] On the other hand, the Tenth Circuit Court of Appeals determined that conspiracy to commit armed robbery was not a violent felony because New Mexico law only required that two or more people enter an agreement with the intent of completing the underlying crime for a conspiracy conviction.[160] Because no overt act of violence was required, the court held that a conspiracy crime was not a "violent felony" by itself without looking into the specific facts of the defendant's prior conduct.[161]

More circuit courts of appeals began using the categorical approach to analyze a crime according to its generic elements as defined by state law

153. *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENTENCING COMM'N 1992), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/1992/manual-pdf/1992_Guidelines_Manual_Full.pdf.

154. *Hawkins*, 139 F.3d at 34.

155. *Id.* This holding is similar to the Supreme Court's determination that the inchoate crime of attempt to commit burglary was a violent felony because attempt posed the same risk of harm to others as the underlying crime of burglary, which is an enumerated offense under Clause Two. James v. United States, 550 U.S. 192, 203–06 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).

156. *See* United States v. Fiore, 983 F.2d 1, 2 (1st Cir. 1992).

157. *See, e.g.*, United States v. King, 979 F.2d 801 (10th Cir. 1992); United States v. Preston 910 F.2d 81 (3d Cir. 1990).

158. *Preston*, 910 F.2d at 86.

159. *Id.* at 86–87.

160. *King*, 979 F.2d at 802.

161. *Id.* at 803–04.

and affording less consideration to the Guidelines's recommended definition of "violent crime" after they were rendered advisory in 2005.[162] For instance, in 2009, in *United States v. Boaz*, the Eighth Circuit Court of Appeals held that a conspiracy to commit auto theft was not a violent felony, vacating the defendant's sentence of 190 months for possessing a firearm with the career offender enhancement under the ACCA.[163] The court reasoned that the level of risk a particular conspiracy presents is based on the level of risk of the object crime (auto theft in this case).[164] In analyzing the generic elements of auto theft as defined by Arizona law,[165] the court concluded that violence was not an element, and, therefore, conspiracy to commit auto theft did not qualify under the residual clause of the ACCA as a violent felony.[166] As a result, the appropriate sentencing range for the defendant fell to between forty-one and fifty-one months.[167]

Also in 2009, the Fourth Circuit Court of Appeals held a conspiracy to commit robbery with a dangerous weapon was a violent felony.[168] Because North Carolina law does not require an overt act to convict a defendant of a conspiracy crime, the court explained that the agreement and the underlying objective could not be separated.[169] Using the categorical approach, the court reasoned that conspiracy to commit robbery should be evaluated at the same level of risk as actual robbery as both were "purposeful, violent, and aggressive."[170] The court justified this conclusion by noting it furthered the legislative purpose of the ACCA by regarding the entrance into a conspiracy as evidence of behavior the Act sought to target: indifference to risk and increased propensity to commit violent acts multiple times.[171]

In 2010, the Eleventh Circuit Court of Appeals reached the opposite conclusion by stating that an agreement had to be considered separately from the underlying crime.[172] The court held that conspiracy to commit

162. United States v. Booker, 543 U.S. 220, 227 (2005) (amending the Federal Sentencing Guidelines to be advisory instead of mandatory).

163. United States v. Boaz, 558 F.3d 800, 808–09 (8th Cir. 2009).

164. *Id.* at 807–08.

165. *Id.* at 808 (stating that Arizona defined auto theft as "taking . . . another['s] . . . motor vehicle . . . with intent to deprive" (alterations in original) (citation omitted)).

166. *Id.*

167. *Id.* at 806, 808.

168. United States v. White, 571 F.3d 365, 366 (4th Cir. 2009).

169. *Id.* at 368, 372.

170. *Id.* at 370–73.

171. *Id.*

172. United States v. Whitson, 597 F.3d 1218, 1223 (11th Cir. 2010) ("To us, *White* seems to conflate 'degree of risk' with 'kind of risk,' without determining if the conspiracy by itself was violent.

strong arm robbery, for which South Carolina did not require an overt act for conviction, was not a violent felony after applying the categorical approach.[173] While conspiracies to commit violent crimes do present "serious potential risk of physical injury" by increasing the likelihood of fulfillment of the object crime, entering into a conspiracy alone cannot be classified as "purposeful, violent, and aggressive conduct."[174] Therefore, conspiracy to commit strong arm robbery is not similar in kind to the enumerated crimes of the ACCA under the "purposeful, violent, and aggressive" test.[175] Although "agreeing" is purposeful, it is neither violent nor aggressive by itself.[176]

The Ninth Circuit Court of Appeals addressed the question of whether a conspiracy constitutes a violent felony in *United States v. Chandler* in 2014.[177] The court applied the categorical approach to determine whether conspiracy to commit robbery was in its generic form a crime of violence.[178] Because the court had previously held that a conspiracy's level of risk was equivalent to the underlying crime given that the involvement of more than one person increased the likelihood that the object crime would be committed, the court concluded that conspiracy to commit robbery, like robbery, "involve[d] a serious risk of physical force."[179] The court then analyzed the level of risk posed by robbery and compared that level to the risk created by the enumerated offenses in Clause Two of the ACCA's definition.[180] It concluded that the level of risk of violence created by robbery was similar to that of burglary in that both involved the likelihood of a face-to-face confrontation resulting in violence and to that of extortion as both utilized threats of force to take money or property from another.[181] Thus, conspiracy to commit robbery was deemed a violent felony, and the defendant's sentence of 235 months in prison under the ACCA was affirmed.[182]

However, the concurring opinion by Judge Bybee questioned the continued use of precedent that dictated that the level of risk posed by a

It may be true that a conspiracy and its target offense are linked, but as we understand it, the *Begay* analysis requires us to separate them and to examine *the conspiracy alone*.").

173. *Id.* at 1221, 1223.
174. *Id.* at 1221–22.
175. *Id.* at 1222.
176. *Id.*
177. United States v. Chandler, 743 F.3d 648, 650 (9th Cir. 2014).
178. *Id.* at 653.
179. *Id.* at 654 (citing United States v. Mendez, 992 F.2d 1488 (9th Cir. 1992)).
180. *Id.*
181. *Id.* at 654–55.
182. *Id.* at 655.

conspiracy was the same as that of the underlying crime.[183] Judge Bybee contended that because an agreement to commit a crime in the future created a risk of future harm, it should be analyzed separately from the completion of the criminal act, which poses a risk of actual harm.[184] He explained that the majority's decision failed to further Congress's purpose in enacting the ACCA because a defendant who merely entered into an agreement without actually committing a violent act was not more likely than a defendant who had never entered into such an agreement to subsequently commit a violent crime by owning a firearm.[185]

In sum, the various definitions of conspiracy under different states' laws combined with the imprecise categorical approach and "level of risk" test has led to seven circuit courts of appeals arriving at five incongruent holdings: (1) follow the Guidelines's definition of "violent crime" in applying the ACCA;[186] (2) a conspiracy to commit a violent crime is not a "violent felony" where no overt act is required for conviction;[187] (3) a conspiracy to commit a violent crime is a "violent felony" where no overt act is required for conviction;[188] (4) a conspiracy to commit a violent crime is a "violent felony" where an overt act is required for conviction;[189] and (5) whether conspiracy to commit a violent crime is a "violent felony" depends on whether the underlying crime requires an act of violence.[190]

C. VOID-FOR-VAGUENESS DOCTRINE

The disparate treatment of conspiracy to commit a violent crime under the ACCA's sentencing enhancement by the federal circuit courts of appeals is evidence that the Supreme Court's attempt to create a uniform test to more narrowly define "violent felony" has only led to further confusion by giving meaning to an overly vague statute. This leaves

183. *Id.* at 657 (Bybee, J., concurring) (opining that the existence of a circuit split on whether conspiracy constitutes a violent felony under the ACCA required a more in depth analysis by the Ninth Circuit of whether continued reliance on precedent was appropriate in light of recent Supreme Court decisions regarding the ACCA's definition of violent felony).

184. *Id.* at 659–61 (Bybee, J., concurring).

185. *Id.* at 657–58 (Bybee, J., concurring).

186. United States v. Hawkins, 139 F.3d 29, 34 (1st Cir. 1992).

187. United States v. Whitson, 597 F.3d 1218, 1221, 1223 (11th Cir. 2010); United States v. King, 979 F.2d 801, 803–04 (10th Cir. 1992).

188. United States v. White, 571 F.3d 365, 366–72 (4th Cir. 2009).

189. United States v. Preston, 910 F.2d 81, 86 (3d Cir. 1990).

190. United States v. Chandler, 743 F.3d 648, 654 (9th Cir. 2014); United States v. Boaz, 558 F.3d 800, 808 (8th Cir. 2009).

"person[s] of ordinary intelligence"[191] unclear as to whom the enhanced sentencing provision of the ACCA applies and defendants, whose liberty depends on how a particular court will categorize conspiracy under the residual clause, with uncertainty as to how their criminal background will be treated during sentencing procedures, even if they were to read the Act before committing the predicate offense of possessing a firearm.[192] Because the ACCA violates defendants' due process rights by failing to give them fair warning as to what conduct constitutes a "violent felony" and encourages arbitrary enforcement of the sentencing enhancement,[193] it should be revised to clearly define "violent felony" in light of the Supreme Court's decision that the residual clause is void for vagueness.[194]

The void-for-vagueness doctrine is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments,[195] which protect against the deprivation of "life, liberty, or property, without due process of law" at the federal and state levels, respectively.[196] The doctrine prescribes that courts should invalidate a state or federal statute in which the "general words and phrases are so vague and indefinite that any penalty prescribed for their violation constitutes a denial of due process of law"[197] because "men of common intelligence must necessarily guess at its meaning and differ as to its application."[198] Although state courts had been invalidating state laws on vagueness grounds since the early nineteenth century, the Supreme Court did not apply any form of vagueness analysis to its decisions until

191. United States v. Williams, 553 U.S. 285, 304 (2008) ("A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited.").

192. *See* Cline v. Frink Dairy Co., 274 U.S. 445, 465 (1927) ("[I]t will not do to hold an average man to the peril of an indictment for the unwise exercise of his . . . knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result. [The statute at issue in this case uses an] utterly impracticable standard for a jury's decision. A legislature must fix the standard more simply and more definitely before a person must conform or a jury can act.").

193. *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." (citations omitted)).

194. Johnson v. United States, 135 S. Ct. 2551, 2563 (2015).

195. Joseph E. Bauerschmidt, Note, "Mother of Mercy—Is This the End of Rico?"—*Justice Scalia Invites Constitutional Void-for-Vagueness Challenge to RICO "Pattern,"* 65 NOTRE DAME L. REV. 1106, 1114 (1990). *See also* Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids." (footnote omitted)).

196. U.S. CONST. amend. V; U.S. CONST. amend. XIV.

197. Champlin Ref. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 243 (1932).

198. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

1875 in *United States v. Reese* and did not invalidate a statute for vagueness until 1914 in *International Harvester Co. v. Kentucky*.[199] The Court's first construction of the void-for-vagueness doctrine consisted of two requirements: (1) a statute must provide fair notice of the conduct prohibited and (2) a statute must use language clear enough to maintain the separation of powers when interpreted by the judiciary.[200] The separation of powers requirement's purpose was to prevent the legislative branch from delegating lawmaking power to the judiciary by purposefully drafting statutes in vague terms in order to defer the responsibility of determining the specific conduct that should be classified as criminal to the judiciary.[201] In 1972, the Supreme Court began to change its analysis of the void-for-vagueness doctrine,[202] and in 1983, it adopted a new test that rendered a statute unconstitutionally vague for one of two independent reasons: (1) the statute "'fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits,'" or (2) the statute "authorizes or even encourages arbitrary and discriminatory enforcement."[203]

D. *JOHNSON V. UNITED STATES*

In *Johnson v. United States*, Samuel Johnson appealed the Eighth Circuit's decision that the unlawful possession of a short-barreled shotgun

199. Int'l Harvester Co. v. Kentucky, 234 U.S. 216, 221 (1914) (holding that a state statute that made "any combination for the purpose of controlling prices lawful unless for the purpose or with the effect of fixing a price that was greater or less than the real value of the article . . . offer[ed] no standard of conduct that [was] possible to know."); United States v. Reese, 92 U.S. 214, 220 (1875) ("If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."); Bauerschmidt, *supra* note 195, at 1113 n.51; Note, *Void for Vagueness: An Escape from Statutory Interpretation*, 23 IND. L.J. 272, 274–80 (1948).

200. Andrew E. Goldsmith, *The Void-for-Vagueness Doctrine in the Supreme Court, Revisited*, 30 AM. J. CRIM. L. 279, 283–86 (2003).

201. *Id.*; United States v. L. Cohen Grocery Co., 255 U.S. 81, 86–87 (1921) ("[T]he statute . . . was so indefinite as not to enable it to be known what was forbidden, and therefore amounted to a delegation by Congress of legislative power to courts and juries to determine what acts should be held to be criminal and punishable . . . ."); *Reese*, 92 U.S. at 221 ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.").

202. Goldsmith, *supra* note 200, at 288 (citing *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) and *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972,) in which the Supreme Court first considered the correlation between vague statutory language and arbitrary and discriminatory decisions by the judiciary).

203. *Id.* at 286 (quoting Hill v. Colorado, 530 U.S. 703, 732 (2000)); Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

was a violent felony under the ACCA's residual clause.[204] Johnson had pled guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g) and sentenced to fifteen years in prison,[205] although his sentence would have been between seven and ten years had the ACCA not applied.[206] After hearing oral arguments on the narrow question of whether possession of a short-barreled shotgun as defined by Minnesota state law constitutes a violent felony, the Court directed the parties to reargue the case on the broader question of whether the residual clause should be declared void for vagueness.[207] On June 26, 2015, the Supreme Court invalidated the ACCA's residual clause for vagueness both because the residual clause did not adequately warn defendants which crimes qualified as "violent felonies" and because it had led to arbitrary enforcement, denying defendants due process of law.[208] This is the first time in fifteen years that the Court has declared a criminal statute void for vagueness[209] and the first time ever that it has used the doctrine to declare a non-capital criminal sentencing law void.[210]

Writing for the majority, Justice Scalia first noted that the "prohibition of vagueness in criminal statutes . . . appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences."[211] He then declared that the residual clause of the ACCA failed the notice requirement of the void-for-vagueness doctrine by requiring courts to look at the underlying crime in the "ordinary case" rather than in "terms of how an

204. Johnson v. United States, 135 S. Ct. 2551, 2556 (2015).

205. *Id.*

206. Rory Little, *Argument Preview: Are There (Finally) Five Votes to Declare the Residual Clause of the ACCA Unconstitutionally Vague?*, SCOTUSBLOG (Nov. 4, 2014, 10:50 AM), http://www.scotusblog.com/2014/11/argument-preview-are-there-finally-five-votes-to-declare-the-residual-clause-of-the-acca-unconstitutionally-vague.

207. Order in Pending Case, *Johnson*, 135 S. Ct. 2551, (No. 13-7120) http://sblog.s3.amazonaws.com/wp-content/uploads/2015/01/13-7120_Order_1-9-15.pdf.

208. *Johnson*, 135 S. Ct. at 2557, 2563. Six Justices joined the majority opinion, which declared the residual clause void for vagueness, reversed Johnson's sentence, and remanded the case for resentencing. *Id.* at 2563. Justices Kennedy and Thomas concurred that the case should be reversed and remanded on the basis that a short-barreled shotgun is not a violent felony, but disagreed with the majority that the residual clause was unconstitutionally vague. *Id.* (Kennedy, J., concurring); *Id.* at 2573 (Thomas, J., concurring). Finally, Justice Alito dissented, arguing that the underlying crime was a violent felony and that the residual clause did not fail for vagueness. *Id.* at 2584 (Alito, J., dissenting).

209. Litman, *supra* note 16, at 55–56.

210. Rory Little, *(Re-)Argument Preview: Is Possession of a Sawed-Off Shotgun a "Violent Felony"? The Government Is Not Going down Without a Fight*, SCOTUSBLOG (Apr. 17, 2015, 11:00 AM), http://www.scotusblog.com/2015/04/re-argument-preview-is-possession-of-a-sawed-off-shotgun-a-violent-felony-the-government-is-not-going-down-without-a-fight.

211. *Johnson*, 135 S. Ct. at 2556–57 (citations omitted).

individual offender might have committed it on a particular occasion"[212] so as not "to give ordinary people fair notice of the conduct it punishes."[213]

Next, Justice Scalia contended that the residual clause failed the requirement that a statute avoid arbitrary and discriminatory enforcement by leaving "grave uncertainty about how to estimate the risk posed by a crime"[214] and "about how much risk it takes for a crime to qualify as a violent felony."[215] This arbitrary enforcement has been evidenced by the disparate interpretations of the clause in the federal circuit courts, the attempts of the Supreme Court to create a comprehensible standard for determining whether a particular crime is a violent felony, and the number of appeals that have arisen under the residual clause of the ACCA.[216] Justice Scalia continued:

> It has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise . . . . Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.[217]

The Court explained, however, that its ruling did not mean that all statutes that create discrepancies among jurisdictions or that use similar phrases to "serious potential risk" should be declared void for vagueness.[218] The ACCA presents a special case for several reasons: (1) it links the phrase "serious potential risk" to a confusing list of unrelated crimes;[219] (2) it requires courts to analyze the level of risk posed by a defendant's prior conviction based on an "idealized ordinary case of the crime" as defined by a particular state statute rather than on the defendant's "real-world conduct;"[220] and (3) it requires "the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions,"[221] as it emphasizes convictions rather than reopening whether the defendant actually committed the underlying crimes.

212. *Id.* at 2557 (quoting Begay v. United States, 553 U.S. 137, 141 (2008) (internal quotation marks omitted)).
213. *Id.* at 2556.
214. *Id.* at 2557.
215. *Id.* at 2558.
216. *Id.* at 2558–60.
217. *Id.* at 2560.
218. *Id.* at 2561.
219. *Id.*
220. *Id.*
221. *Id.* at 2562.

Lastly, Justice Scalia addressed the government's argument that stare decisis required the Court to uphold the residual clause based on the Court's decisions in *James* and *Sykes*.[222] He dismissed this argument as *Johnson* was the first case in which the Court had received briefing and heard oral argument on the issue.[223] He also noted that "[t]he doctrine of *stare decisis* allows [the Court] to revisit an earlier decision where experience with its application reveals that it is unworkable . . . . Here, the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause."[224] With that, the Court overruled *James* and *Sykes*, invalidated the residual clause, and left the remainder of the ACCA's definition of "violent felony" intact.[225]

E. COMPARING THE ACCA TO THE FEDERAL SENTENCING GUIDELINES

Congress should amend the Act to more specifically define "violent felony," like the Federal Sentencing Guidelines define "crime of violence." In the commentary section under the "Career Offender" provision, the Guidelines expressly include conspiracy and other inchoate crimes in their definition of a "crime of violence" for purposes of imposing sentencing enhancements: "'Crime of violence' . . . include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses."[226] The rest of the language in the career offender provision of the Guidelines tracks almost exactly the language used in the ACCA for defining a "violent felony"[227]:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (1) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[228]

222. *Id.*
223. *Id.*
224. *Id.* (citations omitted).
225. *Id.* at 2563.
226. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1 (U.S. SENTENCING COMM'N 2015), http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2015/GLMFull.pdf.
227. *Compare* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(1)–(2), *with* 18 U.S.C. § 924(e)(2)(B) (2012).
228. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(1)–(2).

Further, in January of 2016, the USSC voted to amend the definition of "crime of violence" by striking the phrase "or otherwise involves conduct that presents a serious potential risk of physical injury to another" in light of *Johnson*.[229] This amendment will take effect in August of 2016.[230]

The only difference between the two definitions of "crime of violence" and "violent felony" is that the Federal Sentencing Guidelines target career offenders for the purpose of imposing a sentence for a subsequent felony[231] and the ACCA does so to sentence the crime of possessing a gun as a felon.[232] However, this distinction is irrelevant because both seek to classify crimes based on their level of violence for purposes of identifying career criminals, meaning the focus of the ACCA's sentencing enhancement for armed career criminals and the Guidelines's sentencing enhancement for career offenders is on the defendant's predicate offenses rather than on the defendant's current offense. Interpreting one provision to embrace conspiracies to commit violent crimes and the other to include the same conspiracy crimes only in certain jurisdictions does not advance Congress's purpose in enacting the Comprehensive Crime Control Act of 1984 to increase uniformity in federal courts. Thus, Congress should amend the ACCA so that the definition of "violent felony" parallels the definition of "crime of violence" under the Guidelines. The ACCA's original definition of violent felony only included the crimes of burglary and robbery. In amending the Act in 1986, Congress adopted similar language as used in the Guidelines for "crime of violence," so it is likely that Congress intended a correlation between the terms "crime of violence" and "violent felony" to further the purpose of conformity in federal sentencing. Like it did for the Guidelines's definition of "crime of violence," Congress should reevaluate which crimes should be considered violent and create a clear list for the courts to apply under the ACCA's "violence felony" definition. This list should include conspiracies to commit violent crimes only if the state law definition requires an overt act.

Further, in considering the historical backdrop against which the Comprehensive Crime Control Act of 1984 was passed, the Guidelines and ACCA were intended to grant federal judges less discretionary power, not more. While the Supreme Court rendered the Guidelines advisory with the

229. Notice of Submission to Congress of Amendment to the Sentencing Guidelines Effective August 1, 2016, 81 Fed. Reg. 4741, 4742, 4743 (Jan. 27, 2016).

230. *Id.* at 4741.

231. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a).

232. 18 U.S.C. § 922(g).

Booker decision in 2005,[233] courts still must consider the appropriate punishment range they proscribe in imposing sentences.[234] The majority of the circuit courts of appeals have not even discussed the definition of a "crime of violence" under the Guidelines in interpreting the meaning of a violent felony under the ACCA. The Comprehensive Crime Control Act was enacted to replace a highly discretionary sentencing regime, the unpredictability of which had caused the public to lose faith in the justice system because it allowed judicial biases to play a large role at sentencing.[235] *Booker* wrote back in some discretion to the new mandatory sentencing regime, but it did not render the Guidelines irrelevant in sentencing. While Courts are not required to consider the Guidelines in imposing sentences under the ACCA, doing so would create more consistent rulings and limit the role of judicial biases.

III. RECOMMENDATIONS FOR AMENDING THE ACCA

A. SEPARATION OF POWERS

Although the separation of powers rationale is no longer an element of the void-for-vagueness doctrine,[236] it is still a constitutionally-grounded principle that deserves consideration in the context of redrafting the residual clause of the ACCA. Congress defied this principle by requiring the judicial branch to give meaning to vague statutory language and essentially create legislation instead of merely interpreting it. There is a fine line regarding the separation of powers argument because Congress does not have to provide a definition for every word it uses in a statute and the judiciary can consider other sources besides the text itself, such as Congress's purpose in enacting the statute, to interpret the language used. However, when a statute's language is so vague so as to render it meaningless and requires the judiciary to interpolate wording that is not apparent from the statute's face, the statute should be rendered inoperative in violation of the separation of powers doctrine.[237]

While the judiciary has the power to interpret and enforce acts of Congress, if the statutory language is too vague to be understood by an

233. *See* United States v. Booker, 543 U.S. 220, 246 (2005).

234. *See id.* at 261.

235. *See supra* Part I.B–C.

236. Goldsmith, *supra* note 200, at 286.

237. *See* Sykes v. United States, 131 S. Ct. 2267, 2287 (2011) (Scalia, J., dissenting) ("It is not the job of this Court to impose a clarity which the text itself does not honestly contain. And even if that were our job, the further reality is that we have by now demonstrated our inability to accomplish the task.").

ordinary person, then the courts risk unconstitutionally exercising legislative power, violating the separation of powers doctrine, by essentially guessing as to the language's meaning.[238] Often, the Supreme Court is able to more narrowly construe a statute that uses vague language so as to preserve its meaning for lower courts, but under the ACCA, the Supreme Court's interpretations have amounted to nearly rewriting the residual clause. Further, in failing to amend a vague statute, the legislature violates the separation of powers principle by attempting to confer upon the judiciary a power it does not possess under the Constitution.[239]

Although the Supreme Court has not yet addressed whether a conspiracy to commit a violent felony is itself a violent felony,[240] it has resolved disparate treatment by circuit courts of other crimes under the Act.[241] The Court held in 2007 that the inchoate crime of attempt to commit burglary did fall under the violent felony classification by using the categorical approach to compare the underlying crime's level of risk of physical injury to others to the level of risk posed by the enumerated crimes.[242] The Court then expanded upon this approach in 2008 by reading into the ACCA a standard of "purposeful, violent, and aggressive" conduct for a crime to rise to the level of risk presented by the enumerated crimes.[243] Therefore, driving while under the influence of alcohol was not a violent felony even though it did pose a serious risk of physical injury to another.[244] However, the specific phrase "purposeful, violent, and aggressive" is not used anywhere in the ACCA nor is it found in the legislative record; therefore, the Court crossed the boundary between interpreting an act and legislating. Essentially, the Court arrived at this conclusion by inferring what Congress intended based on the fact that it decided not to utilize even broader language in the residual clause and by

238. *See* Rex A. Collings, Jr., *Unconstitutional Uncertainty—An Appraisal*, 40 CORNELL L. Q. 195, 204 (1955).

239. United States v. Reese, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.").

240. *See* Lee v. United States, 564 U.S. 1030 (2011), *denying cert. to* 631 F.3d 1343 (11th Cir. 2011); Boaz v. United States, 562 U.S. 874 (2010), *denying cert. to* 598 F.3d 936 (8th Cir. 2010).

241. *E.g.*, *Sykes*, 131 S. Ct. at 2267 (holding that fleeing from law enforcement in a vehicle is a violent felony); Begay v. United States, 553 U.S. 137 (2008) (ruling that driving while under the influence of alcohol is not a violent felony); James v. United States, 550 U.S. 192, 195 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015) (concluding that attempted burglary was a violent felony).

242. *James*, 550 U.S. at 214.

243. *Begay*, 553 U.S. at 148.

244. *Id.*

reading between the lines of the vague language used in the Act. The Court modified this holding in 2011 when it limited the "purposeful, violent, and aggressive" test to strict liability, reckless, and negligent crimes; it held that all other crimes would be subjected to a level of risk test. This does not make the statute any clearer for lower courts, however, as a crime's "level of risk" is a subjective standard that leaves discretion to federal district judges and appellate courts when comparing a crime at issue with the crimes enumerated in the statute. When the judiciary proceeds to interpret a statute that is so vague it lacks meaning to an ordinary person, it violates the separation of powers doctrine by writing new legislation rather than merely enforcing the statute at issue.[245]

B. AMENDING THE DEFINITION OF "VIOLENT FELONY" AND RESOLVING THE CIRCUIT SPLIT OVER CONSPIRACIES CRIMES

Because the residual clause is now inoperable, it should be amended along with the Federal Sentencing Guidelines's definition for violent crimes to include conspiracies to commit violent crimes only when an overt act is required for conviction. Appropriate language for the amendments would be a definitional provision:

> "Violent felony"—and "crime of violence" for the Federal Sentencing Guidelines—includes the offense of aiding and abetting as well as the inchoate crimes of conspiracy and attempt to commit such a crime when an overt act was required for conviction. Further, "violent felony" includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included as "violent felony"—or "crime of violence" —if (A) that offense has as an element the use, attempted use, or threatened use of physical force against the person of another, or (B) the conduct set forth (i.e., expressly charged) in the count of which the defendant was convicted involved use of explosives (including any explosive material or destructive device) or, by its nature, presented a serious potential risk of physical injury to another. However, "violent felony"—or "crime of violence"—does not include negligent or

245. Collings, *supra* note 238, at 204 ("If a statute is so uncertain that a court could not enforce it without rewriting it, the court could justify its refusal to do so by merely declaring that it could not usurp the legislative function."); James C. Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law*, 3 VAND. L. REV. 531, 534 (1950) ("If a court should by interpretation or construction give vitality to a meaningless combination of words, it would undoubtedly be legislating and its action would be obnoxious to general principles of government in this country.").

reckless crimes nor strict liability offenses for which no intent is required for conviction.

The overt act distinction is important because a defendant who has committed an act in furtherance of an underlying violent crime is more likely to commit a violent act in the future than a defendant who merely agreed to commit a violent act but took no actual step down the line of execution. Further, by more precisely defining the conduct that the Act considers "violent" and limiting the judiciary to considering the conduct set forth in the indictment or an element of the offense under the relevant statute, the proposed language gives meaning to the residual clause.

This uniform definition would also fulfill Congress's purpose in enacting the Comprehensive Crime Control Act of increasing clarity, fairness, and uniformity in sentencing.[246] Moreover, because the purposes of imposing a mandatory sentencing regime were deterrence, restraint, education, and retribution,[247] specifying the crimes that fall under the ACCA's residual clause would give fair warning to potential offenders, which would have a deterrent effect, in compliance with due process rights. As this solution would also allow for more transparency and predictability in sentencing, it would further due process rights and comply with the void-for-vagueness doctrine. Finally, by not forcing the judiciary to rewrite the residual clause because its vagueness fails to give it any meaning, Congress would no longer be violating the separation of powers doctrine if it amended the statute to clarify its intended meaning. Adopting the same definition for "crime of violence" and "violent felony" for the purposes of the Guidelines's career offender provision and the ACCA's armed career criminal provision, respectfully, would comply with the new sentencing regime under *Booker*.

Further, the law should be clear enough so that ordinary persons could understand to which category of defendants the sentencing enhancements under the ACCA apply and be able to reasonably predict how a court will treat their prior conspiracy convictions in order to make an informed decision whether to engage in conduct in violation of a statute by taking into consideration the approximate level of punishment associated with that conduct. From a policy standpoint, if a defendant is aware or has the ability to make himself aware of the fact that his sentence will be increased from a

246. Anello & Peikin, *supra* note 39, at 310.

247. Sentencing Reform Act of 1984, 18 U.S.C. § 3553(a)(2) (2012); 28 U.S.C. § 994(k) (2012) ("The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant . . . .").

few years in prison to more than fifteen years in prison, it is more likely he will refrain from illegally possessing a gun in violation of the ACCA.[248]

Last, the vagueness of the statue is evidenced by actual confusion of defendants who have received an enhanced punishment under the ACCA. In most of the cases where conspiracy was contested as a violent felony, the defendants had pled guilty to possessing a firearm in violation of the ACCA without knowledge that a previous conspiracy conviction would subject them to the sentencing enhancement for three predicate violent felonies. The defendants were then sentenced to a minimum of fifteen years rather than the three to four years they were anticipating. If the ACCA were more specific in its definition of violent felony, the appeals process could be avoided and judicial resources conserved as there would be no interpretative question to bring to an appellate court or later the Supreme Court.

CONCLUSION

In applying the Supreme Court's ruling in *Johnson* that the residual clause is void for vagueness, Congress should amend the ACCA by not only striking that clause, but also by providing a more specific definition of "violent felony" for the purpose of imposing sentencing enhancements. This would help to resolve the recent circuit split concerning whether a conspiracy falls within the definition of violent felony as well as further fairness and consistent sentencing outcomes for defendants with similar criminal histories who committed similar crimes, whether those defendants are classified as career offenders under the Federal Sentencing Guidelines or as such under the ACCA. The purpose of imposing harsher punishment for career offenders is to target those most likely to commit violent acts in the future; therefore, regardless of the subsequent crime committed, a career offender should be defined the same way across statutes. For these reasons and in the interest of imposing punishment based on retributive and deterrence theories, Congress should amend the ACCA's residual clause as well as the definition used by the Federal Sentencing Guidelines for violent crimes to include conspiracies for violent crimes that require an overt act for conviction.

248. *See* Sykes v. United States, 131 S. Ct. 2267, 2287 (2011) (Scalia, J., dissenting) ("What does violate the Constitution is approving the enforcement of a sentencing statute that does not 'give a person of ordinary intelligence fair notice' of its reach, and that permits, indeed invites, arbitrary enforcement. The Court's ever-evolving interpretation of the residual clause will keep defendants and judges guessing for years to come." (citations omitted)).