

BETWEEN SCALIA AND CHARYBDIS, A RESIDUAL
ODYSSEY: EXAMINING THE AMBIGUOUS PATH PAST A 10-
YEAR MAXIMUM¹

“O Father Zeus, O gods in bliss forever,
here is indecorous entertainment for you. . .”²

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I. INTRODUCTION

The Homeric epic, *The Odyssey*, sets forth the tale of Odysseus, who embarked on his journey home 10 years after sacking the great city of Troy.³ On his journey, Odysseus escapes the domain of a man-eating Cyclops, Polyphemus, by blinding the one-eyed monster.⁴ Angered by the maiming of his son, Poseidon imposes a sentence on the voyaging hero to wander the sea for 10 years.⁵ Thus, Odysseus lives imprisoned for 10 years, adrift at sea and abandoned by the gods, who observe his punishment with mild indifference.⁶ In essence, Odysseus’ story is one of meted punishment with no notice of the particular sentence.⁷ The ancient hero can be viewed as one of the first

1. The *Odyssey* relates the story of Odysseus who during his voyage home navigates a treacherous and narrow channel of water where on one side the six headed monster Scylla waits to devour those who sail too close to her cliffs and on the other side the sea monster Charybdis churns the waters to suck passing ships into her murderous maw. The idiom “between Scylla and Charybdis” means to pass between two dangers. Accordingly, this comment asserts that the residual clause jurisprudence sails a similar treacherous path between being upheld as an unconstitutionally vague statute or being dashed against the rocks and voided from existence for its vagueness; *see generally* *Mayo v. Bentley*, 8 Va. (4 Call) 528, 552 (1800) (Judge Lyons appears to be the first jurist to evoke this idiom in a legal opinion); *Dada v. Mukasey*, 554 U.S. 1, 2 (2008) (Justice Kennedy most recently evoked the idiom for the Supreme Court).

2. HOMER, *THE ODYSSEY*, Book 8, lines 323-24 (Robert Fitzgerald trans., Anchor Books 1963) (1961).

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3. HOMER, *supra* note 2, at Book 1, lines 1-10.

4. *Id.* at Book 9. Odysseus blinds Polyphemus by driving a wooden stake into the Cyclops’ one eye, thus provoking Polyphemus’ father, the sea god Poseidon, to sit in judgment of Odysseus and enact a punishment upon the Greek hero.

5. *Id.*

6. *Id.*

7. HOMER, *THE ODYSSEY*, (Robert Fitzgerald trans., Anchor Books 1963) (1961). Although Odysseus’ blinding of Polyphemus was carried out in self-defense, the arbiter of Odysseus’

criminal defendants whose violent felony conduct triggered an unknown yet severe judgment.⁸

Today, a new Odyssey exists for criminal defendants, a residual Odyssey for felons found in the possession of a firearm, who in turn become subject to the Armed Career Criminal Act (ACCA).⁹ This residual Odyssey requires navigation through jeopardous judicial straits to determine whether past criminal conduct qualifies as a predicate violent felony under the residual clause embedded within the ACCA, which, if triggered, enhances sentences from 10-year maximums to 15-year minimums.¹⁰ The residual clause acts as a catchall that defines the term “violent felony” as “conduct that presents a serious potential risk of physical injury to another.”¹¹

As Justice Scalia observed, the difficulty in applying the residual clause is in its lack of clarity.¹² The Supreme Court most recently highlighted this difficulty in 2011 when it decided *Sykes v. United States*.¹³ The Court determined that felony vehicle flight in Indiana qualified as a violent felony under the residual clause.¹⁴ The holding in *Sykes* resolved the issue for Indiana but did little to instruct other jurisdictions how to handle a similar situation.¹⁵ Notably, this type of *ad hoc* judicial ruling may create disparate sentencing outcomes based on how the offense statute is constructed in each particular

conduct decided the serious physical injury incurred by Polyphemus warranted a mandatory and lengthy punishment; additionally, the analogy between Odysseus’ conduct in the Odyssey takes on a greater degree of importance when taken in consideration with the hero’s conduct in The Iliad where survival and combat ruled the day between adversaries, thus for the gods to punish Odysseus for like conduct after having allowed ten brutal years of the Trojan War to go forward without objection, shows a direct contradiction that failed to put Odysseus on notice, which in turn led to an unexpected consequence.

8. *Id.* In the end, Odysseus, who spent his life in the honorable pursuit of battle, was imprisoned for actions without being apprised of the consequences or able to predict the severity of the sentence to be imposed by the gods.

9. Armed Career Criminal Act, 18 U.S.C. § 924(e) (2012).

10. 18 U.S.C. § 924(e) (2012); *see also* U.S.S.G. 4B1.2(a)(2) (providing a similar provision that is treated in the same manner by the Court).

11. 18 U.S.C. § 924(e)(2)(B) (2012).

12. *See* James v. United States, 550 U.S. 192, 216-17 (2007) (Scalia, J., dissenting) (“[T]he [residual] clause that sweeps within ACCA’s ambit any crime that ‘otherwise involves conduct that presents a serious potential risk of physical injury to another’—is, to put it mildly, not a model of clarity”).

13. *Sykes v. United States*, 131 S. Ct. 2267 (2011).

14. *Id.* at 2268 .

15. *Id.* at 2284-88 (Scalia, J., dissenting) (pointing out that the majority did little more than endorse an “*ad hoc* application of ACCA to the vast variety of state criminal offenses,” and even with this holding the majority failed to add clarity to situations where, as in this instance, the statute being examined categorizes the offense into different degrees depending on the “seriousness of the criminal behavior”); *see also* UNITED STATES COURTS: COURT LOCATOR; http://www.uscourts.gov/Court_Locator.aspx (last visited March 23, 2013) (Indiana rests within the Seventh Circuit, which includes three states comprising seven districts of which only two fall within the borders of Indiana, and so the concern arises that similar conduct in nearby jurisdictions will be treated differently within the same circuit, thus leading to disparate outcomes when criminal defendants are sentenced).

jurisdiction.¹⁶ While the Court resolved the issues involved in *Sykes*, lower courts must now determine how *Sykes* applies, if at all, to felony vehicle flight in their jurisdictions. In addition, courts must consider whether the ACCA applies without creating unacceptable disparity in sentencing throughout the country. Furthermore, *Sykes* fails to put individuals on fair notice of what prior conduct triggers the residual clause. Thus, criminal defendants find themselves on a residual Odyssey with no clear answers as to what conduct will trigger the severe 15-year mandatory minimum sentence.

This comment will analyze the Supreme Court's jurisprudence regarding what criminal conduct triggers the ACCA's residual clause to reveal the unconstitutional vagueness of the residual clause. In particular, this comment will show how the residual clause treats similarly situated defendants differently depending where they reside, how the residual clause fails to put criminal defendants on adequate and fair notice in violation of Constitutional due process, and how certain criminal conduct escapes the ACCA's reach due to the particular state statute's construction.¹⁷ Section II provides a brief history of the ACCA, focusing on the residual clause found in 18 U.S.C. 924(e)(2)(B)(ii). Section III reviews the Supreme Court's analysis of the residual clause, looking at both the majority and dissent in five principal cases. Section IV analyzes the effects of *Sykes* on the future of the residual clause while discussing the categorical and modified categorical approaches to determine the applicability of the residual clause as set forth by the Supreme Court in a trilogy of cases preceding *Sykes*. Section V concludes by advancing the merits of Justice Scalia's dissent in *Sykes* – the residual clause must be found unconstitutional and void for vagueness.

II. THE GENESIS OF THE ACCA

Congress first enacted the 15-year mandatory minimum for felons in possession of a firearm under the Armed Career Criminal Act of 1984.¹⁸ The sentence enhancement acted as a three-strike provision that targeted felons who had three previous robbery or burglary convictions.¹⁹ Accordingly, Congress's purpose behind the legislation was to “increase the participation of the federal law enforcement system in efforts to curb armed, habitual (career)

16. See *United States v. Booker*, 543 U.S. 220 (2005) (making the sentencing guidelines discretionary and reinforcing the need for continuity among sentences for similar conduct nationally); see also 18 U.S.C. § 3553(a)(6) (2012) (stating the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct as a factor to be considered in imposing a sentence).

17. See U.S. CONST. amend. VI and XIV; see also *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (holding that “[i]t is a fundamental tenet of due process that no one may be required at peril of life, liberty or property to speculate as to the meaning of a penal statutes,” therefore a criminal statute is “invalid if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden”).

18. Armed Career Criminal Act of 1984 (ACCA), Pub. L. No. 98-473, 98 Stat. 2185.

19. *Id.*

criminals.”²⁰ Behind the enactment of the ACCA stood a number of studies, which allowed Congress to determine the type of offenses career criminals committed in proportion to other types of criminal conduct.²¹ By relying on these statistical studies, Congress identified specific recidivists whose prior criminal actions supported the inference that their conduct would eventually translate into a career path of violent criminal behavior.²² For instance, one study suggested that 200 career criminals serving substantial time in federal custody for serious offenses would commit 179,000 criminal offenses over a five-year period if allowed to follow their past pattern of conduct.²³ That breaks down to 179 offenses a year or roughly an offense every other day.

The studies stated that “career criminals commit two or three burglaries for every robbery.”²⁴ Relying on the studies, Congress explained that a large percentage of crimes of theft and violence, such as robbery and burglary, were committed by a small percentage of reoffending career criminals.²⁵ Congress assumed that by punishing felons who had three prior robbery or burglary convictions and who were in possession of a firearm with a severe 15-year mandatory minimum sentence, theft and violent crime nationally would decrease.²⁶ For Congress, the property crimes of robbery and burglary were the breadbasket of career criminals whose “full-time occupation is crime for profit.”²⁷

In 1986, Congress amended the predicate offenses that trigger the ACCA’s mandatory minimum sentence beyond property crimes to include “a violent felony or a serious drug offense.”²⁸ As part of this change, Congress defined “violent felony” as a crime punishable by imprisonment by more than a year and that:

20. H.R. REP. NO. 98-1073, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3661.

21. *Id.*

22. *Id.*; S. REP. NO. 98-225, at 5 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 1384.

23. H.R. REP. NO. 98-1073, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3661; *see also* WILLIAM RHODES ET AL., DEVELOPING CRITERIA FOR IDENTIFYING CAREER CRIMINALS, at 44 (1982) (discussing the studies reviewed by Congress during hearings for the ACCA).

24. H.R. REP. NO. 98-1073, at 1 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3661.

25. *Id.*

26. *See generally* S. REP. NO. 98-225 at 4 (discussing burglary as one of the “most damaging crimes to society” as it leads to the “invasion of [victims’] homes or workplaces, violation of their privacy, and loss of their most personal and valued possessions); H.R. REP. NO. 98-1073, at 3, *reprinted in* 1984 U.S.C.C.A.N. 3661, 3663 (“Robberies and burglaries are the most damaging crimes to society,” occurring with greater frequency than other violent felonies, and that “a person is 40 times more likely to be a victim of robbery than of rape”).

27. *See* H.R. REP. NO. 98-1073, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3663 (“Most robberies and burglaries are committed by career criminals. A high percentage of robberies and burglaries are committed by a limited number of repeat offenders. Many commit scores of offenses. Some studies estimated that the majority of these offenses are committed by career criminals . . . career criminals often have no lawful employment;” understanding the Congressional focus on property crimes when analyzing the ACCA permits insight into the motives behind imposing a 15 year mandatory minimum sentence on armed career criminals).

28. Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1401, 100 Stat 3207-39.

has as an element the use, attempted use, or threatened use of physical force against the person of another; or

is burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*.²⁹(emphasis added).

With this amendment, Congress introduced the residual clause into the ACCA. Congress debated the amendments through two proposed bills, which sought to punish crimes varying in offense level against persons and or property.³⁰ Congress recognized that burglary's "character can change rapidly, depending on the fortuitous presence of the occupants of the home when the burglar enters."³¹ Thus, the amended legislation focused on the possible harm to an individual and not harm to property as previously contemplated.³² In addition, Congress stated its purpose was to expand the predicate offenses so as to sweep in a greater range of career violent criminals and career drug dealers.³³ Unfortunately, the legislative history fails to explain the relationship of the residual clause in regards to the enumerated offenses.³⁴ As a result, the residual clause sweeps in prior conduct while failing to provide constitutional notice as to what conduct qualifies to trigger the ACCA.³⁵

One needs to look no further than the lower courts to observe this concern in action. For instance, the Second Circuit held sexual assault of a child in violation of Vermont law to be a violent felony under the ACCA, while the

29. 18 U.S.C. § 924(e)(2)(B)(i)-(ii) (2012).

30. See *Armed Career Criminal Act Amendments: Hearing on S. 2312 before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary*, 99th Cong., 2d Sess. (1986) (contemplating offenses that "involves substantial risk that physical force against the person or property of another may be used in the course of committing the offense"); *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 before the Subcommittee on Crime of the House Committee on the Judiciary*, 99th Cong., 2d Sess. (1986) (contemplating offenses that attempts use or threatened use "of physical force against the person of another").

31. S. REP NO. 98-225, at 4-5 (1983), reprinted in 1984 U.S.C.C.A.N. 3182.

32. See generally *id.*; see also *Taylor v. United States* 495 U.S. 575, at 587-88 (1990) (determining that "Congress focused its efforts on career offenders-those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons"); Brett T. Runyon, *ACCA Residual Clause: Strike Four? The Court's Missed Opportunity to Create A Workable Residual Clause Violent Felony Test* [Sykes v. United States, 131 S. Ct. 2267 (2011)], 51 WASHBURN L.J. 447, 476 (2012) [hereinafter Runyon] (suggesting that the residual clause should require predicate felonies falling under the clause to be "purposeful, violent, and aggressive crimes against property"; however, any attempt to narrow the residual clause as only having a property oriented interest fails, because the clause itself concerns conduct that otherwise presents "serious potential risk of physical injury to another.").

33. See *Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 before the Subcommittee on Crime of the House Committee on the Judiciary*, 99th Cong., 2d Sess. (1986) (discussing the legislative amendments to the ACCA); *Armed Career Criminal Act Amendments: Hearing on S. 2312 before the Subcommittee on Criminal Law of the Senate Committee on the Judiciary*, 99th Cong., 2d Sess. (1986).

34. See Runyon, *supra* note 32.

35. U.S. CONST. amend XIV; see also *Sykes v. United States*, 131 S. Ct. 2267, 2283-88 (2011) (Scalia, J., dissenting).

Eleventh Circuit held sexual battery of a child did not qualify as a predicate offense under the ACCA, and the Fourth Circuit held that taking indecent liberties with a child failed to qualify as a predicate offense.³⁶ Because every state writes its own legislation to criminalize specific behavior, differences in statutory construction can create the disparate outcomes on display above. This concern can be exacerbated if, for instance, states within the same federal circuit treat similar offenses differently, such as sex offenses against children. This has the potential to create even more legal confusion as to what behavior triggers the residual clause leading to advanced sentencing disparity when the ACCA is applied. Exemplifying this point, in a case originating in the Southern District of Illinois, the Seventh Circuit held that the conviction for possession of a sawed-off shotgun based on an Illinois statute qualified as a predicate offense under ACCA, while a fellow Seventh Circuit district court applying a Wisconsin statute found that possession of a short-barreled shotgun did not qualify as a violent felony under the ACCA.³⁷ In another twist, the Seventh Circuit applied *Sykes* to hold that convictions for compelling a person to become a prostitute and for armed violence failed to qualify as a “violent felony” under the ACCA.³⁸ These examples begin to show the troubled waters between the Supreme Court’s residual clause jurisprudence and the lower courts’ attempt to apply a statute specifically designed to address the social problem that armed career criminals present to our streets. To reach these decisions, the courts had to first embark on the residual Odyssey.

III. PRE-SYKES RESIDUAL CLAUSE JURISPRUDENCE

A. *Taylor, Shepard, and the Roots of Residual Clause Jurisprudence*

ACCA jurisprudence began with a categorical approach, which eventually transferred to the residual clause jurisprudence.³⁹ In 1988, Arthur Lajuane

36. Compare *United States v. Daye*, 571 F.3d 225 (2d Cir. 2009) (holding sexual assault of a child in violation of Vermont law to be a violent felony, under the ACCA), with *United States v. Harris*, 608 F.3d 1222 (11th Cir. 2010) (holding a Florida conviction for sexual battery of a child did not qualify as a predicate offense under the ACCA), and *United States v. Vann*, 660 F.3d 771 (4th Cir. 2011) (holding that convictions for taking of indecent liberties with a child were not violent felonies under the ACCA).

37. Compare *United States v. Upton*, 512 F.3d 394 (7th Cir. 2008) (holding prior conviction for possession of a sawed-off shotgun constituted a conviction for a violent felony), with *United States v. Bradford*, 766 F. Supp. 2d 903 (E.D. Wis. 2011) (holding the possession of a short-barreled shotgun under Wisconsin law did not qualify as a violent felony).

38. *Brown v. Rios*, 696 F.3d 638, 641-43 (7th Cir. 2012).

39. Much ink has been spilt in laying out the categorical approaches to history in regards to the “residual clause” found within the ACCA; See, e.g., Runyun, *supra* note 32 (discussing Supreme Court residual clause case history); Isham M. Reavis, *Driving Dangerously: Vehicle Flight and the Armed Career Criminal Act After Sykes v. United States*, 87 WASH. L. REV. 281 (2012) [hereinafter Reavis] (discussing pre-Sykes residual clause cases); James G. Levine, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537 (2009) [hereinafter Levine] (discussing the residual clause as it relates to *Begay* and *Chambers*); David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209 (2010) [hereinafter Holman]

Taylor pled guilty to being a felon in possession of a firearm, in violation of §922(g)(1).⁴⁰ Accordingly, the Government sought a sentence enhancement under § 924(e) because of Taylor's prior convictions for robbery, assault, and burglary, respectively.⁴¹ The Eastern District of Missouri sentenced Taylor to the 15-year mandatory minimum, and the United States Court of Appeals for the Eighth Circuit affirmed Taylor's sentence.⁴² Upon appeal to the Supreme Court, Taylor contested whether the previous burglary conviction should count as a predicate offense to trigger the 15-year minimum sentence enhancement when the burglary did not involve "conduct that presents a serious potential risk of physical injury to another," pursuant to § 924(e)(2)(B)(ii).⁴³ *Taylor v. United States* set the stage for the United States Supreme Court to weigh in on the interpretive quandaries present in the ACCA. First, the Supreme Court would have to decide what Congress meant by the undefined term "burglary" included in the ACCA.⁴⁴ Second, the Court would have to examine burglary in the context of the ACCA's edict that the criminal behavior "involves conduct that presents a serious potential risk of physical injury to another," when certain states do not include any "risk of personal injury" or "threat of force against a person" as a statutory element of burglary.⁴⁵

After discussing the legislative history at great length in *Taylor*, the Supreme Court decided to institute a blanket nationwide "generic burglary" definition to be used by the district courts to determine if the offense qualified as a predicate offense for the purposes of triggering the ACCA's mandatory 15-year minimum sentence.⁴⁶ The Supreme Court's review of the legislative history of the ACCA revealed that Congress considered burglary one of the "most damaging crimes to society" because invasions into an individual's home or workplace involve the violation of privacy and the loss of valued personal possessions.⁴⁷ The theory behind enacting the ACCA, based on House Reports and crime statistics, was that a "large percentage" of violent crimes "are committed by a very small percentage of repeat offenders," and that robbery and burglary head the list of career criminals' favorite crimes.⁴⁸ Accordingly, Congress assumed that if it identified the crimes most often committed by career criminals, and made those crimes serve as predicate

(describing Supreme Court Precedent Regarding the ACCA).

40. *Taylor v. United States*, 495 U.S. 575, 578 (1990) (Scalia, J., concurring) (8-1-0 decision).

41. *Id.* at 579.

42. *Id.*

43. *Id.*

44. *Id.* at 579-80.

45. *Id.* at 576 (assessing the difference between the traditional common law definition, or as the court termed it "arcane" definition, against the states statutory definition of burglary, which changes by jurisdiction, or against a "generic" burglary definition the court eventually decides Congress must have intended).

46. *Taylor v. United States*, 495 U.S. 575, 580 (1990).

47. H.R. REP. NO. 98-1073, at 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3663.

48. *Id.* at 1, 3; *see also* S. REP. NO. 98-225, at 5 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 (legislative history providing support for the ACCA).

offenses in a national three-strike statute, then it could target the most dangerous individuals in society while simultaneously sending a message through a 15-year mandatory minimum sentence for repeat offenders charged as a felon in possession of a firearm.⁴⁹ Congress considered the predicate offenses to reflect the type of offenses armed career criminals commit.⁵⁰

Through its analysis of the legislative history, the Supreme Court determined that Congress never proposed to limit the predicate offense of burglary into any “special subclass of burglaries that might be especially dangerous, such as those where the offender is armed, or the building is occupied, or the crime occurs at night.”⁵¹ The Court surmised that Congress singled out burglary because, in the Court’s view, “an offender enters a building to commit a crime,” which leads to the possibility of a violent confrontation between the burglar and probable victim.⁵²

The Court then announced, through analytical acrobatics, that the ACCA always embodied a categorical approach to the designation of predicate offenses, because the original draft 1984 bill first designed by Congress presented a generic definition of burglary.⁵³ Although the eventual compromise bill, H.R. 4885, neglected to include the prior definition, and because the 1986 amendment to the ACCA’s legislative history did not provide any sign that Congress intended to replace the original definition, the Court inferred that Congress must have sacrificed the generic definition of burglary as “an inadvertent casualty of a complex drafting process.”⁵⁴ As the first hints of the statute’s flaws began to emerge, Taylor would earn a short-lived respite before eventually having his remanded sentence reaffirmed by the Eighth Circuit.⁵⁵

Thus, a criminal defendant cannot rely on the common law definition of burglary or a particular state’s definition of burglary, but instead must use the reinstated generic definition of burglary.⁵⁶ For example, in contrast to Missouri where Taylor offended, “Michigan has no offense formally labeled burglary.”⁵⁷ The Supreme Court explained that burglary in § 924(e) must have a “uniform definition independent of the labels provided by various States’ criminal codes.”⁵⁸ The “generic burglary” definition created by the Court describes burglary, for the purposes of the ACCA’s sentence enhancement, as “any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or

49. See H.R. REP. NO. 98-1073, at 1, 3; see also S. REP. NO. 98-225, at 5 (legislative history providing support for the ACCA).

50. H.R. REP. NO. 98-1073, at 3.

51. *Taylor v. United States*, 495 U.S. 575, 588 (1990).

52. *Id.*

53. *Id.*

54. *Id.* at 589-90.

55. *United States v. Taylor*, 932 F.2d 703.

56. *Id.*

57. *Id.* at 591.

58. *Taylor v. United States*, 495 U.S. 575, 592 (1990).

other structure, with intent to commit a crime.”⁵⁹ Seemingly, the Supreme Court announced this standard to clarify how the ACCA applies to the offense of burglary. Then, the Court sat back and left the district courts to try and fit their square categorical peg into the Congressionally bored residual clause hole.

The Supreme Court then focused on how district courts should apply this definition to state statutes that varied from the newly crafted generic definition.⁶⁰ Determining that Congress intended sentencing courts to look only at convictions for predicate offenses and not at the underlying facts of those convictions, the Supreme Court announced a categorical approach, because any factual inquiry would prove too daunting a task for the district courts.⁶¹ The categorical approach requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense, but the trial court can “go beyond the mere fact of conviction” when the charging paper and jury instructions require a jury to find all the elements of a generic burglary.⁶²

In his concurrence, Justice Scalia mused that the Court’s examination of the legislative history did “not uncover anything useful.”⁶³ What Justice Scalia did not know at the time – but noted with Delphic clarity – was that the in-depth examination of the legislative history by the Court would lead to a categorical approach that would plague the Court’s residual clause jurisprudence to the current day. Eventually, the Supreme Court would apply the categorical approach in various manners in the residual clause cases leading up to *Sykes*.⁶⁴ Before embarking on the residual Odyssey, the Supreme Court would first refine its categorical approach.

In 2005, the Court decided *Shepard v. United States*.⁶⁵ The case involved Reginald Shepard, who pled to being a felon in possession of a firearm.⁶⁶ In the case, Shepard avoided the ACCA’s mandatory minimum because the district court refused to consider police reports attached to his prior convictions, which were the result of plea deals, to determine whether they qualified as predicate offenses.⁶⁷ The government argued the district court needed the police reports to verify that the previous guilty pleas were in fact for generic burglaries, which would in turn validate the 15-year mandatory minimum sought by the government.⁶⁸ The district court decided that *Taylor* prohibited the review of police reports.⁶⁹ Therefore, the district court

59. *Id.* at 599.

60. *Id.*

61. *Id.* at 601.

62. *Id.* at 602.

63. *Id.* at 603 (Scalia, J., concurring).

64. See Reavis, *supra* note 39, at 298 (discussing pre-*Sykes* residual clause cases).

65. *Shepard v. United States*, 544 U.S. 13 (2005) (5-3 decision).

66. *Id.* at 16.

67. *Id.*

68. *Id.* at 17-18.

69. *Id.* at 17

concluded the prior burglaries did not qualify as predicate offenses necessary to trigger the ACCA's mandatory minimum, and the Government appealed.⁷⁰ The First Circuit vacated and remanded; however, the district court again refused to institute the mandatory minimum, and the Government appealed again.⁷¹ Upon review, the Supreme Court held that a sentencing court cannot look to police reports or complaint applications in deciding whether an earlier guilty plea supported a conviction for generic burglary under the ACCA, and instead must restrain its review to the statutory elements, charging documents, and jury instructions to determine if the predicate offense qualifies.⁷²

The Supreme Court determined that the categorical approach applies to guilty pleas as well as jury verdicts for purposes of finding predicate offenses that trigger the ACCA's 15-year mandatory minimum.⁷³ Justice O'Connor, dissenting, pointed out that by applying the rigid categorical approach established in *Taylor* to this case, the defendant would subvert the ACCA.⁷⁴ Essentially, by prohibiting the district courts from looking at police reports attached to guilty pleas, the district courts would be uninformed of whether the defendant committed a predicate offense in a non-generic state, such as Massachusetts, where the plea, like the one in *Shepard*, charged the defendant only with breaking into a building and not with burglary.⁷⁵ The concern for the dissent, which proved true, was that if the district court did not look to police reports, there would be no way to determine whether a predicate offense had been committed in certain jurisdictions when a plea agreement is used in favor of a jury trial, which in turn allows a defendant to avoid having an otherwise predicate offense count.⁷⁶ Although *Shepard* seems to stand only for the unremarkable conclusion that the categorical approach as applied to the ACCA applies to pleas and jury convictions alike, the case also acts as a harbinger for how the categorical approach would become even more unpredictable.

B. The Pre-Sykes Residual Trilogy

The pre-Sykes trilogy includes: the 2007 decision of *James v. United States*, which introduced a variation of the categorical approach test that incorporates a "comparative risk test" for attempted offenses; the 2008 decision of *Begay v. United States*, which expanded the categorical approach into a "purposeful, violent, and aggressive test" to determine whether non-enumerated felonies fit into the residual clause's "violent felony" category; and the 2009 decision of *Chamber v. United States*, which examined passive offenses that lack a sufficient level of risk to qualify as residual clause

70. *Id.* at 17-18.

71. *Shepard v. United States*, 544 U.S. 13, 18 (2005).

72. *Id.* at 16.

73. *Id.* at 19.

74. *Id.* at 28 (O'Connor, J., dissenting).

75. *Id.* at 29.

76. *Id.* at 31-32.

predicate offenses.⁷⁷

1. James and the Categorical Approach

In 2007, the Supreme Court decided *James v. United States*.⁷⁸ The Court held that attempted offenses qualify as ACCA predicates when the attempted offenses involve conduct that presents a serious potential risk of physical injury to another.⁷⁹ Specifically, attempted burglary, as defined by Florida law, was a “violent felony” for purposes of the ACCA’s residual clause.⁸⁰ In so holding, the Supreme Court modified the categorical approach from *Taylor* to consider the “comparative risk” of an attempted offense in comparison to the enumerated offense found listed within the ACCA.⁸¹

To arrive at this holding, the Supreme Court first determined that attempted burglary did not qualify as a “violent felony” under *Taylor* because it lacked “as an element the use, attempted use, or threatened use of physical force against the person of another.”⁸² Next, the defendant proposed that because the enumerated offense clause includes only completed offenses, an attempted offense fails to qualify because it lacks the basic attribute of the enumerated offenses, namely completion.⁸³ The Supreme Court concluded that at least one listed predicate offense, specifically “crimes involving the use of explosives,” could conceivably involve an unsuccessful attempt.⁸⁴ Thereby, the Court concluded that the commonality among the enumerated offenses is the significant risk of bodily injury or confrontation that might result in bodily injury.⁸⁵ As such, a non-enumerated offense can be qualified as a predicate offense by assessing the comparative risk to that of the serious risk of injury present in the enumerated offenses.⁸⁶

The Court found that neither the legislative history nor the statutory text

77. *James v. United States*, 550 U.S. 192, 211 (2007) (5-4 decision); *Begay v. United States*, 553 U.S. 137, 145 (2008) (5-1-3 decision); *Chambers v. United States*, 555 U.S. 122, 127 (2009) (7-2 decision).

78. *James*, 550 U.S. 192.

79. *Id.* at 198.

80. *Id.* at 209.

81. *See id.* at 200-02 (determining that the “comparative risk test,” like the categorical approach from *Taylor*, sprung forth from the legislative history of the ACCA).

82. *Id.* at 197; 18 U.S.C. § 924(e)(2)(B)(i) (2012).

83. *James*, 550 U.S. at 198 (determining that attempted burglary does not appear as an enumerated offense in the ACCA, the defendant attempted to argue that the canon of *ejusdem generis* controls the issue of whether attempted burglary should qualify as a predicate offense).

84. *Id.*

85. *Id.* at 199; *see also Taylor v. United States*, 495 U.S. 575, 588 (noting that Congress singled out burglary because it “often creates the possibility of a violent confrontation”); *United States v. Adams*, 51 Fed. App’x. 507, 508 (6th Cir. 2002) (noting that arson presents “a serious potential risk of physical injury” to building occupants, responding firefighters, or the public); H.R.REP. NO. 99 849, at 3 (1986) (noting that § 924’s clause (ii) meant to add “State and Federal crimes against property such as burglary, arson, extortion, use of explosives and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person).

86. *James*, 550 U.S. at 203.

categorically excluded attempted offenses from qualifying as predicate offenses under the residual clause.⁸⁷ By employing the categorical approach, the Supreme Court determined that the elements of attempted burglary, as defined by Florida law, justified its inclusion into the residual clause.⁸⁸ James argued that the broad statutory language for attempted burglary under Florida law, which states that a defendant take only “any act toward the commission” of burglary, would include activities in preparation of burglary that pose no danger of harm or potential risk of physical injury to another.⁸⁹ The Supreme Court focused its inquiry on whether an overt act directed toward unlawful entry into a dwelling in the commission of a felony is “conduct that presents a serious potential risk of physical injury to another.”⁹⁰ From here, the Court expanded its inquiry to determine if attempted burglary is comparable to its closest analog from the enumerated offenses.⁹¹ Without any reference to burglary statistics, the Court speculated that the risk of burglary arises from the potential confrontation between criminal and victim, thus, attempted burglary involves a heightened opportunity for introducing a situation that poses a “serious potential risk of physical injury,” which Congress specifically stated was their purpose for enacting the ACCA.⁹² Finally, the *ad hoc* process of deciding whether a prior felony offense qualified as a predicate offense under the residual clause of the ACCA was announced with the Supreme Court’s decision that “as long as an offense is of a type that, by its nature, presents a serious potential risk of injury to another, it satisfies the requirements of [the] residual provision.”⁹³ The Supreme Court may have decided the issue as to whether Florida’s attempted burglary statute fell within the ambit of the ACCA’s residual clause, but it fell short of creating a model rule lower courts could apply.⁹⁴

In his dissent, Justice Scalia recognized this and criticized the Court for providing insufficient guidance to the lower courts now charged with determining the comparative risk or nature of attempted or non-enumerated offenses when determining whether an offense qualifies as a predicate for the ACCA’s mandatory minimum.⁹⁵ The problem, Justice Scalia explained, stemmed from the majority’s comparative risk test or the closest analog comparison.⁹⁶ For Scalia, many offenses did not have comparable analogs among the enumerated offenses.⁹⁷ To demonstrate this point, Justice Scalia compared felony driving under the influence to burglary, arson, extortion, or a

87. *Id.* at 193.

88. *Id.* at 209.

89. *Id.* at 202; FLA. STAT. § 777.04(1) (2008).

90. *James*, 550 U.S. at 203; 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

91. *James*, 550 U.S. at 203-04; *see also Taylor*, 110 S. Ct. at 600, n.9.

92. *James*, 550 U.S. at 203-06; 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

93. *James*, 550 U.S. at 209.

94. *See United States v. Burghardt*, 796 F. Supp. 2d 996, 1003 (D. Neb. 2011) (deciding that under Nebraska law attempted burglary can be committed without creating a risk of injury).

95. *James*, 550 U.S. at 215 (Scalia, J., dissenting).

96. *Id.* at 215.

97. *Id.* at 215-16 (Scalia, J., dissenting).

crime involving use of explosives.⁹⁸ Justice Scalia concluded that driving under the influence is not analogous to any of the enumerated offenses, thus rendering *James* a failure to sentencing courts that would be left to the *ad hoc* crime-by-crime analysis proscribed by the Court.⁹⁹ Moreover, Justice Scalia enunciated perhaps the most important aspect of the residual clause: the many years of prison hinging on the ill-defined boundaries of a catchall residual provision.¹⁰⁰ Consequently, Justice Scalia felt it important that criminal defendants receive fair notice that certain conduct, if coupled with being a felon in possession of a firearm, results in a 15-year mandatory minimum sentence pursuant to the ACCA.¹⁰¹ In 2012, the federal government secured convictions or guilty pleas against 8,845 individuals charged under 18 U.S.C. § 922 or § 924¹⁰²; 8,105 of those were charged with a primary firearm offense.¹⁰³

Foreseeing that district judges across the country would fail at applying the residual clause with any degree of consistency, Justice Scalia began to assess the draftsmanship of the ACCA and lay out a number of alternatives for applying the residual clause.¹⁰⁴ First, in an effort to simplify the residual clause's interpretational definition, Justice Scalia suggested that the canon of *ejusdem generis* be applied.¹⁰⁵ Thus, the residual clause could be defined as "conduct that presents a serious potential risk of physical injury to another" when that conduct resembles the degree of risk established in the enumerated offenses.¹⁰⁶ This approach presents a concern that the degree of risk between a possible residual clause offense and an enumerated offense may be indistinguishable.¹⁰⁷ Further, the particular jurisdiction in which an offense occurs suggests that the residual clause must be read narrowly to provide adequate notice and fair warning of what criminal consequences exist.¹⁰⁸

98. *Id.* at 215. This example would appear before the Supreme Court in *Begay v. United States*, 553 U.S. 137 (2008), making Justice Scalia's analogous example a prophetic musing.

99. *Id.* at 215.

100. *Id.* at 216 (noting that the lack of clarity, direction, and application also raised the major issue of fair notice as to what conduct the residual clause covers for purposes of the sentencing enhancement and for identifying discriminatory sentencing practices); *see also* *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *United States v. Batchelder*, 442 U.S. 114 (1979).

101. *James*, 550 U.S. at 214-16.

102. *See United States Attorneys' Annual Statistical Report, Fiscal Year 2012*, 40 (2012), available at http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf (government statistics do not provide information as to how many defendants actually received sentence enhancements under 18 U.S.C. 924, however the statistics indicate that 924 is a primary charging statute).

103. *United States Sentencing Commission, Statistical Information Packet, Fical Year 2012, Western District of Missouri*, 2 (2012), available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2012/mow12.pdf.

104. *James*, 550 U.S. at 214-16.

105. *Id.* at 218; BLACK'S LAW DICTIONARY 594 (9th ed. 2009) (defining the canon of *ejusdem generis* as "when a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed").

106. *James*, 550 U.S. at 218.

107. *Id.* at 219.

108. *Id.* at 219; *see United States v. Batchelder*, 442 U.S. 114, 123 (1979) (requiring

Second, Justice Scalia suggested that defining the enumerated offenses in order to apply the comparative risk test introduces additional problems.¹⁰⁹ For example, to find which enumerated offense poses the least “serious potential risk of physical injury to another,” one must engage in the same type of analysis designed in *Taylor* to determine the definition of burglary.¹¹⁰ To demonstrate this analysis, Justice Scalia attempted to define the enumerated offense of extortion by reviewing a variety of sources, including the Model Penal Code, to determine an appropriate definition.¹¹¹ For the ACCA, extortion cannot fit neatly into clause (ii)’s surroundings because extortion carries a broad and sweeping definition that includes a great many nonviolent activities.¹¹² Specifically, the Model Penal Code describes extortion as:

purposely obtaining “property of another by threatening to: (1) inflict bodily injury on anyone or commit any other criminal offense; or (2) accuse anyone of a criminal offense; or (3) expose any secret tending to subject any person to hatred, contempt or ridicule, or to impair his credit or business repute; or (4) take or withhold action as an official, or cause an official to take or withhold action; or (5) bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or (6) testify or provide information or withhold testimony or information with respect to another’s legal claim or defense; or (7) inflict any other harm which would not benefit the actor.”¹¹³

Of these, only the first item unequivocally meets the ACCA’s edict that the offense “involve conduct that presents a serious potential risk of physical injury to another,” while the others present nonviolent means for conducting the offense.¹¹⁴

In demonstrating the difficulty in defining a term, the canon *noscitur a sociis* provides another means for defining undefined terms.¹¹⁵ Any

sentencing statutes to give fair notice of its reach).

109. *James*, 550 U.S. at 219.

110. *Id.*

111. Congressional failure to provide working definitions of the enumerated offenses listed within the ACCA led Justice Scalia to demonstrate the range in definitions of extortion available from other sources such as common law, federal statutes, and the Model Penal Code. *See id.* at 221-22 (discussing how other federal statutes that might assist in defining extortion, such as the Hobbs Act or RICO, employ broad definitions, which cannot be relied upon to define extortion in the context that the ACCA requires, because the broad definitions include conduct that does not present the possibility of inflicting physical harm)); *see generally* Hobbs Act, 18 U.S.C. § 1951 (2012) (defining extortion in broad terms); RICO, Pub. L. No. 91-452 (1970), 84 Stat. 941.

112. *James*, 550 U.S. at 222.

113. Model Penal Code § 223.4 (2012).

114. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

115. BLACK’S LAW DICTIONARY 1160 (9th ed. 2009) (defining the canon as “the meaning of an unclear word or phrase should be determined by the words immediately surrounding it”); *see Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (applying the canon to show that “a

application of *noscitur a sociis*, however, presents problems. For instance, the terms surrounding extortion in § 924(e) are burglary, arson, and crimes involving the use of explosives.¹¹⁶ As determined by the Court, these predicate offenses are characterized as presenting a serious potential risk of physical harm to others.¹¹⁷ Consequently, extortion must adopt a definition unknown in any working definition available, because extortion pertains to broad nonviolent conduct.¹¹⁸

This becomes important, for example, when a court needs to use extortion as an analog for a non-enumerated offense subjected to the residual clause. This scenario plays out further when a court decides the closest analog for a given offense happens to be one that presents the least serious potential risk for physical injury and settles upon extortion, which, as demonstrated above, fails to provide a workable definition per the comparative risk categorical approach provided in *Taylor*. Endorsing the above approach allows the residual clause to reach levels of conduct that present no serious potential risk of physical injury and could not have been contemplated by Congress when enacting the ACCA.¹¹⁹

In his dissent, Justice Scalia eventually defined extortion under the ACCA as “the obtaining of something of value from another, with his consent, induced by the wrongful use or threatened use of force against the person or property of another.”¹²⁰ Unlike the scenario described above, Justice Scalia determined burglary would pose the least potential for serious physical harm, because extortion requires a confrontation to occur for the offense to take place, while burglary risks only a possible confrontation.¹²¹ Consequently, a crime can qualify under the residual clause only if it poses as much risk of serious physical injury to another as the least risky of the enumerated crimes, specifically generic burglary.¹²²

The original question presented in *James* was whether attempted burglary categorically qualifies as a predicate offense under the ACCA or poses comparative risk to the enumerated offenses or closest analog.¹²³ Justice Scalia concluded that attempted burglary cannot qualify as a predicate offense because, as described above, attempted burglary cannot attain the risk of the least risky enumerated predicate offense, which by Justice Scalia’s assessment should be the completed act of generic burglary.¹²⁴ By expanding *Taylor* and speculating on the nature of burglaries, the Court determined that attempted burglary qualifies as a predicate offense instead of excluding attempted

word is known by the company it keeps”).

116. 18 U.S.C. § 924(e) (2012).

117. *James*, 550 U.S. at 222 (Scalia, J., dissenting).

118. *Id.* at 223.

119. *Id.*

120. *Id.* at 224.

121. *Id.* at 225.

122. *Id.* at 219.

123. *Id.* at 225 (Scalia, J., dissenting).

124. *Id.*

offenses due to their exclusion from the statute. Justice Scalia predicted that in the wake of *James*, lower courts will be left to guess:

- (1) whether the degree of risk covered by the residual provision is limited by the degrees of risk presented by the enumerated crimes;
- (2) if so, whether extortion is to be given its broadest meaning, which would embrace crimes with virtually no risk of physical injury; and most importantly (3) where in the world to set the *minimum* risk of physical injury that will qualify¹²⁵

Justice Scalia characterized the residual clause as leaving “those subject to this law to sail upon a virtual sea of doubt,”¹²⁶ but *James* would only be the beginning of the residual Odyssey. Concluding that Congress failed in its responsibilities by passing a criminal statute incapable of being predictably applied due to shoddy draftsmanship, Justice Scalia presented four choices for lower courts to choose from when confronted with the residual clause: (1) apply the enhancement universally, (2) apply the enhancement *ad hoc* (3) continue to interpret the enhancement so that it applies in a relatively predictable and administrable fashion; or (4) hold the enhancement void for vagueness.¹²⁷

2. The Begay “Purposeful, Violent, and Aggressive” Categorical Way

In 2008, the Supreme Court decided *Begay v. United States*, holding that driving under the influence of alcohol (DUI) is not a “violent felony” subject to the ACCA.¹²⁸ Larry Begay was convicted of being a felon in possession of a firearm in violation of § 922(g)(1) by the district court; the Tenth Circuit affirmed his conviction.¹²⁹ After being convicted as a felon in possession of a firearm, the sentencing court discovered the defendant’s 12 prior DUI convictions.¹³⁰ Of those 12 DUI convictions, the last eight qualified as felonies under New Mexico law, making the fourth or any subsequent DUI a felony.¹³¹ In light of the defendant’s conduct, the district court determined the felony DUI convictions counted as predicate offenses under the ACCA’s residual clause because “three felony DUI convictions involve conduct that presents a serious potential risk of physical injury to another,” thus triggering the 15-year mandatory minimum.¹³²

The Supreme Court held that New Mexico’s felony DUI statute did not meet the criteria of a “violent felony” as contemplated by the ACCA because

125. *Id.* at 228.

126. *Id.*

127. *Id.* at 229-30.

128. *Begay v. United States*, 553 U.S. 137 (2008); *see also James*, 550 U.S. at 215 (dissenting Justice Scalia predicted the exact situation of felony DUI appearing before the Court due to the lack of guidance provided in *James*).

129. *Begay*, 553 U.S. at 137.

130. *Id.*

131. *Id.*

132. *Id.* at 140.

the offense is unlike any of clause (ii)'s enumerated crimes, which involve "purposeful, violent, and aggressive conduct."¹³³ To arrive at this conclusion, the Court asked whether driving under the influence is a "violent felony" as the ACCA and the Court defined it.¹³⁴ The Court considered the offense generically by examining how the law defined the offense and not by the way the defendant actually committed the offense.¹³⁵ This analysis led the Court to determine that felony DUI falls outside of clause (i)'s "violent felony" definition, because DUI does not possess "as an element the use, attempted use, or threatened use of physical force against the person of another."¹³⁶ The Court concluded that although DUI involves conduct that "presents a serious potential risk of physical injury to another," DUI is too dissimilar to the enumerated offenses to fit within the intent of Congress.¹³⁷

The Court instituted a "purposeful, violent, and aggressive test," which in the Court's view bound the enumerated offenses together and thereby separated them from other offenses, such as driving under the influence.¹³⁸ The Court found that burglary is an unlawful or unprivileged entry into a building or other structure with intent to commit a crime;¹³⁹ arson is starting a fire or causing an explosion with the purpose of destroying or damaging any property to collect insurance;¹⁴⁰ and extortion is purposely obtaining the property of another by threatening to inflict bodily injury.¹⁴¹ The court concluded that an offender who committed one of the enumerated offenses would be more likely to use a firearm in a future offense to harm a victim, and that type of conduct was the focus of the intent of Congress when drafting the ACCA.¹⁴² The Court contrasted this stance with its belief that drunken driving statutes typically do not require purposeful, violent, and aggressive conduct.¹⁴³ The majority determined that drunken driving is more of a strict liability offense of reckless conduct lacking the requisite intent necessary to satisfy ACCA, and drunken driving need not be purposeful or deliberate to occur.¹⁴⁴

133. *Id.* at 142; 18 U.S.C. § 924(e)(1), (e)(2)(B)(ii) (2012).

134. *Begay*, 553 U.S. at 140. Although the Court claims the ACCA gives definition to the term "violent felony" prior case law suggests the breath of definition can be partly attributed to the Courts own analytical interpretations. *See also* *Taylor v. United States*, 495 U.S. 575 (1990) (discussing the definition of "violent felony" as it related to the legislative history of the ACCA); *James v. United States*, 550 U.S. 192 (discussing a "violent felony" under the residual clause as having a comparative risk comparable to enumerated offenses in clause (ii)).

135. *Begay*, 553 U.S. at 141.

136. *Id.*; 18 U.S.C. § 924(e)(2)(B)(i) (2012).

137. *Begay*, 553 U.S. at 141; 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

138. *Begay*, 553 U.S. at 144-45.

139. *Taylor*, 495 U.S. at 598.

140. Model Penal Code § 220.1 (2012).

141. Model Penal Code § 223.4 (2012). As discussed by Justice Scalia in his *James* dissent, but ignored by the majority in *Begay*, extortion has a broader meaning than the one used for the Court's analysis in *Begay*.

142. *Begay*, 553 U.S. at 145.

143. *Id.* at 138.

144. *Id.* at 145; *See also* *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (determining that a DUI offense involves accidental or negligent conduct); *United States v. Begay*, 470 F.3d 964, 980

In closing, the majority found that DUI differs from “aggressive crimes committed intentionally such as arson, burglary, extortion, or crimes involving the use of explosives” because in the latter instances, an offender who commits these crimes poses an increased likelihood of pointing a gun and pulling a trigger during the commission of a future offense.¹⁴⁵ Accordingly, the majority felt that it was the increased likelihood of violence that Congress took aim at with the sentencing enhancement for armed career criminals.¹⁴⁶ Conversely, the dissent considered a vehicle under the control of a drunken driver to pose a serious potential risk of physical injury to others.¹⁴⁷

In dissenting, Justice Alito wrote that though he was sympathetic to the majority’s attempt to narrow the provision’s construction, the “so-called residual clause . . . calls out for legislative clarification.”¹⁴⁸ Justice Alito focused his concern on the fact that approximately 15,000 fatalities occur annually as a result of drunken driving, which in turn reflects a serious risk of potential injury to others.¹⁴⁹ The dissent viewed the majority’s “purposeful, violent, and aggressive” test to run afoul of reality, and he addressed each element of the newly announced test in turn.¹⁵⁰

First, under the “purposeful” prong of the test, the DUI statute in at least one state (Georgia) required proof of purposeful conduct, which directly contradicted the majority’s position that DUI is a crime void of purposeful conduct.¹⁵¹ Second, the “violent” prong cannot be limited to violent crimes because if it were, it would be a redundancy, demonstrated by the statute’s inclusion of offenses that required only the threatened use of violence.¹⁵² Third, the “aggressive” prong, as the dissent argued, should be satisfied by felony recidivist DUI as perpetrated in *Begay*.¹⁵³ In addition, a number of states maintain “aggressive driving” statutes.¹⁵⁴ Studies show that alcohol abuse precedes violent crimes, which can add an additional concern when considering an individual who has multiple felony DUI convictions and a demonstrated record of unlawful use of a firearm.¹⁵⁵

(10th Cir. 2006), *rev'd*, 553 U.S. 137 (2008) and *opinion vacated in part, reinstated in part*, 282 F. App’x 656 (10th Cir. 2008) (drunk driving is a crime of negligence or recklessness, rather than violence or aggression).

145. *Begay*, 553 U.S. at 146-48.

146. *Id.* at 147.

147. *Id.* at 155-63 (Alito, J., dissenting).

148. *Id.* at 155.

149. *Id.* at 156.

150. *Id.* at 158-60.

151. *Id.* at 159 (pointing to the unremarkable observation that most DUI defendants purposefully drank before purposefully getting behind the wheel and purposefully driving their vehicle in a manner that posed sufficient risk to the public to warrant their arrest).

152. *Id.* at 159-60; 18 U.S.C. § 924(e)(2)(B) (2012).

153. *Begay*, 553 U.S. at 161.

154. See Melissa A. Savage et al., *Traffic Safety and Public Health: State Legislative Action 2007*, TRANSP. SERIES (Nat’l Conf. of State Legislatures), at 17 (Dec. 2007), available at <http://www.ncsl.org/print/transportation/07trafficsafety.pdf>.

155. See, e.g., Judith Roizen, *Epidemiological Issues in Alcohol-Related Violence*, in 13

Finally, the dissent pointed out that the ACCA is directed at punishing felons found in the possession of a firearm, which they have been deemed untrustworthy to possess, and defendants with felony DUI convictions likely have alcohol abuse problems.¹⁵⁶ Therefore, the likelihood increases that a defendant with prior felony DUI convictions will engage in dangerous conduct while intoxicated, because the recidivist nature demonstrates an inability to exert sound judgment.¹⁵⁷ Accordingly, the damage and harm to victims perpetrated by those who drink and drive is necessarily purposeful, violent, and aggressive.¹⁵⁸ Justice Scalia concurred in the judgment that felony DUI failed to meet the murky requirements of the residual clause, but parted by noting that the “residual clause unambiguously encompasses all crimes that present a serious risk of injury to another.”¹⁵⁹

3. Chambers and the Less Likely Risk Approach

The next stop on the residual Odyssey begins with a 2008 assessment by the Supreme Court in *Chambers v. United States* as to what type of conduct is less likely to involve the type of risk previously contemplated in *James and Begay*.¹⁶⁰ Employing *Begay*'s “purposeful, violent, and aggressive test,” the Court held that a failure-to-report offense did not qualify as a “violent felony” under the ACCA.¹⁶¹

After Deondrey Chambers pled guilty to being a felon in possession of a firearm, the Government sought to apply the ACCA's 15-year mandatory minimum, in part because of a prior conviction for failing to report to a penal institution.¹⁶² The district court determined that failure to report to a penal institution under Illinois law was a “violent felony” in accordance with ACCA, thus satisfying the requirements of the residual clause, and the Seventh Circuit

RECENT DEV. ALCOHOLISM 7, (Marc Galanter ed., 1997); *Begay*, 553 U.S. at 161.

156. *Begay*, 553 U.S. at 161.

157. *Id.*

158. *Id.*; see also NATIONAL HIGHWAY TRAFFIC SAFETY ADMIN., TRAFFIC SAFETY FACTS, 2006 TRAFFIC SAFETY ANNUAL ASSESSMENT—ALCOHOL-RELATED FATALITIES 1 (2007) (presenting drunk driving statistics detailing how alcohol-related motor vehicle accidents claimed over 17,000 victims in 2006), available at <http://www-nrd.nhtsa.dot.gov/Pubs/810821.PDF>; Mothers Against Drunk Driving, *Mission Statement*, Mothers Against Drunk Driving (MADD), perhaps the largest anti-drinking and driving national organization, mission statement reads, “The mission of Mothers Against Drunk Driving is to stop drunk driving, support the victims of this violent crime and prevent underage drinking,” MADD also boasts that to date, the organization has saved 300,000 lives), available at <http://www.madd.org/about-us/mission/>; See N.M. STAT. ANN. §§ 66-8-102(G)-(J) (2007) (showing a state statute that categorizes multiple or subsequent DUI's as felony violent crimes); see Mothers Against Drunk Driving, *MADD Supports Chairman Mica and Legislation to Reauthorize the Nation's Highway Safety Programs*, (2012) (discussing MADD's campaign to eliminate drunk driving by lobbying Congress for stricter drunk driving enforcement and to fund a Driver Alcohol Detection System for Safety that would save lives), available at <http://www.madd.org/media-center/press-releases/2012/madd-supports-chairman-mica.html>.

159. *Begay*, 553 U.S. at 148 (Scalia, J., concurring).

160. See *Chambers v. United States*, 555 U.S. 122 (2009).

161. *Id.* at 127; see Holman, *supra* note 39, at 222.

162. *Chambers*, 555 U.S. at 124-25.

affirmed.¹⁶³ Upon review, the Supreme Court concluded that the failure-to-report offense lacked the element of use, attempted use, or threatened use of physical force necessary to satisfy the “purposeful, violent, and aggressive test,” spelled out in *Begay*.¹⁶⁴ In addition, failure to report in this instance was a “relatively passive offense” lacking a serious potential risk of physical injury to another, thereby preventing the offense from being labeled a “violent felony” under the ACCA.¹⁶⁵ To arrive at this conclusion, the Court assessed the passivity of the offense.¹⁶⁶

Determining that the categorical approach demands the offense be viewed as a generic crime without looking at how the defendant committed the crime, the Court concluded the district court erred in equating the passive offense of failing to report with a more active, and perhaps dangerous, offense of escape from a penal institution.¹⁶⁷ In addition, the Court also seemed to consider statistical assessments, signaling a slight departure from the tenet in *Taylor* that “requires the trial court to only view the fact of conviction and the statutory definition of the prior offense, or for a jury to find all the elements of generic [crime] as determined by the charging paper or jury instruction.”¹⁶⁸ Reminiscent to Justice Scalia’s deconstruction of extortion in his *James dissent*, the Court signaled a willingness in *Chambers* to dissect the statute in question to arrive at an acceptable result.¹⁶⁹ The Court identified the Illinois’ escape statute as having seven different types of behavior:

- (1) escape from a penal institution, (2) escape from the custody of an employee of a penal institution, (3) failing to report to a penal institution, (4) failing to report for periodic imprisonment, (5) failing to return from furlough, (6) failing to return from work and day release, and (7) failing to abide by the terms of home confinement.¹⁷⁰

Of the seven subparts of the Illinois statute, the Supreme Court determined the third, fourth, fifth, sixth, and seventh offenses were separate and of a different quality than the type of escape described by the first and second offenses within the statute.¹⁷¹ As a result, the Court concluded that the behavior underlying a failure to report was less aggressive and more passive,

163. *Id.* at 125 (explaining how the district court applied 720 ILL. COMP. STAT. § 5 / 31-6(a) (2008)).

164. *Id.*

165. *Chambers*, 555 U.S. at 127-28.

166. *Id.* at 127.

167. *Id.* at 126-27.

168. *See id.* at 131 (Alito, J., concurring) (relying on “Report on Federal Escape Offenses in Fiscal Years 2006 and 2007, p.7, fig. 1 (Nov. 2008)” to enlighten the Court’s opinion); *See supra* Part III.A.

169. *See Chambers*, 555 U.S. at 126; *see also James v. United States*, 550 U.S. 192, 222 (discussing the variety of ways in which extortion could be defined).

170. *Chambers*, 555 U.S. at 126; 720 ILL. COMP. STAT. § 5 / 31-6(a) (2008).

171. *Chambers*, 555 U.S. at 126-27.

and the Illinois escape statute failed to trigger the ACCA's residual clause.¹⁷² Keeping the categorical approach intact, the Court mused that the "categorical approach requires courts to choose the right category."¹⁷³ It is possible that the above announced approach of analyzing the sufficiency of risk may assist criminal defendants whose conduct presents little or no risk, as illustrated when the charging statute includes several types of conduct of which some pose a heightened level of risk while other charged conduct poses little or no risk as to be sufficient to trigger the ACCA's residual clause.¹⁷⁴

In addition, concerns over whether lower courts would consider the categorical approach to be dead after *Begay* and *Chambers* appear to be unsubstantiated.¹⁷⁵ Filing a separate concurrence in *Chambers*, Justice Alito claimed that "only Congress can rescue the federal courts from the mire into which ACCA's draftsmanship and *Taylor's* 'categorical approach' have pushed us," concluding that "each new application of the residual clause seems to lead us further and further away from the statutory text."¹⁷⁶

IV. SYKES REVISITS THE RESIDUAL CLAUSE

A. *The Majority's Morass*

In 2011, The Supreme Court heard the latest installment of the residual Odyssey and once again failed to add clarity to the statute.¹⁷⁷ By a 5-1-3 decision, the Supreme Court held that felony vehicle flight was a "violent felony" under the ACCA. Marcus Sykes was convicted for being a felon in possession of a firearm in the Southern District of Indiana.¹⁷⁸ Complicating Mr. Sykes position was the fact that he had prior offenses, which the Government contended qualified as violent felonies under the ACCA's residual clause.¹⁷⁹ The district court sentenced Sykes under the ACCA's residual provision, and the Seventh Circuit affirmed. Sykes' appeal contested the conviction and asserted that knowing or intentional flight from a law enforcement officer by vehicle was not a "violent felony" as contemplated by the ACCA.¹⁸⁰ The Supreme Court recognized that opinions from the First,

172. *Id.* at 127-28.

173. *Id.* at 126.

174. *See* Commonwealth v. Eberhart, 965 N.E.2d 791, 799 (Mass. 2012) (holding that conviction for assault and battery did not qualify as a predicate offense under ACCA's residual clause, where Massachusetts criminal statute defined three types of battery and defendant committed the nonviolent offensive battery).

175. *See* Holman, *supra* note 39, at 222-24 (highlighting the concern in *Chambers* as being that "each new application of the residual clause seems to lead us further and further away from the statutory text," whereas this *comment* seeks to advocate a full abandonment of the residual clause that continues to mystify lower courts across the country with its cryptic text and seemingly impenetrable interpretation).

176. *Chambers*, 555 U.S. at 132-34 (Alito, J., concurring).

177. *See* Sykes v. United States, 131 S. Ct. 2267 (2011) (6-3 decision).

178. *Id.* at 2270-71.

179. *Id.*

180. *Id.* at 2275.

Fifth, Sixth, Seventh, and Tenth Circuits, which concluded that felony vehicle flight is a violent felony, conflicted with rulings from the Eighth, Ninth, and Eleventh Circuits.¹⁸¹

Highlighting the residual clause jurisprudence previously laid out by the Supreme Court, Sykes argued that pursuant to *James*, the Court must look to the “conduct encompassed by the elements of the offense, in the ordinary case,” to interpret what conduct fits within the residual clause.¹⁸² In addition, the Court must separate the conduct offense from other offenses within the same statute per *Chambers* to show how the conduct offense is distinct from separate activities that pose substantial risk of bodily injury to another person, because “it is important to keep offenses in their proper categories in making ACCA determinations.”¹⁸³ In making this argument, Sykes attempted to tie all of the previous residual clause cases together. Sykes argued that the Seventh Circuit speculated what might occur after the offending conduct in violation of *James* and blurred the statutory categories required by *Chambers*.¹⁸⁴ Subsequently, the appellate court’s decision expanded the scope of Sykes’ offense to an uncharged offense that required an element of creating substantial risk of injury.¹⁸⁵

The Supreme Court started with the premise that the categorical approach still applied to Sykes as well as the residual clause.¹⁸⁶ Therefore, the Court looked to see which enumerated offense fit as the closest analog to vehicle flight.¹⁸⁷ The Court looked beyond the fact of conviction and the statutory definition to determine whether vehicle flight qualifies as a “violent felony” and engaged in an exercise of speculation to determine the severity of vehicle flight.¹⁸⁸ The Court determined that a perpetrator’s indifference to collateral consequences, such as eluding capture by putting the safety of property and people at risk demonstrates violent and lethal potential.¹⁸⁹ Providing an example of such a scenario, the Court envisioned a criminal eluding capture without driving full speed, but creating the possibility that police would exceed or match the criminal’s speed and use force to bring him within their custody.¹⁹⁰ The Court’s speculation in *Sykes* led to the comparison of vehicle

181. *Id.* at 2272.

182. Brief for Petitioner at 9, *Sykes v. United States*, 131 S. Ct. 2267 (2011) (No. 09-11311), 2010 WL 4641672, at *10.

183. *Id.* at *6.

184. *Id.* at *7.

185. *Id.* at *12.

186. *Sykes v. United States*, 131 S. Ct. 2267, 2272 (2011) (quoting *James v. United States*, 550 U.S. 192, 202 (2007)).

187. *Id.* at 2273; *see also James*, 550 U.S. at 203.

188. *Sykes*, 131 S. Ct. at 2273.

189. *Id.*

190. *Id.*; *see also 30 for 30: June 17th 1994* (ESPN television broadcast Jun. 16, 2010) (depicting the widely publicized June 17, 1994 35 mph high-speed car chase on the 405 freeway, where O.J. Simpson led an entire squad of police cruisers who matched his speed in an incident resembling more of a motorcade or funeral procession than a high-speed vehicle flight endangering the lives of wayward interstate pedestrians), *available at* <http://www.realclear>

flight to arson, because vehicle flight, like arson, “entails intentional release of a destructive force dangerous to others.”¹⁹¹ In another shot at the *James* closest-analog assessment, the Court then compared vehicle flight to burglary, because burglary, like vehicle flight, can end in a confrontation leading to violence, which in the typical case requires pursuit.¹⁹²

In contrast to the Supreme Court’s high-speed chase hypothetical stands a growing movement by law enforcement agencies adopting pursuit policies that focus on the “protection of human life” by restricting the instances in which a pursuit takes place.¹⁹³ The speculation that a high-speed pursuit would create a dangerous situation or particular outcome is complicated by the fact that the jurisdiction in which the vehicle flight takes place may have a policy prohibiting high-speed pursuits or use of force, such as roll bars or ramming techniques, lacking exigent circumstances, which in effect would eliminate any serious potential risk of harm.¹⁹⁴

Maintaining the position that vehicle flight poses inherent risks of violence, the Supreme Court proceeded to apply *Begay* in a two-part inquiry by analyzing the “purposeful” element.¹⁹⁵ First, the Court contrasted vehicle flight to drunken driving. Under Indiana law, vehicle flight required knowing or intentional conduct, whereas drunken driving did not require deliberate conduct.¹⁹⁶ Next, the Court analyzed the statutory text to quantify the violent and aggressive nature of the conduct.¹⁹⁷ The majority announced that the new *Begay* two-part inquiry, though in part redundant, created a “categorical and manageable standard” aimed at showing the levels of risk that divide qualifying prior violent felonies from non-qualifying crimes.¹⁹⁸ Thus, the Court announced this method to resolve *Sykes*, and presumably future cases.¹⁹⁹ In due course, the Court backed off the *Begay* purposeful, violent, and aggressive test by relegating it to strict liability, negligence, and recklessness offenses.²⁰⁰ This decision’s lack of guidance and clarity has left other courts

history.com/video/2012/06/16/oj_simpsons_low-speed_chase.html.

191. *Sykes*, 131 S. Ct. at 2273.

192. *Id.*

193. See Memorandum from Ryan S. Evans, First Assistant City Manager, City of Dallas, to Members of the Pub. Safety Comm. (Sep. 3, 2010) (Dallas Police Department Pursuit Policy General Order 906.01 B) (June 8, 2006) (requiring the decision to engage in a pursuit to be based on “the pursuing officer’s conclusion that the immediate danger to the officer, public and suspect created by the pursuit is less than the immediate or potential danger to the public should the suspect remain at large”), http://dallascityhall.com/committee_briefings/briefings0910/PS_DPD-PursuitOverview_090710.pdf.

194. See Procedural Instruction, Kansas City, MO Police Department, Pursuits and Emergency Police Vehicle Operations (Oct. 29, 2002) (prohibiting the use of police vehicles to ram pursued vehicles and restricting the occasions in which pursuits take place), <http://www.kcpd.org/masterindex/files/PI/PI02-10.pdf>.

195. See *Sykes*, 131 S. Ct. at 2274.

196. *Id.* at 2275.

197. *Id.*

198. *Id.* at 2275-76.

199. *Id.*

200. *Id.* at 2276.

unsure whether and when the *Begay* test applies.²⁰¹

After diminishing *Begay*'s usefulness, the majority addressed the issue as to whether the residual clause is unconstitutional.²⁰² The majority correctly characterized the ACCA as framed in "general and qualitative" terms.²⁰³ The normative principle of the residual clause seeks to enhance punishment for felon gun possession where prior offenses that posed risk of physical injury occurred.²⁰⁴ Although difficult for lower courts to implement, the majority maintained that the residual clause falls firmly within the power of Congress to enact.²⁰⁵

Citing *James*, the majority insisted that its previous decisions gave examples of multiple federal laws similar to the ACCA's residual clause.²⁰⁶ However, in *James*, only one federal statute was mentioned in contrast to the multiple the *Sykes* majority implied.²⁰⁷ The abbreviated federal statute cited refers to acts of terrorism and in *James* the statute "defin[es] a terrorist act as conduct that, among other things, creates a substantial risk of serious bodily injury to any other person."²⁰⁸ However, the excised part of the statute continues, "by destroying or damaging any structure, conveyance, or other real or personal property within the United States."²⁰⁹ This type of pick and choose statutory reading reflects the type of problems inherent with the residual clause categorical approach that presents a limitless morass unto which lower courts cannot find stable ground. This validated Justice Scalia's concerns that *Sykes* resolved only whether vehicle flight under Indiana law qualified as a predicate offense under the ACCA, and that *Sykes* provided a lack of guidance for future residual clause cases.²¹⁰

B. Sykes' Directionless Abyss

Since *Sykes*, lower courts have attempted to navigate the residual clause by charting cases according to *Sykes*' direction. On October 5, 2012, the Sixth

201. See *United States v. McMurray*, 653 F.3d 367, 376 n.9 (6th Cir. 2011) (noting the Supreme Court's retreat from the *Begay* test); *Miller v. United States*, 792 F. Supp. 2d 104, 107 (D. Mass. 2011) (noting a shift in *Sykes* of the categorical approach to risk level assessment); *Brown v. Rios*, 696 F.3d 638, 641 (7th Cir. 2012) (noting that *Sykes* retreat from *Begay* cannot mean that every intentional crime is a violent felony, such as tax evasion or price fixing); *Commonwealth v. Eberhart*, 965 N.E.2d 791, 799 (Mass. 2012) (noting Supreme Court's retreat from *Begay* in *Sykes*).

202. *Sykes*, 131 S. Ct. at 2277.

203. *Id.*

204. *Id.*

205. *Id.*

206. *Id.*

207. See *James v. United States*, 550 U.S. 192, 210 n.6 (2007) (discussing 18 U.S.C. § 2332b (2012) as defining "terrorist act" as conduct that, among other things, "creates a substantial risk of serious bodily injury to any other person").

208. *Id.*

209. *Id.*; 18 U.S.C. § 2332b(a)(1)(B) (2012).

210. *Sykes*, 131 S. Ct. at 2275-76 (Scalia, J., dissenting).

Circuit decided *United States v. Wilson*.²¹¹ The Court held that a prior criminal charge of obstructing a police officer that involved vehicular flight did not qualify as a violent felony for purposes of triggering a sentence enhancement.²¹² According to the Sixth Circuit, “*Sykes* offers no guidance on how to treat an obstruction offense” under Michigan law.²¹³ *Wilson* had disobeyed a traffic officer’s command to stop his vehicle.²¹⁴ In *Wilson*, the Sixth Circuit observed that the underlying conduct of vehicle flight as charged under the obstruction statute could include conduct as harmless as “a knowing failure to comply with a lawful command,” which could include “refusing to provide information” to an officer or ignoring a command to not jaywalk.²¹⁵ Accordingly, the Michigan statute includes conduct that lacks an inherent risk of physical injury as required by the categorical approach and controlled by *Sykes*.²¹⁶ However, the application of *Sykes* by the Sixth Circuit ended up treating similar conduct in a completely different manner.²¹⁷ The district court applied the categorical approach and looked to the statutory definition of the crime, not the underlying conduct.²¹⁸ In doing this, the district court examined *Shepard* documents and concluded that *Wilson* could not be punished for the conduct of vehicular flight where he did not plead guilty to said offense.²¹⁹ Although the conduct in *Wilson* mirrored that in *Sykes*, different outcomes occurred because of the differences in the way state statutes are constructed and in part by the way different jurisdictions set out to apply the categorical approach. This lack of consistency in the application of the categorical approach validates Justice Scalia’s assertion that the residual clause is incapable of being universally applied in a fair manner that keeps criminal defendants apprised of their rights and provides guidance to sentencing courts.

In addition, in *United States v. Thompson*, a district court in West Virginia found a prior conviction for theft of firearms from a business licensed to sell firearms not to be a crime of violence.²²⁰ Here, the defendant was convicted of “theft from premises,” which does not require persons to be present or for damage to property or people to occur.²²¹ The district court interpreted *Sykes* to say that an offense falls within the residual clause when it, as a categorical matter, is similar in type and poses the inherent risk associated to the

211. *United States v. Wilson*, 2012 U.S. App. LEXIS 20854, 2012 FED App. 1050N (6th Cir.), 2012 WL 4748113 (6th Cir. Mich. 2012).

212. *Id.* at *1; see U.S.S.G. § 4B 1.2(a) (using the term “crime of violence” which has virtually an identical definition to the residual clause found in 18 U.S.C. § 924(e)(2)(B)(ii) (2012) and is treated the same by the courts); see also *Sykes*, 131 S. Ct. at 2272.

213. *United States v. Wilson*, 2012 U.S. App. LEXIS 20854, 2012 FED App. 1050N (6th Cir.), 2012 WL 4748113 (6th Cir. Mich. 2012).

214. *United States v. Wilson*, 501 Fed. App’x. 499, 501 (6th Cir. 2012).

215. *Wilson*, 2012 U.S. App. LEXIS 20854, at *5 L.

216. *Id.*

217. *Id.* at *2.

218. *Id.*

219. *Id.* at *5-6.

220. 820 F. Supp. 2d 763 (S.D.W. Va. 2011).

221. *Id.* at 767.

enumerated crimes.²²² Thus, *Thompson* demonstrates how statutory construction and charging decisions sometimes have the unintended consequence of excluding conduct that shows an increased likelihood that the offender is the kind of person who might deliberately point a gun and pull the trigger, contrary to the purpose of the ACCA.²²³

C. The Clarity of Dissent

For the fourth time in five years, the Supreme Court has unsuccessfully attempted to clarify the definition of “violent felony” under the residual clause of the ACCA.²²⁴ Instead of providing guidance or “producing a clarification of the Delphic residual clause,” *Sykes* adds a fourth *ad hoc* judgment to further confuse lower courts faced with determining whether an offense qualifies as predicate under the residual clause to trigger the weighty mandatory 15-year minimum sentence.²²⁵ The residual clause stands in stark comparison to the very real consequences associated with the mandatory 15-year minimum sentence that accompanies an ACCA conviction based on the undefined reach the residual clause encompasses. From 2000 to 2012, the United States government charged and sentenced 112,422 individuals under 18 U.S.C. § 922 or § 924.²²⁶ As such, the residual Odyssey of criminal defendants continues.

As Justice Scalia notes, a felon convicted under the ACCA faces “many years of prison” based on whether a crimes conduct “presents a serious potential risk of physical injury to another.”²²⁷ Based on this definition, a criminal defendant can receive a mandatory 15-year sentence, which can be a constructive life sentence for older individuals, without ever knowing the prior conduct fell within this statutory construction.²²⁸ Whereas, without the various prior convictions that might possibly exist, a criminal defendant would face a lesser sentence, “which could not possibly exceed 10 years.”²²⁹ Furthermore, *Sykes* attempts to hearken back to the closest-analog test of *James*, which instructs courts to hold a mirror up to felony offenses such as “vehicular flight” and then begin the categorical comparison between the argued predicate offense and the named enumerated offenses of burglary, arson, extortion or

222. *Id.* at 768.

223. *See, e.g.,* *Brown v. Rios*, 696 F.3d 638 (7th Cir. 2012) (finding the crime of compelling a person to become a prostitute, in violation of Illinois pandering statute, to not be a violent felony under ACCA).

224. *Sykes v. United States*, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting).

225. *Id.*

226. *See United States Attorneys' Annual Statistical Report, Fiscal Year 2012*, 40 (2012) available at http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf (adding the near decades worth of defendants found guilty of firearms offenses produces a population surpassing that of Green Bay, Wisconsin's 104,057); *see* U.S. Census Bureau, Community Facts, (2013) available at http://factfinder2.census.gov/nav/jsf/pages/community_facts.xhtml (providing population statistics).

227. *Id.*

228. *Id.*

229. *Id.*

crimes that involve the use of explosives.²³⁰ Unfortunately, for some courts, the attempt to compare certain felony offenses to the enumerated offense fails to provide a satisfactory form of predictable analysis or consistent results among the varied circuit and district courts.²³¹

Failing to find a mirror image, the majority in *Sykes* pressed on to the risky-as-the-least-risky test contemplated in *James* and found “vehicular flight” to pose the type of risk apparent in both arson and burglary.²³² In addition, the Court failed to clarify or discard the “purposeful, violent, and aggressive” test set forth in *Begay*, which adds to the additional confusion of the residual clause’s application to prospective predicate offenses.²³³ Finally, the Court mentions *Chambers* to discuss the importance of statistics in providing evidence of a crime’s purported risk.²³⁴ However, as Justice Scalia points out in his dissent, the Court has failed to clarify the future application of the residual clause or how these cases actually affected *Sykes*.²³⁵ In fact, the majority never examined the veracity of the statistics relied upon in *Sykes* to determine if the data represented the type of actual vehicle flight at issue in *Sykes*.²³⁶ This apparent oversight takes on greater importance when the eventual outcome of the *Sykes* decision indicates its limited reach to vehicle flight under Indiana law, because other state statutes presumably include separate elements of the vehicle flight that change the analysis set forth in *Sykes*.²³⁷ In effect, the statistical analysis set forth in *Sykes* amounts to “untested judicial fact finding masquerading as statutory interpretation.”²³⁸ Furthermore, courts may fail to apply *Sykes* because of its inconsistencies, lack of direction, and amplification of vagueness to the residual clause as discussed in the cases above.²³⁹ In addition to the amplified vagueness of the residual

230. *Id.* (citing *James*, v. United States 550 U.S. 192, 203 (2007)).

231. *Compare* United States v. Daye, 571 F.3d 225 (2d Cir. 2009) (holding sexual assault of a child in violation of Vermont law to be a violent felony, under the ACCA), *with* United States v. Harris, 608 F.3d 1222 (11th Cir. 2010) (holding a Florida conviction for sexual battery of a child did not qualify as a predicate offense under the ACCA), *and* United States v. Vann, 660 F.3d 771 (4th Cir. 2011) (holding that convictions for taking of indecent liberties with a child were not violent felonies under the ACCA); *compare* United States v. Upton, 512 F.3d 394 (7th Cir. 2008) (holding prior conviction for possession of a sawed-off shotgun constituted a conviction for a violent felony), *with* United States v. Bradford, 766 F. Supp. 2d 903 (E.D. Wis. 2011) (holding the possession of a short-barreled shotgun under Wisconsin law did not qualify as a violent felony).

232. *Sykes*, 131 S. Ct. at 2285 (Scalia, J., dissenting).

233. *Id.*

234. *Id.* at 2285-86.

235. *Id.*

236. *Id.* at 2286.

237. *See* United States v. Wilson, 2012 U.S. App. LEXIS 20854, 2012 FED App. 1050N (6th Cir.), 2012 WL 4748113 (6th Cir. Mich. 2012).

238. *Sykes*, 131 S. Ct. at 2285 (Scalia, J., dissenting).

239. *See supra* Section IV.B; *see generally* *Sykes*, 131 S. Ct. 2267; *see* *Miller v. United States*, 792 F. Supp. 2d 104, 107 (D. Mass. 2011) (speculating *Sykes* “marks a shift in the standard” for application of residual clause to assault and battery”); *United States v. Brown*, 450 Fed. App’x. 916, 920 (11th Cir. 2012) (announcing that “*Sykes* (read in conjunction with *Begay*) reflects the proposition that, if an offense has a *mens rea* of strict liability, negligence, or

clause set forth in *Sykes*, criminal defendants need now familiarize themselves with statistical spreadsheets from unusual or unknown data sources to determine whether a particular criminal offense falls within the ambit of riskiness contemplated in *Sykes*.²⁴⁰

Sykes does little more than find a way to resolve the limited issue of the status of Indiana felony vehicular flight as being risky enough to qualify as a predicate offense under the ACCA.²⁴¹ In addition, *Sykes* allows the residual clause to continue denying individuals of fair notice of the statute's reach, and to perpetuate a hopelessly vague text that fails to yield "an intelligible principle."²⁴² Criminal proscriptions require clarity; otherwise, the criminal justice system fails to serve the society it seeks to protect.²⁴³ However, the Supreme Court cannot manufacture clarity that a statute lacks because of drafting deficiencies.²⁴⁴ When Congress becomes a criminal statute factory geared toward quantity and not quality of the statutes created, imprecision and sloppy draftsmanship become a natural byproduct of the process.²⁴⁵ By failing to articulate an applicable test for the residual clause, the majority fails to provide necessary guidance to lower courts.²⁴⁶ By failing to recognize the unconstitutional vagueness of the residual clause and by allowing Congress to persist in the "leave-the-details-to-be-sorted-out-by-the-courts" draftsmanship, the majority fails the criminal justice system and all of the citizens adrift on their individual residual Odysseys.²⁴⁷ As such, the residual clause should be found void for vagueness and struck down as unconstitutional.

V. CONCLUSION

From the ACCA's inception trial and appellate courts have been plagued and perplexed by the deficiencies apparent in one clause: "otherwise involves conduct that presents a serious potential risk of physical injury to another." This residual clause, as it has come to be known, has spawned an evolving jurisprudence based upon a categorical approach. However, the categorical approach, at its best, fails to provide a consistent guidepost that lower courts may rely upon when determining whether prior convictions will enhance a sentence beyond a 10-year maximum to a 15-year minimum. Beyond failing

recklessness, that offense would only qualify as a crime of violence under the residual clause if it is purposeful, violent, and aggressive, but if an offense has a knowing or intentional *mens rea*, then the *Begay* inquiry becomes redundant, and risk levels would provide a sufficient standard for making the crime-of-violence determination" however *Sykes* also used statistics in addition to common sense in determining the risk of the offense but no requirement to use statistics was set forth), *cert. denied*, 133 S. Ct. 265 (2012).

240. *See generally Sykes*, 131 S. Ct. at 2286-87.

241. *See generally id.* at 2287.

242. *Id.*

243. *Id.* at 2288; *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89-90 (1921).

244. *Sykes* 131 S. Ct at 2289.

245. *Id.* at 2287.

246. *Id.* at 2288.

247. *Id.*

the courts, the residual clause fails the criminal justice system by failing to put criminal defendants on fair notice of what future consequences their prior actions will create. Further complicating matters for criminal defendants who engage in the criminal process is the uncertainty they face with not knowing if a prior conviction will count toward any future sentence enhancement.

In effect, a criminal defendant might be pressured to take a longer sentence through plea because of the fear that a prior conviction might fall under the ACCA's residual clause. This likelihood is amplified in a criminal justice system where defense attorneys are becoming less of a trial advocate and more of a sentencing advocate. A criminal defendant who accepts a conditional weighted plea agreement while preserving the right to appeal the status of the offense responsible for the sentence enhancement must sacrifice certainty and his freedom while courts and prosecutors determine which prior convictions will qualify. The other option for a criminal defendant is to proceed to the high-risk trial. Trial may seem like the only choice for certain defendants facing a 15-year mandatory minimum, which for an elderly defendant is nothing less than a life sentence. Further, when defense attorneys counsel their clients on the perils of a possible ACCA enhancement, the defendant faces the bleak decision of accepting a 15-year plea, which reflects the prospective ACCA enhancement, or facing the prospective wrath of the government during sentencing upon eventual conviction.²⁴⁸

Another aspect of the felon-in-possession quandary rests on the role of the federal government in prosecuting this offense. For instance, in Missouri, where *Taylor* set the stage for the residual Odyssey, a felon in possession of a firearm commits a class C felony punishable by no more than 7 years incarceration.²⁴⁹ Furthermore, a persistent offender statute gives Missouri courts the discretion to enhance a sentence to the next felony tier, which would allow a court to sentence a defendant up to 15 years.²⁵⁰ Here, one can begin to see the differences in time a criminal defendant faces whether in the federal or state system, but a question arises as to why the federal government is in the business of prosecuting firearm offenses in the first place when state systems present adequate statutory systems to address the problem. Of course the federal government is entitled to prosecute individuals it finds to be in violation of its laws, but perhaps an assessment is overdue on how the government reaches its prosecutorial decisions, how United States Attorney's offices prioritize their resources, and how those offices view the importance of conviction rates. For instance, in 2012 the Western District of Missouri, which includes Kansas City and Springfield, prosecuted 207 firearm offenders

248. See *United States Attorneys' Annual Statistical Report, Fiscal Year 2012*, 41 (2012) available at http://www.justice.gov/usao/reading_room/reports/asr2012/12statrpt.pdf (in cases where either a guilty or not guilty disposition occurred the federal government secured 83,860 guilty dispositions compared to 390 not guilty dispositions accounting for a 99% guilty rate).

249. MO REV. STAT. § 571.070 (2010); MO REV. STAT. § 558.011 (Supp. 2003).

250. MO REV. STAT. § 558.016 (Supp. 2005); MO REV. STAT. § 558.011 (Supp. 2003) (noting the sentencing decision is discretionary and not mandatory, thus giving the judge an opportunity to weigh defense factors without being forced into a sentence).

accounting for 26.4% of that district's prosecutions.²⁵¹ Similarly, the District of Kansas prosecuted 151 firearm offenders accounting for 20.9% of total prosecutions.²⁵² On the other hand, the Eastern District of Michigan, which includes Detroit and Flint, prosecuted only 168 firearm offenders accounting for 18.5% of prosecutions, while the national number sat at 9.6%.²⁵³ One must assume that the purpose Congress announced as to combating violent crime on the streets of America was a valid reason for enacting the ACCA,²⁵⁴ but one might also question the utility of prosecuting low-hanging fruit offenses that fill federal penitentiaries in the name of fighting crime while states stand at the ready to address the problem.²⁵⁵ Seemingly lost in this malaise is the undisputed loss of years thousands of individuals face after each and every firearm conviction that teeters on the residual fulcrum.

Nevertheless, the lack of clarity as to what qualifies as a predicate offense allows the Government to seek the ACCA's 15-year mandatory minimum and test the court's willingness to apply and stretch the limits of the sentencing enhancement. As a long-term goal, a redrafted ACCA with enumerated and defined offenses would go a long way to resolve the uncertainty in applying the mandatory 15-year minimum sentence that looms with *Damoclean* mystification above the heads of criminal defendants. However, another possible solution to the current status of the residual clause rests in the Court's prior opinions, specifically Justice Scalia's dissent in *James* suggesting the court "recognize the statute for the drafting failure it is and hold it void for vagueness."²⁵⁶

"I long for home, long for the sight of home.
If any god has marked me out again
For shipwreck, my tough heart can undergo it.

251. *United States Sentencing Commission, Statistical Information Packet, Fiscal Year 2012, Western District of Missouri*, 2 (2012) available at http://www.uscc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2012/mow12.pdf.

252. *United States Sentencing Commission, Statistical Information Packet, Fiscal Year 2012, District of Kansas*, 2 (2012) available at http://www.uscc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2012/ks12.pdf.

253. *United States Sentencing Commission, Statistical Information Packet, Fiscal Year 2012, Eastern District of Michigan*, 2 (2012) available at http://www.uscc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2012/mie12.pdf.

254. *James*, 550 U.S. at 203-06; 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

255. See 18 U.S.C. § 922(g) (providing that to convict an individual of being a felon in possession of a firearm all the government need do is show that an individual: (1) is a felon (2) in actual or constructive possession of a firearm or ammunition (3) affecting interstate commerce; the offense is essentially low hanging fruit because the elements are normally self-proving and little room for defense exists); see also *Federal Offender Demographics Change with Time*, THE THIRD BRANCH (Feb. 2009), http://www.uscourts.gov/News/TheThirdBranch/09-02-01/Federal_Offender_Demographics_Change_with_Time.aspx (describing offender demographics and the explosion in prison populations and firearm prosecutions).

256. *James v. United States*, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting); see also *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

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What hardship have I not long since endured at sea, in battle!
Let the trial come."²⁵⁷

257. HOMER, *THE ODYSSEY*, Book 5, lines 229-33 (Robert Fitzgerald trans., Anchor Books 1963) (1961).