CATEGORICALLY WRONG: JUDICIAL INTERPRETATION OF THE ARMED CAREER CRIMINAL ACT HAS LEFT THE ACT CONFUSING AND DIFFICULT TO APPLY, BUT CONGRESS CAN FIX IT

*G. Kirk Smith**

I. INTRODUCTION

The Armed Career Criminal Act (ACCA) is a legislative enactment that establishes a mandatory minimum sentence of fifteen years of imprisonment if an offender is convicted of illegally possessing a firearm under 18 U.S.C. § 924(g) and has three previous convictions for "a violent felony or a serious drug offense, or both . . . ."[1] This statute, while seemingly simple on its face, has proven to be a source of confusion regarding what is, or is not, a "violent felony."[2] A particular crime may be a violent felony in one state or circuit, while another state or circuit may find that it is not.[3]

This Note attempts to analyze the problems that exist with the ACCA and prevent its successful application. It begins by first examining the legislative history of the ACCA, and the Supreme Court jurisprudence interpreting the Act in Section II. The ACCA was enacted by Congress in the mid-1980s[4] in an effort to curb recidivism rates of violent offenders. The Supreme Court first interpreted the ACCA in 1990, mandating the application of the categorical approach to ACCA cases.[5]

Although the categorical approach has evolved over time through various Supreme Court decisions, the basic premise remains. In using the categorical approach to apply the ACCA, a sentencing judge is to compare the elements of the prior conviction to those of the generic version of the offense.[6] If the elements of the prior conviction meet, but are not broader than the elements

---

* J.D. candidate, 2019. I would like to thank Professors Justin Walker, Les Abramson, and Sam Marcosson for their insights and advice, as well as Jason Parman for inspiring this Note. Most of all, I would like to thank my parents, Steve and Sharon Smith, for their unending love and support.

[1] 18 U.S.C. § 924(e)(1) (LEXIS through Pub. L. No. 115-193).

[2] *Id.*

[3] *See* Chambers v. United States, 555 U.S. 122, 133 n.2 (2009) (Alito, J., concurring).

[4] Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185, 2185 (1984) (current version at 18 U.S.C. § 924 (2006)).

[5] *See* Taylor v. United States, 495 U.S. 575, 602 (1990).

[6] *See id.*

of the generic version, then the prior conviction qualifies as a predicate offense.[7]

Section III focuses on analyzing some of the problems with the ACCA or, more specifically, the categorical approach. One such problem is that convictions that, on the surface, seem to be predicate offenses sometimes slip through the cracks and do not count due to the categorical approach. One example is a recent Sixth Circuit case in which a prior conviction for burglary in Tennessee did not count as a predicate offense simply because Tennessee's burglary statute applies to more locations than the generic version of burglary.[8]

Another problem examined in Section III is the effect of the Supreme Court's ruling in *Johnson v. United States*.[9] In *Johnson*, the Court held that the ACCA's residual clause was unconstitutionally vague.[10] Without the residual clause, the applicability of the ACCA is limited to serious drug offenses, the enumerated violent felonies included in the statute, and felonies that have "as an element the use, attempted use, or threatened use of physical force against the person of another . . . ."[11] This ruling prevents the ACCA from applying to many violent crimes, thus reducing its deterrent effect.

Finally, Section IV features two potential solutions to counteract the problems posed by the current ACCA and the categorical approach. Previous works have examined the fact-based approach where, rather than comparing elements, a sentencing judge looks to the defendant's conduct. However, this approach presents several concerns. The counterpart statute approach proposed by this Note, however, does not share them. It calls for Congress to work in tandem with state legislatures to address the recidivism problem that the ACCA was enacted to counter.

II. HISTORY AND BACKGROUND OF THE ARMED CAREER CRIMINAL ACT

A. Legislative History of the Armed Career Criminal Act

Recidivism, or the re-engagement of criminal behavior by prior offenders, is a consistent problem that the American justice system seeks to address. The Bureau of Justice Statistics reported that, in 1983, eleven states

---

[7] *See id.*; United States v. Stitt, 860 F.3d 854, 858 (6th Cir. 2017) (explaining that Tennessee's burglary statute is not a predicate offense because the location element is broader than the location element in the generic version).

[8] *See Stitt*, 860 F.3d at 858.

[9] Johnson v. United States, 135 S. Ct. 2551 (2015).

[10] *See id.* at 2557.

[11] 18 U.S.C. § 924(e)(2)(B) (LEXIS through Pub. L. 115-173).

released a total of 108,580 prisoners.[12] Approximately 62.5% of those prisoners found themselves rearrested within three years of their release for either a felony or a serious misdemeanor.[13] Further, of the prisoners released in 1983, approximately 22.7% "were rearrested for a violent offense within three years of their release."[14]

1983 is not an anomaly. Of 272,111 prisoners released from fifteen states in 1994, 67.5% were rearrested within three years of release.[15] The rearrested prisoners accounted for 744,480 new crimes, over 100,000 of which were violent crimes.[16]

Federal prisoners represent similar numbers. The United States Sentencing Commission found that 49.3% of federal prisoners released back into society in 2005 were rearrested within eight years.[17] The Sentencing Commission found that "the type of crime the offender committed does have some correlation with the risk of future crime."[18] The data collected by the Sentencing Commission indicated that federal prisoners who had committed an offense involving firearms "were most likely to be rearrested."[19]

Congress attempted to address the issue of recidivism for offenders with a propensity to engage in violent crimes, particularly those involving firearms, with the ACCA. The ACCA first became law as part of the Comprehensive Crime Control Act of 1984, passed by Congress and signed into law by President Ronald Reagan.[20] The original version of the ACCA mandated that "any person who receives, possesses, or transports in commerce or affecting commerce any firearm and who has three previous convictions . . . for robbery or burglary, or both, such person shall not be fined more than $25,000 and imprisoned not less than 15 years . . . ."[21]

The ACCA has, however, evolved over time. Just two years after it became law, the Subcommittee on Criminal Law of the Senate Committee

---

[12] Allen J. Beck & Bernard E. Shipley, *Recidivism of Prisoners Released in 1983*, U.S. DEP'T OF JUST. 1 (Apr. 1989), https://www.bjs.gov/content/pub/pdf/rpr83.pdf.

[13] *Id.*

[14] *Id.*

[15] Patrick A. Langan & David J. Levin, *Recidivism of Prisoners Released in 1994*, U.S. DEP'T OF JUST. 1 (June 2002), https://www.bjs.gov/content/pub/pdf/rpr94.pdf.

[16] *Id.* at 4.

[17] U.S. SENTENCING COMM'N., RECIDIVISM AMONG FEDERAL OFFENDERS: A COMPREHENSIVE OVERVIEW 15 (Mar. 2016), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/recidivism_overview.pdf.

[18] *Id.* at 20.

[19] *Id.*

[20] Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185, 2185 (1984) (current version at 18 U.S.C. § 924 (2006)).

[21] *Id.*

on the Judiciary held hearings on proposed amendments to the Act.[22] The proposed amendments were designed to strike from the text of the Act the phrase "for robbery or burglary, or both" and replace it with "for a crime of violence or a serious drug offense, or both."[23] Representative Ron Wyden, of Oregon, speaking before the Subcommittee, said "it is just a matter of simple logic to include crimes of violence as potential predicate offenses. It does not make any sense to say that a referral under the act is possible for a three-time bank robber, but not a habitual offender with prior convictions for rape and murder."[24] Representative Wyden also praised the addition of serious drug offenses as predicate offenses, stating, "we have seen in our investigation . . . that drugs and violent crime go hand-in-hand."[25]

The ACCA, as it stands today, has undergone further revisions, but still remains similar to the original version passed in 1984. For example, three previous convictions for predicate offenses are still required to trigger the Act.[26] The mandatory minimum sentence imposed by a violation is still fifteen years.[27] Serious drug offenses are still predicate offenses.[28] However, changes are apparent in the definition of "violent felony" as it applies to the ACCA.

The term "violent felony" encompasses many of the predicate offenses. They must be a crime that carries with it a prison sentence of more than one year.[29] If such a crime "has as an element the use, attempted use, or threatened use of physical force against the person of another,"[30] it is considered a violent felony. Further, burglary, arson, extortion, and crimes involving the use of explosives are also considered violent felonies.[31] The last clause of 18 U.S.C. § 924(e)(2)(B)(ii), which made any crime punishable by imprisonment for more than one year that "otherwise involves conduct that presents a serious potential risk of physical injury to another"[32] a violent felony, is known as the residual clause.

---

[22] *The Armed Career Criminal Act Amendments: Hearing on S. 2312 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 99th Cong. I–58 (1986).

[23] *Id.* at 2.

[24] *Id.* at 5.

[25] *Id.*

[26] 18 U.S.C. § 924(e)(1).

[27] *Id.*

[28] *Id.*

[29] 18 U.S.C. § 924(e)(2)(B) (LEXIS through Pub. L. 115-173).

[30] 18 U.S.C. § 924(e)(2)(B)(i) (LEXIS through Pub. L. 115-173).

[31] 18 U.S.C. § 924(e)(2)(B)(ii) (LEXIS through Pub. L. 115-173).

[32] *Id.*

B. The Supreme Court's Interpretation of the Armed Career Criminal Act Through the Categorical Approach

1. Establishment of the Categorical Approach In *Taylor*

The Supreme Court established the categorical approach for applying the ACCA in *Taylor v. United States*[33] in 1990. In *Taylor*, the defendant was convicted of being a felon in possession of a firearm.[34] Having prior convictions for robbery, assault, and burglary, Taylor received a mandatory minimum sentence of fifteen years in prison under the ACCA.[35] On appeal, Taylor argued, "his burglary convictions should not count for enhancement because they did not involve 'conduct that presents a serious potential risk of physical injury to another.'"[36] Recognizing that the states defined burglary differently from one another, the Supreme Court granted certiorari.[37]

The Court first recognized that the original version of the ACCA, which included only robbery and burglary as predicate offenses, defined burglary within the statute itself as "'any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense.'"[38]

The definition of burglary found in the statute, however, was deleted when Congress amended the ACCA with the Career Criminals Amendment Act of 1986.[39] The Court looked to this legislative history and made three observations to determine its course of action. First, the Court noted that Congress, through the statute, targeted career offenders and specifically identified burglary as creating an increased likelihood of violence, compared to other property crimes, due to the risk of confrontation between the burglar and occupant of the target structure.[40]

Second, the Court found that "the enhancement provision always has embodied a categorical approach to the designation of predicate offenses."[41] The inclusion of definitions for robbery and burglary in the original version of the ACCA, according to the Court, indicated that "Congress intended that

---

[33] *See* Taylor v. United States, 495 U.S. 575, 602 (1990).

[34] *See id.* at 578.

[35] *See id.* at 578–79.

[36] *Id.* at 579 (quoting 18 U.S.C. § 934(e)(2)(B)(ii) (LEXIS Pub. L. 115-173)).

[37] *See id.* at 579–80.

[38] *Id.* at 581 (quoting Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 2185, 2185 (1984)(current version at 18 U.S.C. § 924 (2006))).

[39] *Id.* at 582.

[40] *Id.* at 587–88.

[41] *Id.* at 588.

the enhancement provision be triggered by crimes having certain specified elements, not by crimes that happen to be labeled 'robbery' or 'burglary' by the laws of the State of conviction."[42] Further, the Court found that "the 1986 amendments carried forward this categorical approach, extending the range of predicate offenses to all crimes having certain common characteristics—the use or threatened use of force, or the risk that force would be used—regardless of how they were labeled by state law."[43]

Third, the Court noted that, by including a definition for burglary in the 1984 statute, Congress "had in mind a 'generic' view of burglary. . . ."[44] According to Justice Blackmun, by including this definition, "Congress both prevented offenders from invoking the archaic technicalities of the common-law definition of burglary to evade the sentence-enhancement provision, and protected offenders from the unfairness of having enhancement depend upon the label employed by the State of conviction."[45] Keeping these observations in mind while noting that the definitions of burglary employed by the states could differ greatly from one another, the Court decided that "'burglary' in § 924(e) must have some uniform definition independent of the labels employed by the various States' criminal codes."[46]

The Court rejected the common law definition of burglary[47] and, instead, formulated its own. The Court decided that "Congress meant by 'burglary' the generic sense . . . used in the criminal codes of most States."[48] According to the Court, "the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime."[49] This decision established that all burglary convictions, if they are to serve as a predicate offense to trigger the ACCA enhancement, must meet the generic definition of burglary put forth by the Court.

The *Taylor* Court also decided that a sentencing judge may look only at the statutory definition of the offender's prior convictions, and may not consider the facts supporting those convictions, in determining if a prior conviction is a predicate offense.[50] In reaching this conclusion, the Court made three observations. First, the Court stated that the language of the

---

[42] *Id.* at 588–89.
[43] *Id.* at 589.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 592.
[47] *See id.* at 594.
[48] *Id.* at 598.
[49] *Id.*
[50] *See id.* at 600.

ACCA itself supports this standard.[51] The Court concluded that the statute requiring prior convictions for, rather than the prior commission of, violent felonies, along with the phrase "has as an element" in the statutory definition of violent felony, indicated that Congress intended for courts to look to the elements, rather than the factual underpinning, of prior convictions.[52]

Second, the Court determined that the legislative history of the ACCA supported the categorical approach.[53] The Court reasoned that "[i]f Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate factfinding process regarding the defendant's prior offenses, surely this would have been mentioned somewhere in the legislative history."[54]

Third, the Court found that a fact-based approach would present "practical difficulties and potential unfairness."[55] Questions such as how a sentencing court would determine if a defendant's prior conduct met the generic definition of the offense, whether the parties would be permitted to put on witnesses, whether the judge could examine the record of the prior proceedings, and concerns about the effect of plea bargains caused the Court to feel that a fact-based approach may be unfair to defendants.[56]

The decision in *Taylor* set the standard for interpretation of the ACCA. Ultimately, the *Taylor* Court concluded that sentencing courts must utilize the categorical approach, which "generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense."[57] The Court did recognize, however, that the "categorical approach may...permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where the jury was actually required to find all the elements of generic burglary."[58]

2. Refining the Categorical Approach

The Supreme Court has continued to expand on the decision it reached in *Taylor*. The Court attempted to clarify precisely what situations permit a sentencing judge to look at a limited set of documents to determine if a defendant's prior conviction is a predicate offense under the ACCA.

---

[51] *See id.*
[52] *Id.* at 600–01.
[53] *See id.* at 601.
[54] *Id.*
[55] *Id.*
[56] *See id.* at 601–02.
[57] *Id.* at 602.
[58] *Id.*

Taylor opened the door for sentencing judges to look at "charging paper[s] and jury instructions"[59] in specific cases that required a jury to "find all the elements of generic burglary in order to convict the defendant."[60] The Court expanded the class of documents that could be examined by a sentencing judge in *Shepard v. United States*[61] to include "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented."[62]

Simultaneously, the Court precluded sentencing courts from examining other documents, such as "police reports or complaint applications. . . ."[63] The Court held, however, that the permitted set of documents may be used "to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offence. . . ."[64] This eventually became known as the modified categorical approach.[65]

In *Descamps v. United States*,[66] the Supreme Court expanded on when the modified categorical approach should be applied.[67] The Court specified that if a statute "sets out one or more elements of the offense in the alternative—for example stating that burglary involves entry into a building *or* an automobile,"[68] then that statute is a divisible statute. If the statute at issue is a divisible statute, then "[t]he modified categorical approach permits sentencing courts to consult a limited class of documents . . . to determine which alternative formed the basis of the defendant's prior conviction."[69]

Indivisible statutes are the opposite of divisible statutes. An indivisible statute is "one not containing alternative elements . . . ."[70] The *Descamps* Court held that "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements."[71]

---

[59] *Id.*

[60] *Id.*

[61] Shepard v. United States, 544 U.S. 13 (2005).

[62] *Id.* at 16.

[63] *Id.*

[64] *Id.* at 26.

[65] Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 187 (2007) (citing Conteh v. Gonzalez, 461 F.3d 45, 54 (1st Cir. 2006)).

[66] Descamps v. United States, 570 U.S. 254 (2013).

[67] *See id.*

[68] *Id.* at 257.

[69] *Id.*

[70] *Id.* at 258.

[71] *Id.*

3. *Mathis* and Means

The Supreme Court once again revised the categorical approach in its decision in *Mathis v. United States*.[72] The *Mathis* Court addressed a different type of statute than the Court faced in its previous decisions: one that does not "list[] multiple elements disjunctively, but instead one that enumerates various factual means of committing a single element."[73] For example, the burglary statute in question applied to "'any building, structure [or] land, water, or air vehicle.'"[74] "[T]hose listed locations are not alternative elements, going toward the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying a single locational element . . . ."[75]

Whether a statute contains elements or means is a preliminary question a sentencing judge must answer before applying an enhancement under the ACCA. The Court outlined several ways a sentencing judge can carry out the inquiry. First, if a state court decision has already made the determination, "a sentencing judge need only follow what it says."[76] Second, the statute itself may provide the answer. "If statutory alternatives carry different punishments, then . . . they must be elements."[77] On the other hand, "if a statutory list is drafted to offer 'illustrative examples,' then it includes only a crime's means of commission."[78] Also, "a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means)."[79] If these sources do not provide the answer, and the sentencing judge is unable to determine whether a statute contains elements or means from the statute itself or a prior decision, "federal judges have another place to look: the record of a prior conviction itself."[80] However, "such a 'peek at the [record] documents' is for 'the sole and limited purpose of determining whether [the listed items are] element[s] of the offense.'"[81]

Ultimately, the Court stayed the course in *Mathis*. After determining whether a statute contains alternative elements or means, a sentencing judge must then apply the categorical approach. As before, only the elements are to be considered because "application of ACCA involves, and involves only,

---

[72] Mathis v. United States, 136 S. Ct. 2243 (2016).

[73] *Id.* at 2249.

[74] *Id.* at 2250 (quoting IOWA CODE § 702.12 (2013)).

[75] *Id.*

[76] *Id.* at 2256.

[77] *Id.*

[78] *Id.* (quoting United States v. Howard, 742 F.3d 1334, 1348 (11th Cir. 2014)).

[79] *Id.*

[80] *Id.*

[81] *Id.* at 2256–57 (quoting Rendon v. Holder, 782 F.3d 466, 473–74 (9th Cir. 2015) (Kozinsky, J., dissenting)).

comparing elements."[82] The defendant's means of committing the crime may not be considered. "[T]hey remain what they ever were—just the facts, which ACCA . . . does not care about."[83]

4. The Death of the Residual Clause

Perhaps the decision with the greatest impact on the ACCA concerns the residual clause. The residual clause is the last clause of 18 U.S.C. § 924(e)(2)(B)(ii), which states that any crime punishable by imprisonment for more than one year that "otherwise involves conduct that presents a serious potential risk of physical injury to another"[84] is a "violent felony."[85] In *Johnson v. United States*,[86] the Supreme Court found that "imposing an increased sentence under the residual clause . . . violates the Constitution's guarantee of due process"[87] because the residual clause is unconstitutionally vague. As the Court explained, it is a violation of due process if the government "tak[es] away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement."[88]

The Court found two reasons that the residual clause was unconstitutionally vague.[89] First, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime."[90] Because the residual clause considers a conviction that "otherwise involves conduct that presents a serious potential risk of physical injury to another,"[91] a predicate offense, an estimate of the risk posed by the conduct is necessary.

Second, the Court found that "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony."[92] This problem is compounded by the categorical approach itself. "It is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction."[93] The

---

[82] *Id.* at 2257.
[83] *Id.*
[84] 18 U.S.C. § 924(e)(2)(B)(ii) (LEXIS through Pub. L. 115-173).
[85] 18 U.S.C. § 924(e)(2)(B) (LEXIS through Pub. L. 115-173).
[86] Johnson v. United States, 135 S. Ct. 2551 (2015).
[87] *Id.* at 2563 (2015).
[88] *Id.* at 2556 (quoting Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).
[89] *See id.* at 2557.
[90] *Id.*
[91] 18 U.S.C. § 924(e)(2)(B)(ii) (LEXIS through Pub. L. 115-173).
[92] *Johnson*, 135 S. Ct. at 2558.
[93] *Id.*

categorical approach, of course, does not deal in facts.[94] Further, the Court found the language of the statute requires the risk to be estimated "in light of the four enumerated crimes . . . ."[95] However, "[t]hese offenses are 'far from clear in respect to the degree of risk each poses.'"[96] In light of these factors, the Court held that the residual clause was unconstitutionally vague.[97]

III. ANALYSIS OF THE APPLICATION OF THE ARMED CAREER CRIMINAL ACT

The Supreme Court's interpretation of the ACCA has led to significant issues with its application. First, offenders who could be subject to an enhanced sentence do not receive one due to a conviction under a statute that does not match the generic version of the offense, regardless of the risks posed or the harm caused by their crime. In fact, after the *Johnson* decision, many crimes that are violent or involve a significant risk of harm cannot trigger the ACCA. As a result, the effects of the ACCA that are likely to reduce recidivism, deterring violent crime and keeping violent offenders off the street, have been undercut.

Second, lower courts have struggled to apply the ACCA. A predicate offense in one state or circuit may not be a predicate offense in another. Once again, this undercuts the effects of the statute. It is also unfair to defendants. A defendant in one state may be subject to an enhancement, while a defendant in another state will not, even though he committed the same crimes as the first. These concerns must be addressed if the ACCA is to be effective.

A. Serious Crimes, Even the Enumerated Offenses, Slip Through the Cracks

A significant flaw of the categorical approach is that, all too frequently, a previous conviction that would undoubtedly amount to a crime of violence does not trigger the ACCA enhancement. This occurs because "application of ACCA involves, and involves only, comparing elements."[98] If the elements of the statute of conviction do not meet the elements of the generic offense, the categorical approach precludes the ACCA enhancement.[99]

---

[94] Mathis v. United States, 136 S. Ct. 2243, 2257 (2016).

[95] *Johnson*, 135 S. Ct. at 2558.

[96] *Id.* (quoting Begay v. United States, 553 U.S. 137, 143 (2008)).

[97] *Id.* at 2557.

[98] *Mathis*, 136 S. Ct. at 2257.

[99] *See supra* Section II.B.

A recent Sixth Circuit decision provides an example. In *United States v. Stitt*,[100] the Sixth Circuit, sitting en banc, reversed the defendant's sentence, which had been enhanced under the ACCA and previously affirmed in a panel decision.[101] The trial court found that Stitt had nine prior convictions that qualified as violent felonies under the ACCA and sentenced him accordingly.[102] Three of those convictions could no longer be considered violent felonies because they fell under the ACCA's residual clause, which was invalidated for vagueness in *Johnson*.[103] The remaining six convictions were all for aggravated burglary.[104] A Sixth Circuit panel affirmed Stitt's sentence based upon *United States v. Nance*,[105] "which held that Tennessee aggravated burglary fit the Supreme Court's definition of 'generic burglary . . . .'"[106]

The en banc hearing, however, overruled *Nance*[107] and reversed Stitt's enhanced sentence.[108] The Tennessee aggravated burglary statute that Stitt was previously convicted under "defines aggravated burglary as the 'burglary of a habitation . . . .'"[109] Further, Tennessee's definition of habitation "includes 'mobile homes, trailers, and tents,' as well as any 'self-propelled vehicle that is designed or adapted for the overnight accommodation of persons and is actually occupied at the time of initial entry by the defendant.'"[110]

Conversely, the Supreme Court defined generic burglary as "'an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.'"[111] In establishing the generic definition of burglary, the Supreme Court "has confirmed repeatedly that vehicles and moveable enclosures (e.g. railroad cars, tents, and booths) fall outside the definitional sweep of 'building or other structure.'"[112]

The Sixth Circuit held that "Tennessee's aggravated-burglary statute includes exactly the kind of vehicles and moveable enclosures that the Court

---

[100] United States v. Stitt, 860 F.3d 854 (6th Cir. 2017).

[101] *Id.* at 856.

[102] *Id.*

[103] *Id.*

[104] *Id.*

[105] United States v. Nance, 481 F.3d 882 (6th Cir. 2007), *overruled by* United States v. Stitt, 860 F.3d 854 (6th Cir. 2017).

[106] *Stitt*, 860 F.3d at 856 (citing United States v. Stitt, 637 F. App'x 927, 921–32 (6th Cir. 2016)).

[107] *Id.* at 861.

[108] *Id.* at 862–63.

[109] *Id.* at 857 (quoting TENN. CODE ANN. § 39-14-403 (2018)).

[110] *Id.* (quoting TENN. CODE ANN. § 39-14-401(1)(A) (2018)).

[111] *Id.* (quoting Taylor v. United States, 495 U.S. 575, 598 (1990)).

[112] *Id.* (citing *Taylor*, 495 U.S. at 599).

excludes from generic burglary."[113] Further, the court held that the categorical approach precluded the ACCA from applying to Tennessee's aggravated burglary statute even though the statute itself applies only to those vehicles or moveable enclosures that are habitable.[114] The court's reasoning was that the Tennessee statute was broader than the generic definition of burglary because "*Taylor* emphasizes a place's form and nature—not its intended use or purpose—when determining whether a burglary statute's locational element is a 'building or other structure.'"[115] Thus, because the Tennessee statute included moveable enclosures, it did not meet the generic definition of burglary and could not, under the categorical approach, trigger an ACCA sentencing enhancement.[116]

As *Stitt* demonstrates, the categorical approach itself can, and frequently does, prevent even an offense that is enumerated in the text of the ACCA itself from qualifying as a predicate offense and triggering the sentencing enhancement.[117] This case, and many others like it, identifies a severe flaw in the categorical approach for two reasons. First, the ACCA was initially enacted by Congress to address a problem with recidivism. The defendant in *Stitt* had nine previous convictions that were potential predicate offenses.[118] Surely a defendant with six prior convictions for an offense that Congress specifically named in the text of the statute is exactly the kind of repeat offender that Congress sought to deter. Yet Stitt's sentence was reversed.

Secondly, Congress specifically chose the term "violent felony"[119] to describe predicate offenses, and burglary is an enumerated offense, thus implying that Congress considers burglary an inherently violent crime. Burglary is no less violent if it occurs in a tent, car, mobile home, or boat than if it occurs in a house sitting on a foundation. "The main risk of burglary arises not from the simple physical act of wrongfully entering onto another's property, but rather from the possibility of a face-to-face confrontation between the burglar and a third party . . . ."[120] It is not radically unusual these

---

[113] *Id.* at 858.

[114] *Id.*

[115] *Id.* (citing *Taylor*, 495 U.S. at 598).

[116] The Supreme Court has since overturned the Sixth Circuit's decision in *Stitt*, holding that "coverage of vehicles designed or adapted for overnight use" does not "take[] the statute outside the generic burglary definition." United States v. Stitt, 202 L. Ed. 2d 364, 373 (2018).

[117] *Stitt*, 860 F.3d at 859–61.

[118] *Id.* at 856.

[119] 18 U.S.C. § 924(e)(2)(B) (LEXIS through Pub. L. 115-173).

[120] James v. United States, 550 U.S. 192, 203 (2007).

days to find someone living, full time, out of their boat[121] or R.V.[122] The same risks are present if a burglar decides to target such a person's boat as are present if the burglar targets a house.

Tennessee's burglary statute is not alone. Kentucky's burglary statute, for example, defines "building" as "in addition to its ordinary meaning, any structure, vehicle, watercraft, or aircraft . . . ."[123] Burglary is committed in Georgia when the burglar unlawfully enters "the dwelling house of another or any building, vehicle, railroad car, watercraft, aircraft, or other such structure . . . ."[124] In Florida, a burglary can occur in a conveyance,[125] which is defined by statute to include "any motor vehicle, ship, vessel, railroad vehicle or car, trailer, aircraft, or sleeping car . . . ."[126] In any of these states, although no less dangerous than a burglary committed elsewhere, a conviction for burglary would not be an ACCA predicate offense under the categorical approach.

Cases like *Stitt* present a serious flaw caused by the categorical approach. Kentucky and Tennessee both have scenic lakes, while Georgia and Florida are on the coast. It makes perfect sense for their state legislatures to include ships and boats in criminal statutes like their burglary statutes. But, as states tailor their criminal statutes to better protect their own unique communities, they may inadvertently sacrifice the protection the ACCA affords. This should not be the case.

B. Following Johnson, Many Serious Crimes That Are Not Enumerated Offenses Cannot Even Be Considered as Predicate Offenses

The Supreme Court held, in *Johnson*, that "imposing an increased sentence under the residual clause of the ACCA violates the Constitution's

---

[121] *See* Antonia Farzan, *One Couple Breaks Down the Costs of a Year Living On a Boat*, BUSINESS INSIDER (June 3, 2015, 1:13 PM), http://www.businessinsider.com/couple-took-out-a-mortgage-on-a-boat-instead-of-buying-a-house-2015-5; Tamara Schweitzer, *The Way I Work: Blake Mycoskie of Toms Shoes*, INC. (June 1, 2010), https://www.inc.com/magazine/20100601/the-way-i-work-blake-mycoskie-of-toms-shoes.html; Susan Smillie, *Ten Years Living On a Boat: 'It's a fun life – I'm not a Watery hobo,'* GUARDIAN (July 29, 2015, 13:59 EDT), https://www.theguardian.com/lifeandstyle/2015/jul/29/ten-years-living-on-a-boat-its-a-fun-life-im-not-a-watery-hobo.

[122] *See Living the RV Life Full-Time*, FOUNTAIN HILLS TIMES (May 15, 2013), http://www.fhtimes.com/features/featured_stories/living-the-rv-life-full-time/article_8dd911fa-bcd7-11e2-a4c5-0019bb30f31a.html; Brandon, *Three Years Living in an RV Full-Time and No End in Sight*, DRIVE DIVE DEVOUR (Jan. 24, 2017), http://www.drivedivedevour.com/three-years-living-in-an-rv-full-time/.

[123] KY. REV. STAT. ANN. § 511.010(1) (LexisNexis 2018).

[124] GA. CODE ANN. § 16-7-1 (2017).

[125] FLA. STAT. ANN. § 810.02 (LexisNexis 2018).

[126] FLA. STAT. ANN. § 810.011(3) (LexisNexis 2018).

guarantee of due process"[127] because the ACCA's residual clause, the last clause found in 18 U.S.C. § 924(e)(2)(B)(ii), is unconstitutionally vague. A consequence of this decision is a significant reduction in the number of offenses, even violent offenses comparable to those enumerated in the ACCA itself, which can qualify as predicate offenses triggering an enhanced sentence.

Attempted burglary is an example of such an offense. In a 2007 case, *James v. United States*,[128] the Supreme Court upheld an enhanced sentence under the ACCA when one of the defendant's prior convictions triggering the enhancement was for attempted burglary in Florida.[129] James argued that attempt offenses could not be considered predicate offenses under clause (ii) of 18 U.S.C. § 924(e)(2)(B).[130] The Court found otherwise. "In 1986, Congress amended [the] ACCA for the purpose of 'expanding the range of predicate offenses.'"[131] "Congress' inclusion of a broad residual provision in clause (ii) indicates that it did not intend the preceding enumerated offenses to be an exhaustive list of the types of crimes that might present a serious risk of injury to others and therefore merit status as a § 924(e) predicate offense."[132]

The Court found that an attempted burglary does present the type of risk that Congress attempted to target with the ACCA. According to the Court, "the risk posed by an attempted burglary that can serve as the basis for an ACCA enhancement may be even greater than that posed by a typical completed burglary."[133] The main risk associated with burglary is the potential for a confrontation between the burglar and another person.[134] "Many completed burglaries do not involve . . . confrontations. But attempted burglaries often do; indeed, it is often . . . outside intervention that prevents the attempt from ripening into completion."[135]

Recent examples indicate that attempted burglaries do present a serious risk of injury. Last year, in Atlanta, a police officer was injured by a gunshot while responding to an attempted burglary.[136] In July, a Louisiana deputy

---

[127] Johnson v. United States, 135 S. Ct. 2551, 2563 (2015).

[128] James v. United States, 550 U.S. 192 (2007).

[129] *Id.* at 195–96.

[130] *Id.* at 198–201.

[131] *Id.* at 201 (quoting Taylor v. United States, 495 U.S. 575, 584 (1990)).

[132] *Id.* at 200.

[133] *Id.* at 204.

[134] *Id.* at 203.

[135] *Id.* at 204.

[136] *Police Officer Shot During Attempted Burglary at S. Buckhead Apartments*, BUCKHEADVIEW (June 6, 2016), http://buckheadview.com/2016/06/06/police-officer-shot-attempted-burglary-s-buckhead-apartments/.

was injured, and a suspect killed, while the deputy was responding to an attempted burglary call.[137] A man in Las Vegas attempted a burglary on his ex-girlfriend's home.[138] He found her inside and strangled her so severely that, when police officers arrived on the scene, she was not breathing on her own and had to be placed on a ventilator.[139]

In fact, the deterrent effect from the possibility of a future enhanced sentence stemming from an attempted burglary conviction may serve to protect even the would-be burglars themselves from injury. After all, the risk of injury due to a confrontation during an attempted burglary is high for the suspects as well. For example, two suspects were shot in St. Louis County, Missouri, by the homeowner, when they attempted a burglary.[140] One suspect died while the other, a fourteen-year-old juvenile, was injured.[141]

With the residual clause of the ACCA no longer in effect after the 2015 *Johnson* decision, attempted burglary will no longer be recognized as a predicate offense under the ACCA. This remains true even though, by enacting the ACCA and its amendments, Congress sought to deter or prevent "the types of crimes that might present a serious risk of injury to others and therefore merit status as a § 924(e) predicate offense."[142] As demonstrated above, attempted burglary is undoubtedly that type of crime.

Another offense that will no longer be considered an ACCA predicate offense after the *Johnson* decision is the production or distribution of child pornography. In *United States v. Champion*,[143] the defendant was sentenced as a career offender under § 4B1.1 of the United States Sentencing Guidelines.[144] This comparison is worthwhile because § 4B1.1, like the ACCA, is applied using the categorical approach, and contains language that is substantially similar to that found in the ACCA.[145]

---

[137] Samantha Morgan, *Deputy Injured, Man Killed During Early Morning Attempted Burglary Investigation*, WAFB (July 6, 2017, 6:43 PM), http://www.wafb.com/story/35824331/deputy-injured-mankilled-during-early-morning-attempted-burglary-investigation.

[138] *Man Faces Charges of Attempted Murder, Strangulation, Burglary*, LASVEGASNOW.COM, http://www.lasvegasnow.com/news/man-faces-charges-of-attempted-murder-strangulation-burglary/732601136 (last visited Oct. 14, 2017).

[139] *Id.*

[140] *Man Killed, Boy Injured By Homeowner In Burglary Attempt, St. Louis County Police Say*, ST. LOUIS POST-DISPATCH (Sept. 23, 2017), http://www.stltoday.com/news/local/crime-and-courts/man-killed-boy-injured-by-homeowner-in-burglary-attempt-st/article_065cbbc9-f807-5c97-b502-8ab1d5cbd61c.html.

[141] *Id.*

[142] James v. United States, 550 U.S. 192, 200 (2007).

[143] United States v. Champion, 248 F.3d 502 (6th Cir. 2001).

[144] *See id.* at 504.

[145] The Supreme Court declined to extend the *Johnson* holding to the Sentencing Guidelines, holding that "the advisory Guidelines are not subject to vagueness challenges under the Due Process Clause."

Under the Sentencing Guidelines, "a defendant is a career offender if (1) the defendant was at least 18 years old at the time of the instant offense, (2) the instant offense is a crime of violence, and (3) the defendant has at least two prior felony convictions for either a crime of violence or a controlled substance offence."[146] A crime of violence, for the purposes of the Sentencing Guidelines, is defined as "among other things, any offense under federal or state law, punishable by imprisonment of over one year, that (1) has an element of the use, attempted use, or threatened use of physical force against the person of another, or (2) otherwise involves conduct that presents a serious potential risk of physical injury to another."[147] The defendant in *Champion* challenged whether a conviction for violating 18 U.S.C. § 2251(a) is a predicate offense for career offender status.

18 U.S.C. § 2251(a), a federal child exploitation statute, states "[a]ny person who employs, uses, persuades, induces, entices, or coerces any minor to engage in, or who has a minor assist any other person to engage in, or who transports any minor . . . with the intent that such minor engage in, any sexually explicit conduct for the purpose of producing . . . or . . . transmitting a . . . visual depiction of such conduct, shall be punished . . . ."[148] Champion, upon arrest, admitted to transporting a thirteen-year-old girl from Arizona to Tennessee and engaging in sexual intercourse with her.[149] Police located twenty-seven photographs of Champion and his girlfriend "engaging in various acts of sexual intercourse" with the child.[150]

The Sixth Circuit "affirm[ed] the district court's conclusion that a conviction under § 2251(a) is a crime of violence because it presents serious potential risk of physical injury."[151] In reaching its conclusion, the court looked to Congress' intent in passing the statute. The court found that "Congress, in enacting § 2251(a) emphasized that 'the use of children in the production of sexually explicit materials . . . is a form of sexual abuse which can result in physical or psychological harm, or both, to the children involved . . . .'"[152]

Other sources agree with Congress's reasoning. The Department of Justice has found that "victims of child pornography suffer not just from the

---

Beckles v. United States, 137 S. Ct. 886, 890 (2017).

[146] *Champion*, 248 F.3d at 504 (citing United States Sentencing Commission, *Guidelines Manual*, § 4B1.1 (Nov. 1998)).

[147] *Id.* (citing United States Sentencing Commission, *Guidelines Manual*, § 4B1.2 (Nov. 1998)).

[148] 18 U.S.C. § 2251(a) (LEXIS through Pub. L. No. 115-173).

[149] *Champion*, 248 F.3d at 503.

[150] *Id.*

[151] *Id.* at 506.

[152] *Id.* (quoting Pub. L. 104-208, Div. A, Title I, § 101(a)).

sexual abuse inflicted on them to produce child pornography, but also from knowing that their images can be traded and viewed by others worldwide."[153] The sexual abuse a child victim experiences through the production of child pornography "can alter his or her life forever."[154] It often causes "[m]any victims [of] child pornography to suffer from feelings of helplessness, fear, humiliation, and lack of control given that their images are available for others to view in perpetuity."[155] There are other serious effects that victims of child pornography may be forced to endure. In the short term, they can include "[p]hysical injury and pain, including sexually transmitted diseases";[156] "feelings of shame, unworthiness, anger, and confusion";[157] "[s]omatic responses (headaches, stomachaches, etc.)";[158] "[w]ithdrawl and isolation"; and more.[159] Long term effects can include: "[d]epression, anxiety, PTSD, and other mental illnesses";[160] "[f]eelings of worthlessness [and] low self-esteem";[161] "[d]istorted and unhealthy sexuality";[162] "[d]ifficulty establishing healthy relationships";[163] "[r]isky behaviors";[164] and more.[165]

Child exploitation, including the production of child pornography, is a serious crime that is, unfortunately, increasing in frequency.[166] "The National Center for Missing and Exploited Children reports, 'Best data suggests at least 100,000 American children a year are victimized through child sexual exploitation,' (more children are victimized than the number of people that die from car accidents and illegal drugs combined in America)."[167] Congress clearly sought to protect children through enacting statutes such as 18 U.S.C. § 2251(a). Given the growing rate of child

---

[153] *Child Pornography*, U.S. DEP'T. OF JUST., https://www.justice.gov/criminal-ceos/child-pornography (last visited Oct 14, 2017).

[154] *Id.*

[155] *Id.*

[156] *The Impact of Child Pornography on Victims*, FOOTHILLS CHILD ADVOCACY CENTER, http://www.foothillscac.org/uploads/9/9/2/1/9921414/the_impact_of_child_pornography_on_victims.pdf (last visited Oct. 14, 2017).

[157] *Id.*

[158] *Id.*

[159] *Id.*

[160] *Real Stats*, DEMAND PROJECT, http://www.thedemandproject.org/Statistics.aspx (last visited Oct. 14, 2017).

[161] *Id.*

[162] *Id.*

[163] *Id.*

[164] *Id.*

[165] *Id.*

[166] *Id.*

[167] *Id.*

exploitation offenses, as well as the serious impacts they can have on their victims, inclusion as an ACCA predicate may at least help remove some of the more dangerous child predators from the equation. However, after the *Johnson* decision, many child exploitation offenses, like a violation of 18 U.S.C. § 2251(a), will not trigger an ACCA enhancement.

Johnson is a serious blow to the ACCA that must be corrected. Without the residual clause, or a constitutionally sound replacement, many crimes, even if they are violent or otherwise present a risk of harm to another, cannot be predicate offenses. As a result, offenders who, for example, have committed a crime, like attempted burglary or child exploitation, that is no longer a predicate offense may feel emboldened to continue their criminal behavior.

C. Courts Have Struggled to Apply the ACCA

Different courts, at both the district and circuit levels, have reached differing conclusions on whether or not particular offenses can lead to a sentencing enhancement under the ACCA. The Sixth Circuit provides an example in *United States v. Collier*,[168] where the court determined that prison escape, at least under Michigan law, is not a predicate offense.[169] The court noted that the Seventh, Ninth, Tenth, and D.C. Circuits have held that a walk away escape, where a prisoner leaves from, for example a halfway house or other authorized departure, and fails to return, is not a crime of violence.[170] The First, Third, and Eighth Circuits, on the other hand, have found walk away escapes, like any other prison escape, are violent felonies[171] due to the danger police officers "might encounter in attempting to re-apprehend the escapee . . . ."[172]

The circuits have split on other issues as well. Justice Alito, a persistent opponent of the categorical approach, provides several examples in his concurrence in *Chambers v. United States*.[173] For example, the Sixth Circuit found that statutory rape was not, categorically, a violent felony,[174] while the Fifth Circuit found inducement of a minor to commit sodomy was a violent

---

[168] United States v. Collier, 493 F.3d 731 (6th Cir. 2007).
[169] *Id.* at 738.
[170] *Id.* at 735 n.4.
[171] *Id.* at 735 n.5.
[172] *Id.* at 735.
[173] Chambers v. United States, 555 U.S. 122, 133 n.2 (2009) (Alito, J., concurring).
[174] *Id.* (citing United States v. Sawyers, 409 F.3d 732 (6th Cir. 2005)).

felony,[175] and the Ninth Circuit found that all rape crimes are violent felonies.[176]

Sometimes, the circuits even have inconsistent holdings internally. Prior to the *Stitt* en banc hearing, the Sixth Circuit held that "a conviction under Tennessee's aggravated burglary statute . . . categorically qualifies as an enumerated 'violent felony' under the Armed Career Criminal Act . . . ."[177] The Sixth Circuit later determined that a violation of "Ohio's similarly worded burglary statute" was not a violent felony under the ACCA.[178] In Stitt's initial appeal, a Sixth Circuit panel stayed true to *Nance* and held that Stitt's Tennessee aggravated burglary violation was a predicate offense.[179] The en banc hearing, however, reversed this decision, as discussed above.[180]

These cases identify a significant flaw in the categorical approach. Two defendants, both with prior convictions for the same offense in different states, who engaged in virtually identical conduct, may ultimately receive wildly different sentences. One may be subject to a mandatory minimum fifteen year sentence under the ACCA while the other will not, due only to the location where the prior offenses occurred. While Justice Kagan believes that "an elements-focus avoids unfairness to defendants,"[181] the examples above indicate the opposite may be true.

D. Language Similar to the ACCA Appears in Other Statutes or Federal Materials

The ACCA is not an anomaly. Language similar to that found in the ACCA exists throughout other federal statutes or sentencing materials. Aside from section 4B1.1 of the Federal Sentencing Guidelines,[182] at issue in *Champion*,[183] similar language appears in at least two other places. The first is the Bail Reform Act of 1984.[184] The Act, among other things, instructs judicial officers on what information to consider when deciding whether a

---

[175] *Id.* (citing United States v. Williams, 120 F.3d 575 (5th Cir. 1997)).

[176] *Id.* (citing United States v. Thomas, 231 F. App'x 765 (9th Cir. 2007)).

[177] United States v. Stitt, 860 F.3d 854, 856 (6th Cir. 2017) (citing United States v. Nance, 481 F.3d 882, 887 (6th Cir. 2007)).

[178] *Id.* (citing United States v. Coleman, 655 F.3d 480, 482 (6th Cir. 2011), *abrogated on other grounds* by Johnson v. United States, 135 S. Ct. 2551, 2563 (2015)).

[179] *Id.* (citing United States v. Stitt, 637 F. App'x 927, 931–32 (6th Cir. 2016)).

[180] *Id.* at 857.

[181] Mathis v. United States, 136 S. Ct. 2243, 2253 (2016).

[182] U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (U.S. SENTENCING COMM'N 2016).

[183] *See* United States v. Champion, 248 F.3d 502 (6th Cir. 2001).

[184] 18 U.S.C. § 3142 (LEXIS through Pub. L. No. 115-108).

defendant should be released.[185] One thing a judge may consider is "the nature and circumstances of the offense charged, including whether the offense is a crime of violence . . . ."[186] Crime of violence is defined, for this statute, as:

> [A]n offense that has as an element of the offense the use, attempted use, or threatened use against the person or property of another; any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in committing the offense . . . .[187]

Another statute that contains similar language is a general definition of crime of violence, found in the general provisions chapter of Title 18 of the U.S. Code.[188] This provision, nearly identical to the Bail Reform Act's definition, is located at 18 U.S.C. § 16.[189] The second subpart of both definitions is essentially equivalent to the ACCA's residual clause.[190]

Like the ACCA, the definition of a crime of violence is under attack. In the October 2017 term, the Supreme Court heard arguments challenging 18 U.S.C. § 16 as its definition is incorporated into the Immigration and Nationality Act.[191] This Act includes crimes of violence in its definition of aggravated felonies, the conviction of which subjects a noncitizen to deportation proceedings.[192] Citing *Johnson*, the Court held that the "crime of violence" residual clause was, like the ACCA's residual clause, unconstitutionally vague because it "possesses the exact same two features. And none of the minor linguistic disparities in the statutes makes any real difference. So just like ACCA's residual clause, § 16(b) 'produces more unpredictability and arbitrariness than the Due Process Clause tolerates.'"[193]

This case illustrates how the *Johnson* decision can have a far-reaching negative impact. With the fall of the residual clauses in both the ACCA and

---

[185] 18 U.S.C. § 3142(g) (LEXIS through Pub. L. No. 115-108).

[186] 18 U.S.C. § 3142(g)(1) (LEXIS through Pub. L. No. 115-108).

[187] 18 U.S.C. § 3156(a)(4) (LEXIS through Pub. L. No. 115-108).

[188] 18 U.S.C. § 16 (LEXIS through Pub. L. No. 115-108).

[189] *Id.*

[190] *Compare* 18 U.S.C. § 3156(a)(4)(B) (LEXIS through Pub. L. No. 115-108), *and* 18 U.S.C. § 16(b) (LEXIS through Pub. L. No. 115-108), *with* 18 U.S.C. § 924(e)(2)(B)(ii) (LEXIS through Pub. L. No. 115-173).

[191] Kevin Johnson, *Argument Preview: Criminal Removal – Is "Crime of Violence" Void For Vagueness?*, SCOTUSBLOG (Sept. 25, 2017, 1:45 PM), http://www.scotusblog.com/2017/09/argument-preview-criminal-removal-crime-violence-void-vagueness/.

[192] *Id.*

[193] Sessions v. Dimaya, 138 S. Ct. 1204, 1223 (2018) (quoting Johnson v. United States, 135 S. Ct. 2551, 2554 (2015)).

the crime of violence definition, Americans have lost laws that were designed to protect them. The few in society who commit violent crimes will be more likely to remain in society, or at least return sooner rather than later. The enactment of the ACCA itself shows that recidivism is a problem.[194] Without the deterrence, detention, or even deportation provided by laws like the ACCA and 18 U.S.C. § 16, violent offenders will have more opportunities to become violent once again.

IV. RESOLVING THE ISSUES WITH THE CATEGORICAL APPROACH

As discussed above, the Court's interpretation of the ACCA presents significant problems. Chief among them are the inapplicability of the ACCA when an offender was previously convicted of a state statute that is broader than the generic version of the offense, confusion in applying the ACCA, and the limitation on applicable predicate offenses following the *Johnson* decision.[195] One underlying factor ties all of these problems together: the categorical approach.

The *Taylor* Court, quoting a Senate report, noted that Congress originally included a definition for burglary in the ACCA to prevent offenders from avoiding an enhancement due simply to a technicality because of the way various states label their criminal offenses.[196] Unfortunately, the categorical approach itself has resulted in offenders escaping enhancement due to a technicality. The ACCA is no longer providing the results that Congress intended, but the fault does not lie entirely with the courts.

The Supreme Court's interpretation of the ACCA, for the most part, makes sense. The language of the ACCA does lend itself to a comparison of elements rather than facts.[197] Further, a judge presiding over a case which triggers the ACCA may not have access to facts found by a jury relating to the defendant's predicate convictions, leaving the fact of conviction itself, and the elements, as the only basis for comparison. In a way, the Court's options were limited from the start, and there is little indication that the Court will abandon the categorical approach, despite its flaws. Congress, however, has the power to fix it.

---

[194] *See supra* Section II.A.

[195] *See supra* Section III.

[196] Taylor v. United States, 495 U.S. 575, 582 (1990) (quoting S. REP. No. 98-190, p. 20 (1983)).

[197] *See id.* at 600–01.

A. The Fact-Based Approach

The first way that Congress can deal with the categorical approach's weaknesses is to rewrite the statute in a way that enables a fact-based approach.[198] In a fact-based approach, a sentencing judge must determine whether a defendant, based on his prior conduct, committed three or more predicate offenses. There are no limitations on what record materials the judge may use to reach this conclusion.

The use of a fact-based approach completely eliminates the need for a generic version of predicate offenses. The judge simply looks at the statute of conviction and determines whether or not the defendant's conduct meets the elements put forth in the statute. Further, this enables each state to address its own concerns in crafting its criminal statutes. For example, while Kentucky may find that burglary occurring on boats is a sufficient enough problem to address in its burglary statute,[199] another state may not. Under a fact-based approach, a burglary counts as a predicate offense based upon the statute of conviction, no matter how the state chooses to define it.

In order to direct the courts to use a fact-based approach, Congress must change the language of the ACCA. As Justice Kagan pointed out in *Mathis*, the current text of the ACCA favors the categorical approach.[200] The statute calls for "enhancing the sentence of a defendant who has 'three prior convictions'. . . rather than one who has thrice committed that crime."[201] Congress can change the statutory language to require that the defendant has previously committed a predicate offense to enable the courts to use a fact-based approach.

Additionally, the Court has found that the language of 18 U.S.C. § 924(e)(2)(B)(i), which includes in the definition of "violent felony" an offense that "has as an element the use, attempted use, or threatened use of physical force against the person of another,"[202] encourages courts to compare the elements of the offense of conviction rather than examine the facts behind that conviction.[203] As a result, Congress could simply rewrite this provision to state that a violent felony includes those that involve the use,

---

[198] Justice Alito has expressed support for a sentencing judge's ability to consider facts in an ACCA case, if not an outright fact-based approach. *See* Mathis v. United States, 136 S. Ct. 2243, 2269–70 (2016) (Alito, J., dissenting).

[199] KY. REV. STAT. ANN. § 511.010(1) (LexisNexis 2017).

[200] *Mathis*, 136 S. Ct. at 2252.

[201] *Id.*

[202] 18 U.S.C. § 924(e)(2)(B)(i) (LEXIS through Pub. L. No. 115-173).

[203] *See* Taylor v. United States, 495 U.S. 575, 600–01 (1990).

attempted use, or threatened use of physical force against the person of another in order to facilitate a fact-based approach to applying the ACCA.

However, the Supreme Court has expressed concern with a fact-based approach. The primary concern is that a fact-based approach will result in judicial fact finding that runs afoul of the Sixth Amendment.[204] "Th[e] Court has held that only a jury, and not a judge, may find facts that increase a maximum penalty, except for the simple fact of a prior conviction."[205] As a result, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed the offense."[206]

Other concerns exist as well. A defendant's previous conviction, especially in the case of a guilty plea in which facts were not presented at a trial, may provide a record with insufficient facts for a judge to determine whether or not the defendant's conduct constituted a predicate offense.[207] "Further, enhancing a sentence based on such facts when a defendant had pleaded guilty to a lesser offense seems unjust."[208]

B. The Counterpart Statute Approach

To address these concerns, I introduce another approach, which I will call the counterpart statute approach. This approach maintains the categorical approach, but avoids its weaknesses by allowing for cooperation between Congress and the state legislatures.

Adoption of the counterpart statute approach requires Congress to act. First, Congress must identify which crimes it deems serious enough to be a predicate offense. After the *Johnson* decision, a catchall provision like the residual clause is not acceptable.[209] Therefore, Congress must specifically identify the predicate offenses that can lead to an enhancement.

Second, Congress must define the offenses. Doing so will remove the uncertainty caused by judicially-created generic versions of offenses. The Model Penal Code or existing state and federal statutes may provide a starting point. Either way, Congress, rather than judges, defining precisely what conduct amounts to a predicate offense ensures fairness and proper separation of powers by allowing the elected representatives of the people to establish

---

[204] *See Mathis*, 136 S. Ct. at 2252.

[205] *Id.* (citing Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).

[206] *Id.* (citing Shepard v. United States, 544 U.S. 13, 25 (2005)).

[207] Isham M. Reavis, Comment, *Driving Dangerously: Vehicle Flight and the Armed Career Criminal Act After Sykes v. United States*, 87 WASH. L. REV. 281, 296 (2012) (citing Taylor v. United States, 495 U.S. 575, 601–02 (1990)).

[208] *Id.* (citing Taylor v. United States, 495 U.S. 575, 601–02 (1990)).

[209] *See* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015).

the breadth of a criminal statute. Further, listing and defining exactly what conduct is covered by the statute alleviates the problems caused by the lack of the residual clause post-*Johnson*.

Third, after Congress has rewritten the ACCA, state legislatures then have the opportunity to create a new category of each offense listed in their own criminal code, matching the definition supplied by Congress. Convictions under this new category will count as ACCA predicates. This compromise allows states to keep their current criminal statutes as well, even if they are broader than Congress's definition. This preserves the ability of states to act "as a laboratory; and try novel social and economic experiments."[210] A particular state may find it necessary to criminalize more conduct than Congress included in its definitions. The task then falls to state prosecutors to charge a defendant under the appropriate category of the offense. For example, take a Kentucky defendant charged with burglary. If the defendant burglarized a houseboat, he should be charged under Kentucky's existing burglary statute, as it includes watercraft in the definition of a "building."[211] Although this will still not count as a predicate offense, it allows the state to criminalize and punish the conduct that it felt necessary to address.

If, on the other hand, the defendant burglarized a house, he should be charged under Kentucky's new category of burglary that matches the congressional definition (assuming Congress's definition is similar to the current generic definition, although a definition including living area, like a houseboat, is ideal). In this case, a conviction will count as a predicate offense. This approach removes the possibility of a defendant's conduct satisfying the accepted definition of a predicate offense, but failing as a predicate conviction due to an overbroad statute.[212]

The counterpart statute approach not only solves most of the problems associated with the categorical approach, it also has advantages over the fact-based approach. It avoids Sixth Amendment concerns because judicial fact finding is not involved. States will have the option to keep "non-predicate" statutes to cover conduct that goes beyond the congressional definition of an offense, and prosecutors choose the appropriate statute to indict under based on the defendant's conduct. The fact of conviction under a "predicate" statute means that conviction counts as an ACCA predicate because the defendant engaged in conduct that Congress decided should count as a predicate, even if a guilty plea left a thin record. Where a sentencing judge under the fact-

---

[210] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

[211] KY. REV. STAT. ANN. § 511.010(1) (LexisNexis 2017).

[212] *See* United States v. Stitt, 860 F.3d 854, 857 (6th Cir. 2017).

based approach may not be able to establish a defendant's conduct qualifies as a predicate after a guilty plea, a judge under the counterpart statute approach merely compares statutes.

Adopting the counterpart statute approach is not without difficulty. However, the difficulty associated with it is largely a logistical concern and can be overcome. To be sure, expecting Congress to rewrite the ACCA and fifty state legislatures to create new criminal statutes to serve as counterparts will require time and effort. However, similar goals have been reached before. By 1994, nearly twenty years after they were enacted, over thirty states had substantially adopted the Federal Rules of Evidence.[213] Likewise, several states have adopted parts of the Uniform Commercial Code.[214] With hard work and good communication between Congress and state legislatures, a new ACCA adopting the counterpart statute approach can be just as far-reaching.

V. CONCLUSION

"As James Madison wrote in *The Federalist*, the 'protection' of 'the faculties of men,' and of 'the rights of property' to which these faculties give rise, 'is the first object of government.'"[215] Congress sought to perform this duty with the passage of the ACCA by deterring repeat violent felonies. However, it was unsuccessful. The Supreme Court's interpretation of the statute, largely hinging on its wording, indicates that it is time for the ACCA to be rewritten.

Congress can once again amend the ACCA, this time working in tandem with state legislative bodies to adopt the counterpart statute approach. In doing so, it will avoid the problems that have plagued ACCA application for nearly three decades and allow the ACCA to serve its intended purpose. To be sure, defining violent felonies and working with state legislatures to adopt their counterpart statutes will not be easy. It is, however, "the first object of government."[216]

---

[213] *See* Mark D. Rosen, *What Has Happened to the Common Law?—Recent American Codifications, and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1123–24 (1994).

[214] *See States Adopting the UCC*, USLEGAL, https://uniformcommercialcode.uslegal.com/states-adopting-the-ucc/ (last visited Feb. 6, 2018).

[215] Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507, 524 (1991) (quoting THE FEDERALIST NO. 10, at 42 (James Madison) (Max Beloff ed., 2d ed. 1987)).

[216] *Id.*