

Remediating the Armed Career Criminal Act's Ailing Residual Provision

Hayley A. Montgomery[†]

I. INTRODUCTION

Jerihmie Franetich is a dangerous man. By the age of twenty-four, he had been convicted of three felonies: drive-by shooting, third-degree assault, and riot.¹ On May 24, 2007, Mr. Franetich stood before the District Court for the Eastern District of Washington and pleaded guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1).² Because Mr. Franetich had three prior felony convictions, he faced a fifteen-year mandatory minimum prison sentence under the Armed Career Criminal Act (“ACCA” or “the Act”).

At sentencing, the question before the court was whether Mr. Franetich's drive-by shooting conviction qualified as a “violent felony” under the ACCA. Before the Supreme Court's decision in *Beay v. United States*,⁴ the answer would have been simple: it qualified. But after *gay*, which redefined the way courts decide whether certain crimes qualify as violent felonies under the ACCA, the answer is much less clear.

This Comment explores the U.S. Supreme Court's attempt to create a judicial standard for defining the term “violent felony” that embodies the purpose of the ACCA and its ultimate failure to do so. Part II presents a brief background on the ACCA. Part III discusses

[†] J.D. candidate, Seattle University School of Law 2010; B.A. Art History, Northwestern University, 2006. Special thanks to my parents, Steve and Elaine Matheson, and sisters, Katie MacGillivray, Kelly Jones, and Ashley Montgomery, Seattle University Law Review editors and friends, Colin Prince, Megan Farooqui, and Lindsay Taft, Judge Edward F. Shea for inspiring this Comment, and Jay McEntire for being “The Man.” I wrote this article for my father, Richard A. Montgomery, a fine lawyer who would have been a proud dad.

1. Order Granting Defendant's Motion to Revoke Armed Career Criminal Designation at 4, *United States v. Jerihmie Joel Franetich*, No. CR-06-123-EFS (E.D. Wash. May 29, 2008).

2. *Id.* at 2. Although the court's order states that Mr. Franetich pleaded guilty on May 24, 2008, it appears that this date is wrong; in fact, Mr. Franetich pleaded guilty on May 24, 2007.

3. *Id.*

4. 553 U.S. 137, 128 S. Ct. 1581 (2008).

States v. James,⁵ *Begay*, and *United States v. Chambers*⁶—three recent Supreme Court decisions that suggest the Court's analyses are flawed. Part IV examines opportunities for the Court and Congress to remedy the situation, including a critique of each proposal.

II. THE ARMED CAREER CRIMINAL ACT'S RESIDUAL CLAUSE: A SUMMARY

A. History and Purpose

Congress enacted the ACCA in 1984, seeking to protect society from violent habitual criminals by incarcerating them. When drafting the legislation, Congress relied on studies showing that a large percentage of violent crimes were being committed by a very small percentage of repeat offenders.⁷ That is, recidivism rates were high among violent criminals,⁸ so high, in fact, that one study estimated that career criminals commit two or three burglaries for every robbery they commit.⁹

The purpose of the original legislation was "to curb armed, habitual (career) criminals¹¹ by limiting their access to firearms once they have demonstrated a history of serious, violent behavior.¹² When Senator Arlen Specter introduced his bill on January 26, 1983, he stated:

Robberies and burglaries are the most damaging crimes to society. Robberies and burglaries occur with greater frequency than other violent felonies, affect many more people, and cause the greatest losses. A person is 40 times more likely to be a victim of robbery than of rape.

Robberies involve physical violence or the threat thereof, being deliberately directed against innocent individuals. . . . Often—30 percent of robberies—these offenses result in physical injuries; usually—90 percent for robberies—they result in significant financial

5. 550 U.S. 192 (2007).

6. 129 S. Ct. 687 (2009).

7. H.R. REP. NO. 98-1073, at 2-3 (1984), printed in 1984 U.S.C.C.A.N. 3661.

8. *Id.* at 1, 3.

9. A study by Professor Marvin E. Wolfgang at the University of Pennsylvania showed that "chronic offenders which comprised 6 percent of study group committed 61 percent of all homicides, 76 percent of all rapes, 73 percent of robberies, and 65 percent of all aggravated assaults perpetrated by members of the group." *Id.* at 2. Another study focused on two hundred offenders serving substantial sentences for sex offenses in federal prisons. Based on these offenders' admissions and FBI records, the author estimated "if they followed their past pattern of conduct they would commit 179,000 criminal offenses in a five year period."

10. *Id.*

11. *Id.* at 1.

12. *See id.*; see also *Taylor v. United States*, 495 U.S. 575, 587-88 (1990).

loss; always they inflict psychological injury. Such crimes force people to live not in freedom, but in fear.

Most robberies and burglaries are committed by career criminals.¹³

Thus, the ACCA subjected “any convicted felon found guilty of possession of a firearm, who had three previous convictions ~~for~~ robbery or burglary” to a fifteen-year mandatory minimum sentence.¹⁴ Recognizing that crimes other than robbery and burglary present a similar danger of physical injury, Congress revisited the Act just five months later, this time expanding the range of predicate offenses.¹⁵

Debate ensued as to which crimes should qualify as predicate offenses under the Act. Congress agreed that only violent felonies—those crimes that indicate that a criminal is particularly dangerous when in possession of a firearm—should qualify. While some members of Congress argued that this common goal would be satisfied by a catch-all provision for all crimes that “present a serious potential risk of physical injury to another,” others argued that a list of dangerous crimes would be useful.¹⁶

B. Language

In 1986, after vigorous debate, Congress settled on a compromise.¹⁷ Under the ACCA, criminals who violate 18 U.S.C. § 922(g) after being convicted of three violent felonies or serious drug offenses must serve a mandatory minimum sentence of fifteen years imprisonment.¹⁸ The ACCA presently defines violent felony as “any crime punishable by imprisonment for a term exceeding one year” that

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

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.²⁰

The first sub-clause, 18 U.S.C. § 924(e)(2)(B)(i), qualifies violent crimes against another person. This comment refers to the first sub-

13. H.R. REP. No. 98-1073, at 3 (1984).

14. *Taylor*, 495 U.S. at 581 (emphasis added).

15. *Id.* at 583–85.

16. *See id.* at 586–87.

17. *Id.* at 587.

18. 18 U.S.C. § 922(g) prohibits felons from shipping, transporting, possessing, or receiving any firearm or ammunition in or affecting interstate or foreign commerce.

19. 18 U.S.C. § 924(e)(1) (2009).

20. *Id.* § 924(e)(2)(B) (emphasis added).

clause as “the physical force provision.” The focus of this Comment however, centers on the interpretation of the second sub-clause, 18 U.S.C. § 924(e)(2)(B)(ii), which is hereinafter referred to as “the residual provision.”

C. United States Sentencing Guidelines

Three years after Congress passed the ACCA, the United States Sentencing Commission (USSC or the Sentencing Commission) developed the United States Sentencing Guidelines (USSG or Sentencing Guidelines).²¹ Section 2K2.1 of the Sentencing Guidelines sets the base offense level for felons who have unlawfully possessed firearms under 18 U.S.C. § 922(g). Violators of § 922(g) who were previously convicted of a “crime of violence”²² are assigned higher base offense levels, and as a result, higher sentences.²³ USSG § 4B1.2(a) defines crime of violence as

any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.²⁴

Obviously, the Sentencing Guidelines’ definition of a crime of violence is nearly identical to the ACCA’s definition of a violent felony.²⁵ Not surprisingly, courts have interpreted crime of violence and violent felony as interchangeable terms; the case law applies to both. Opinions interpreting the ACCA’s violent felony are regularly used to construe the Sentencing Guidelines’ crime of violence and vice versa.²⁶ Because the violent felony and crime of violence analysis is the same, the Supreme Court’s ACCA decisions are wide-reaching.

III. SUPREME COURT PRECEDENT: *JAMES, BEGAY, AND CHAMBERS*

Beginning with *Taylor v. United States*,²⁷ there are approximately ten U.S. Supreme Court decisions interpreting the ACCA.²⁸ However,

21. U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2009).

22. *Id.* § 2K2.1.

23. *Id.*

24. *Id.* § 4B1.2(a) (emphasis added).

25. Compare U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2009) with 18 U.S.C. § 924(e)(2)(B). The provisions differ only in that, the residual provision, the Sentencing Guidelines use the phrase “burglary of a dwelling” while ACCA refers to “burglary.”

26. See *United States v. Brown*, 514 F.3d 256 (2d Cir. 2008).

27. 495 U.S. 575 (1990).

only three of these decisions are particularly pertinent to this discussion: *James*, *Begay*, and *Chambers*. Together, these cases demonstrate how difficult it has been for the Supreme Court to fashion a standard that furthers the purpose of the statute—to keep firearms out of the hands of violent career criminals. Furthermore, these cases demonstrate how complicated and opaque ACCA jurisprudence has become and why it is time for Congress to amend the ACCA.

A. *James v. United States*

Alphonso James, having already been convicted of a felony, pleaded guilty to possessing a firearm.²⁸ James admitted to three prior felony convictions: attempted burglary of a dwelling, possession of cocaine, and trafficking cocaine.³⁰ At issue before the Supreme Court was whether attempted burglary qualified as a violent felony under 18 U.S.C. § 924(e).³¹

Florida law defines burglary as “entering or remaining in a . . . structure . . . with the intent to commit an offense therein.”³² A person commits the offense of criminal attempt in Florida if she attempts to commit an offense but fails to execute it.³³ The parties agreed that even

28. *Id.* (interpreting Congress’s listed term burglary under the residual provision); *Custis v. United States*, 511 U.S. 485 (1994) (defining the right collateral attack on prior convictions under 18 U.S.C. § 924(e)); *Daniels v. United States*, 532 U.S. 374 (2001) (discussing whether ACCA enhancement is constitutional when based in part two prior unconstitutional convictions); *Shepard v. United States*, 544 U.S. 13 (2005) (defining what documents the sentencing court might examine when determining whether the crime is a violent felony under the categorical approach); *James v. United States*, 550 U.S. 192 (2007) (determining whether “attempted burglary” qualifies as a violent felony under the residual provision); *Lujan v. United States*, 552 U.S. 23 (2007) (construing the ACCA’s “civil rights restored” exception under 18 U.S.C. § 921(a)(20)); *Begay v. United States*, 553 U.S. 137 (2008) (determining whether felony drunk driving is a violent felony under the residual provision); *United States v. Rodriguez*, 553 U.S. 377 (2008) (construing the phrase “maximum term of imprisonment . . . prescribed by law” for state drug convictions under 18 U.S.C. § 924 (e)(2)(A)(ii)); *Chambers v. United States*, 559 U.S. Ct. 687 (2009) (determining whether conviction for failing to report to imprisonment qualifies as a violent felony under the residual provision); *Johnson v. United States*, No. 08-6925 (Oral Argument Oct. 6, 2009) (determining whether a conviction for “unwanted touching,” which had been elevated from simple battery to felony status because of a prior battery conviction, qualifies as “physical force” under the physical force provision).

29. *James*, 550 U.S. at 195.

30. *Id.* at 196. James’s possession and trafficking offenses were determined to be “serious drug offense[s]” under 18 U.S.C. § 924(e)(1) of the ACCA.

31. *Id.*

32. FLA. STAT. § 810.02(1) (1993). Florida defined the crime of burglary at the time of James’s conviction as “entering or remaining in a dwelling, a structure or a conveyance with the intent to commit an offense therein, unless the premises are at the time open to the public or the defendant is licensed or invited to enter or remain.”

33. According to Florida’s criminal attempt statute, “A person who attempts to commit an offense prohibited by law and in such attempt does act toward the commission of such offense,

though it was punishable by imprisonment for a term exceeding one year, attempted burglary does not qualify as a violent felony under the physical force provision because it does not have “as an element the use, attempted use, or threatened use of physical force against the person of another.”³⁴ Furthermore, it is not one of the specifically listed crimes under the residual provision—burglary, arson, extortion, or use of explosives.³⁵

Thus, the Court was left with a narrow question of whether attempted burglary fell under the ACCA’s residual provision, which includes crimes that “otherwise involve conduct that present[] a serious potential risk of physical injury to another.”³⁶ In answering this question, the Court employed the “categorical approach.” Under this approach, courts “look only to the fact of conviction and the statutory definition of the prior offense,” and do not consider the “particular facts disclosed by the record of conviction.”³⁷ In other words, courts consider whether the elements of the crime present a serious potential risk of physical injury without looking to “the specific conduct of this particular offender.”³⁸

The Court held that attempted burglary, as defined by Florida law, “involves conduct that presents a serious potential risk of physical injury to another,” and thus qualifies as a violent felony under the ACCA because it poses the same level of risk as the completed offense of burglary.⁴⁰ The Court reasoned that in the burglary of a home, the potential for confrontation and injury arises if the homeowner discovers the burglar.⁴¹ Thus, the risk of confrontation in attempted burglary is the same or similar to the risk of completed burglary because confrontation could occur regardless of whether the crime was in fact completed.⁴²

Although not every attempted burglary case poses a “realistic risk of confrontation or injury to anyone,” the ACCA’s residual provision simply requires a “potential risk.”⁴³ Similarly, the Court’s categorical approach does not require that “every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before

but fails in the perpetration or is intercepted or prevented in the execution thereof, commits the offense of criminal attempt. *Id.* § 777.04(1).

34. *James*, 550 U.S. at 197.

35. *Id.*

36. *See id.*; 18 U.S.C. § 924(e)(2)(B)(ii) (2009).

37. *Shepard v. United States*, 544 U.S. 13, 17 (2005) (quoting *Taylor v. United States*, 495 U.S. 575 (1990)).

38. *James*, 550 U.S. at 202.

39. *Id.* at 203–04.

40. *Id.* at 203.

41. *Id.* at 201.

42. *Id.* at 211–12.

43. *Id.* at 207.

the offense can be deemed a violent felony.⁴⁴ Rather, the Court considers whether the conduct described by the elements of the offense, *in the ordinary sense*, presents a serious potential for physical injury to another.⁴⁵ Thus, the *James* decision stands for the proposition that, “[a]s 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 § 924(e)(2)(B)(ii)’s residual provision.”⁴⁶

The Court’s reasoning in *James* allows courts to weigh the risk of the instant crime against the risk of crimes listed in the statute. Thus, under the *James* decision, the ACCA encompasses all crimes that pose a serious risk of physical injury. Recognizing that some risky crimes may not demonstrate that a criminal is particularly dangerous when in possession of a firearm and identifying a need for a more definite standard, the Court granted certiorari for *Begay* and changed the *James* standard just one year after it was decided.

B. *Begay v. United States*

In September 2004, Larry Begay was arrested after he threatened his aunt and his sister with a rifle.⁴⁷ Mr. Begay pleaded guilty to possession of a firearm after committing three prior felonies, a violation of § 922(g)(1).⁴⁸ Under New Mexico law, if an individual accrues four driving-under-the-influence (DUI) convictions, the crime becomes a felony.⁴⁹ Because Mr. Begay had accrued twelve DUI convictions, he had committed the crime of felony DUI three times over.⁵⁰ The sentencing judge concluded that Mr. Begay had at least three prior convictions “punishable by imprisonment for a term exceeding one year,” and that the prior convictions involved “conduct that presents a serious potential risk of physical injury to another.”⁵¹ Thus, Mr. Begay was sentenced to a mandatory minimum prison term of fifteen years as provided in the ACCA.⁵²

Mr. Begay appealed, arguing that DUI is not a violent felony under § 924(e)(2)(B)(ii)’s residual provision because the provision embraces only crimes that present a serious potential risk in the same way as those

44. *Id.* at 208.

45. *Id.*

46. *Id.* at 209.

47. *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581, 1583 (2008).

48. *Id.* at 1584.

49. *Id.* at 1583–84.

50. *Id.* at 1584.

51. *Id.*; see also 18 U.S.C. § 924(e)(2)(B).

52. *Begay*, 128 S. Ct. at 1584.

listed, and DUI is too dissimilar to the listed crimes to be included.⁵³ The Tenth Circuit affirmed the district court's sentencing decision. Mr. Begay sought and was granted certiorari.⁵⁴

As an initial matter, the Court ~~read~~ that because New Mexico's DUI law does not include "as an element the use, attempted use, or threatened use of physical force against the person of another," a conviction under New Mexico law could not qualify as a violent felony under the physical force provision, § 924 (e)(2)(B)(i). Furthermore, because DUI is not one of the crimes listed under § 924 (e)(2)(B)(ii), the only way it would qualify is if it falls within the scope of the ACCA's residual provision.

Thus, the specific question before the Court was whether convictions under New Mexico's felony DUI law qualify as violent felonies under the residual provision—whether it otherwise "presents a serious potential of physical injury to another."⁵⁵ The Court answered that question in the negative, holding that felony drunk driving does not qualify as a predicate offense because it does not involve the kind of "purposeful, violent, and aggressive" conduct typical of the listed offenses.⁵⁶

In the Court's view, a predicate crime should be more than potentially risky. Rather, a predicate crime should indicate that an offender, "later possessing a gun, will use that gun deliberately to harm a victim."⁵⁷ The majority reasoned that the mere existence of the provision's listed examples—burglary, arson, extortion, and crimes involving the use of explosives—demonstrate that Congress intended the statute to cover crimes *similar to* those listed but *not every* crime that presents a serious potential risk of physical injury to another.⁵⁸ If Congress had meant the statute to cover every such crime, it would not have included the examples at all. Thus, the Court limited qualifying crimes under the residual provision to crimes that are "roughly similar, in kind as well as in degree of risk posed" to those listed in the statute.⁵⁹

To be "similar in kind" to the listed offenses, the Court held that an offense must be purposeful, violent, and aggressive. According to the Court, if burglary, arson, extortion, and use of explosives are all exam-

53. United States v. Begay, 470 F.3d 964, 966 (10th Cir. 2006), 553 U.S. 137, 128 S. Ct. 1581 (2008).

54. *Begay*, 128 S. Ct. at 1584.

55. *Id.*

56. *Id.* at 1587. Four justices joined in the opinion and one justice concurred in the judgment.

The concurring and dissenting opinions demonstrate that the Court remains divided on how to proceed in sentencing decisions under the ACCA.

57. *Id.* at 1586.

58. *Id.* at 1585.

59. *Id.*

ples of crimes that “otherwise involve conduct that presents a serious potential risk of physical injury to another,” then DUI differs from the listed crimes in “at least one pertinent, and important, respect.”⁶⁰ The listed crimes all typically involve purposeful, violent, and aggressive conduct,” while DUI typically does not. Applying the Court’s reasoning, only crimes committed purposefully or intentionally indicate that the criminal is dangerous when in possession of a gun; strict liability crimes, on the other hand, do not.

Thus, the *Begay* decision created a two-step analysis for residual clause interpretation.⁶² First, a court must determine whether a crime creates a serious potential for physical injury.⁶³ If so, then the court proceeds to step two: determining whether the crime is purposeful, violent, and aggressive.⁶⁴ As always, the court considers the crime categorically, asking whether it typically involves purposeful, violent, and aggressive behavior and not how an individual offender might have committed it on a particular occasion.⁶⁵

With only those three imprecise adjectives to guide them, district and circuit courts released a flurry of misguided and confused decisions in the wake of *Begay*.⁶⁶ These decisions demonstrate why Justice Scalia’s concurrence in *Begay* was correct: the majority failed to “provide a complete framework that will embrace all future cases” and in-

60. *Id.* at 1586.

61. The Supreme Court used purposeful and intentional interchangeably. at 1587–88.

62. *Id.* at 1586. Some courts consider this a three-step inquiry. For example, *United States v. Harrison*, 558 F.3d 1280, 1287 (11th Cir. 2009), where the court stated

James and Begay, taken together, establish a three-step inquiry for determining whether a crime falls under the ACCA’s residual provision. First, what is the relevant category of crime, determined by looking to how the crime is ordinarily committed? Second, does that crime pose a “serious potential risk of physical injury” that is similar in degree to the risks posed by the enumerated crimes? Third, is that crime similar in kind to the enumerated crimes?

Id.

63. *Begay*, 128 S. Ct. at 1583.

64. *Id.* at 1587.

65. *Id.* at 1584.

66. *E.g.*, compare *United States v. Harrimon*, 568 F.3d 531 (5th Cir. 2009), *United States v. LaCasse*, 567 F.3d 763 (6th Cir. 2009) with *Harrison*, 558 F.3d 1280.

67. Judge Edward F. Shea expressed his displeasure with the decision on the record: [by] including the holy trinity of purposeful, violent, and aggressive, all the Supreme Court did was confuse the entire issue, do a grave disservice to everybody like yourself and the defender’s office and everyone else by attempting to make sense out of their opinions and administer justice fairly to all. And I simply regard it as meaningless and not worthy of consideration.

See Transcript of Proceedings at 15, *United States v. Dustin Andrew Christensen*, No. CR-04-267-EFS (E.D. Wash. Jul. 9, 2009).

stead continued the Court's tradition of a "piecemeal, suspenseful, Scrabble-like approach" to interpreting the residual provision.⁶⁸

The *Begay* Court's choice of the terms purposeful, violent, and aggressive is deeply flawed for three reasons: first, the Court's purposeful *mens rea* requirement excludes some particularly dangerous crimes, crimes that should qualify under ACCA; second, the terms violent and aggressive are exceedingly difficult to apply, leaving courts confused and circuits split; and third, deciding whether crimes are typically committed purposefully, violently, and aggressively is needlessly complicated.

1. The Court's Purposeful *Mens Rea* Requirement Excludes Some Particularly Dangerous Crimes

In *Begay*, the Court sought to rectify the *James* standard. The *James* standard was flawed because it qualified all risky crimes, regardless of whether the person who committed the crime was particularly dangerous when possessing a gun. By limiting crimes to only those that are similar in kind to those listed in ACCA, the *Begay* Court sought to capture the essence of the ACCA. On the ACCA's purpose of keeping guns out of dangerous individuals' hands, the *Begay* Court's similar in kind distinction makes sense; a burglar is more likely to use a gun while burglarizing a home than a drunk driver is when driving drunk. When a burglar burglarizes a home, she may use a gun against the homeowner if discovered, while a drunk driver is less likely to use a gun against those she encounters. With *Begay*'s distinction, criminals who are not necessarily dangerous when in possession of a gun would be subject to the stiff fifteen-year mandatory minimum sentence.⁶⁹

But the Court's solution—qualifying crimes only if they are typically committed purposefully, violently, and aggressively—utterly fails to capture the essence of this distinction.⁷⁰ Rather, this new standard allows crimes to be shoehorned into the purposeful, violent, and aggressive mold or, alternatively, excluded by it.

Mr. Franetich's case embodies this principle. Before *Begay*, Mr. Franetich would have been an armed career criminal under the ACCA;

68. *Begay*, 128 S. Ct. at 1589 (Scalia, J., dissenting). In Scalia's opinion, the Court simply adopted a standard that would have felony drunk driving from the purview of the residual provision, without any basis for holding that the crimes are similar in kind as well as degree of risk and without considering the implications of this decision on future cases.

69. *Id.*

70. Both Mr. *Begay* and Mr. Franetich are exactly the types of individuals who would deliberately point a gun and pull the trigger. After Mr. *Begay* threatened his aunt and sister with a rifle, *id.* at 1583, and Mr. Franetich shot a gun out of a moving vehicle, Order Granting Def.'s Mot. to Reconsider Armed Career Criminal Designation, *supra* note 1, at 4. But neither of them had committed a crime that would qualify for ACCA status.

he had committed three violent felonies by the time he was found in possession of a firearm.⁷¹ After *Begay*, however, he was not; Mr. Franetich lacked the three violent felonies because a third-degree assault conviction no longer qualified.⁷² At sentencing, however, the district court addressed a new question: whether Mr. Franetich's drive-by shooting conviction qualified as a crime of violence under the Sentencing Guidelines.⁷³ Even though Mr. Franetich no longer qualified for ACCA enhancement, this question was still relevant because the decision also changed the way courts view the Sentencing Guidelines. In short, if drive-by shooting was a crime of violence, then Mr. Franetich faced a higher base offense level and, ultimately, a higher sentence.⁷⁵

The very phrase the *Begay* Court chose to more accurately embody the ACCA's purpose failed in practice because it excluded the quintessential ACCA crime: drive-by shooting. Under Washington law, "[a] person is guilty of drive-by shooting when he or she recklessly discharges a firearm . . . in a manner which creates a substantial risk of death or serious physical injury to another person."⁷⁶ Drive-by shooting does not qualify as a violent felony under the physical force provision because physical force is not an element of drive-by shooting.⁷⁷ Similarly, drive-by shooting is not one of the listed crimes in the residual provision. Consequently, drive-by shooting would qualify if it otherwise involved conduct that presents a serious potential risk of physical injury to another person⁷⁸ under the residual provision.

Pre-*Begay*, drive-by shooting would qualify. Discharging a firearm in a manner that creates substantial risk of death or serious physical injury to another person⁷⁹ surely presents a serious potential risk of physi-

71. Order Granting Def.'s Mot. to Reconsider Armed Career Criminal Designation, *supra* note 1, at 2. Mr. Franetich's third-degree assault, drive-by shooting, and riot convictions qualified him for ACCA's fifteen-year sentence.

72. *Id.* at 4. "[T]he result is that Defendant lacks the three (3) prior violent felonies necessary for an ACCA sentence." *Id.*

73. See Transcript of Sentencing Hearing, *United States v. Jeriehmie Joel Franetich*, CR-06-123-EFS (E.D. Wash. Aug. 20, 2009), *supra* note 1, at 4, 344 Fed. Appx. 416 (9th Cir. 2009) [hereinafter Franetich Sentencing]. Because Mr. Franetich admitted to committing riot while armed with a dangerous weapon, the court found that this was a purposeful, violent, and aggressive act that qualified as a crime of violence. *Jeriehmie J. Franetich*, 344 Fed. Appx. at 417–19 (mem.).

74. See *supra* text accompanying notes 25–26.

75. Franetich Sentencing, *supra* note 73, at 10.

76. WASH. REV. CODE § 9A.36.045(1) (2009) (emphasis added). Drive-by shooting is a Class B felony in Washington, *id.* § 9A.36.045(3), making it punishable by more than one year of incarceration.

77. See *United States v. Howell*, 531 F.3d 621 (8th Cir. July 7, 2008) (finding that reckless cause of physical injury does not include an element of physical force).

78. 18 U.S.C. § 924(e)(2)(B)(ii) (2009).

79. WASH. REV. CODE § 9A.36.045(1) (2009)

cal injury of another.⁸⁰ But post *Begay*, the Supreme Court required a purposeful mental state to qualify as a predicate offense under the ACCA. Thus, because drive-by shooting requires recklessness, not purposefulness, it is no longer a crime of violence; it is not purposeful, violent, and aggressive.⁸¹

Because drive-by shooting was not a crime of violence, Mr. Franetich's USSG base offense level was lowered from 24 to 20.⁸² Although this also lowered Mr. Franetich's recommended Sentencing Guidelines range to 63–78 months, Judge Edward F. Shea was authorized to impose a maximum sentence of 120 months under 18 U.S.C. § 922(g)(1).⁸³ In sentencing, Judge Shea departed from the recommended range, sentencing Mr. Franetich to 102 months and expressing his displeasure with the *Begay* decision:

[I]n my mind, you're exactly the kind of person that Justice Breyer was taking about. You have all the likelihoods—likelihood of having a gun and hurting people. You've thrown a beer can, a full beer can, in the face of a loved one. You've stabbed another loved one twice. . . . But for the benefit of some very surreptitious decisions by the United States Supreme Court, you would have been an Armed Career Criminal, and I would have sentenced you to 15 years, but you've had – you've had good luck in that regard. The United States Supreme Court in its wisdom has seen fit to define things in a way that's been beneficial to you. So you've saved yourself from what was almost a certain sentence of 15 years in my mind and much deserved, because you are in my mind, as a practical matter, an Armed Career Criminal, to a guideline range now of top end 78 months with a statutory max of 120.⁸⁴

Surely a man who recklessly discharges a firearm out the window of a moving vehicle is the type of person who should be prosecuted under the Act. Gun crimes are inherently risky. Crimes involving guns are indicative of the very individuals Congress aimed to protect society from—those who are dangerous when in possession of a gun. Mr. Franetich is exactly that type of man: he has committed third-degree assault, drive-by

80. 18 U.S.C. § 924(e)(2)(B)(ii).

81. See *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1581, 1586 (2008).

82. Franetich Sentencing *opra* note 73, at 10, 18.

83. Because Mr. Franetich's conviction qualified under ACCA, while his third-degree assault and drive-by shooting convictions did not, resulting total offense level was calculated as nineteen: twenty for one previous violent felony, U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(4)(A) (2009), plus two because the firearm has obliterated serial number *id.* § 2K2.1(b)(4), and minus three for acceptance of responsibility, § 3E1.1. Neither party objected to the conclusion that Mr. Franetich had twenty-five criminal history points, a total offense level of VI. Accordingly, the applicable guideline range was 63–78 months at 18.

84. Franetich Sentencing *opra* note 73, at 35–38.

shooting, and riot.⁸⁵ Nonetheless, the *Begay* decision unambiguously excludes a number of crimes from the scope of the residual provision, including drive-by shooting.

2. The Terms “Violent” and “Aggressive” Are Exceedingly Difficult to Apply, Leaving Courts Confused and Circuits Split

Purposeful is a distinct legal term that is easy to define and to apply to a set of facts. But because the terms violent and aggressive are not legal terms, and the *Begay* Court did not define them, deciding whether a crime is violent and aggressive proves difficult. Lower courts have dealt with this problem by asking whether the elements of the crime fall within common definitions,⁸⁷ which results in conflicting interpretations of violent and aggressive. Two examples demonstrate this principle.

First, circuits are split on whether the crime of felony fleeing arrest (or eluding a police officer) qualifies as a violent felony under the Act.⁸⁸ In *United States v. Harrimon*,⁸⁹ the Fifth Circuit held that fleeing arrest satisfies the *Begay* test; it both presents a serious potential risk for physical injury to police officers and bystanders and involves purposeful, violent, and aggressive behavior.⁹⁰ This is because an offender’s use of a vehicle to evade police necessarily involves force against other motorists and pedestrians and typically leads to confrontation with officers.⁹¹ On the other hand, the Eleventh Circuit found, *United States v. Harri-*

85. Order Granting Def.’s Mot. to Reconsider Armed Career Criminal Designation, *supra* note 1, at 4.

86. The Court did, however, explain why a DUI is not violent and aggressive. *Begay*, 127 S. Ct. at 1586–87.

87. *See, e.g.*, *United States v. Herrick*, 545 F.3d 53 (1st Cir. 2008). *Herrick*, the court defined violence as “marked by extreme force and sudden intense activity” at 58 (citing Merriam-Webster’s Collegiate Dictionary 24 (11th ed. 2003)). It defined aggressive as “tending toward or exhibiting aggression,” in “a forceful action or procedure (as an provoked attack) esp. when intended to dominate or master.” Applying these definitions, the First Circuit found that Wisconsin’s vehicular homicide felony was not a crime of violence. Although it was violent, it was not aggressive because the statute requires criminal negligence, while the definition of aggressive involves a degree of intent when engaging in a forceful action at 59. The Wisconsin statute, entitled “Homicide by negligent operation of vehicle,” under which *Herrick* was convicted, provides as follows: “(1) Whoever causes the death of another human being by the negligent operation or handling of a vehicle is guilty of a Class G felony and (2) Whoever causes the death of an unborn child by the negligent operation or handling of a vehicle is guilty of a Class G felony.” WIS. STAT. § 940.10 (2005).

88. Compare *United States v. Harrimon*, 568 F.3d 531 (5th Cir. 2009), *United States v. LaCasse*, 567 F.3d 763 (6th Cir. 2009), with *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009).

89. 568 F.3d 531 (5th Cir. 2009).

90. *Id.* at 534–36.

91. *Id.* at 535.

son,⁹² that the crime of “willful fleeing after a police vehicle had activated its lights and sirens” failed the *Begay* two-step because it did not present the same high-level risk as those listed offenses and, although purposeful, it was not sufficiently violent and aggressive to be similar in kind to the listed offenses.⁹³

Second, the Tenth Circuit’s decision in *United States v. Zuniga*⁹⁴ contradicts, at least in part, the Supreme Court’s *Chambers* decision.⁹⁵ In *Zuniga*, the Tenth Circuit found that Mr. Zuniga’s knowing possession of a weapon in prison, like burglary, “indicates a readiness to enter into conflict,” creating the likelihood of violent confrontation.⁹⁶ Thus, according to the Tenth Circuit, the crime of knowing possession of a weapon in prison “typically involves purposeful, violent, and aggressive conduct.”⁹⁷ But in *Chambers*, the Supreme Court rejected the government’s argument that Mr. Chamber’s failure to report to prison is purposeful, violent, and aggressive the same way as burglary, even though that crime indicates a readiness to enter into conflict.⁹⁸ Instead, the Court concluded that “[c]onceptually speaking, the crime amounts to a form of inaction, a far cry from the ‘purposeful,’ ‘violent’ and ‘aggressive’ conduct’ contemplated by *Begay*.”¹⁰⁰

This inconsistency may be resolved, and the cases reconciled, if courts were able to consider the purpose of the ACCA. Generally speaking, a person who actually holds a weapon in prison is the type of person who is particularly dangerous when in possession of a gun, while a person who simply fails to report to prison is not. But these cases cannot be reconciled under *Begay* because courts cannot consider ACCA’s purpose.¹⁰¹ Instead, a court must fit the particular elements of a crime into a trio of adjectives that the Supreme Court believes to embody ACCA’s purpose.¹⁰² Whether those adjectives actually embody that purpose is in serious doubt.

92. 558 F.3d 1280 (11th Cir. 2009).

93. *Id.* at 1293–96.

94. 553 F.3d 1330 (10th Cir. 2009).

95. 129 S. Ct. 687 (2009); for discussion, see Part III.C.

96. *Zuniga*, 553 F.3d at 1336.

97. *Id.* at 1334.

98. *Id.*

99. *Chambers*, 129 S. Ct. at 692–93.

100. *Id.* at 692.

101. See generally *Begay v. United States*, 553 U.S. 137, 128 S. Ct. 1583 (2008).

102. Perhaps this is because the *Zuniga* court did not have the opportunity to apply *Chambers*, given that the decision was made only three days after *Chambers*.

3. Determining Whether Crimes Are Typically Committed Purposefully, Violently, and Aggressively is Needlessly Complicated

In *Begay*, the Court held that an ACCA crime must typically involve purposeful, violent, and aggressive conduct.¹⁰³ But are the listed offenses themselves typically committed purposefully, violently, and aggressively? In *James*, the Court posed the imaginary situation of an extortion scheme in which an anonymous blackmailer threatens to release embarrassing personal information about the victim unless he is mailed regular payments.¹⁰⁴ In this situation, the risk of physical injury to another is minimal, and although purposeful, the extortion is not committed violently or aggressively. But the Court is not concerned with how an extortionist behaved in one particular instance; it must determine whether extortion is typically committed violently or aggressively.

In *Begay*, the Court defined extortion under the Model Penal Code as “‘purposeful’ obtaining property of another through threat of, inflicting ‘bodily injury.’”¹⁰⁵ But this definition is incomplete. In fact, the Model Penal Code defines extortion as 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.¹⁰⁶

Subsections (2)–(7) are committed without any trace of violence or aggression. Thus, it is possible that extortion is not typically committed

103. *Begay*, 128 S. Ct. at 1586.

104. *James v. United States*, 550 U.S. 192, 208–09 (2007).

105. *Begay*, 128 S. Ct. at 1586.

106. MODEL PENAL CODE § 223.4 (2001).

purposefully, violently, and aggressively, but rather through other non-violent means.¹⁰⁷

Furthermore, how is a court to tell whether a crime is typically committed purposefully, violently, and aggressively in a case where a statute may criminalize purposeful and non-purposeful, violent and non-violent, and aggressive and non-aggressive behavior? In the general sense, nonconsensual sex crimes are considered purposeful, violent, and aggressive, while consensual ones are not.¹⁰⁸ This makes sense because a person who forcibly engages in sexual relations with another is the type of dangerous individual who is more likely to deliberately point a gun and pull the trigger. The Washington statute at issue in *United States v. Christensen*, however, criminalizes both consensual and nonconsensual sex with a minor:

A person is guilty of rape of a child in the third degree when the person has sexual intercourse with another who is at least fourteen years old but less than sixteen years old and not married to the perpetrator and the perpetrator is at least forty-eight months older than the victim.¹⁰⁹

“Consent by the victim is not a defense” to a charge of statutory rape under RCW 9A.44.079.¹¹⁰

In *Christensen*, the Ninth Circuit held that under the categorical approach, Christensen’s conviction for statutory rape in violation of Washington law does not constitute a violent felony under ACCA. The court stated that “because statutory rape may involve consensual sexual intercourse, it does not necessarily involve either ‘violent’ or ‘aggressive’ conduct and, therefore, is not a violent crime under the ACCA.”¹¹¹ The *Christensen* court stated “[b]ecause the Court in *Begay* used the conjunction ‘and,’ all three of its criteria—purposeful, violent, and aggres-

107. Similarly, in his *Begay* concurrence, Justice Scalia points out that one of the listed crimes—the unlawful use of explosives—may involve negligent or reckless conduct. *Begay*, 128 S. Ct. at 1590. Under the Model Penal Code, “[a] person is guilty of a misdemeanor if he recklessly creates a risk of catastrophe in the employment of explosives or other dangerous means.” MODEL PENAL CODE § 220.2(2) (2001).

108. Compare *United States v. Rooks*, 556 F.3d 1145 (10th Cir. 2009) (finding nonconsensual sexual assault was a crime of violence because it is purposeful, violent, and aggressive as it “endangers the health and life of the victim” and creates a risk of confrontation), *United States v. Thornton*, 554 F.3d 443 (4th Cir. 2009) (holding that consensual statutory rape is not a crime of violence because it does not, by its definition, involve the use of force, and thus is not violent and aggressive).

109. WASH. REV. CODE § 9A.44.079(1).

110. *State v. Heming*, 90 P.3d 62, 63 (Wash. App. 2004).

111. *United States v. Christensen*, 559 F.3d 1092, 990 (9th Cir. 2009) (citing *Heming*, 90 P.3d at 63).

sive'—must be satisfied.¹¹² However, the *Christensen* court failed to mention the word typically. How is one able to tell whether statutory rape is typically committed with consent or without? The *Begay* decision leaves this question unanswered.

C. *United States v. Chambers*

Decided just one year after *Begay*, *Chambers*¹¹³ is the latest in the line of Supreme Court residual provision cases. Deondery Chambers pleaded guilty to being a felon in possession of a firearm under § 922(g). At sentencing, the government sought a fifteen-year mandatory prison sentence under the ACCA.¹¹⁴ While Mr. Chambers conceded that his 1998 conviction for robbery and aggravated battery and his 1999 drug-crime convictions fell within the ACCA definitions, he argued that his failure to report for penal confinement conviction did not.¹¹⁵ Mr. Chambers' 1998 sentence required him to report for weekend confinement eleven times, four of which he failed to appear.¹¹⁶ He was later convicted of the crime of failing to report to a penal institution under Illinois law.¹¹⁷

Under the categorical approach, courts must consider whether the generic set of acts, not the specific act committed on the particular occasion, falls under the residual provision by presenting a serious potential risk of physical injury.¹¹⁸ The Illinois statute at issue criminalized several different kinds of behavior: (1) escape from a penal institution, (2) escape from the custody of a penal institution employee, (3) failure to report to a penal institution, (4) failure to report for periodic imprisonment, (5) failure to return from furlough, (6) failure to return from work and day release, and (7) failure to abide by terms of home confinement.¹¹⁹ Mr. Chambers pleaded guilty to the lesser crime of knowingly failing to

112. *Christensen*, 559 F.3d at 1095.

113. 129 S. Ct. 687 (2009). In *Chambers*, the Court does not indicate any intention of changing the *Begay* standard.

114. *Johnson v. United States*, 130 S. Ct. 1265 (2010). *The Johnson* opinion, decided on March 2, 2010, as this article goes to press, is cited to interpretation of the physical force provision. *See id.* at 1265 (denying remand for reconsideration under the residual clause—"the Government did not keep this option alive because it claimed at sentencing any reliance upon the residual clause"). The *Johnson* decision does not so much as mention *Begay*. *See id.*

115. *Chambers*, 129 S. Ct. at 690.

116. *Id.*

117. *Id.*

118. *Id.*

119. *See, e.g., Taylor v. United States*, 495 U.S. 575, 602 (1990); also *Shepard v. United States*, 544 U.S. 13, 16–17 (2005).

120. 720 IL. COMP. STAT. 5/31-6(a) (2009).

report for periodic imprisonment to Jefferson County Jail—a penal institution.¹²¹

The district court treated the failure to report as an “escape from [a] penal institution” and thus held that it qualified as a violent felony under the ACCA.¹²² The Seventh Circuit reluctantly agreed.¹²³ Recognizing a circuit split, the Supreme Court granted certiorari.¹²⁴ Unlike the lower courts, the Supreme Court separated “failure to report” from “escape from a penal institution” under the Illinois statute, “treat[ing] the statute for ACCA purposes as containing at least two separate crimes, namely, escape from custody on the one hand, and a failure to report on the other.”¹²⁵ The Court found that when a statute, like this one, criminalizes purposeful and non-purposeful, violent and non-violent, and aggressive and non-aggressive behavior, courts must “choose the right category.”¹²⁶ The “nature of the behavior that underlies the statutory phrase” matters in this determination.¹²⁷ Because Mr. Chambers pleaded guilty to the lesser crime of knowingly failing to report for periodic imprisonment, failure to report was the crime at issue.¹²⁸

Thus, the question before the Court was whether failure to report for penal confinement as defined under Illinois law was a violent felony within ACCA’s residual provision.¹²⁹ The Court found that although it is a “crime punishable by imprisonment for a term exceeding one year,”¹³⁰ it did not satisfy either of § 924(e)(2)(B)’s sub-clauses. It does not qualify under the physical force provision because it does not have as an element the use, attempted use, or threatened use of physical force against the person of another,¹³¹ and it is not one of the listed crimes of burglary, arson, extortion, or the use of explosives.¹³² Finally, it does not qualify under the residual provision because it does not involve conduct that presents a serious potential risk of physical injury to another.¹³³

121. *Chambers*, 129 S. Ct. at 691.

122. *Id.* at 690.

123. *Id.*; *United States v. Chambers*, 473 F.3d 724, 726 (7th Cir. 2007).

124. *Chambers*, 129 S. Ct. at 690; compare *United States v. Winn*, 364 F.3d 7, 12 (1st Cir. 2004) (failure to report is a violent felony) with *United States v. Piccolo*, 441 F.3d 1084, 1088 (9th Cir. 2006) (failure to report is not a violent felony).

125. *Chambers*, 129 S. Ct. at 691.

126. *Id.* at 690.

127. *Id.*

128. *Id.* at 691.

129. *Id.* at 690.

130. 18 U.S.C. § 924(e)(2)(B) (2009).

131. *Id.* § 924(e)(2)(B)(i).

132. *Id.* § 924(e)(2)(B)(ii).

133. *Id.*

The government argued that failure to report escape revealed an offender's strong aversion to penal custody and that it is dangerous in the same way as a burglary. Because common-law burglary is committed once one enters a structure with the requisite intent, the risk of injury arises in the act of discovery or in the instance of confrontation.¹³⁴ Similarly, in knowingly failing to report to a penal institution, the risk arises once the crime has been committed and law enforcement has been dispatched.¹³⁵ An individual, like Mr. Chambers, deliberately commits the crime while conscious of the risk of closely-related, violent confrontation. Thus, the crime is similar to listed offenses of burglary, arson, extortion, and use of explosives.¹³⁶

The Court was not convinced. The Court noted that, "[c]onceptually speaking, the crime amounts to a form of inaction, a far cry from the 'purposeful,' 'violent,' and 'aggressive' conduct contemplated by *Begay*."¹³⁷ Furthermore, relying on statistical data developed by the Sentencing Commission,¹³⁸ the *Chambers* Court found that an offender is not "significantly more likely than others to attack or physically resist an apprehender, thereby producing a serious potential risk of physical injury."¹³⁹ The data "strongly supports the intuitive belief that failure to report does not involve a serious potential risk of physical injury."¹⁴⁰ In sum, the *Chambers* Court found that failure to report does not qualify as a violent felony because it is a crime of inaction—it is not the sort of purposeful, violent, and aggressive behavior that would rise to the level of risk in burglary, arson, extortion, or the use of explosives.¹⁴¹

IV. PROPOSALS

In place of *Begay*'s purposeful, violent, and aggressive standard, the Supreme Court or Congress could take one of several approaches to remedy ACCA's ailing residual provision. The most practical, fair, and consistent approach would be for Congress to amend the statute to provide two lists: a list of crimes that qualify as violent felonies and a list of crimes that do not. The Sentencing Guidelines have successfully used this approach for years, making it an excellent model for the residual provision.

134. Brief for the United States at 18, *Chambers v. United States*, 129 S. Ct. 687 (2009) (No. 06-11206), 2008 WL 4598678.

135. *Id.* at 18–20.

136. *Id.*

137. *Chambers*, 129 S. Ct. at 692.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

A. Possible Supreme Court Actions

1. Status Quo

The Court could keep the *Begay* standard, and wait to review cases in which courts have applied the purposeful, violent, and aggressive standard illogically. For example, in *Chambers*, the Court accepted certiorari less than a year after releasing the *Begay* decision.¹⁴² In that case, the crime of failure to report was arguably purposeful, violent, and aggressive in the same way as burglary, arson, extortion, and use of explosives.¹⁴³ However, because failure to report was a crime of inaction, it was simply not the kind of crime contemplated by the ACCA,¹⁴⁴ despite the fact that the Court could have shoehorned the crime into the mold. This approach would not, however, solve the problems discussed in Part III.B(1)–(3) of this Comment.

2. Readopt the *James* Standard

The Supreme Court could readopt the *James* standard, which requires courts to determine whether a crime presents a serious potential risk of physical injury regardless of intent.¹⁴⁵ While this alternative would allow courts to make individualized decisions free from the purposeful, violent, and aggressive straightjacket, it fails to capture the true essence of the ACCA. The ACCA's purpose is to incapacitate individuals who are particularly dangerous when in possession of a gun-like felonies such as operating a dump truck without the consent of the owner,¹⁴⁷ negligent pollution,¹⁴⁸ and reckless tampering with consumer products,¹⁴⁹ felonies under the ACCA should indicate a higher level of dangerousness.

The majority in *Begay* attempted to limit the ACCA qualification to crimes that are similar to those that Congress listed in the statute. In the Court's opinion, what distinguishes crimes under the ACCA from regular crimes is that crimes under the ACCA are committed purposefully, violently, and aggressively. Flawed as it is, the *Begay* decision attempts to link the scope of the ACCA with its purpose. Mere risk-balancing, re-

142. *Chambers v. United States*, 128 S. Ct. 687 (2008) (mem.).

143. *Chambers*, 129 S. Ct. at 692.

144. *Id.*

145. *See James v. United States*, 550 U.S. 192, 207 (2007).

146. *See supra* text accompanying notes 11–12.

147. *See United States v. Johnson*, 417 F.3d 990 (8th Cir. 2005).

148. 33 U.S.C. § 1319(c)(1) (2009).

149. 18 U.S.C. § 1365(a) (2009).

ardless of the person committing the crime, does not create that essential link; thus, re-adoption of the *James* standard is not the best option.

3. A Flexible, Purpose-Driven Standard

The Supreme Court could abandon the *Begay* framework and replace it with a more flexible, purpose-driven standard. Under this new standard, a court would first consider whether the crime otherwise creates a serious potential risk of physical injury, which is consistent with the *James* analysis and the first step of the *Begay* analysis. Once the potential for physical injury is established, a court would consider the crime in conjunction with the ACCA purpose. Instead of asking whether the crime falls within *Begay*'s rigid purposeful, violent, and aggressive standard, a court would simply ask whether the crime is indicative of the type of individual targeted by the ACCA: an individual who is particularly dangerous when possessing a gun.

While this purpose-driven standard gets to the heart of the ACCA's purpose, it may be more elusive than the *Begay* approach. Allowing courts to consider crimes on a case-by-case basis will undoubtedly lead to inconsistent results, falling short of being "concrete enough to ensure that the ACCA residual provision will be applied with an acceptable degree of consistency by the hundreds of district judges that impose sentences every day."¹⁵⁰ While this approach would give courts much-needed flexibility, courts would also have the "power to subject almost any repeat offender to the ACCA's fifteen-year mandatory minimum."¹⁵¹ Conversely, courts could allow dangerous criminals to assimilate back into society without a well-deserved fifteen-year prison term. True, a purpose-driven standard would uphold the purpose of the statute the best. But if the goal is consistency, this proposal fails.

4. Scalia's Standard

The Court could adopt Justice Scalia's proposal, which is set out in his concurring opinions in both *James* and *Begay*. Justice Scalia, while agreeing with *Begay*'s result, generally opposed the Court's purposeful, violent, and aggressive standard because the statutory language does not warrant it.¹⁵²

For Justice Scalia, the ACCA's congressional intent is best served when all crimes that present a serious potential risk of physical injury are included within the scope of the residual provision.¹⁵³ Thus, the best way

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

151. *Id.* at 224.

152. *Begay v. United States*, 553 U.S. 1328 S. Ct. 1581, 1589 (Scalia, J., concurring).

153. *Id.*

to interpret § 924(e) is to first determine which of the listed crimes poses the least serious risk of physical injury.¹⁵⁴ That level will be set as the serious potential risk required by the statute. Crimes that pose at least that serious a risk of injury are encompassed by the statute, while those that do not rise to the level of serious potential risk are excluded.¹⁵⁵

This standard, although “seemingly straightforward,”¹⁵⁶ requires courts to engage in simple risk-balance without considering the type of offender that commits the crime. *Buttgay* made clear that the ACCA requires more than just risk-balance; Crimes that qualify should indicate that a criminal is “the kind of person who might deliberately point the gun and pull the trigger.”¹⁵⁷ Because Justice Scalia’s proposal includes all crimes that present a potential risk of physical injury, no matter how benign, this standard is not the best option.

5. Hold it Void for Vagueness

Finally, the Court could acknowledge the statute as constitutionally unintelligible and hold it void for vagueness.¹⁵⁸ As Justice Scalia argues, “Congress has simply abdicated its responsibility when it passes a criminal statute insusceptible of an interpretation that enables principled, predictable application; and this Court has abdicated its responsibility when it allows that.”¹⁵⁹ Thus, the Court could simply void the statute and ask Congress to render a new, more definite statute that provides more guidance.

B. Possible Congressional Actions

Congress could take one of two approaches to remedy the ACCA’s ailing residual provision. First, Congress could amend the ACCA to create a specific list of crimes worthy of ACCA enhancement. Second, Congress could abandon the ACCA altogether, recognizing that Supreme Court standards are inconsistent and unfair given the ACCA’s fifteen-year mandatory minimum. While neither approach is ideal, if the goal is practicality, the former is the surest bet. But if the goal is absolute fairness, the latter prevails.

154. *Id.*

155. *Id.*

156. *Id.* at 1590.

157. *Id.* at 1595.

158. See *James v. United States*, 550 U.S. 192 (2007) (Scalia, J. dissenting).

159. *Id.* at 230 (majority opinion).

1. Amend the ACCA, Using the Sentencing Guidelines as a Model

In his concurring opinion in *Chambers*, Justice Alito advocates for a list of qualifying crimes, describing this approach as “the only way to right ACCA’s ship.”¹⁶⁰ Congressional intent would no longer be a mystery because Congress would list each crime that it believes should qualify under the ACCA. But criminal codes vary widely because states name and define crimes differently. This variation makes an exhaustive list encompassing all fifty states’ codes impracticable, if not impossible.

The Sentencing Guidelines, however, has used the list approach for several years,¹⁶¹ making it an excellent model for how to amend the ACCA. USSG § 4A1.2(c)(1) is particularly helpful because it describes how to count criminal history points for sentencing purposes, a computation that is similar to the way that ACCA counts predicate crimes.¹⁶² Section 4A1.2(c)(1) first identifies sentences that are counted, followed by a list of generic crimes. It states, “[s]entences for the following prior offenses and offenses similar to them, by whatever name they are known are counted.”¹⁶³ Then, the Sentencing Guidelines identify offenses or ones similar to those, by whatever name they are known, which are counted.¹⁶⁴

To help courts understand how to apply this section, the Sentencing Guidelines provide useful commentary, outlining relevant factors for courts to consider when determining whether an unlisted offense is similar to an offense listed under that section. Courts are directed to use common sense to compare the punishment, seriousness, elements, culpability, and likelihood of recurring criminal conduct between a listed and unlisted crime.¹⁶⁵ When common sense is used to determine whether a state crime is similar to a listed generic crime, the analysis becomes simple.

To illustrate, consider Virginia’s statutory rape provision, which classifies nonforcible carnal knowledge of a minor. Given only its

160. *Chambers v. United States*, 129 S. Ct. 687 (2009).

161. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(c)(1) (2009).

162. *See id.*

163. *Id.* (emphasis added).

164. *Id.*

165. *Id.* § 4A1.2 cmt. n.12 (2007). Relevant factors include (i) a comparison of punishments imposed for the listed and unlisted offenses; (ii) the perceived seriousness of the offense as indicated by the level of punishment; (iii) the elements of the offense; (iv) the level of culpability involved; and (v) the degree to which the commission of the offense indicates a likelihood of recurring criminal conduct. *Id.*

166. *See United States v. Thornton*, 554 F.3d 443, 446 (4th Cir. 2009). Under Virginia law, a person is guilty of statutory rape if he “carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age.” CODE ANN. § 18.2-63(A) (West 2007) (emphasis added).

name, deciding what type of criminal behavior this crime covers is not straightforward. But considering that carnal knowledge is essentially sexual contact,¹⁶⁷ common sense dictates that this crime is commonly known as statutory rape. Assuming Congress includes statutory rape in its list of ACCA crimes, Virginia's non-forcible carnal knowledge of a minor statute would qualify because it is similar to the generic crime of statutory rape. It is that simple.

Admittedly, this solution is not perfect. Because each state fashions its own criminal code, deciding whether a particular state crime is similar enough to a listed crime may be difficult. Moreover, Congress could easily overlook a crime that should qualify, or alternatively, include a crime that it should not. But the Sentencing Guidelines' model is currently the most practical approach, providing clear direction to lower courts and consistent results for armed career criminals.

2. Abolish the Act

On the other hand, Congress could abolish the ACCA. As long as the *Begay* standard exists, the ACCA will be imposed inconsistently and, undoubtedly, on an undeserving criminal.¹⁶⁸ Such inconsistent application of the *Begay* standard creates a serious societal problem in light of the harsh fifteen-year sentence the statute triggers. In doing away with the ACCA entirely, courts would simply sentence criminals according to the Sentencing Guidelines and judges could still exercise discretion to sentence above the Sentencing Guidelines if a particular criminal is so dangerous that a harsher penalty is appropriate. True, this option would neither fully address Congress's concerns about the recidivism rate of dangerous individuals, nor serve as the strict deterrent Congress intended when it drafted the ACCA. But abandoning the ACCA would avoid the inconsistency plaguing the lower courts and finally allow for fairness in sentencing under the ACCA.

V. CONCLUSION

When drafting the residual provision, Congress intended to provide courts with the flexibility to include (or exclude) a crime from ACCA status if it met (or failed to meet) the ACCA's purpose. *Begay*, the Supreme Court attempted to capture that purpose by limiting felonies under the ACCA to those committed purposefully, violently, and aggressively. But, like other Supreme Court ACCA standards, that attempt was

167. The statute defines carnal knowledge as including "the acts of sexual intercourse, cunnilingus, fellatio, anilingus, anal intercourse, and ~~anal~~ and inanimate object sexual penetration." VA. CODE ANN. § 18.2-63(C) (West 2007).

168. See *infra* Part III.B(1)–(2).

fruitless. The lower court decisions were plagued with frustration and inconsistency, and as Justice Scalia aptly described ~~in the~~ decision was a “made-for-the-case improvisation” that failed to “provide a complete framework that ~~it~~ embrace future cases.”¹⁶⁹

To remedy the ACCA’s ailing residual provision, Congress should amend the statute, using the Sentencing Guidelines as a model. Under that model, instead of wrestling a crime’s elements ~~into~~ *Begay*’s purposeful, violent, and aggressive standard, a court would simply look at whether that crime, or a crime similar to it, is listed under the statute. This simple approach can finally provide clear guidance for lower courts and fair, consistent results for armed career criminals.

169. *Begay v. United States*, 553 U.S. 137, ~~§2~~ Ct. 1581, 1589 (2008) (Scalia, J., dissenting).