

**IS THAT PRIOR A VIOLENT FELONY OR A CRIME OF VIOLENCE?:
An Analytical Framework for Approaching ACCA (and Career Offender) Predicates¹**

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e), mandates a minimum of fifteen years imprisonment for a felon who possesses a firearm and has “three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” ACCA defines a “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.

18 U.S.C. § 924(e)(2)(B). The career offender provisions of the sentencing guidelines contain a similar, though not identical, definition of “crime of violence.” *See* USSG § 4B1.2.²

The Supreme Court has decided seven key cases interpreting the ACCA, which courts have uniformly applied to both ACCA and the career offender guideline.³ A brief summary of the seven cases appears below⁴ followed by an eight step analytical framework for assessing

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² USSG § 4B1.2 includes only “burglary of a dwelling.” The application note also enumerates additional “crimes of violence.” Those enumerated offenses may be treated differently under the career offender guideline than ACCA. *See United States v. Martinez*, 602 F.3d 1166, 1172-75 (10th Cir. 2010) (attempted second-degree burglary under Arizona law is a crime of violence but not a violent felony). *But see United States v. Armijo*, ___ F.3d ___, 2011 WL 2687274 (10th Cir. July 12, 2011) (Colorado manslaughter is not a crime of violence under § 4B1.2 even though guideline commentary includes “manslaughter”; a crime of violence must be purposeful).

³ *United States v. Polk*, 577 F.3d 515, 519 n.1 (3d Cir. 2009); *United States v. Seay*, 553 F.3d 732, 739 (4th Cir. 2009); *United States v. Mohr*, 554 F.3d 604, 608-09 (5th Cir.), *cert. denied*, 130 S.Ct. 56 (2009); *United States v. Herrick*, 545 F.3d 53, 58 (1st Cir. 2008); *United States v. Gray*, 535 F.3d 128, 129 (2d Cir. 2008); *United States v. Bartee*, 529 F.3d 357, 363 (6th Cir. 2008); *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008); *United States v. Williams*, 537 F.3d 969, 971 (8th Cir. 2008); *United States v. Coronado*, 603 F.3d 706, 708 (9th Cir. 2010); *United States v. Tiger*, 538 F.3d 1297, 1298 (10th Cir. 2008); *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

⁴ Those cases are discussed in detail elsewhere. *See, e.g.*, Timothy Crooks and Margaret Katze, *Begay and Beyond: Chipping Away at Crimes of Violence* (May 2008); Anne Blanchard and Sara Noonan, *Potential Uses of Begay and Chambers: Annotated Case Law Outline* (rev. May 12, 2010) (both available at fd.org).

your client's prior convictions.

I. SUPREME COURT CASE LAW: *Taylor, Shepard, James, Begay, Chambers, Johnson, and Sykes*

A. The Categorical and Modified Categorical Approaches for Determining Whether a Prior Offense Qualifies Under ACCA: *Taylor, Shepard, and Chambers*

In *Taylor v. United States*, 495 U.S. 575, 592 (1990), the Court made clear that the offenses enumerated in subparagraph (ii) – that is, burglary, arson, and extortion – have a “uniform definition independent of the labels employed by the various States’ criminal codes.” Rejecting the common law definition of burglary, the Court looked to state criminal codes for a “generic, contemporary meaning of burglary.” *Id.* at 589. The Court defined “generic burglary” as “an unlawful entry, into a building or structure, with intent to commit a crime.” *Id.* at 598.⁵

Taylor further held that, in determining whether an offense qualifies as an ACCA predicate under subparagraph (ii) (either as an enumerated offense or because it “otherwise involves a serious potential risk of physical injury to another”), the trial court should “look [only] to the statutory definitions of the prior offenses [categorical approach], and not to the particular facts underlying those convictions [circumstance-specific approach].” *Id.* at 600 (emphasis added). *Taylor* acknowledged that some burglary statutes are overbroad, meaning that they cover both unlawful entry of a building to commit a crime (generic burglary) and, for example, unlawful entry of an automobile to commit a crime (not generic burglary). *Id.* at 602. In such an instance, where the offense may be committed by more than one means, but not all of those means qualify as a violent felony, then the court may use a modified categorical approach, which under *Taylor*, permits courts to look to “the charging paper or jury instructions” to see whether the conviction “actually required the jury to find all the elements of generic burglary in order to convict the defendant.” *Id.*

In *Shepard v. United States*, 544 U.S. 13, 19 (2005), the Court clarified that *Taylor*’s modified categorical approach applies for guilty pleas as well as jury verdicts. *Shepard* held that the “right analogs for applying the *Taylor* rule . . . would [in a bench trial] be a bench-trial judge’s formal rulings of law and findings of fact, and in pleaded cases they would be the statement of factual basis for the charge, shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by

⁵ The Supreme Court has not yet weighed in on the elements of “generic arson” or “generic extortion.” A good source for those elements, however, would be the version of LaFave & Scott that was current in 1986, when ACCA was passed. See *Taylor*, 495 U.S. at 598 (citing W. LaFave & A. Scott, Substantive Criminal Law § 8.13(a), (c), p. 466, 474 (1986) as its source for the “generic, contemporary meaning of burglary”). Nor has the Court weighed in on the elements of an offense that “otherwise involves use of explosives.” At a minimum, however, the elements should satisfy the *Begay* test. See Part I(B)(b), *infra*.

the defendant upon entering the plea.” *Id.* at 20. Thus, under the modified categorical approach in a jury case, the court may look only to the indictment, jury instructions, or verdict sheet; and in a pleaded case, the court may examine only the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” *Id.* at 16.

The line drawn by *Taylor* and *Shepard* has important constitutional significance. In *Taylor*, the Court queried “[i]f the sentencing court were to conclude, from its own view of the record, that the defendant actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?” *Taylor*, 495 U.S. at 601. *Shepard* later answered that question in the affirmative, because a sentencing judge that makes a disputed finding of fact about “what the defendant and state judge must have understood as the factual basis of the prior plea . . . raises the [Sixth Amendment] concern underlying *Jones* and *Apprendi*.” *Shepard*, 544 U.S. at 25-26 (citations omitted).⁶

In *Chambers v. United States*, 555 U.S. 122 (2009) (discussed *infra*), the Court clarified that under the categorical approach, when a statute defines an offense to include multiple forms (or categories) of conduct, a court may look to the documents approved in *Shepard* to determine whether the defendant’s conviction was for a particular one of those categories. *Id.* at 126 (where state escape statute criminalized multiple forms of escape, “[w]e know from the state-court information in the record that Chambers pleaded guilty to ‘knowingly fail[ing] to report’”). If so, that offense category is the proper focus of the inquiry. *Id.* at 126-27 (treating the failure to report for custody as a separate offense from escape from custody even though both categories are covered under the same statute because a failure to report is “less likely to involve a risk of physical harm than the less passive, more aggressive behavior underlying an escape from custody”).⁷

⁶This portion of *Shepard* was only joined by four justices (Justices Souter, Stevens, Scalia, and Ginsburg). Justice Thomas, however, separately concurred because he believed that even the fact-finding line drawn by *Shepard* and *Taylor* violated the Sixth Amendment as interpreted by *Apprendi v. New Jersey*, 530 U.S. 466 (2000). See *Shepard*, 544 U.S. at 28 (Thomas, J., concurring in part and concurring in judgment). Thus five justices agreed that, at the least, anything beyond the narrow category of documents approved in *Taylor* and *Shepard* would implicate the Sixth Amendment right to a jury.

⁷Some courts have used the modified categorical approach to undertake a broad inquiry into the facts of a particular case regardless of whether the statutory or common law definition of the offense is set out in subsections or the disjunctive. See *United States v. Johnson*, 376 Fed. Appx. 205, 212 n.3 (3d Cir. 2010). Others apply the modified categorical approach only where the elements of the offense are framed in the disjunctive and where one element involves violence and the other does not. See *United States v. Woods*, 576 F.3d 400, 406 (7th Cir. 2009) (modified categorical approach applies when statute is divisible, i.e., when it “expressly identifies several ways in which a violation may occur.” Cf. *United States v. Calderon-Pena*, 383 F.3d 254, 287 (5th Cir. 2004 (en banc) (decided under 2L1.2); *United States v. Lipscomb*, 619 F.3d 474, 491 (5th Cir. 2010) (citing *Nijahawan v. Holder*, 129 S.Ct. 2294, 2299 (2009)), cert. denied, 131 S.Ct. 2475 (2011); *United States v. Robledo-Leyca*, 307 Fed. Appx. 859, 962 (5th Cir.

B. ACCA Subparagraph (ii): “Otherwise Involves a Serious Potential Risk of Injury to Another”: *James, Begay, Chambers, and Sykes*

a. *James*: Similar in Degree of Risk to Subparagraph (ii)’s Enumerated Offenses

In *James v. United States*, 550 U.S. 192 (2007), the Court applied the categorical approach to determine that attempted burglary as defined under Florida state law fits the “otherwise” clause in subparagraph (B)(ii) because it is similar in degree of risk to a completed burglary. First, the Court looked at the elements of the statute, which required only that the defendant “take any act toward commission” of the burglary offense. *See id.* at 202. Then the Court looked to see whether the state’s courts had interpreted the statutory language and found that “while the statutory language is broad, the Florida Supreme Court has considerably narrowed its application in the context of attempted burglary, requiring an overt act directed toward entering or remaining in a structure or conveyance.” *Id.* The Court had little difficulty finding that the risks associated with attempts to unlawfully enter or remain in a dwelling with intent to commit a felony therein (as required by Florida law) presented a risk “that is comparable to the risk posed by the completed offense” – that is, the possibility of a face to face confrontation between the attempted burglar and another. *Id.* at 204.

James noted “the proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.” *Id.* at 208 (emphasis added). If a statute’s elements permit a conviction for conduct that does not present a serious potential risk of injury to another, then it does not qualify as a predicate offense, even if the state typically invokes the statute to punish conduct that would qualify “in the ordinary case.” *See id.* at 205 n.4 (listing cases finding that certain attempted burglary statutes did not qualify under ACCA because they could be based on such conduct as making a duplicate key, casing a building, obtaining floor plans, and possessing burglary tools). Although the Court stated that for an offense not to qualify as a predicate, there must be a “realistic probability, not a theoretical possibility,” that the statute covers conduct that does not present a serious potential risk of physical injury, *id.* at 208, a defendant may show the breadth of the statute by “pointing to his

2009); *United States v. Siegel*, 477 F.3d 87, 91 (3d Cir. 2007) (question is whether statute is “disjunctive in a relevant sense; not necessarily whether the statute is formally divided into separate subsections”). ” The Second Circuit in *United States v. Daye*, 571 F.3d 225, 231 n.4 (2d Cir. 2009), left open the question of whether the modified categorical approach applies to a statute that “encompasses both felonies and other crimes, but does not describe the violent felonies only in distinct subsections or elements of a disjunctive list.”

The Ninth Circuit in *United States v. Aguila Montes de Oca*, 2011 WL 3506442 (9th Cir. Aug 11, 2011) (en banc), held that even where a state statute is missing an element of a generic offense (e.g., unprivileged entry for burglary), the court may examine state court documents to determine if the offense included the missing element.

own case or other cases in which the state courts did in fact apply the statute” in such a manner. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) (cited in *James*, 550 U.S. at 208).⁸

b. *Begay*: Not Similar in Kind to Subparagraph (ii)’s Enumerated Offenses

In *Begay v. United States*, 553 U.S. 137 (2008), the Court again analyzed the “otherwise” clause, this time significantly narrowing its reach and finding that the predicate offense must be “similar in kind as well as in degree of risk posed” to subparagraph (ii)’s enumerated offenses to qualify as a “violent felony” under ACCA. *Id.* at 144 (emphasis added). To be similar in kind, the offense must involve “purposeful, violent, and aggressive conduct,” *id.* at 145, such that it would be “potentially more dangerous when firearms are involved” and is “characteristic of the armed career criminal, the eponym of the statute.” *Id.* at 145. The Court emphasized that the requirement that past crimes be “purposeful, violent and aggressive” was necessary to trigger ACCA, because they “show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger. We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist.” *Id.* at 146. Applying this new test, the Court found that driving under the influence does not qualify as an ACCA predicate, chiefly because it is not a purposeful crime. *Id.* at 148.

c. *Chambers*: Not Similar in Kind or Degree of Risk to Subparagraph (ii)’s Enumerated Offenses

In *Chambers v. United States*, 555 U.S. 122 (2009), the Court applied *Begay* to find that an Illinois escape conviction based on a failure to report to custody does not qualify as a violent felony under ACCA’s “otherwise clause.” First, the Court held that it is not similar in kind to the enumerated offenses because “the crime amounts to a form of inaction, a far cry from the ‘purposeful, ‘violent,’ and ‘aggressive’ conduct’ potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion.” *Id.* at 128 (citing *Begay*, 553 U.S. at 141-42). Second, the Court held that failure to report is not similar in degree of risk posed to the enumerated offenses. *Id.* Framing the question as whether an offender who fails to report is “significantly more likely than others to attack, or physically to resist, an apprehender,” the Court relied heavily on data from the U.S. Sentencing Commission, which showed that of 160 failure to report cases in a two year period, none involved violence. *Id.* at 128-29. The Court also noted the government’s failure to produce other empirical evidence showing a risk of violence. *Id.* at 130.

d. *Sykes*: Risk Posed is Comparable to that Posed by “Closest Analog” Among Enumerated Offenses

⁸ This case-specific look is consistent with the modified categorical approach described in Part I(A), *supra*, as it is used only to interpret what the elements of the statute actually require.

In *Sykes v. United States*, 131 S. Ct. 2267 (2011), the Court held that the defendant's prior felony conviction for knowing or intentional flight from a law enforcement officer by vehicle was a violent felony. First, the Court held that the conduct of fleeing creates a risk of violence, which is "similar in degree of danger to that involved in arson, which also entails intentional release of a destructive force dangerous to others." *Id.* at 2273. Second, the Court reasoned that vehicle flight, like burglary, can "end in a confrontation leading to violence." *Id.* Third, the Court looked to statistical data on the injury rates associated with vehicle flight, compared those statistics to data on burglaries and arson, and concluded that the injury rates are higher for vehicle flight than arson or burglary.

The Court declined to examine whether the offense was "purposeful, violent, or aggressive," because it had already concluded vehicle flight was "similar in risk to the listed crimes." *Id.* at 2276. The Court noted that the "specific reason for its holding" in *Begay* was that "the conduct for which the drunk driver is convicted (driving under the influence) need not be purposeful or deliberate." *Id.* at 2275 (quoting *Begay*, 553 U.S. at 145). Unlike driving under the influence, the Indiana vehicle flight statute had a "stringent *mens rea* requirement," i.e., a "knowing attempt to escape law enforcement." The Court further noted: "[i]n many cases, the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk, for crimes that fall within the former formulation and those that present serious potential risks of physical injury to others tend to be one and the same." *Id.*⁹

Sykes adds a new component to the analysis of whether a crime is a violent felony. The Indiana statute at issue in *Sykes* set forth multiple variations of "fleeing" offenses. One provision criminalized flight where the defendant "operates a vehicle in a manner that creates a substantial risk of bodily injury to another." The provision under which *Sykes* was convicted prohibited vehicle flight from a law enforcement officer after the offender has, by visible or audible means, identified himself and ordered the person to stop." The Court rejected *Sykes*'s argument that only the former presented a serious potential risk of physical injury to another. In reaching this conclusion, the Court relied heavily on the fact that the two offenses were punished similarly

⁹ Some courts have questioned what effect *Sykes* has on the purposeful, violent, and aggressive test under *Begay*. See, e.g., *Sun Bear v. United States*, 644 F.3d 700, 704 n.6 (8th Cir. 2011); *United States v. Honeycutt*, 2011 WL 2471024 (S.D. W. Va. June 20, 2011) ("it is unclear whether the *Begay* test survived *Sykes*, and if so, under what circumstances *Begay* continues to apply"). Others have either incorporated language from *Sykes* without suggesting that it fundamentally altered *Begay*, *United States v. Park*, 649 F.3d 1175, 1175 (9th Cir. 2011), or expressly acknowledged that "*Sykes* did not overrule any of the previous tests, and *James*, *Begay*, and *Chambers* remain good law." *United States v. Oliveira*, ___ F. Supp. 2d ___, 2011 WL 2909816 (D. Mass. July 21, 2011).

While *Sykes* notes that the *Begay* formulation is not rooted in the text of the residual clause, the Court does not overrule *Begay* and makes clear that it applies when the predicates are "akin to strict liability, negligence, and recklessness crimes." 131 S.Ct. at 2276. Justice Kagan, in her *Sykes* dissent, noted her understanding that the majority retained the *Begay* test, but concluded it was redundant in that particular case. Justice Kagan also noted that *Chambers* itself makes clear that the *Begay* analysis applies to some intentional crimes. *Sykes*, 131 S. Ct. at 2289 (Kagan, J., dissenting).

(both Class D felonies carrying terms of between six months and three years). The Court expressly declined to decide if it matters under the residual clause “whether a crime is a lesser included offense even in cases where that offense carries a less severe penalty than the offense that includes it.” *Id.* at 2277.

C. ACCA Subparagraph (i): Element of “Physical Force”: *Johnson*

In *Johnson v. United States*, 130 S. Ct. 1265 (2010), the Court for the first time analyzed subparagraph (i), which defines as a “violent felony” a prior conviction “that has as an element the use, threatened use, or attempted use of physical force against the person of another.” See 18 U.S.C. § 924(e)(2)(B)(i). The defendant had been convicted of battery under a Florida statute. Like the offense in *Chambers*, the crime of battery could be committed under the statute in multiple ways (or categories). Unlike *Chambers*, however, nothing in the record suggested that the defendant had been convicted of any particular offense category. As a result, the Court analyzed whether the least serious offense category set forth in the battery statute satisfied subparagraph (i)’s definition. See *Johnson*, 120 S. Ct. at 1269 (“Since nothing in the record of Johnson’s 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts, his conviction was a predicate conviction for a ‘violent felony’ under the Armed Career Criminal Act only if ‘[a]ctually and intentionally touch[ing] another person constitutes the use of physical force’ within the meaning of § 924(e)(2)(B)(i).”) (citations omitted).

As in *James*, the Court looked to how the elements of the battery statute had been interpreted by the state courts. *Id.* (“We are bound . . . by the Florida Supreme Court’s interpretation of state law, including its determination of the elements” of the battery statute). Because the Florida Supreme Court had found that the element of “actually and intentionally touching” another person could be “satisfied by any physical contact, no matter how slight,” *id.* at 1269-70 (citations omitted), the Court used that same interpretation in its ACCA analysis. The question then became whether “any physical contact, no matter how slight,” constitutes “physical force” under subparagraph (i), and thus constitutes a “violent felony” under ACCA.

The Court concluded that the term “physical force” in subparagraph (i) means “violent force – that is force capable of causing physical pain or injury to another person.” *Id.* at 1271 (emphasis in original). The Court reasoned that even though an unwanted touching constituted “physical force” under common law battery, it must interpret the phrase “physical force” in subparagraph (i) in context – that is, as defining what is and is not a “violent felony” for purposes of ACCA. *Id.* The Court determined that a “violent felony” necessarily required strong physical force, because the term “violent . . . connotes a substantial degree of force” and when attached to the term “felony, its connotation of strong physical force is even clearer.” *Id.* The Court also found significant that battery was typically a nonviolent misdemeanor at common law, leading it to question even more the appropriateness of importing its definition of “force” into ACCA’s definition of “violent felony.” *Id.* at 1271-72.

II. CONSTITUTIONAL AND OTHER CHALLENGES: Preserving the Issues

In addition to ensuring that courts apply the proper analysis in deciding whether a prior counts as a “violent felony,” counsel should preserve all constitutional and other challenges to the process and substance of mandatory minimum and recidivist sentencing. Many of these arguments are set forth in the Brief for the National Association of Federal Defenders as Amicus Curiae Supporting Peititioner, *Begay v. United States*, 553 U.S. 137 (2008) (No. 06-11543), 2007 WL 3353092.¹⁰ Be sure to check your circuit case law in deciding how best to frame these issues.

A. The Residual Clause is Unconstitutionally Vague.

Although the Court has twice stated in dicta that the residual clause is not unconstitutionally vague, it has never addressed squarely whether the judicial gloss placed on the residual clause, the conflicting interpretations emerging from the Court’s decisions, and the use of statistical data to construe the clause, render it vague.

The Court in both *Sykes* and *James* suggested in dicta that the residual clause is not unconstitutionally vague because it “states an intelligible principle and provides guidance that allows a person ‘to conform his or her conduct to the law.’” *Sykes*, 131 S. Ct. at 2277; *James*, 550 U.S. at 210, n.6. In support of this analysis, the Court cited to various other provisions of the federal criminal code that use variants of the term “serious personal injury,” or “substantial risk.” *Id.* That other provisions of the code happen to use some of the same language as 924(e)(B)(ii) in defining an element of the offense, however, is not dispositive. *See James*, 550 U.S. at 230 n.7 (Scalia, J. with Stevens, J., and Ginsburg, J., dissenting) (“None of the provisions the Court cites . . . prefaces its judicially-to-be-determined requirement of risk of physical injury with the word ‘otherwise,’ preceded by four confusing examples that have little in common with respect to the supposedly defining characteristic.”); *Sykes*, 131 S. Ct. at 2288 (Scalia, J., dissenting) (same and adding that “even if the cited statutes were comparable, repetition of constitutional error does not produce constitutional truth”).

Here it is not the “serious potential risk of physical injury to another” language that is the source of the problem. Rather, the phrase preceding the “serious potential risk language, i.e., “or otherwise involves conduct,” and the conflicting judicial interpretations of that phrase, render the provision “latently vague.” *U.S. v. Caseer*, 399 F.3d 828, 836 (6th Cir. 2005). Latent vagueness increases “the danger of persons being caught unaware of the criminality of their conduct,” because the uncertainty of the statute is not revealed until a court rules on whether a particular prior offense meets the *Taylor*, *James*, *Begay*, *Chambers*, or *Sykes* formulation of the risk inquiry. *Sykes*, 131 S. Ct. at 2287 (Scalia, J., dissenting) (Court’s “repeated inability to craft a principled test out of the statutory text” “confirms its incurable vagueness”).

¹⁰ See also William R. Maynard, *Statutory Enhancement by Judicial Notice of Danger: Who Needs Legislators or Jurors?*, 31 *Champion* 42 (Jan/Feb 2007); William R. Maynard, *Judge-Made Enhancements: A Question of Fact, of Law, or of the Constitution?*, 25 *Champion* 13 (June 2001); Brief for Appellant, *United States v. Nevarez-Puentes*, 278 Fed. Appx. 429 (5th Cir. 2008), 2007 WL 5746632.

There is support on the Supreme Court for the position that ACCA is unconstitutionally vague. Earlier this year, Justice Scalia concluded in unequivocal terms: We should admit that ACCA's residual provision is a drafting failure and declare it void for vagueness." *Sykes*, 131 S. Ct. 2284. He explained that "[t]he reality is that the phrase 'otherwise involves conduct that presents a serious potential risk of physical injury to another' does not clearly define the crimes that will subject defendants to the greatly increased ACCA penalties." *Id.* at 2287. He reiterated his commitment to this reasoning and conclusion in his subsequent dissent from the denial of certiorari in *Derby v. United States*, 131 S. Ct. 2858 (2011) (Scalia, J., dissenting from denial of certiorari) ("Since our ACCA cases are incomprehensible to judges, the statute obviously does not give 'person[s] of ordinary intelligence fair notice' of its reach. I would grant certiorari, declare ACCA's residual provision to be unconstitutionally vague, and ring down the curtain on the ACCA farce playing in federal courts throughout the nation.") (internal citations omitted).

Justice Scalia has not stood alone throughout the years in raising questions about whether it is possible to interpret the statute in a manner that would allow for sufficiently consistent application. As early as 2007, in dissent from the majority's opinion in *James*, Justice Scalia, joined by Justices Stevens and Ginsburg, reasoned that the majority's "uninformative opinion . . . leaves the lower courts and those subject to this law to sail upon a virtual sea of doubt." *James*, 550 U.S. 192, 228 (Scalia, J., with Stevens, J., and Ginsburg, J., dissenting). These three Justices noted that this "[i]mprecision and indeterminacy are particularly inappropriate in the application of a criminal statute." *Id.* at 216. They criticized the majority for "prefer[ing] to keep [offenders] guessing," when "[o]ffenders should be on notice that a particular course of conduct will result in a mandatory minimum prison term of 15 years." *Id.* Later, in the Court's 2009 ruling in *Chambers*, two other Justices, Justice Alito and Justice Thomas concurred in the judgment, but wrote separately to "emphasize that only Congress can rescue the federal courts from the mire into which ACCA's draftsmanship and *Taylor*'s 'categorical approach' have pushed us." *Chambers*, 555 U.S. 122, 132 (Alito, J., with Thomas, J., concurring). They observed that "[a]fter almost two decades with *Taylor*'s 'categorical approach,' only one thing is clear: ACCA's residual clause is *nearly impossible to apply consistently*." *Id.* at 133 (emphasis added). They called on Congress to "formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA's sentencing enhancement," and declared such Congressional action to be "the only way to right ACCA's ship." *Id.* at 134.¹¹

Decisions addressing whether a right is "clearly established" for purposes of qualified immunity provide a helpful framework for assessing whether a defendant had fair warning that a particular prior conviction would qualify as a violent felony or crime of violence. The Supreme Court likened the "fair warning" and "clearly established" right standards in *United States v. Lanier*, 520 U.S. 259, 270 (1997). *See also Hope v. Pelzer*, 536 U.S. 730, 740 n. 10 (2002). Since *Lanier*, the Court has taken a strict view of what it means for a right to be "clearly

¹¹ The disparate, and often conflicting, opinions in the circuits on whether certain offenses are violent felonies provide additional fodder for a void for vagueness argument. *See United States v. Lanier*, 520 U.S. 259, 269 (1997) ("disparate decisions in various Circuits might leave the law insufficiently certain" and "may be taken into account in deciding whether the warning is fair enough").

established” such that it gives fair warning to government actors that their conduct is unlawful. *See, e.g., Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633, 2643-44 (2009) (finding that numerous conflicting interpretations of Court’s decision in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) showed that law was not “clearly established”); *Wilson v. Layne*, 526 U.S. 603, 618 (1999) (relying on judicial disagreement over law as evidence that right was not “clearly established”); *see also Korb v. Lehman*, 919 F.2d 243, 247 (4th Cir. 1990) (“If there exists a “legitimate question” as to whether particular conduct violates a particular right then the right is not clearly established and qualified immunity applies.”). By analogy, be sure to bolster your lack of fair warning arguments by identifying conflicts in the case law, or judicial statements acknowledging the legitimacy of the question of whether a particular offense qualifies under the residual clause.

The Court’s use of statistical data in deciding whether an offense falls within the residual clause raises additional concerns about fair warning. *See Sykes*, 131 S. Ct. at 2286 (Scalia, J., dissenting) (“the more fundamental problem with the Court’s use of statistics is that, far from eliminating the vagueness of the residual clause, it increases the vagueness.” A defendant cannot be expected to have “fair notice” of the conduct that places him within the reach of a statute when the answer turns on statistical data subject to change and interpretation.

One commentator has explained the problem as follows:

Following this statistical approach, the law categorizes crimes as violent felonies depending on how most criminals actually commit them. If the use of violence in commission of a particular crime significantly increased over a two-year period, the law categorizing that crime could change just as quickly. This approach and its small sample size create more problems. Courts could never rely on past precedent but would have to reassess continually whether a crime had become-or ceased to be-a violent felony, depending on how felons in recent years had chosen to commit that particular crime.¹²

Under the statistical analysis employed in *Chambers* and *Sykes*, the definition of violent felony under the residual clause has no fixed, independent meaning. Instead, whether an offense “typically” or “ordinarily” involves the requisite level of risk can vary. “Such a capricious method of statutory interpretation cannot adequately place offenders on notice of which actions trigger the ACCA and its fifteen-year minimum sentence or the career offender guideline and its sixteen-level sentencing enhancement.”¹³ More importantly, it creates the specter of arbitrary and discriminatory application of sentencing enhancements – where prosecutors and courts may pursue their own “personal predilections” with whatever “statistical” data they can muster to support their position. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (discussing importance

¹² David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 Conn. L. Rev. 209, 251 (2010).

¹³ *Id.* at 254.

of void-for-vagueness doctrine in establishing guidelines to govern law enforcement).

In cases where the court or prosecution relies on statistical data to assess whether an offense is a violent felony or crime of violence, be sure to look for contrary data. The more contested the issue and the closer the question, the stronger the argument that the provision does not give a person of ordinary intelligence adequate notice that the prior conviction qualifies as a violent felony or crime of violence.

B. Judicial Fact-Finding Violates the Sixth Amendment Rights to a Jury Trial, Confrontation, and Proof Beyond a Reasonable Doubt.

Practitioners may also want to preserve the argument that ACCA requires a court to go beyond “the fact of a prior conviction,” *see Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), whenever it must find that a prior offense “otherwise involves a serious potential risk injury to another.” Unlike other predicate offenses, where a jury has determined that the defendant’s conduct met the required elements, in cases falling under the residual clause, the risk of injury need not be an element of the predicate offense. Rather than punishing a defendant based upon facts that the government previously proved beyond a reasonable doubt, courts interpreting the residual clause do so based upon their own fact-finding. Courts are required to consider the “ordinary”¹⁴ or “typical”¹⁵ commission of the offense and are even invited to examine statistical data to determine the degree of risk involved in the offense. *Chambers*, 555 U.S. at 129 (statistical evidence sometimes “helps provide a conclusive . . . answer” about the risk crimes present); *Sykes*, 131 S. Ct. at 2279 (looking to “statistical evidence” in addition to “[c]ommon experience” to “confirm the ‘potential risk’ of intentional vehicular flight”). When a court makes a finding about what the defendant’s prior conviction “involves,” it is going well beyond the original jury’s findings or any admissions made at the time of the conviction. Such judicial fact-finding violates a defendant’s rights to a jury and proof beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 490 (“[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”); *see also Taylor*, 495 U.S. at 601 (suggesting that categorical approach is necessary to avoid Sixth Amendment violation); *Sykes*, 131 S. Ct. at 2286 (Scalia, J., dissenting) (Court’s “statistical analysis in ACCA cases is untested judicial fact-finding masquerading as statutory interpretation”).

While the Court in *James* rejected a Sixth Amendment challenge to a court deciding whether a predicate conviction qualifies as a violent felony, it did not “foreclose future *Apprendi* Sixth Amendment arguments.” *United States v. Johnson*, 648 F. Supp. 2d 764, 768 (D.S.C. 2009). According to the Court, “[i]n determin[ing] whether attempted burglary under Florida law qualifies as a violent felony under § 924(2)(2)(B)(ii), the Court engaged in statutory

¹⁴ *James*, 550 U.S. at 208 (“proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another”).

¹⁵ *Begay*, 553 U.S. at 144–45 (stating that enumerated crimes “all typically involve purposeful, violent, and aggressive conduct”).

interpretation, not judicial fact-finding. *James*, 550 U.S. at 213-14. *James*, however, involved an offense, attempted burglary, for which there was an express analog (burglary) in the enumerated offenses. *James* turned on a categorical comparison of the elements of the two offenses under *Taylor*. It did not rely on additional evidence or even “judicial notice” in deciding the two offenses presented similar risk. In residual clause cases where the predicate conviction has no express analog among the enumerated offenses, the analysis is murkier and a court must necessarily look to other evidence (be it statistical or a survey of the factual scenarios surrounding the “typical” offense) in deciding the level or kind of risk involved in the offense.

C. Judicial Fact-Finding Violates the Fifth Amendment Right to Procedural Due Process.

Even if a Court could constitutionally increase a statutory maximum sentence based upon its own findings regarding the risk involved in a prior offense, it should be required to provide the defendant with basic procedural protections before doing so, including notice of the evidence that will be used against him, a right to present contrary evidence, and an evidentiary hearing. Few courts afford the defense such notice and opportunity to be heard. Indeed, in some cases, courts rely on no evidence to assess the risk “involved” in a prior offense. Instead, they simply guess at the risk or engraft their own subjective judgments. In other cases, the courts may rely on statistical data, but without a meaningful adversarial hearing in which the defendant has the right to challenge the underlying data. In either event, the procedure should be challenged on due process grounds.

D. The Fact-Finding Required Under the Residual Clause Violates the Doctrine of Separation of Powers.

Congress retains the power to define crimes and fix penalties. U.S. Const, art. 1, § 1.¹⁶ It may delegate to the judicial branch certain “nonadjudicative functions, but it may not “vest in the Judicial Branch the legislative responsibility of establishing minimum and maximum penalties for every crime.” *Mistretta v. United States*, 488 U.S. 361, 396 (1989). The residual clause of the Armed Career Criminal Act violates the separation of powers because it delegates to courts the power to set the minimum and maximum penalty for an offense by deciding which of thousands of state and federal offenses “otherwise involve [] conduct that presents a serious potential risk of physical injury to another.” 18 U.S.C. § 924(e)(2)(B)(ii) and (2).

The residual clause requires a court to do more than apply to a prior conviction the plain language of § 924(e)(2)(B)(ii). It requires a court to assess the degree and kind of risk involved in a particular offense by looking to the “typical case,” examining statistical data, and speculating about the circumstances surrounding particular crimes. Whether one labels such an assessment “fact-finding” or a form of statutory interpretation, it results in the courts, not

¹⁶ Art. 1, § 1 provides: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.” See also *United States v. Evans*, 333 U.S. 483, 476 (1948) (“as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial functions”).

Congress, determining the minimum and maximum penalties available for a violation of 18 U.S.C. § 922(g).

This delegation of legislative power is substantially broader than what the Court approved in *Mistretta*. First, in *Mistretta*, the Court made clear that the Sentencing Reform Act merely delegated to an independent agency within the judiciary (the Sentencing Commission) the responsibility of “promulgating guidelines to govern the exercise of the judicial function in pronouncing a sentence “*within the statutory range* established by Congress,” *Mistretta*, 488 U.S. at 391 (emphasis added). Here, ACCA vests a court with broad authority to determine what kinds of prior offenses pose a risk of physical injury sufficient to increase the statutory sentencing range from zero to ten years to fifteen years to life imprisonment. Second, the guidelines are subject to congressional review. Congress undertakes no such review of a judge’s decision on whether a particular offense “otherwise involves conduct that presents a serious potential risk of physical injury to another.” *Compare Mistretta*, 488 U.S. at 394 (relying on congressional review as one reason why powers of Commission are not united with judiciary). Rather, the judiciary, and the judiciary alone, decides which prior convictions fall within the residual clause and expose a defendant to greater punishment.

Third, unlike in *Mistretta*, where Congress set up the Sentencing Commission as an agency independent from the courts, the ACCA joins the legislative and judicial function in the courts. Courts have the sole authority to decide which of hundreds of federal or state offenses will expose a defendant to a fifteen-year mandatory minimum sentence and a maximum of life imprisonment. The “practical consequences,” *Mistretta*, 488 U.S. at 393, of having a court determine whether a prior conviction falls within the residual clause of the ACCA undermines the integrity of the legislative process and prevents Congress from “accomplishing its constitutionally assigned functions.” *Id.* at 383 (citations omitted). The end result – arbitrary control over a person’s liberty caused by joining legislative and judicial functions – is precisely what the framers wanted to avoid. *See id.* at 394 (recognizing the “continuing vitality of Montesquieu’s admonition: ‘Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary controul,’ The Federalist No. 47, p. 326 (J. Cooke ed. 1961 (Madison), quoting Montesquieu”).

E. A Court May Not Use *Sykes* to Overrule Existing Case Law Without Implicating the Ex Post Facto Clause.

Sykes did not overrule *Begay* or fundamentally alter the risk of injury inquiry. *See United States v. Park*, 649 F.3d 1175, 1175 (9th Cir. 2011) (applying *Begay* formulation post-*Sykes*); *Sykes*, 131 S. Ct. at 2289, n1. (Kagan, J., dissenting) (stating understanding that Court retained *Begay* but found it redundant in this particular case). Some courts, however, have suggested that certain post-*Begay* decisions may no longer be good law under *Sykes*.¹⁷ Should a court seek to use *Sykes* to overrule existing precedent, defense counsel should consider the ex post facto implications of such a ruling.

¹⁷ *See infra* note 9.

If the offense was committed at a time when circuit law held that a prior offense was not a violent felony, it would violate the ex post facto clause for a court to reverse itself, hold that the crime is a violent felony or crime of violence, and apply the new decision to the defendant. “[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.” *United States v. Lanier*, 520 U.S. 259, 267 (1997). “[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant’s conduct was criminal.” *Id.* See also *Bowie v. City of Columbia*, 378 U.S. 347, 352 (1964) (“deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and *retroactive* judicial expansion of narrow and precise statutory language”). Cf. *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (“Because the focus is on whether the officer had fair notice that her conduct was unlawful, reasonableness is judged against the backdrop of the law at the time of the conduct.”).

F. *Harris v. United States*, 536 U.S. 545 (2002) and *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) should be overruled.

Defense counsel also should preserve the argument that *Harris* and *McMillan* are incompatible with *Apprendi*, and thus should be overruled. As Justice Stevens recently explained, both cases “should be overruled, at least to the extent that they authorize judicial factfinding on a preponderance of the evidence standard of facts that expose a defendant to a greater punishment than what is otherwise legally prescribed.” *United States v. O’Brien*, 130 S.Ct. 2169, 2183 (2010) (Stevens, J., concurring) (citations and internal punctuation omitted); see also *id.* at 2184 (Thomas, J., concurring in the judgment) (“If a sentencing fact either raises the floor or raises the ceiling of the range of punishments to which a defendant is exposed, it is, by definition an element . . . of a separate, aggravated offense that [must be] submitted to a jury and proved beyond a reasonable doubt.”) (citations and internal punctuation omitted).

G. Other Challenges

Counsel should also consider raising other constitutional claims, including arguments that the mandatory minimums violate the right to be treated equally,¹⁸ mandatory minimum sentences

¹⁸ It is well settled that mandatory minimums increase sentences for black defendants far more frequently than for white defendants. For example, in 2008, 11,372 defendants were subject to mandatory minimum sentences that trumped the guideline range in their cases. That same year, although black defendants made up only 24% of all federal defendants, they comprised 31% of those subject to a mandatory minimum, meaning that black defendants are subjected to mandatory minimum sentences at a disproportionately high rate. See also *United States v. Angelos*, 345 F. Supp. 2d 1227 (D. Utah 2004) (discussing ways in which mandatory minimum sentences under 18 U.S.C. § 924(c) arbitrarily classify offenders and offenses); *United States v. McClinton*, 815 F.2d 1242, 1245 (8th Cir. 1989) (rejecting defendant’s equal protection claim because “it is difficult to say that the increased penalty provided in [ACCA] was not rationally related to a legitimate concern of the federal government” but urging Congress to consider whether the resulting sentence is just).

are cruel and unusual under the Eighth Amendment,¹⁹ enhanced sentences based on facts necessary to sustain a “violent felony” or “crime of violence” finding are substantively unreasonable and violate the Sixth Amendment as applied.²⁰

In a jury trial, counsel should request that the jury be instructed about any mandatory minimum penalties facing the defendant. It would be wise to frame such a motion as a way to “better ensure that the jury bases [its] verdict solely on the evidence.”²¹

III. ANALYTICAL FRAMEWORK: Does the Prior Fit the Relevant Test?

With these cases as a guide, the following analytical framework should help you determine whether a conviction qualifies as a violent felony or crime of violence.

1. Obtain a copy of the court file for the prior conviction. Only the following information is acceptable. Any other information (such as that contained in a police report or complaining witness statement) should be objected to as inadmissible under ACCA and the Sixth Amendment (*Taylor, Shepard*).

An indictment or charging document (in all types of cases)

The jury instructions and verdict sheet (if a jury trial)

The judge’s formal rulings of law and findings of fact (if a bench trial)

¹⁹ See *Graham v. Florida*, 130 S. Ct. 2011 (2010) (applying framework for categorical challenges under the Eighth Amendment beyond the death context to strike down a sentence to a term of years (life without the possibility of parole) imposed on a juvenile offender convicted of a non-homicide offense); cf. *United States v. Farley*, 607 F.3d 1294 (11th Cir.) (reversing district court’s finding that 30-year mandatory minimum sentence for crossing state lines with intent to engage in a sexual act with a person under the age of twelve violated the Eighth Amendment), *cert. denied*, 131 S.Ct. 369 (2010).

²⁰ See Amy Baron-Evans, Jennifer Coffin & Sara Noonan [Silva], *Deconstructing the Career Offender Guideline*, available at http://www.fd.org/odstb_SentDECON.htm; see also Brief for Respondent Martin O’Brien filed in *United States v. O’Brien et al.*, 2010 WL 181571 (Jan. 14, 2010) (arguing that any fact that is required to sustain a sentence under reasonableness review is thereby transformed into a constitutionally-meaningful fact to which *Apprendi* applies).

²¹ See *United States v. Polouizzi*, 564 F.3d 142, 162 (2d Cir. 2009) (noting that circuit precedent foreclosed defendant’s argument that he had a Sixth Amendment right to trial by a jury that had been instructed on the mandatory minimum sentence applicable to his charges but finding that nothing precludes a district court from doing so to “better ensure that the jury bases that verdict solely on the evidence” and to “discourage nullification”).

The written plea agreement presented to the court, transcript of plea colloquy, or any explicit factual finding by the trial judge to which the defendant assented (if a plea)

2. If the offense can be committed in multiple ways under the statute, and some of those ways satisfy the definition of “violent felony” and some do not, use the modified categorical approach to determine whether the record of conviction clarifies which category of offense your client committed (again, looking only to the charging document, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law, jury instructions, and/or verdict forms) (*Taylor, Shepard, Chambers, Johnson*).

If the record fails to reveal any more information about the offense of conviction, the government must prove that the least serious offense category criminalized by the statute satisfies § 924(e)(2)(B) (*Johnson*).

3. Determine the statutory elements of the prior offense category and research any state and federal case law interpreting those elements (be sure to look at the elements as they existed at the time your client committed the prior offense). (*James and Johnson*).
4. If subparagraph (i) of ACCA is at issue, does the offense of conviction have as an element the use of “violent force capable of causing physical pain or injury to another person?” (*Johnson*).
5. If subparagraph (ii) of ACCA is at issue,

Is the offense a generic burglary, arson or extortion, as defined by LaFave & Scott in 1986? (*Taylor, Shepard*).

Did the offense involve use of explosives? (*Begay*).

If neither, go to step 6.

6. If the residual clause is at issue, was it a crime that “shows an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger”? (*Begay, Sykes*)?

Was the offense similar in degree of risk to burglary, arson, extortion or the use of explosives? (*Begay, Sykes*)

- i. Is the “violence” required by the statute the kind of violence contemplated by the phrase “violent felony,” i.e., substantial or strong physical force capable of causing physical pain or injury? (*Johnson*)
 - ii. Do the statutory elements raise a significant, non-hypothetical risk of violent conduct that is likely to result in bodily injury? (*James, Chambers*).
 1. Has the government produced any statistical evidence showing a significant risk of bodily injury in the ordinary case? (*Chambers, Sykes*).
 2. Is there statistical evidence showing a low risk of bodily injury that you can introduce? (*Chambers*).
 - iii. If not, then the offense should not qualify. If so, go to step 7.
7. Was the offense similar in kind to the enumerated offenses?
- The level of risk involved in the offense may be dispositive of this question, particularly when the offense has a “stringent mens rea requirement.” (*Sykes*).
- Is the offense “akin to strict liability, negligence, and recklessness crimes”? (*Sykes*) If so, then the offense should not qualify.²²
- Does the offense require “purposeful or deliberate” conduct? (*Sykes*) If not, the offense should not qualify.
8. Was the offense of conviction a lesser included offense of another crime that requires a risk of injury to another (*Sykes*)?
- a. If so, does the offense of conviction carry a less severe penalty than the offense that includes it? (*Sykes*). If it does, then *Sykes* does not control, and the offense should not necessarily qualify.

²² Note that every crime of recklessness or negligence “necessarily requires a purposeful, volitional act that sets in motion the later outcome.” *United States v. Woods*, 576 F.3d 400, 411 (7th Cir. 2009). Hence, an expansive interpretation of the purposeful analysis would nullify *Sykes*’ clear ruling that *Begay* still applies to crimes that are “akin to strict liability, negligence, and recklessness crimes.”