a. The Residual Clause of ACCA is Unconstitutionally Vague.

The phrase "or otherwise involves conduct that presents a serious potential risk of physical injury to another" in the ACCA is referred to as the "residual clause." Mr. ___ submits the residual clause of the ACCA is unconstitutionally vague. This is because the statutory prohibitions under the residual clause in 18 U.S.C. § 924(e)(2)(B)(ii) are so indefinite an ordinary person would not know what conduct it prohibits. As explained below, the government must rely upon the residual clause in its attempt to prove Mr. ____ has three ACCA predicates. As the residual clause of the ACCA is unconstitutionally vague, the government cannot meet its burden of proof.

Over the last 21 years, the Supreme Court has repeatedly attempted to define the residual clause. These attempts began with Taylor v. United States, 495 U.S. 575 (1990), continued with Shepard v. United States, 544 U.S. 13, 19 (2005), James v. United States, 550 U.S. 192 (2007); Chambers v. United States, 555 U.S. 122 (2009); Begay v. United States, 553 U.S. 137 (2008), and culminated most recently in Skyes v. United States, 131 S.Ct.2267 (2011). Despite its efforts, the Supreme Court has not been able to overcome the vagueness that remains present in the ACCA's residual clause.

In Taylor, the Court stated the enumerated offense in subparagraph (ii) of the ACCA – burglary, arson, and extortion – have a "uniform definition independent of the labels employed by the various States' criminal codes." Taylor, 495 U.S. at 572. Thus, to determine whether an offense qualifies as an ACCA predicate under subparagraph (ii), either as an enumerated offense or because it fell within the residual clause, 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. If an 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 and look to "the charging paper or jury instructions" to see whether the conviction actually required the jury to find all the elements necessary to convict the defendant of an offense that actually qualified as a violent felony. Id.

In Shepard, the Court clarified Taylor's modified categorical approach applies for guilty pleas as well as jury verdicts. Shepard also held 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 the defendant upon entering the plea." Shepard, 544 U.S. at 20 (internal citation and footnote omitted).

In James, the Supreme Court stated "the proper inquiry" under the residual clause "is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." James, 550 U.S. at 208. 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 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).

In Begay, the Court again analyzed the residual clause, this time significantly narrowing its reach and finding 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. Begay, 553 U.S. at 143. To be similar in kind, the offense must involve "purposeful, violent, and aggressive conduct," id. at 144, 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. (internal quotation and citation omitted).

Finally, in Sykes, the Court was called upon to determine whether the defendant's prior felony conviction for knowing or intentional flight from a law enforcement officer by vehicle was a violent felony. Sykes, 131 S.Ct. at 2271. The Court held 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. The Court then reasoned vehicle flight, like burglary, can "end in a confrontation leading to violence." Id. The Court also looked to statistical data on the injury rates associated with vehicle flight, compared those statistics to data on burglaries and arson, and concluded the injury rates are higher for vehicle flight than arson or burglary. Id. at 2274-75. Based on all of these factors, the Court held the vehicle flight at issue constituted a violent felony under the ACCA. Id. at 2277.

Despite the Supreme Court majority opinions that have attempted to provide a finite definition for the residual clause, numerous Justices have taken issue with the continued vagueness of the residual clause. For instance, Judge Antonin Scalia dissented James v. United States, 550 U.S. 192, 230 (2007), joined by Justices Stevens and Ginsburg, stating:

> Congress passed ACCA to enhance punishment for gun-wielding offenders who have, *inter alia*, previously committed crimes that pose a 'serious potential risk of physical injury to another.' Congress provided examples of crimes that meet this eminently reasonable but entirely abstract condition. Unfortunately, however, the four examples have little in common, most especially with respect to the level of risk of physical injury they pose. Such shoddy draftsmanship puts courts to a difficult choice: They can (1) apply the ACCA enhancement to virtually all predicate

> offenses, . . . ; (2) apply it case-by-case in its pristine abstraction, finding it applicable whenever the particular sentencing judge (or the particular reviewing panel) believes there is a 'serious potential risk of physical injury to another' (whatever that means); (3) try to figure out a coherent way of interpreting the statute so that it applies in a relatively predictable and administrable fashion to a smaller subset of crimes; or (4) recognize the statute for the drafting failure it is and hold it void for vagueness. . . .
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> In Skyes, Justice Scalia again dissented, stating:
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> As was perhaps predictable, instead of producing a clarification of the Delphic residual clause, today's opinion produces a fourth *ad hoc* judgment that will sow further confusion. Insanity, it has been said, is doing the same thing over and over again, but expecting different results. Four times is enough. **We should admit that ACCA's residual provision is a drafting failure and declare it void for vagueness.** See Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

Sykes, 131 S.Ct. at 2284 (emphasis added).

Most recently, in his dissent in Derby v. United States, 131 S.Ct. 2858 (2011), Justice Scalia, reiterated his belief the ACCA should be declared void for vagueness, stating:

> The 'rule' we announced [in Sykes], as far as I can tell, is as follows: A court must compare the degree of risk of the crime in question with the degree of risk of ACCA's enumerated offenses (burglary, extortion, arson, and crimes involving the use of explosives) as a 'beginning point,' . . .; look at the statistical record, which is not 'dispositive' but sometimes confirms 'commonsense conclusion[s],' . . . ; and check whether the crime is 'purposeful, violent, and aggressive,' unless of course the crime is among the unspecified 'many cases' in which that test is 'redundant with the inquiry into risk,' . . . . And of course given our track record of adding a new animal to our bestiary of ACCA residual-clause standards in each of the four successive cases we have thus far decided, . . . , who knows what new beasties our fifth, sixth, seventh, and eighth tries would produce? Surely a perfectly fair wager.
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> If it is uncertain how this Court will apply Sykes and the rest of our ACCA cases going forward, it is even more uncertain how our lower-court colleagues will deal with them. Conceivably, they will simply throw the opinions into the air in frustration, and give free rein to their own feelings as to what offenses should be considered crimes of violence—which, to tell the truth, seems to be what we have done. (Before throwing the opinions into the air, however, they should check whether littering—or littering in a purposeful, violent, and aggressive fashion—is a felony in their jurisdiction. If so, it may be a violent felony under ACCA; or perhaps not.)

> Since our ACCA cases are incomprehensible to judges, the statute obviously does not give 'person[s] of ordinary intelligence fair notice' of its reach. United States v. Batchelder, 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979) (internal quotation marks omitted). 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.

Although the Supreme Court has twice stated in dicta 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 the residual clause is not unconstitutionally vague because "[i]t 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 (citation omitted); 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." James, 550 U.S. at 210, n6. That other provisions of the code, however, use some of the same language as 924(e)(B)(ii) in defining an element of the offense is not dispositive.

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 placed on that phrase, render the provision "latently vague." United States 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, Chambers, Begay, 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"); see also Chambers, 129 S.Ct. at 694 (Alito, J., with Thomas, J., concurring) (commenting on impossibility of applying the clause "consistently"). 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").

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 Lanier. Lanier, 520 U.S. at 270; 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 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 numerous conflicting interpretations of Court's decision in New Jersey v. T.L.O., 459 U.S. 325 (1985) showed 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."). For example, and as discussed below, one such circuit conflict exists between the Sixth and the Third Circuits as to whether a burglary conviction under Ohio law constitutes a violent felony under the ACCA. Compare United States v. Coleman, – F.3d –, 2011 WL 3687870 (6th Cir. 2011) (finding

3rd degree burglary under Ohio law is a violent felony) with United States v. Lewis, 330 Fed.Appx. 353, 364 (3d Cir.2009) (finding 2nd degree burglary under Ohio law is not a violent felony).

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, interpretation, and myriad variables.

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. 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. Lawson, 461 U.S. at 357-58 (discussing importance of void-for-vagueness doctrine in establishing guidelines to govern law enforcement).

For these reasons, Mr. _____ states the residual clause of the ACCA is void for vagueness, as there is no predictable, consistent, or fair definition that can be applied to the residual clause. Because the government cannot seek application of the ACCA without employing the vague concepts inherent in the residual clause (as discussed below), this Court should declare the residual clause unconstitutionally vague and sentence Mr. _____ without application of the ACCA's enhanced penalties.