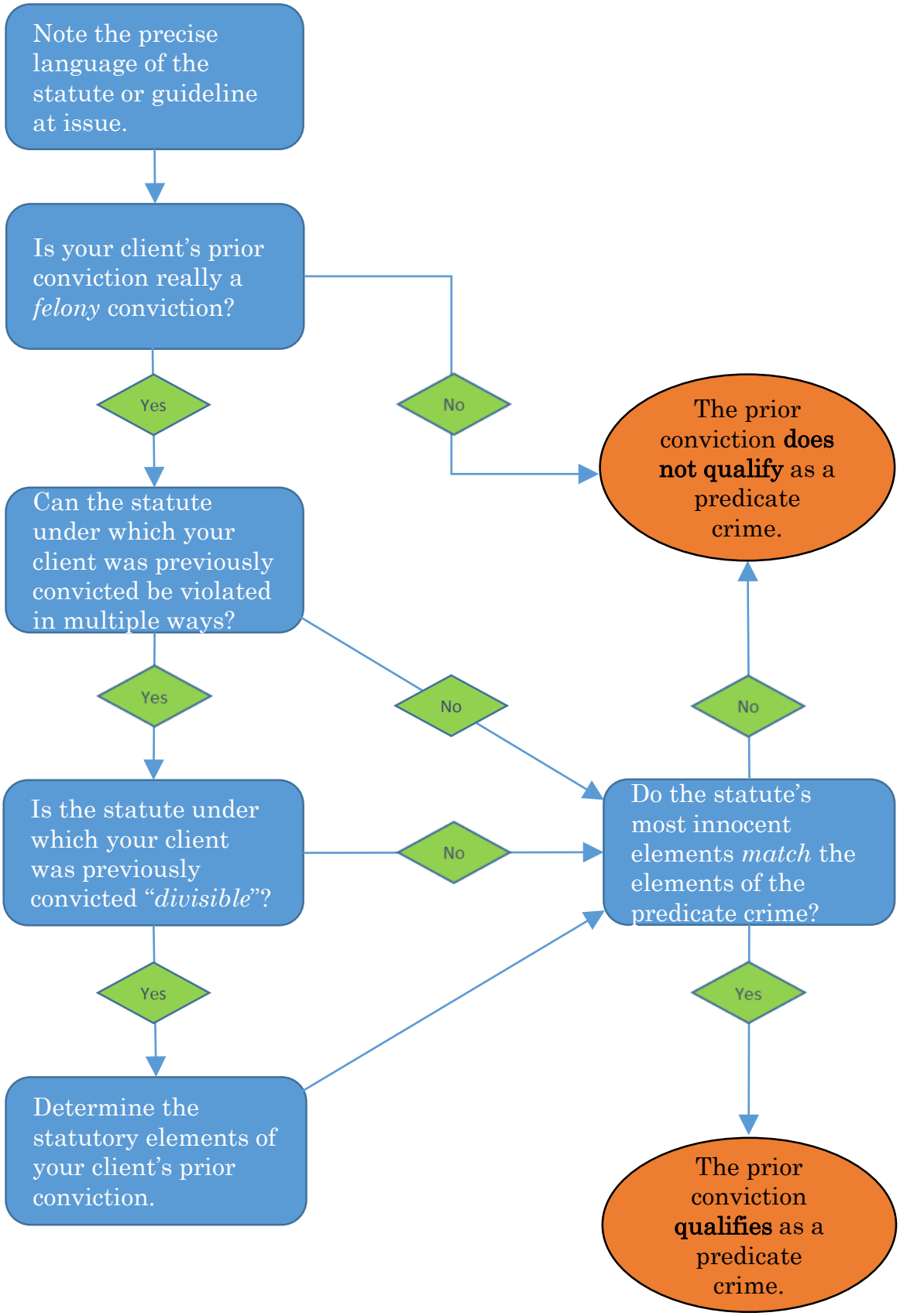
Analyzing Prior Convictions after *Brooks*, *Descamps*, and *Johnson*



Statute or guideline (2015 version), and what it does	What predicate offenses trigger it			
	Force-clause offenses	Enumerated offenses	Drug offenses	Residual-clause offenses
18 U.S.C. § 924 (ACCA) In the case of a person who violates section 922(g) [***felon in possession***] of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g)	has as an element the use, attempted use, or threatened use of physical force against the person of another	burglary, arson, or extortion, [or] involves use of explosives	listed federal drug offenses, or an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), ***for which a maximum term of imprisonment of ten years or more is prescribed by law***	~~involves conduct that presents a serious potential risk of physical injury to another~~* *language held unconstitutionally vague by *Johnson*
U.S.S.G. § 4B1.1 & 4B1.2 (Career Offender) (a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) ***the instant offense**** of conviction is a felony that is either a crime of violence or a controlled substance offense; ***and*** (3) the defendant has at least two prior felony convictions** of either a crime of violence or a controlled substance offense *The current offense must also = a predicate offense. ***See* § 4A1.2(e)(1) for age of priors	has as an element the use, attempted use, or threatened use of physical force against the person of another	burglary ***of a dwelling***, arson, or extortion, [or] . . . use of explosives ***After Aug. 16, 2016:*** murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, burglary of a dwelling, arson, or extortion, or the use or unlawful possession of a firearm . . . or explosive material	an offense under federal or state law, ***punishable by imprisonment for a term exceeding one year***, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense	~~involves conduct that presents a serious potential risk of physical injury to another~~* *language held unconstitutionally vague by *Madrid* **Watch out for "commentary offenses" (eliminated as of Aug. 16, 2016)

Statute or guideline (2015 version), and what it does	What predicate offenses trigger it			
	Force-clause offenses	Enumerated offenses	Drug offenses	Residual-clause offenses
U.S.S.G. § 2K2.1 (firearms guideline) Sets the base offense level at 24 if the defendant committed any part of the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense	*See* 4B1.2	*See* 4B1.2	*See* 4B1.2	*See* 4B1.2
U.S.S.G. § 2L1.2 (unlawful reentry) Increases the base offense level if the defendant was deported or unlawfully remained in the United States after certain convictions for a felony crime of violence (12-16 levels) or three or more convictions for misdemeanor crimes of violence (4 levels) any aggravated felony (8 levels) or other felony (4 levels)	has as an element the use, attempted use, or threatened use of physical force against the person of another	a firearms offense; a child pornography offense; a national security or terrorism offense; a human trafficking offense; an alien smuggling offense murder, man-slaughter, kid-napping, aggravated assault, forcible sex offenses . . . statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary ***of a dwelling***	a drug trafficking offense for which the sentence imposed exceeded 13 months (12-16 levels); or a drug trafficking offense for which the sentence imposed was 13 months or less (8-12 levels) "Drug trafficking offense" = an offense under federal, state, or local law that prohibits the manu-facture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counter-feit substance) or the possession of a con-trolled substance (or a counterfeit substance) with intent to manu-facture, import, export, distribute, or dispense	no "risk" clause mirroring the ACCA's residual clause; but force-clause offenses are sometimes (confusingly) referred to in the 2L1.2 context as residual-clause offenses

Statute or guideline (2015 version), and what it does	What predicate offenses trigger it			
	Force-clause offenses	Enumerated offenses	Drug offenses	Residual-clause offenses
U.S.S.G. § 7B1.1 (classifying probation and supervised-release violations) Ranking as Grade A violations: conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years	*See* 4B1.2	*See* 4B1.2	*See* 4B1.2	*See* 4B1.2
18 U.S.C. § 924(c) Establishes mandatory minimum sentences for any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm Note: The only predicate offense here = a current offense (rather than a prior conviction), even if not prosecuted	has as an element the use, attempted use, or threatened use of physical force against the person ***or property*** of another	[none]	the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46	by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense

Statute or guideline (2015 version), and what it does	What predicate offenses trigger it			
	Force-clause offenses	Enumerated offenses	Drug offenses	Residual-clause offenses
18 U.S.C. 16 Defines "crime of violence" for purposes of various criminal offenses, drug offenses, immigration offenses (and removal), and restitution	has as an element the use, attempted use, or threatened use of physical force against the person ***or property*** of another	[none]	[none]	by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense* *language may be unconstitutionally vague under *Johnson*; *see Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015).
18 U.S.C. § 3142(f)(1)(A) & (f)(1)(D) (Bail Reform Act) Mandating detention hearings on motion of the government in cases involving, among other crimes, "a crime of violence" or drug crime, or in felony prosecutions of a defendant with two or more prior convictions for a crime of violence or drug crime Also specifying "whether the offense is a crime of violence" as factor to consider at bail hearings	has as an element of the offense the use, attempted use, or threatened use of physical force against the person ***or property*** of another 18 U.S.C. § 3156(a)(4)(A)	*See* statute	an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46	by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense 18 U.S.C. § 3156(a)(4)(B)

2016 Guideline Amendments to Career-Offender "Crime of Violence" Definitions

The big news in early 2016 was the Sentencing Commission's announcement of several proposed amendments to the "crime of violence" definitions in the career-offender guideline at § 4B1.2. These amendments, if approved by Congress (which they probably will be), will take effect August 1, 2016, and will not be retroactive. As is so often the case, we'll have to take the bitter with the sweet.

The sweet

First, the Commission's amendments strike the residual clause from the guideline.

Second, the amendments eliminate burglary as an enumerated predicate offense (though new commentary suggests that a violent burglary may be grounds for an upward departure).

Third, new commentary to § 4B1.1 suggests that if the career-offender guideline is triggered by prior felony convictions for crimes that are now classified as misdemeanors, a downward departure may be appropriate.

The bitter

First, the amendments add new enumerated predicate offenses. As noted elsewhere in these materials the "commentary offenses" listed in the application notes to § 4B1.2 should not trigger the career-offender guideline unless they meet the elements of the force clause, or are included in the enumerated-offenses clause within the guideline itself. This is because the application notes cannot trump the guideline itself. The Commission's amendments answer this dilemma by moving (most of) the commentary offenses into the guideline itself. Note that while "manslaughter" was listed as a commentary offense, the new enumerated offenses include only "voluntary manslaughter." And "extortionate extension of credit" is gone. Extortion remains an enumerated offense, with a commentary definition limiting it to instances involving force or the fear or threat of physical injury.

Second, new commentary defining "forcible sex offense" (now an enumerated offense within the guideline itself) may open the door to more statutory rapes and other sex crimes being classified as crimes of violence.

What hasn't changed

The amendments affect the career-offender guideline and other guidelines that cross-reference the career-offender guideline (§ 2K2.1 felon in possession, § 7B1.1 supervised release classification). They do not affect the unlawful reentry guideline at § 2L1.2.

What can I do for my clients between now and August 16?

These are, for the most part, substantive changes to the guidelines rather than clarifying amendments. There are three ways to give effect to the positive changes: continue any sentencing past the date that the amendments will be effective; get an agreement from the prosecutor that the effect of the changes should apply; or move for a downward variance.

For the negative amendments, because they are substantive, they cannot be applied retroactively. If your sentencing is set past the effective date, argue that application of the punitive amendments violate the ex post facto clause, as held in *Peugh v. United States*, 133 S.Ct. 2072 (2013).

Watch Out for Enumerated "Commentary Offenses"

The career-offender guideline contains both (1) force-clause offenses, and (2) enumerated offenses. It defines "crimes of violence" that trigger the guideline 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~~."

U.S.S.G. § 4B1.2(a) (stricken language unconstitutional under *United States v. Madrid*, 805 F.3d 1204 (10th Cir. 2015)).

When asking whether a prior conviction matches a predicate offense, courts will compare the prior's elements either to (1) the elements of the force-clause, in which case the prior must contain an element of *physical force* (actual *violence*, either used, attempted, or threatened), against the *person of another* (force against property won't do here); or to (2) the generic elements of an enumerated offense.

BUT LOOK OUT! The application notes to § 4B1.2 state that "'Crime of violence' includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling." § 4B1.2, comment. (n.1). ***The inclusion of these enumerated offenses in the commentary is not definitive***. These "commentary offenses" will not trigger the career-offender guideline unless they either qualify as force-clause offenses under subsection (1), or are in fact listed as enumerated offenses in the guideline itself in subsection (2).

This is because "it is the text [of the guideline], of course, that takes precedence." *United States v. Shell*, 789 F.3d 335, 340 (4th Cir. 2015); *see also Stinson v. United States*, 506 U.S. 36, 43 (1993) ("If . . . commentary and the guideline it interprets are inconsistent in that following one will result in violating the dictates of the other, the Sentencing Reform Act itself commands compliance with the guideline.").

The *Shell* case provides a perfect example of this point. The question in *Shell* was whether a prior conviction for statutory rape qualified as a crime of violence for career-offender purposes. The Fourth Circuit held that it did not, *despite* the inclusion of "forcible sex offenses" in the list of commentary offenses. Even if the prior conviction might qualify as a "forcible sex offense," it did not qualify under the force-clause itself because it did not require "*physical* force against the person of

another," and thus it could not be used to trigger the career-offender guideline: "§ 4B1.2 provides a separate two-part definition of crime of violence in its text, with the commentary serving only to amplify that definition, and any inconsistency between the two resolved in favor of the text." 789 F.3d at 345. *See also United States v. Armijo*, 651 F.3d 1226, 1236-37 (10th Cir. 2011) (prior conviction for reckless manslaughter did not trigger career-offender guideline despite inclusion of "manslaughter" in list of commentary offenses: "To read application note 1 as encompassing non-intentional crimes would render it utterly inconsistent with the language of § 4B1.2(a), which, as set out at length above, only applies to purposeful or intentional conduct.").

Bottom line: Don't let § 4B1.2's enumerated commentary offenses fool you or the court. Qualifying priors must still match the definitions of "crime of violence" that appear within the guideline itself.

751 F.3d 1204
United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Damian L. BROOKS, Defendant–Appellant.

No. 13–3166. | June 2, 2014.

Synopsis

Background: Defendant pleaded guilty in the United States District Court for the District of Kansas to possessing with intent to distribute cocaine base and to using and carrying a firearm in furtherance of drug trafficking offense. Defendant appealed his sentence.

[Holding:] The Court of Appeals, Baldock, Circuit Judge, held that defendant's prior Kansas conviction for eluding police was not a felony for purposes of imposition of career offender enhancement.

Reversed and remanded for resentencing.

Attorneys and Law Firms

***1205** Melody Evans, Interim Federal Public Defender, Topeka, KS, for Defendant–Appellant.

James A. Brown, Assistant United States Attorney (Barry R. Grissom, United States Attorney, with him on the brief), Topeka, KS, for Plaintiff–Appellee.

Before KELLY, BALDOCK, and HARTZ, Circuit Judges.

Opinion

BALDOCK, Circuit Judge.

Did Defendant Damian L. Brooks commit enough prior qualifying felonies to be considered a "career offender" under the Federal Sentencing Guidelines? The district court below said yes, relying on *United States v. Hill*, 539 F.3d 1213 (10th Cir.2008), to classify a prior Kansas conviction of Defendant as a felony because it was punishable by more than one year in prison. On appeal, Defendant admits *Hill* mandates this classification. He argues, however, that *Hill* was abrogated by the Supreme Court in *Carachuri–Rosendo v. Holder*, 560 U.S. 563, 130 S.Ct. 2577, 177 L.Ed.2d 68 (2010). We agree. As such, exercising jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742, we reverse and remand for resentencing.

I.

A. Kansas Sentencing Guidelines

Kansas's rather unusual criminal sentencing scheme lies at the heart of the current dispute. While we now abandon *Hill's* holding, we do not quibble with *Hill's* description of Kansas's sentencing parameters. In general, Kansas criminal statutes do *not* contain

explicit maximum penalties *(e.g.* "Burglary is punishable by no more than ten years ...."). *See, e.g.,* Kan. Stat. Ann. § 21–6201 (2010). Instead,

> [t]he determination of a felony sentence [in Kansas] is based on two factors: the current crime of conviction and the offender's prior criminal history. The Kansas sentencing guidelines employ a grid, which is a two-dimensional chart.[1] ***1206** The grid's vertical axis lists the various levels of crime severity, ranging from I to IX for non-drug offenses. The horizontal axis is the criminal history scale, which classifies various criminal histories. To determine an offender's presumptive sentence, one must consult the grid box at the juncture of the severity level of the crime for which the defendant was convicted and the offender's criminal history category....
>
> On June 6, 2002, Kansas adopted new sentencing provisions ... eradicat[ing] the trial court's discretion to sentence a defendant to an upward departure [from the presumptive sentence] based on aggravating factors. Instead, upward departures are permitted where by unanimous vote, the jury finds beyond a reasonable doubt that one or more specific factors exist that may serve to enhance the maximum sentence. The state must seek an upward departure sentence not less than thirty days prior to trial. The court must then determine if any facts or factors that would increase the sentence beyond the statutory maximum need to be presented to the jury and proved beyond a reasonable doubt. As a consequence, upward departures are ... constitutional in Kansas, but they require new procedures and a jury finding.

Hill, 539 F.3d at 1215–16 (internal quotation marks, citations, and footnote omitted).

B. Federal Sentencing Guidelines

Under § 4B1.1(a) of the U.S. Sentencing Guidelines Manual (U.S.S.G.), a defendant is considered a "career offender" if, among other things, he "has at least two prior felony convictions of either a crime of violence or a controlled substance offense." The U.S.S.G. commentary later defines "[p]rior felony conviction" as "a prior adult federal or state conviction for an *offense punishable by ... imprisonment for a term exceeding one year*, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed." U.S.S.G. § 4B1.2 cmt. app. n. 1 (emphasis added).

C. Precedent

In 2005 we decided *United States v. Plakio,* 433 F.3d 692 (10th Cir.2005), which required us to determine whether a defendant's prior Kansas drug conviction qualified under U.S.S.G. § 2K2.1(a)(4)(A) as a "felony"; that is, whether the offense was "punishable by ... imprisonment for a term exceeding one year." *Plakio,* 433 F.3d at 693–94 (quoting U.S.S.G. § 2K2.1 cmt. app. n. 1). Under Kansas's sentencing scheme, the defendant could have received eleven months in prison at most. *Id.* at 695. Reversing the district court, we held this conviction was not a felony "[b]ecause the [state] sentencing court could not have imposed a sentence greater than one year." *Id.* "Central to the *Plakio* decision was the premise that the maximum sentence must be calculated by focusing on the particular defendant," taking his criminal history category (under Kansas law) into account. *Hill,* 539 F.3d at 1217 (citing *Plakio,* 433 F.3d at 697).

Three years later, the Supreme Court issued *United States v. Rodriquez,* 553 U.S. 377, 128 S.Ct. 1783, 170 L.Ed.2d 719 (2008). Soon after, we decided *Hill,* 539 F.3d 1213. Much like *Plakio, Hill* required us to determine whether a defendant's prior Kansas firearm conviction qualified as a "crime punishable by imprisonment for a term exceeding one year"—this time under 18 U.S.C. § 922(g)(1). *Hill,* 539 F.3d at 1214. Also like *Plakio,* under Kansas's sentencing scheme the defendant could have received no more than eleven months in prison. *Id.* Initially, under our *Plakio* approach, we held the defendant was not convicted of a "crime punishable by imprisonment ***1207** for a term exceeding one year." *Id.* at 1213–14, 1218. After *Rodriquez* was released, however, we granted panel rehearing and vacated our prior opinion. *Id. Rodriquez,* we held, "explicitly rejected the proposition that mandatory guidelines systems that cap sentences [like Kansas's system] can decrease the maximum term of imprisonment." *Id.* at 1218 (quoting *Rodriquez,* 553 U.S. at 390, 128 S.Ct. 1783) (internal quotation marks omitted). Relying on *Rodriquez,* we overturned *Plakio* and held the proper focus in regard to the language in question is on the crime itself, not the individual defendant. *Id.* at 1221. "A defendant convicted of a severity level VIII crime with a more extensive criminal history does not commit a different *crime*," we emphasized. "Instead, he is simply exposed to a greater sentence under the guidelines." *Id.* at

1219. Thus, we held that when analyzing whether a defendant's prior crime was punishable by a certain amount of prison time under Kansas's scheme, the largest possible recidivist enhancement must be taken into account. *Id.* at 1221. And, because the severity level of Hill's crime cross-referenced with the worst criminal history possible carried a maximum penalty of twenty-three months in jail, we concluded he was convicted of "a crime punishable by imprisonment for a term exceeding one year." *Id.* (quoting 18 U.S.C. § 922(g)(1)).

In 2010, the Supreme Court issued *Carachuri–Rosendo*, 560 U.S. 563, 130 S.Ct. 2577. There the defendant was a lawful permanent resident being removed from the United States because of two prior Texas drug misdemeanor convictions—one in 2004 and one in 2005. *Id.* at 566, 570–71, 130 S.Ct. 2577. For the 2005 crime, which involved possession of a single Xanax tablet sans prescription, the defendant was sentenced to just ten days in jail. *Id.* In Texas, however, he could have been subject to a major sentencing enhancement because of the 2004 conviction—an enhancement that would have exposed him to more than one year in prison—but only if the prosecution proved the prior conviction. *Id.* at 570–71, 130 S.Ct. 2577. The State did not elect to offer such proof. *Id.* at 571, 130 S.Ct. 2577. Regardless, the Federal Government in *Carachuri–Rosendo* contended the defendant was not eligible for cancellation of removal or waiver because the 2005 offense qualified as an "aggravated felony" under the Immigration and Nationality Act (INA), a determination that ultimately hinged on whether the crime allowed for a "maximum term of imprisonment" of "more than one year." *Id.* at 566–67, 130 S.Ct. 2577 (quoting 8 U.S.C. § 1229b(a)(3) and 18 U.S.C. § 3559(a)). The Government theorized that, "had Carachuri–Rosendo been prosecuted in federal court instead of state court [for the 2005 offense], he *could have been* prosecuted as a felon and received a 2–year sentence based on the ... [2004] offense." *Id.* at 570, 130 S.Ct. 2577 (emphasis in original).

In its decision, the Supreme Court first expressed wariness of the Government's argument because "the English language tells us that most aggravated felonies are punishable by sentences far longer than 10 days...." *Id.* at 575, 130 S.Ct. 2577. The Supreme Court then rejected the Government's "hypothetical approach" because it: (1) ignored the INA's text, which "indicates that we are to look at the conviction itself ... not to what might or could have been charged"; (2) would punish a defendant for recidivism without providing him notice or opportunity to contest said recidivism and would "denigrate the independent judgment of state prosecutors" who chose not to prove recidivism; (3) depends on a misreading of *Lopez v. Gonzales*, 549 U.S. 47, 127 S.Ct. 625, 166 L.Ed.2d 462 (2006), which did not go so far as to permit the reliance on a "hypothetical to a hypothetical"; (4) was inconsistent with common ***1208** federal court practice, whereby the defendant "would *not*, in actuality, have faced any felony charge"; and (5) failed to construe an ambiguity in an immigration-related criminal statute in the noncitizen's favor. *Id.* at 575–81, 130 S.Ct. 2577. In conclusion, the Supreme Court stated: "The prosecutor in Carachuri–Rosendo's [Texas] case declined to charge him as a recidivist. He has, therefore, not been convicted of a felony punishable [by more than one year in prison] under the Controlled Substances Act." *Id.* at 582, 130 S.Ct. 2577.

Significantly, the Supreme Court also dismissed the argument that *Rodriquez* supported the Government. *Rodriquez*, the Court clarified, "held that a recidivist finding could set the 'maximum term of imprisonment,' but only when the finding is a part of the record of conviction." *Id.* at 577 n. 12, 130 S.Ct. 2577. Indeed, the Court noted,

> we specifically observed [in *Rodriquez*] that "in those cases in which the records that may properly be consulted do not show that the defendant faced the possibility of a recidivist enhancement, it may well be that the Government will be precluded from establishing that a conviction was for a qualifying offense." In other words, [pursuant to *Rodriquez*,] when the recidivist finding giving rise to a 10–year sentence is not apparent from the sentence itself, or appears neither as part of the "judgment of conviction" nor the "formal charging document," the Government will not have established that the defendant had a prior conviction for which the maximum term of imprisonment was 10 years or more (assuming the recidivist finding is a necessary precursor to such a sentence).

Id. (internal citations omitted).

D. Facts

In December 2009, a Kansas state court convicted Defendant of possessing cocaine with intent to sell and sentenced him to 40 months in jail. Around the same time, Defendant was convicted in a Kansas state court of eluding a police officer. For this latter crime, Defendant's presumptive Kansas guideline range allowed for a maximum of seven months of jail time. The prosecutor did not seek an upward departure, meaning the state court could not have sentenced Defendant to more than seven months imprisonment. In the end, the court imposed a six month sentence.

On May 8, 2012, Defendant pled guilty in the federal District of Kansas to possessing with intent to distribute cocaine base in violation of 21 U.S.C. § 841(a)(1), and to using and carrying a firearm in furtherance of a drug trafficking offense in violation of 18 U.S.C. § 924(c). Prior to sentencing, the United States Probation Office concluded in its Presentence Report (PSR) that Defendant was a "career offender" under U.S.S.G. § 4B1.1(a) because, among other requirements not at issue here, he had "at least two prior felony convictions of either a crime of violence or a controlled substance offense." Namely, the PSR counted Defendant's prior cocaine distribution conviction as a felony controlled substance offense and his prior eluding conviction as a felony crime of violence. This career offender categorization added two points to Defendant's offense level, giving him a total offense level of 31. This, combined with his criminal history category, produced a guideline range of 262 to 327 months in prison.

Defendant objected to his career offender classification, arguing that eluding a police officer, while indeed a crime of violence, was not a federal *felony* in this instance because it was not "punishable by ... imprisonment for a term exceeding one year." For support, Defendant relied on *Carachuri–Rosendo,* which he argued had implicitly invalidated *Hill* and *Hill's* ***1209** reliance on the "hypothetical worst recidivist" to determine the length of imprisonment for which a crime was punishable. Because the Kansas prosecution never sought an upward departure in regard to Defendant's conviction for eluding a police officer, the crime only subjected him to a maximum of seven months in prison. Thus, Defendant asserted, it was *not* a felony under the federal sentencing strictures. In response, the Government stood by *Hill*; eluding a police officer was punishable by over one year in prison because a defendant with the worst criminal history possible could have received up to 17 months in jail for committing the crime. Both parties agreed this issue should not be covered by the waiver of appeal in Defendant's plea agreement, and the district court acknowledged the parties' unity on this point.

Eventually, after a hearing, the district court overruled Defendant's objection in a written order. The court acknowledged two circuits had "held that in light of *Carachuri–Rosendo,* hypothetical aggravating factors cannot be considered when determining a defendant's maximum punishment for a prior offense." *See United States v. Simmons,* 649 F.3d 237 (4th Cir.2011) (en banc); *United States v. Haltiwanger,* 637 F.3d 881 (8th Cir.2011). The court, however, denied having the authority to ignore *Hill* because the case was not "clearly irreconcilable" on its face with *Carachuri–Rosendo.* For support on this point, the court noted that six circuit judges dissented in *Simmons* and *Haltiwanger* combined.

At sentencing, the district court departed downward based on the plea agreement and sentenced Defendant to 151 months imprisonment on both counts combined. Had the career offender enhancement not been applied, the guideline imprisonment range would have been 121 to 151 months. Defendant appealed.

II.

[1] [2] [3] Defendant's sole argument on appeal is that, in light of *Carachuri–Rosendo,* the district court wrongfully relied upon our past precedent in *Hill* to label him a career offender under U.S.S.G. § 4B1.1(a). Absent *en banc* consideration, we generally "cannot overturn the decision of another panel of this court." *United States v. Meyers,* 200 F.3d 715, 720 (10th Cir.2000). This rule does not apply, however, when the Supreme Court issues an intervening decision that is "contrary" to or "invalidates our previous analysis." *Id.*; *United States v. Shipp,* 589 F.3d 1084, 1090 n. 3 (10th Cir.2009) (citation omitted). Thus, we must now determine whether *Carachuri–Rosendo* contradicts or invalidates *Hill's* prescribed method for determining the maximum punishment length for a past state crime. This issue is entirely legal in nature, and we review legal issues in this

context de novo. *United States v. Patterson,* 561 F.3d 1170, 1172 (10th Cir.2009). In the end, we hold that *Carachuri–Rosendo* does indeed invalidate *Hill's* analysis.

We acknowledge up front that *Carachuri–Rosendo* is not directly on point with *Hill* or with our Defendant. After all, *Carachuri–Rosendo* involved immigration law, a different line of Supreme Court precedent, *see, e.g., Lopez,* 549 U.S. 47, 127 S.Ct. 625, and whether a past crime was an *aggravated* felony, among various other distinguishable aspects. [2] The question, however, is not whether an intervening ***1210** Supreme Court case is on all fours with our precedent, but rather whether the subsequent Supreme Court decision *contradicts* or *invalidates* our prior analysis. Here, *Carachuri–Rosendo* plainly invalidates *Hill,* primarily because of the Supreme Court's clarification of the holding of its own precedent—*Rodriquez.* As detailed above, the Supreme Court rejected the argument that *Rodriquez's* recidivism holding supported the Government's "hypothetical to a hypothetical" approach. *Carachuri–Rosendo,* 560 U.S. at 577 n. 12, 130 S.Ct. 2577. In doing so, the Supreme Court expounded upon *Rodriquez* in a manner entirely contradictory to our interpretation of that case in *Hill.*

[4] In *Hill,* we relied on *Rodriquez* to overturn our own prior precedent. *Rodriquez,* we wrote, stood for the proposition that "the calculation of the 'maximum term of imprisonment ... prescribed by law' included the term imposed by applicable recidivist statutes." *Hill,* 539 F.3d at 1218 (quoting *Rodriquez,* 553 U.S. at 393, 128 S.Ct. 1783). Moreover, we held, *Rodriquez* "explicitly rejected the proposition that mandatory guidelines systems that cap sentences [like Kansas's system] can decrease the maximum term of imprisonment." *Id.* (quoting *Rodriquez,* 553 U.S. at 390, 128 S.Ct. 1783) (internal quotation marks omitted). The Supreme Court in *Carachuri–Rosendo,* however, wrote that under *Rodriquez* a recidivist finding could *only* set the maximum term of imprisonment "when the finding is a part of the record of conviction." *Carachuri–Rosendo,* 560 U.S. at 577 n. 12, 130 S.Ct. 2577 (emphasis added). Riffing on the facts of *Rodriquez,* the Court stated: "[W]hen the recidivist finding giving rise to a [prior] 10–year sentence is not apparent from the sentence itself, or appears neither as part of the 'judgment of conviction' nor the 'formal charging document,' the Government will not have established that the defendant had a prior conviction for which the maximum term of imprisonment was 10 years or more...." *Id.* (internal citation omitted). In short, in *Hill* we interpreted *Rodriquez* to mean the most severe recidivist increase possible *always* applies when calculating a maximum sentence, whereas the Supreme Court has now interpreted *Rodriquez* to mean a recidivist increase can *only* apply *to the extent that a particular defendant was found to be a recidivist.* This makes all the difference in the world to our Defendant, who was saddled by the district court with the guideline range merited by the worst recidivist imaginable even though his own recidivism did not allow for imprisonment of more than one year. Under *Rodriquez* via *Hill* Defendant is a career offender; under *Rodriquez* via *Carachuri–Rosendo,* he is not.

[5] Based on *Carachuri–Rosendo,* our interpretation of *Rodriquez* in *Hill* was incorrect. This incorrect interpretation was pivotal to our holding in *Hill* that, in determining whether a prior Kansas crime was punishable by more than a year in prison, we must "focus on the maximum statutory penalty for the offense, *not* the individual defendant." *Hill,* 539 F.3d at 1221 (emphasis added). [3] Thus, we must reverse the district court here and hold that *Carachuri–Rosendo* contradicts and invalidates *Hill.* Under Kansas law, Defendant could not have been sentenced to ***1211** more than seven months in jail for his eluding conviction. That conviction, therefore, did not qualify as an "offense punishable by ... imprisonment for a term exceeding one year." U.S.S.G. § 4B1.2 cmt. app. n. 1. As such, Defendant should not have been labeled a career offender under the Guidelines because he only had one "prior felony conviction[ ] of either a crime of violence or a controlled substance offense," whereas two such convictions are required. *Id.* § 4B1.1(a). To summarize, *Hill* no longer controls, and we revert back to our prior precedent on this point. [4]

III.

The case law surrounding this issue strongly supports our holding. Most importantly (as noted above) two circuits have already analyzed *Carachuri–Rosendo's* effect in this regard, and both have agreed with our conclusion. Moreover, they have done so at the prompting of the Supreme Court.

The initial case comes from the Eighth Circuit and bears a striking resemblance to our situation. In *Haltiwanger*, the district court found a defendant's prior drug tax stamp conviction under 21 U.S.C. 841(b)(1) was a felony even though—under Kansas law, again—he could only have received seven months in jail. *See United States v. Haltiwanger*, No. CR07–4037, 2009 WL 454978, at *5 (N.D.Iowa Feb. 23, 2009) (unpublished). The Eighth Circuit, prior to *Carachuri–Rosendo*, agreed. *See United States v. Haltiwanger*, 356 Fed.Appx. 918 (8th Cir.2009) (per curiam) (unpublished). The Supreme Court, however, granted certiorari and remanded the case, without opinion, "for further consideration in light of *Carachuri–Rosendo*." *Haltiwanger v. United States*, —— U.S. ——, 131 S.Ct. 81, 178 L.Ed.2d 2 (2010). On remand, "[u]pon careful review of *Carachuri–Rosendo*, including the Court's clarification and reiteration of its holding in *Rodriquez*," the Eighth Circuit reversed course: "[W]here a maximum term of imprisonment of more than one year is directly tied to recidivism, *Carachuri–Rosendo* and *Rodriquez* require that an actual recidivist finding—rather than the mere possibility of a recidivist finding—must be part of a particular defendant's record of conviction for the conviction to qualify as a felony." *Haltiwanger*, 637 F.3d at 883–84. Because Haltiwanger's record of conviction did not include recidivism sufficient to expose him to more than one year in prison, "the hypothetical possibility that some recidivist defendants could have faced a sentence of more than one year is not enough to qualify Haltiwanger's conviction as a felony under 21 U.S.C. § 841(b)(1)." *Id.* at 884. Judge Beam dissented, writing only: "I believe that our judgment in this case is not affected by *Carachuri–Rosendo*." *Id.*

Several months after the Eighth Circuit's about-face in *Haltiwanger*, an *en* ***1212** *banc* Fourth Circuit panel confronted the same issue. There, the district court had originally classified a defendant's prior North Carolina drug conviction as a felony under 21 U.S.C. § 841(b)(1) even though he could have received at most eight months community service. *Simmons*, 649 F.3d at 239–41. [5] On appeal, prior to *Carachuri–Rosendo*, the Fourth Circuit affirmed. *See United States v. Simmons*, 340 Fed.Appx. 141 (4th Cir.2009) (unpublished). Like *Haltiwanger*, the Supreme Court granted certiorari and remanded the case, without opinion, "for further consideration in light of *Carachuri–Rosendo*." *Simmons v. United States*, 561 U.S. 1001, 130 S.Ct. 3455, 177 L.Ed.2d 1048 (2010). On remand, the same panel concluded *Carachuri–Rosendo* did not implicate its prior analysis. *See United States v. Simmons*, 635 F.3d 140 (4th Cir.2011). After *en banc* rehearing, however, the Fourth Circuit also reversed course. According to an eight-judge majority, the Fourth Circuit precedent holding similarly to *Hill*—*United States v. Harp*, 406 F.3d 242 (4th Cir.2005)—was no longer good law under *Carachuri–Rosendo*. *See Simmons*, 649 F.3d at 239–50. Explicitly tracking *Haltiwanger*, the Fourth Circuit held that " 'where a maximum term of imprisonment ... is directly tied to recidivism,' the 'actual recidivist finding ... must be part of a particular defendant's record of conviction for the conviction to qualify as a felony.' " *Id.* at 244 (quoting *Haltiwanger*, 637 F.3d at 884). Five dissenters found the *Simmons* majority's holding to be "contrary to the plain language of the relevant statutes," which differed "in critical respects" from the immigration statutes at issue in *Carachuri–Rosendo*. *Id.* at 250, 253. More specifically, this dissent argued the phrase "offense punishable by more than one year imprisonment" clearly calls for an offense-specific analysis rather than a defendant-specific analysis. *Id.* at 258. "As such," the dissent concluded, "we [should] follow the mandate of Congress to look to the maximum authorized punishment for *any* defendant convicted of the offense." *Id.* (emphasis added).

[6] Although we are not unsympathetic to the dissent's appeal to plain language, we are not analyzing this case in a vacuum. Rather, Supreme Court precedent binds us. And we simply cannot ignore *Carachuri–Rosendo*'s unambiguous clarification of *Rodriquez* that directly contradicts our view of *Rodriquez* in *Hill*. [6] We also cannot ignore the Supreme Court's subsequent remands to the Fourth and Eighth Circuits with instruction to analyze markedly similar issues "in light of *Carachuri–Rosendo*." Certainly, such remands are not "final determination[s] on the merits" by the Supreme Court. *Tyler v. Cain*, 533 U.S. 656, 666 n. 6, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001). They do, however, indicate the Supreme Court believes there is a "reasonable probability" these circuits "would reject a legal premise on which [they] relied...." *Id.*

Finally, our present holding also comports with the Sixth Circuit's decision in ***1213** *United States v. Pruitt*, 545 F.3d 416 (6th Cir.2008). While *Pruitt* pre-dates *Carachuri–Rosendo*, both the Fourth and Eighth Circuits noted that *Carachuri–Rosendo* "essentially ratified the Sixth Circuit's understanding of *Rodriquez*." *Haltiwanger*, 637 F.3d at 884; *see Simmons*, 649 F.3d at 244 ("[T]he Sixth Circuit's analysis [in *Pruitt*] now seems clearly correct given the Supreme Court's subsequent ruling in *Carachuri*."). The Sixth Circuit in *Pruitt* held, in regard to whether prior North Carolina convictions made a defendant a career offender under U.S.S.G. § 4B1.1(a), that in light of *Rodriquez* courts must "consider the defendant's particular prior record level

—and not merely the worst [possible] prior record level—in determining whether a conviction was for an offense 'punishable' by a term exceeding one year." *Pruitt*, 545 F.3d at 424. Thus, in essence, *three* circuits have agreed with our Defendant, whereas none have agreed with the Government. [7]

IV.

[7] In conclusion, *Hill*—which looked to the hypothetical worst possible offender to determine whether a state offense was punishable by more than a year in prison—cannot stand in light of *Carachuri–Rosendo*. We now hold, in line with our pre-*Hill* precedent, that in determining whether a state offense was punishable by a certain amount of imprisonment, the maximum amount of prison time a *particular* defendant could have received controls, rather than the amount of time the worst imaginable recidivist could have received. As such, Defendant's prior Kansas conviction for eluding police is not a felony for purposes of U.S.S.G. § 4B1.1(a). The district court's imposition of a career offender enhancement was therefore in error and is REVERSED. This case is REMANDED for resentencing.

APPENDIX

SENTENCING RANGE – NONDRUG OFFENSES

Category →	A	B	C	D	E	F	G	H	I
Severity Level ↓	3 + Person Felonies	2 Person Felonies	1 Person & 1 Nonperson Felonies	1 Person Felony	3 + Nonperson Felonies	2 Nonperson Felonies	1 Nonperson Felony	2 + Misdemeanor	1 Misdemeanor No Record
I	653 620 592	618 586 554	285 272 258	267 253 240	246 234 221	226 214 203	203 195 184	186 176 166	165 155 147
II	493 467 442	460 438 416	216 205 194	200 190 181	184 174 165	168 160 152	154 146 138	138 131 123	128 117 109
III	247 233 221	228 216 206	107 102 96	100 94 89	92 88 82	83 79 74	77 72 68	71 66 61	61 59 55
IV	172 162 154	162 154 144	75 71 68	68 66 62	64 60 57	59 56 52	52 50 47	48 45 42	43 41 38
V	136 130 122	128 120 114	60 57 53	55 52 50	51 49 46	47 44 41	43 41 38	38 36 34	34 32 31
VI	46 43 40	41 39 37	38 36 34	36 34 32	32 30 28	29 27 25	26 24 22	21 20 19	19 18 17
VII	34 32 30	31 29 27	29 27 25	26 24 22	23 21 19	19 18 17	17 16 15	14 13 12	13 12 11
VIII	23 21 19	20 19 18	19 18 17	17 16 15	15 14 13	13 12 11	11 10 9	11 10 9	9 8 7
IX	17 16 15	15 14 13	13 12 11	13 12 11	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5
X	13 12 11	12 11 10	11 10 9	10 9 8	9 8 7	8 7 6	7 6 5	7 6 5	7 6 5

Probation Terms are:
36 months recommended for felonies classified in Severity Levels 1-5
24 months recommended for felonies classified in Severity Levels 6-7
18 months (up to) for felonies classified in Severity Level 8
12 months (up to) for felonies classified in Severity Levels 9-10

Postrelease Supervision Terms are:
36 months for felonies classified in Severity Levels 1-4
24 months for felonies classified in Severity Levels 5-6
12 months for felonies classified in Severity Levels 7-10

Postrelease for felonies committed before 4/20/95 are:
24 months for felonies classified in Severity Levels 1-6
12 months for felonies classified in Severity Level 7-10

LEGEND
Presumptive Probation
Border Box
Presumptive Imprisonment

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Footnotes

1 The chart for non-drug offenses is attached to this opinion. *See* Appendix; *cf.* Kan. Stat. Ann. § 21–6804 (2013) (statutory basis for the chart).

2 To give another example, as mentioned above the Supreme Court emphasized that the scales were tilted against the Government from the beginning because "the English language tells us that most aggravated felonies are punishable by sentences far longer than 10 days...." *Carachuri–Rosendo,* 560 U.S. at 575, 130 S.Ct. 2577.

3 At oral argument the Government asserted that, while *Hill* was "informed" by *Rodriquez,* our misreading of *Rodriquez* did not actually "dictate" *Hill*'s conclusion. We disagree. Our language in *Hill* makes clear that had it not been for *Rodriquez,* we would not have overruled *Plakio. See, e.g., Hill,* 539 F.3d at 1218–20 ("Under the doctrine of *stare decisis,* the structure of § 922(g)(1), alone, would not have been sufficient to overrule our precedent.... Intervening Supreme Court precedent [*i.e. Rodriquez*], however, overrules our prior approach.").

4 Our decisions in *United States v. Coleman,* 656 F.3d 1089 (10th Cir.2011), and *United States v. Romero–Leon,* 488 Fed.Appx. 302 (10th Cir.2012), do not contradict this holding. First and foremost, the Government does not rely on these cases. Second, while in *Coleman* and *Romero–Leon* we did, post-*Carachuri–Rosendo,* rely on *Hill* and its interpretation of *Rodriquez,* we never mentioned *Carachuri–Rosendo* in either case. "[W]e are generally not bound by a prior panel's implicit resolution of an issue that was neither raised by the parties nor discussed by the panel." *Streu v. Dormire,* 557 F.3d 960, 964 (8th Cir.2009); *cf. United States v. West,* 646 F.3d 745, 748 (10th Cir.2011) ("Mr. West did not raise his challenge to the restitution award in his initial ... appeal, and, therefore, we are not bound by the law of the case with respect to this issue."). Third, not only was *Romero–Leon* unpublished, but it also is arguably distinguishable since the defendant there had aggravating circumstances that would have allowed for a sentence of ten years or more on his past state convictions. *Romero–Leon,* 488 Fed.Appx. at 305.

5 Like Kansas, the North Carolina "sentencing structure ties a particular defendant's criminal history to the maximum term of imprisonment." *Simmons,* 649 F.3d at 244 (quoting *Haltiwanger,* 637 F.3d at 884).

6 Furthermore, we agree with much of what the Fourth Circuit majority wrote in *Simmons.* For instance, the majority notes that under the dissent's approach, virtually all North Carolina offenses—from the most minor misdemeanor to the most major felony—would be considered felonies for federal purposes. *Simmons,* 649 F.3d at 249–50. This, the majority opined, "makes a mockery of North Carolina's carefully crafted sentencing scheme." *Id.* at 249. The same applies here. Taking the hypothetical worst offender into account, every Kansas crime—severity level I to severity level X—would be considered punishable by more than one year in prison for federal law purposes. *See* Appendix.

7 Supplemental authority filed by Defendant calls into question whether the Government even agrees with its *own* position on this case. In a Fed. R.App. P. 28(j) letter filed prior to oral argument, Defendant asserted that the United States Solicitor General agreed before the Supreme Court, in two recent cases from the Sixth Circuit, that remand was appropriate on this issue because the defendants had been subjected to erroneous sentences. The Government did not respond to the 28(j) letter prior to oral argument. At oral argument, the Government did not disagree with Defendant's assertion. Rather, the Government stated it was not prepared at that time to distinguish the Solicitor General's actions. We have received no follow-up containing any such distinction. Thus, the Government has seemingly taken contradictory positions on this issue in different federal courts.

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133 S.Ct. 2276
Supreme Court of the United States

Matthew Robert DESCAMPS, Petitioner
v.
UNITED STATES.

No. 11–9540. | Argued Jan. 7, 2013. | Decided June 20, 2013.

Synopsis
Background: Defendant was convicted in the United States District Court for the Eastern District of Washington, Fred L. Van Sickle, Senior Judge, of possession of firearm by convicted felon and sentenced under the Armed Career Criminal Act (ACCA). Defendant appealed. The United States Court of Appeals for the Ninth Circuit, 466 Fed.Appx. 563, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Justice Kagan, held that:

[1] courts may not apply the modified categorical approach to sentencing under ACCA when the crime of which the defendant was convicted has a single, indivisible set of elements, abrogating *U.S. v. Aguila–Montes de Oca*, 655 F.3d 915, *U.S. v. Armstead*, 467 F.3d 943, and

[2] defendant's prior burglary conviction under California law was not for a violent felony within the meaning of ACCA.

Reversed.

Justice Kennedy filed a concurring opinion.

Justice Thomas filed an opinion concurring in the judgment.

Justice Alito filed a dissenting opinion.

2278 *Syllabus [*]

The Armed Career Criminal Act (ACCA) increases the sentences of certain ***2279** federal defendants who have three prior convictions "for a violent felony," including "burglary, arson, or extortion." 18 U.S.C. § 924(e). To determine whether a past conviction is for one of those crimes, courts use a "categorical approach": They compare the statutory elements of a prior conviction with the elements of the "generic" crime—*i.e.*, the offense as commonly understood. If the statute's elements are the same as, or narrower than, those of the generic offense, the prior conviction qualifies as an ACCA predicate. When a prior conviction is for violating a "divisible statute"—one that sets out one or more of the elements in the alternative, *e.g.*, burglary involving entry into a building *or* an automobile—a "modified categorical approach" is used. That approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative element formed the basis of the defendant's prior conviction.

Petitioner Descamps was convicted of being a felon in possession of a firearm. The Government sought an ACCA sentence enhancement, pointing to Descamps' three prior convictions, including one for burglary under California Penal Code Ann. §

459, which provides that a "person who enters" certain locations "with intent to commit grand or petit larceny or any felony is guilty of burglary." In imposing an enhanced sentence, the District Court rejected Descamps' argument that his § 459 conviction cannot serve as an ACCA predicate because § 459 goes beyond the "generic" definition of burglary. The Ninth Circuit affirmed, holding that its decision in *United States v. Aguila–Montes de Oca*, 655 F.3d 915, permits the application of the modified categorical approach to a prior conviction under a statute that is "categorically broader than the generic offense." It found that Descamps' § 459 conviction, as revealed in the plea colloquy, rested on facts satisfying the elements of generic burglary.

Held : The modified categorical approach does not apply to statutes like § 459 that contain a single, indivisible set of elements. Pp. 2281 – 2293.

(a) This Court's caselaw all but resolves this case. In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607, and *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205, the Court approved the use of a modified categorical approach in a "narrow range of cases" in which a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction. Because a sentencing court cannot tell, simply by looking at a divisible statute, which version of the offense a defendant was convicted of, the court is permitted to consult extra-statutory documents—but only to assess whether the defendant was convicted of the particular "statutory definition" that corresponds to the generic offense. *Nijhawan v. Holder*, 557 U.S. 29, 129 S.Ct. 2294, 174 L.Ed.2d 22, and *Johnson v. United States*, 559 U.S. 133, 130 S.Ct. 1265, 176 L.Ed.2d 1, also emphasized this elements-based rationale for the modified categorical approach. That approach plays no role here, where the dispute does not concern alternative elements but a simple discrepancy between generic burglary and § 459. Pp. 2281 – 2286.

(b) The Ninth Circuit's *Aguila–Montes* approach turns an elements-based inquiry into an evidence-based one, asking not whether "statutory definitions" necessarily require an adjudicator to find the ***2280** generic offense, but whether the prosecutor's case realistically led the adjudicator to find certain facts. *Aguila–Montes* has no roots in this Court's precedents. In fact, it subverts those decisions, conflicting with each of the rationales supporting the categorical approach and threatening to undo all its benefits. Pp. 2286 – 2291.

(1) *Taylor* 's elements-centric categorical approach comports with ACCA's text and history, avoids Sixth Amendment concerns that would arise from sentencing courts' making factual findings that properly belong to juries, and averts "the practical difficulties and potential unfairness of a factual approach." 495 U.S., at 601, 110 S.Ct. 2143.

ACCA's language shows that Congress intended sentencing courts "to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Id.*, at 600, 110 S.Ct. 2143. The Ninth Circuit's approach runs headlong into that congressional choice. Instead of reviewing extra-statutory documents only to determine which alternative element was the basis for the conviction, the Circuit looks to those materials to discover what the defendant actually did.

Under ACCA, the sentencing court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction. That is why *Shepard* refused to permit sentencing courts to make a disputed determination about what facts must have supported a defendant's conviction. 544 U.S., at 25, 125 S.Ct. 1254 (plurality opinion). Yet the Ninth Circuit flouts this Court's reasoning by authorizing judicial factfinding that goes far beyond the recognition of a prior conviction.

The Ninth Circuit's decision also creates the same "daunting" difficulties and inequities that first encouraged the adoption of the categorical approach. Sentencing courts following *Aguila–Montes* would have to expend resources examining (often aged) documents for evidence that a defendant admitted, or a prosecutor showed, facts that, although unnecessary to the crime of conviction, satisfied an element of the relevant generic offense. And the *Aguila–Montes* approach would also deprive many defendants of the benefits of their negotiated plea deals. Pp. 2287 – 2290.

(2) In defending *Aguila–Montes,* the Ninth Circuit denied any real distinction between divisible and indivisible statutes extending further than the generic offense. But the Circuit's efforts to imaginatively reconceive all indivisible statutes as divisible ones are unavailing. Only divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime. Pp. 2289 – 2291.

(c) The Government offers a slightly different argument: It contends that the modified categorical approach should apply where, as here, the mismatch of elements between the crime of conviction and the generic offense results not from a missing element but from an element's overbreadth. But that distinction is malleable and manipulable. And in any event, it is a distinction without a difference. Whether the statute of conviction has an overbroad or missing element, the problem is the same: Because of the mismatch in elements, a person convicted under that statute is never convicted of the generic crime. Pp. 2291 – 2293.

(d) Because generic unlawful entry is not an element, or an alternative element of, § 459, a conviction under that statute is ***2281** never for generic burglary. Descamps' ACCA enhancement was therefore improper. Pp. 2292 – 2293.

466 Fed.Appx. 563, reversed.

KAGAN, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, KENNEDY, GINSBURG, BREYER, and SOTOMAYOR, JJ., joined. KENNEDY, J., filed a concurring opinion. THOMAS, J., filed an opinion concurring in the judgment. ALITO, J., filed a dissenting opinion.

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Opinion

Justice KAGAN delivered the opinion of the Court.

[1] The Armed Career Criminal Act (ACCA or Act), 18 U.S.C. § 924(e), increases the sentences of certain federal defendants who have three prior convictions "for a violent felony," including "burglary, arson, or extortion." To determine whether a past conviction is for one of those crimes, courts use what has become known as the "categorical approach": They compare the elements of the statute forming the basis of the defendant's conviction with the elements of the "generic" crime—*i.e.*, the offense as commonly understood. The prior conviction qualifies as an ACCA predicate only if the statute's elements are the same as, or narrower than, those of the generic offense.

[2] **[3]** We have previously approved a variant of this method—labeled (not very inventively) the "modified categorical approach"—when a prior conviction is for violating a so-called "divisible statute." That kind of statute sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile. If one alternative (say, a building) matches an element in the generic offense, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction. The court can then do what

the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime.

[4] This case presents the question whether sentencing courts may also consult those additional documents when a defendant was convicted under an "indivisible" statute—*i.e.*, one not containing alternative elements—that criminalizes a broader swath of conduct than the relevant generic offense. That would enable a court to decide, based on information about a case's underlying facts, that the defendant's prior conviction qualifies as an ACCA predicate even though the elements ***2282** of the crime fail to satisfy our categorical test. Because that result would contravene our prior decisions and the principles underlying them, we hold that sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements.

I

Petitioner Michael Descamps was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). That unadorned offense carries a maximum penalty of 10 years in prison. The Government, however, sought an enhanced sentence under ACCA, based on Descamps' prior state convictions for burglary, robbery, and felony harassment.

ACCA prescribes a mandatory minimum sentence of 15 years for a person who violates § 922(g) and "has three previous convictions ... for a violent felony or a serious drug offense." § 924(e)(1). The Act defines a "violent felony" to mean any felony, whether state or federal, that "has as an element the use, attempted use, or threatened use of physical force against the person of another," or that "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B).

Descamps argued that his prior burglary conviction could not count as an ACCA predicate offense under our categorical approach. He had pleaded guilty to violating California Penal Code Ann. § 459 (West 2010), which provides that a "person who enters" certain locations "with intent to commit grand or petit larceny or any felony is guilty of burglary." That statute does not require the entry to have been unlawful in the way most burglary laws do. Whereas burglary statutes generally demand breaking and entering or similar conduct, California's does not: It covers, for example, a shoplifter who enters a store, like any customer, during normal business hours. See *People v. Barry*, 94 Cal. 481, 483–484, 29 P. 1026, 1026–1027 (1892). In sweeping so widely, the state law goes beyond the normal, "generic" definition of burglary. According to Descamps, that asymmetry of offense elements precluded his conviction under § 459 from serving as an ACCA predicate, whether or not his own burglary involved an unlawful entry that could have satisfied the requirements of the generic crime.

The District Court disagreed. According to the court, our modified categorical approach permitted it to examine certain documents, including the record of the plea colloquy, to discover whether Descamps had "admitted the elements of a generic burglary" when entering his plea. App. 50a. And that transcript, the court ruled, showed that Descamps had done so. At the plea hearing, the prosecutor proffered that the crime " ' involve[d] the breaking and entering of a grocery store,' " and Descamps failed to object to that statement. *Ibid.* The plea proceedings, the District Court thought, thus established that Descamps' prior conviction qualified as a generic burglary (and so as a "violent felony") under ACCA. Applying the requisite penalty enhancement, the court sentenced Descamps to 262 months in prison—more than twice the term he would otherwise have received.

The Court of Appeals for the Ninth Circuit affirmed, relying on its recently issued decision in *United States v. Aguila–Montes de Oca*, 655 F.3d 915 (2011) (en banc) (*per curiam*). There, a divided en banc court took much the same view of the modified categorical approach as had the District Court in this case. The en banc court held that when a sentencing court considers a conviction under § 459—or ***2283** any other statute that is "categorically broader than the generic offense"—the court may scrutinize certain documents to determine the factual basis of the conviction. See *id.*, at 940. Applying that approach, the Court

of Appeals here found that Descamps' plea, as revealed in the colloquy, "rested on facts that satisfy the elements of the generic definition of burglary." 466 Fed.Appx. 563, 565 (2012).

We granted certiorari, 567 U.S. ——, 133 S.Ct. 90, 183 L.Ed.2d 730 (2012), to resolve a Circuit split on whether the modified categorical approach applies to statutes like § 459 that contain a single, "indivisible" set of elements sweeping more broadly than the corresponding generic offense. [1] We hold that it does not, and so reverse.

II

[5] Our caselaw explaining the categorical approach and its "modified" counterpart all but resolves this case. In those decisions, as shown below, the modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction. So understood, the modified approach cannot convert Descamps' conviction under § 459 into an ACCA predicate, because that state law defines burglary not alternatively, but only more broadly than the generic offense.

[6] **[7]** **[8]** We begin with *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), which established the rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses (*e.g.*, burglary). *Taylor* adopted a "formal categorical approach": Sentencing courts may "look only to the statutory definitions"—*i.e.*, the elements—of a defendant's prior offenses, and *not* "to the particular facts underlying those convictions." *Id.*, at 600, 110 S.Ct. 2143. If the relevant statute has the same elements as the "generic" ACCA crime, then the prior conviction can serve as an ACCA predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is "necessarily ... guilty of all the [generic crime's] elements." *Id.*, at 599, 110 S.Ct. 2143. But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as an ACCA predicate, even if the defendant actually committed the offense in its generic form. The key, we emphasized, is elements, not facts. So, for example, we held that a defendant can receive an ACCA enhancement for burglary only if he was convicted of a crime having "the basic elements" of generic burglary —*i.e.*, "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Ibid.* And indeed, we indicated that the very statute at issue here, § 459, does not fit that bill because "California defines 'burglary' so broadly as to include shoplifting." *Id.*, at 591, 110 S.Ct. 2143.

At the same time, *Taylor* recognized a "narrow range of cases" in which sentencing courts—applying what we would later dub the "modified categorical approach"— ***2284** may look beyond the statutory elements to "the charging paper and jury instructions" used in a case. *Id.*, at 602, 110 S.Ct. 2143. To explain when courts should resort to that approach, we hypothesized a statute with alternative elements—more particularly, a burglary statute (otherwise conforming to the generic crime) that prohibits "entry of an automobile as well as a building." *Ibid.* One of those alternatives (a building) corresponds to an element in generic burglary, whereas the other (an automobile) does not. In a typical case brought under the statute, the prosecutor charges one of those two alternatives, and the judge instructs the jury accordingly. So if the case involves entry into a building, the jury is "actually required to find all the elements of generic burglary," as the categorical approach demands. *Ibid.* But the statute alone does not disclose whether that has occurred. Because the statute is "divisible"—*i.e.*, comprises multiple, alternative versions of the crime—a later sentencing court cannot tell, without reviewing something more, if the defendant's conviction was for the generic (building) or non-generic (automobile) form of burglary. Hence *Taylor* permitted sentencing courts, as a tool for implementing the categorical approach, to examine a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction.

In *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the hypothetical we posited in *Taylor* became real: We confronted a Massachusetts burglary statute covering entries into "boats and cars" as well as buildings. 544 U.S., at 17, 125 S.Ct. 1254. The defendant there pleaded guilty to violating the statute, and we first confirmed that *Taylor* 's categorical approach applies not just to jury verdicts, but also to plea agreements. That meant, we held, that a conviction based on a guilty plea can qualify as an ACCA predicate only if the defendant "necessarily admitted [the] elements of the generic

offense." *Id.*, at 26, 125 S.Ct. 1254. But as we had anticipated in *Taylor*, the divisible nature of the Massachusetts burglary statute confounded that inquiry: No one could know, just from looking at the statute, which version of the offense Shepard was convicted of. Accordingly, we again authorized sentencing courts to scrutinize a restricted set of materials—here, "the terms of a plea agreement or transcript of colloquy between judge and defendant"—to determine if the defendant had pleaded guilty to entering a building or, alternatively, a car or boat. *Ibid.* Yet we again underscored the narrow scope of that review: It was not to determine "what the defendant and state judge must have understood as the factual basis of the prior plea," but only to assess whether the plea was to the version of the crime in the Massachusetts statute (burglary of a building) corresponding to the generic offense. *Id.*, at 25–26, 125 S.Ct. 1254 (plurality opinion).

Two more recent decisions have further emphasized the elements-based rationale—applicable only to divisible statutes—for examining documents like an indictment or plea agreement. In *Nijhawan v. Holder*, 557 U.S. 29, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009), we discussed another Massachusetts statute, this one prohibiting " 'Breaking and Entering at Night' " in any of four alternative places: a "building, ship, vessel, or vehicle." *Id.*, at 35, 129 S.Ct. 2294. We recognized that when a statute so "refer[s] to several different crimes," not all of which qualify as an ACCA predicate, a court must determine which crime formed the basis of the defendant's conviction. *Ibid.* That is why, we explained, *Taylor* and *Shepard* developed the modified categorical ***2285** approach. By reviewing the extra-statutory materials approved in those cases, courts could discover "which statutory phrase," contained within a statute listing "several different" crimes, "covered a prior conviction." 557 U.S., at 41, 129 S.Ct. 2294. And a year later, we repeated that understanding of when and why courts can resort to those documents: "[T]he 'modified categorical approach' that we have approved permits a court to determine which statutory phrase was the basis for the conviction." *Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010) (citation omitted).

[9] **[10]** Applied in that way—which is the only way we have ever allowed—the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates "several different ... crimes." *Nijhawan*, 557 U.S., at 41, 129 S.Ct. 2294. If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of. That is the job, as we have always understood it, of the modified approach: to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense. [2]

[11] The modified approach thus has no role to play in this case. The dispute here does not concern any list of alternative elements. Rather, it involves a simple discrepancy between generic burglary and the crime established in § 459. The former requires an unlawful entry along the lines of breaking and entering. See 3 W. LaFave, Substantive Criminal Law § 21.1(a) (2d ed. 2003) (hereinafter LaFave). The latter does not, and indeed covers simple shoplifting, as even the Government acknowledges. See Brief for United States 38; *Barry*, 94 Cal., at 483–484, 29 P., at 1026–1027. In *Taylor* 's words, then, § 459 "define[s] burglary more broadly" than the generic offense. 495 U.S., at 599, 110 S.Ct. 2143. And because that is true—because California, ***2286** to get a conviction, need not prove that Descamps broke and entered—a § 459 violation cannot serve as an ACCA predicate. Whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant. Our decisions authorize review of the plea colloquy or other approved extra-statutory documents only when a statute defines burglary not (as here) overbroadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not. In that circumstance, a court may look to the additional documents to determine which of the statutory offenses (generic or non-generic) formed the basis of the defendant's conviction. But here no uncertainty of that kind exists, and so the categorical approach needs no help from its modified partner. We know Descamps' crime of conviction, and it does not correspond to the relevant generic offense. Under our prior decisions, the inquiry is over.

III

The Court of Appeals took a different view. Dismissing everything we have said on the subject as "lack[ing] conclusive weight," the Ninth Circuit held in *Aguila–Montes* that the modified categorical approach could turn a conviction under *any* statute into an ACCA predicate offense. 655 F.3d, at 931. The statute, like § 459, could contain a single, indivisible set of elements covering far more conduct than the generic crime—and still, a sentencing court could "conside[r] to some degree the factual basis for the defendant's conviction" or, otherwise stated, "the particular acts the defendant committed." *Id.*, at 935–936. More specifically, the court could look to reliable materials (the charging document, jury instructions, plea colloquy, and so forth) to determine "what facts" can "confident[ly]" be thought to underlie the defendant's conviction in light of the "prosecutorial theory of the case" and the "facts put forward by the government." *Id.*, at 936–937. It makes no difference, in the Ninth Circuit's view, whether "specific words in the statute" of conviction " ' actually required' " the jury (or judge accepting a plea) "to find a particular generic element." *Id.*, at 936 (quoting *Taylor*, 495 U.S., at 602, 110 S.Ct. 2143; internal quotation marks omitted). [3]

***2287** That approach—which an objecting judge aptly called "modified factual," 655 F.3d, at 948 (Berzon, J., concurring in judgment)—turns an elements-based inquiry into an evidence-based one. It asks not whether "statutory definitions" necessarily require an adjudicator to find the generic offense, but instead whether the prosecutor's case realistically led the adjudicator to make that determination. And it makes examination of extra-statutory documents not a tool used in a "narrow range of cases" to identify the relevant element from a statute with multiple alternatives, but rather a device employed in every case to evaluate the facts that the judge or jury found. By this point, it should be clear that the Ninth Circuit's new way of identifying ACCA predicates has no roots in our precedents. But more: *Aguila–Montes* subverts those decisions, conflicting with each of the rationales supporting the categorical approach and threatening to undo all its benefits.

A

This Court offered three grounds for establishing our elements-centric, "formal categorical approach." *Taylor*, 495 U.S., at 600, 110 S.Ct. 2143. First, it comports with ACCA's text and history. Second, it avoids the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries. And third, it averts "the practical difficulties and potential unfairness of a factual approach." *Id.*, at 601, 110 S.Ct. 2143. When assessed in light of those three reasons, the Ninth Circuit's ruling strikes out swinging.

[12] **[13]** **[14]** Start with the statutory text and history. As we have long recognized, ACCA increases the sentence of a defendant who has three "previous convictions" for a violent felony—not a defendant who has thrice committed such a crime. 18 U.S.C. § 924(e)(1); see *Taylor*, 495 U.S., at 600, 110 S.Ct. 2143. That language shows, as *Taylor* explained, that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid.*; see *Shepard*, 544 U.S., at 19, 125 S.Ct. 1254. If Congress had wanted to increase a sentence based on the facts of a prior offense, it presumably would have said so; other statutes, in other contexts, speak in just that way. See *Nijhawan*, 557 U.S., at 36, 129 S.Ct. 2294 (construing an immigration statute as requiring a " 'circumstance-specific,' not a 'categorical,' " approach). But in ACCA, *Taylor* found, Congress made a deliberate decision to treat every conviction of a crime in the same manner: During the lengthy debate preceding the statute's enactment, "no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case." 495 U.S., at 601, 110 S.Ct. 2143. Congress instead meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none.

The Ninth Circuit's approach runs headlong into that congressional choice. Instead of reviewing documents like an indictment or plea colloquy only to determine "which statutory phrase was the basis for the conviction," the Ninth Circuit looks to those materials to discover what the defendant actually did. *Johnson*, 559 U.S., at 144, 130 S.Ct. 1265. This case demonstrates the point. Descamps was not *convicted of* generic burglary, because (as the Government agrees) § 459 does not contain that crime's required unlawful- ***2288** entry element. See Brief for United States 38, 43–44. At most, the colloquy showed that Descamps *committed* generic burglary, and so hypothetically *could have been* convicted under a law criminalizing that conduct. But that is just what we said, in *Taylor* and elsewhere, is not enough. See 495 U.S., at 600, 110 S.Ct. 2143; *Carachuri–Rosendo v. Holder*,

560 U.S. ——, ——, 130 S.Ct. 2577, 2586, 177 L.Ed.2d 68 (2010) (rejecting such a " 'hypothetical approach' " given a similar statute's directive to "look to the conviction itself," rather than "to what might have or could have been charged"). And the necessary result of the Ninth Circuit's method is exactly the differential treatment we thought Congress, in enacting ACCA, took care to prevent. In the two years since *Aguila–Montes*, the Ninth Circuit has treated some, but not other, convictions under § 459 as ACCA predicates, based on minor variations in the cases' plea documents. Compare, *e.g.*, 466 Fed.Appx., at 565 (Descamps' § 459 conviction counts as generic burglary), with 655 F.3d, at 946 (Aguila–Montes' does not).

[15] Similarly, consider (though *Aguila–Montes* did not) the categorical approach's Sixth Amendment underpinnings. We have held that "[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." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Under ACCA, the court's finding of a predicate offense indisputably increases the maximum penalty. Accordingly, that finding would (at the least) raise serious Sixth Amendment concerns if it went beyond merely identifying a prior conviction. Those concerns, we recognized in *Shepard*, counsel against allowing a sentencing court to "make a disputed" determination "about what the defendant and state judge must have understood as the factual basis of the prior plea," or what the jury in a prior trial must have accepted as the theory of the crime. 544 U.S., at 25, 125 S.Ct. 1254 (plurality opinion); see *id.*, at 28, 125 S.Ct. 1254 (THOMAS, J., concurring in part and concurring in judgment) (stating that such a finding would "giv[e] rise to constitutional error, not doubt"). Hence our insistence on the categorical approach.

[16] **[17]** Yet again, the Ninth Circuit's ruling flouts our reasoning—here, by extending judicial factfinding beyond the recognition of a prior conviction. Our modified categorical approach merely assists the sentencing court in identifying the defendant's crime of conviction, as we have held the Sixth Amendment permits. But the Ninth Circuit's reworking authorizes the court to try to discern what a trial showed, or a plea proceeding revealed, about the defendant's underlying conduct. See *Aguila–Montes*, 655 F.3d, at 937. And there's the constitutional rub. The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances. See, *e.g.*, *Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999). Similarly, as *Shepard* indicated, when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment. See 544 U.S., at 24–26, 125 S.Ct. 1254 (plurality opinion). So when the District Court here enhanced Descamps' sentence, based on ***2289** his supposed acquiescence to a prosecutorial statement (that he "broke and entered") irrelevant to the crime charged, the court did just what we have said it cannot: rely on its own finding about a non-elemental fact to increase a defendant's maximum sentence.

Finally, the Ninth Circuit's decision creates the same "daunting" difficulties and inequities that first encouraged us to adopt the categorical approach. *Taylor*, 495 U.S., at 601–602, 110 S.Ct. 2143. In case after case, sentencing courts following *Aguila–Montes* would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense. The meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to. At trial, extraneous facts and arguments may confuse the jury. (Indeed, the court may prohibit them for that reason.) And during plea hearings, the defendant may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations. In this case, for example, Descamps may have let the prosecutor's statement go by because it was irrelevant to the proceedings. He likely was not thinking about the possibility that his silence could come back to haunt him in an ACCA sentencing 30 years in the future. (Actually, he could not have been thinking that thought: ACCA was not even on the books at the time of Descamps' burglary conviction.)

Still worse, the *Aguila–Montes* approach will deprive some defendants of the benefits of their negotiated plea deals. Assume (as happens every day) that a defendant surrenders his right to trial in exchange for the government's agreement that he plead guilty to a less serious crime, whose elements do not match an ACCA offense. Under the Ninth Circuit's view, a later sentencing court could still treat the defendant as though he had pleaded to an ACCA predicate, based on legally extraneous statements

found in the old record. *Taylor* recognized the problem: "[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain," the Court stated, "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty" to generic burglary. 495 U.S., at 601–602, 110 S.Ct. 2143. That way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain.

B

The Ninth Circuit defended its (excessively) modified approach by denying any real distinction between divisible and indivisible statutes extending further than the generic offense. "The only conceptual difference," the court reasoned, "is that [a divisible statute] creates an *explicitly* finite list of possible means of commission, while [an indivisible one] creates an *implied* list of every means of commission that otherwise fits the definition of a given crime." *Aguila–Montes*, 655 F.3d, at 927. For example, an indivisible statute "requir[ing] use of a 'weapon' is not meaningfully different"—or so says the Ninth Circuit—"from a statute that simply lists every kind of weapon in existence ... ('gun, axe, sword, baton, slingshot, knife, machete, bat,' and so on)." *Ibid.* In a similar way, *every* indivisible statute can be imaginatively reconstructed as a divisible one. And if that is true, the Ninth Circuit asks, why limit the modified categorical ***2290** approach only to explicitly divisible statutes?

The simple answer is: Because only divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime. A prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives. See, *e.g.*, *The Confiscation Cases*, 20 Wall. 92, 104, 22 L.Ed. 320 (1874) ("[A]n indictment or a criminal information which charges the person accused, in the disjunctive, with being guilty of one or of another of several offences, would be destitute of the necessary certainty, and would be wholly insufficient"). [4] And the jury, as instructions in the case will make clear, must then find that element, unanimously and beyond a reasonable doubt. So assume, along the lines of the Ninth Circuit's example, that a statute criminalizes assault with any of eight specified weapons; and suppose further, as the Ninth Circuit did, that only assault with a *gun* counts as an ACCA offense. A later sentencing court need only check the charging documents and instructions ("Do they refer to a gun or something else?") to determine whether in convicting a defendant under that divisible statute, the jury necessarily found that he committed the ACCA-qualifying crime.

None of that is true of an overbroad, indivisible statute. A sentencing court, to be sure, can hypothetically reconceive such a statute in divisible terms. So, as *Aguila–Montes* reveals, a court blessed with sufficient time and imagination could devise a laundry list of potential "weapons"—not just the eight the Ninth Circuit mentioned, but also (for starters) grenades, pipe bombs, spears, tire irons, BB guns, nunchucks, and crossbows. But the thing about hypothetical lists is that they are, well, hypothetical. As long as the statute itself requires only an indeterminate "weapon," that is all the indictment must (or is likely to) allege and all the jury instructions must (or are likely to) mention. And most important, that is all the jury must find to convict the defendant. The jurors need not all agree on whether the defendant used a gun or a knife or a tire iron (or any other particular weapon that might appear in an imagined divisible statute), because the actual statute requires the jury to find only a "weapon." And even if in many cases, the jury could have readily reached consensus on the weapon used, a later sentencing court cannot supply that missing judgment. Whatever the underlying facts or the evidence presented, the defendant still would not have been convicted, in the deliberate and considered way the Constitution guarantees, of an offense with the same (or narrower) elements as the supposed generic crime (assault with a gun).

Indeed, accepting the Ninth Circuit's contrary reasoning would altogether collapse the distinction between a categorical and a fact-specific approach. After all, the Ninth Circuit's "weapons" example is just the tip of the iceberg: Courts can go much further in reconceiving indivisible statutes as impliedly divisible ones. In fact, every element of every statute can be imaginatively transformed as the Ninth ***2291** Circuit suggests—so that every crime is seen as containing an infinite number of sub-crimes corresponding to "all the possible ways an individual can commit" it. *Aguila–Montes*, 655 F.3d, at 927. (Think: Professor Plum, in the ballroom, with the candlestick?; Colonel Mustard, in the conservatory, with the rope, on a snowy day, to cover up his affair with Mrs. Peacock?) If a sentencing court, as the Ninth Circuit holds, can compare each of those "implied ... means of commission" to the generic ACCA offense, *ibid.* (emphasis deleted), then the categorical approach is at an end. At that point,

the court is merely asking whether a particular set of facts leading to a conviction conforms to a generic ACCA offense. And that is what we have expressly and repeatedly forbidden. Courts may *modify* the categorical approach to accommodate alternative "statutory definitions." *Ibid.*; cf. *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, 512 U.S. 218, 225, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994) (" ' [T]o modify' means to change moderately or in minor fashion"). They may not, by pretending that every fact pattern is an "implied" statutory definition, *Aguila–Montes*, 655 F.3d, at 927, convert that approach into its opposite.

IV

The Government tries to distance itself from the Ninth Circuit by offering a purportedly narrower theory—that although an indivisible statute that is "truly missing" an element of the generic offense cannot give rise to an ACCA conviction, California's burglary law can do so because it merely "contains a broader version of the [generic] element of unlawfulness of entry." Brief for United States 11–12. The Government's argument proceeds in three steps. It begins from the premise that sentencing courts applying ACCA should consider not only the statute defining a prior crime but also any judicial interpretations of it. Next, the Government points to a California decision holding (not surprisingly) that a defendant cannot "burglariz[e] his own home"; the case's reasoning, the Government notes, is that § 459 (though not saying so explicitly) requires "an entry which invades a possessory right." *People v. Gauze*, 15 Cal.3d 709, 713–716, 125 Cal.Rptr. 773, 542 P.2d 1365, 1367–1368 (1975). Given that precedent, the Government contends, § 459 includes a kind of "unlawful entry" element, although it is broader than the generic crime's analogous requirement. Finally, the Government asserts that sentencing courts may use the modified approach "to determine whether a particular defendant's conviction under" such an overbroad statute actually "was for [the] generic" crime. Brief for United States 11.

[18] Although elaborately developed in the Government's brief, this argument's first two steps turn out to be sideshows. We may reserve the question whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but of judicial rulings interpreting it. And we may assume, as the Government insists, that California caselaw treats § 459 as including an element of entry "invading a possessory right"—although, truth be told, we find the state decisions on that score contradictory and confusing. [5] Even on those assumptions, ***2292** § 459's elements do not come into line with generic burglary's. As the Government concedes, almost every entry onto another's property with intent to steal—including, for example, a shoplifter's walking into an open store—"invades a possessory right" under § 459. See Brief for United States 38; *Gauze*, 15 Cal.3d, at 714, 125 Cal.Rptr. 773, 542 P.2d, at 1367. By contrast, generic burglary's unlawful-entry element excludes any case in which a person enters premises open to the public, no matter his intent; the generic crime requires breaking and entering or similar unlawful activity. See Brief for United States 38; LaFave § 21.1(a). So everything rests on the Government's third point: that this mismatch does not preclude applying the modified categorical approach, because it results not from a missing element but instead from an element's overbreadth.

But for starters, we see no principled way to make that distinction. Most overbroad statutes can also be characterized as missing an element; and most statutes missing an element can also be labeled overbroad. Here is the only conclusion in *Aguila–Montes* we agree with: "[I]t is difficult, if not impossible" to determine which is which. 655 F.3d, at 925. The example that court gave was as follows: A statute of conviction punishes possession of pornography, but a federal law carries a sentence enhancement for possession of child pornography. Is the statute of conviction overbroad because it includes both adult and child pornography; or is that law instead missing the element of involvement of minors? The same name game can be played with § 459. The Government labors mightily to turn what it fears looks like a missing-element statute into an overbroad statute through the incorporation of judicial decisions. But even putting those decisions aside, the Government might have described § 459 as merely having an overbroad element because "entry" includes both the lawful and the unlawful kind. And conversely, Descamps could claim that even as judicially interpreted, § 459 is entirely missing generic burglary's element of breaking and entering or similar unlawful conduct. All is in the eye of the beholder, and prone to endless manipulation.

In any event, and more fundamentally, we see no reason why the Government's distinction should matter. Whether the statute of conviction has an overbroad or missing element, the problem is the same: Because of the mismatch in elements, a person convicted under that statute is never convicted of the generic crime. In this case, for example, Descamps was not convicted of generic burglary because § 459, whether viewed as missing an element or containing an overbroad one, does not require breaking and entering. So every reason we have given—textual, constitutional, and practical—for rejecting the Ninth Circuit's proposed approach applies to the Government's as well. See *supra*, at 2287 – 2290. At bottom, the Government wants the same thing as the Ninth Circuit (if nominally in a few fewer cases): It too wishes a sentencing court to look beyond the elements to the evidence or, otherwise said, to explore whether a person convicted of one crime could also have been convicted of another, more serious offense. But that circumstance-specific review is just what the categorical approach precludes. And as we have explained, we adopted the modified approach to help implement ***2293** the categorical inquiry, not to undermine it.

V

[19] Descamps may (or may not) have broken and entered, and so committed generic burglary. But § 459—the crime of which he was convicted—does not require the factfinder (whether jury or judge) to make that determination. Because generic unlawful entry is not an element, or an alternative element, of § 459, a conviction under that statute is never for generic burglary. And that decides this case in Descamps' favor; the District Court should not have enhanced his sentence under ACCA.[6] That court and the Ninth Circuit erred in invoking the modified categorical approach to look behind Descamps' conviction in search of record evidence that he actually committed the generic offense. The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an elements-based one. A court may use the modified approach only to determine which alternative element in a divisible statute formed the basis of the defendant's conviction. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

Justice KENNEDY, concurring.

As the Court explains, this case concerns earlier convictions under state statutes classified by cases in the Courts of Appeals, and now in today's opinion for the Court, as "indivisible." See, *e.g.*, *United States v. Aguila–Montes de Oca*, 655 F.3d 915 (C.A.9 2011) (en banc) (*per curiam*); *United States v. Beardsley*, 691 F.3d 252 (C.A.2 2012). This category is used to describe a class of criminal statutes that are drafted with a single set of elements that are broader than those of the generic definition of the corresponding crime enumerated in the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B)(ii).

Just one of the substantial concerns that the Court is correct to consider is that, in the regular course of the criminal process, convictions may be entered, often by guilty pleas, when either the attorney or the client, or both, have given no consideration to possible later consequences under ACCA. See *ante*, at 2289 – 2290. As a result, certain facts in the documents approved for judicial examination in *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), may go uncontested because they do not alter the sentencing consequences of the crime, even though their effect is to require a later enhancement under ACCA. This significant risk of failing to consider the full consequences of the plea and conviction is troubling.

Balanced against this, as Justice ALITO indicates, is that the dichotomy between divisible and indivisible state criminal statutes is not all that clear. See *post*, at 2301 – 2302 (dissenting opinion). The effect of today's decision, moreover, is that an unspecified number, but likely a large number, of state criminal statutes that are indivisible but that often do reach serious crimes otherwise subject to ACCA's provisions, ***2294** now must be amended by state legislatures. Otherwise, they will not meet federal requirements even though they would have come within ACCA's terms had the state statute been drafted in a different way. This is an intrusive demand on the States.

On due consideration, the concerns well expressed by the Court persuade me that it reaches the correct result. The disruption to the federal policy underlying ACCA, nevertheless, is troubling and substantial. See *post,* at 2301 – 2302 (ALITO, J., dissenting). If Congress wishes to pursue its policy in a proper and efficient way without mandating uniformity among the States with respect to their criminal statutes for scores of serious offenses, and without requiring the amendment of any number of federal criminal statutes as well, Congress should act at once. It may then determine whether ACCA's design and structure should be modified to meet the concerns expressed both by the Court and the dissenting opinion.

With these observations, I join the opinion of the Court.

Justice THOMAS, concurring in the judgment.
Petitioner Matthew Descamps was convicted of being a felon in possession of a firearm, 18 U.S.C. § 922(g), which subjected him to a maximum sentence of 10 years' imprisonment. The District Court, however, applied an Armed Career Criminal Act (ACCA) enhancement with a mandatory *minimum* of 15 years based in part on Descamps' earlier California conviction for burglary. See § 924(e). The California law says that any "person who enters" any of a number of structures "with intent to commit grand or petit larceny or any felony is guilty of burglary." California Penal Code Ann. § 459 (West 2010). That law does not, on its face, require the jury to determine whether the entry itself was unlawful, a required element of the so-called "generic" offense of burglary that qualifies as an ACCA predicate. See *Taylor v. United States,* 495 U.S. 575, 599, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). The majority holds that a court may not review the underlying facts of Descamps' state crime to determine whether he entered the building unlawfully and, thus, that his burglary conviction may not be used as a predicate offense under ACCA. While I agree with the Court's conclusion, I disagree with its reasoning.

I have previously explained that ACCA runs afoul of *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), because it allows the judge to "mak[e] a finding that raises [a defendant's] sentence beyond the sentence that could have lawfully been imposed by reference to facts found by the jury or admitted by the defendant." *James v. United States,* 550 U.S. 192, 231, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007) (dissenting opinion) (internal quotation marks omitted). Under the logic of *Apprendi,* a court may not find facts about a prior conviction when such findings increase the statutory maximum. This is so whether a court is determining whether a prior conviction was entered, see 530 U.S., at 520–521, 120 S.Ct. 2348 (THOMAS, J., concurring), or attempting to discern what facts were necessary to a prior conviction. See *James, supra,* at 231–232, 127 S.Ct. 1586 (THOMAS, J., dissenting). In either case, the court is inappropriately finding a fact that must be submitted to the jury because it "increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi, supra,* at 490, 120 S.Ct. 2348

In light of the foregoing, it does not matter whether a statute is "divisible" or "indivisible," see *ante,* at 2278 – 2280, and courts should not have to struggle with the ***2295** contours of the so-called "modified categorical" approach. *Ibid.* The only reason Descamps' ACCA enhancement is before us is "because this Court has not yet reconsidered *Almendarez–Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998), which draws an exception to the *Apprendi* line of cases for judicial factfinding that concerns a defendant's prior convictions." *Shepard v. United States,* 544 U.S. 13, 27, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005) (THOMAS, J., concurring in part and concurring in judgment). Regardless of the framework adopted, judicial factfinding increases the statutory maximum in violation of the Sixth Amendment. However, because today's opinion at least limits the situations in which courts make factual determinations about prior convictions, I concur in the judgment.

Justice ALITO, dissenting.
The Court holds, on highly technical grounds, that no California burglary conviction qualifies as a burglary conviction under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(c). This is so, according to the Court, because (1) burglary under California law is broader than so-called "generic burglary"—unlawfully entering or remaining in a building with the intent to commit a crime; (2) the California burglary statute is not "divisible"; and (3) our "modified categorical approach" cannot be used in a case involving an indivisible statute. Even when it is apparent that a California burglary conviction was based on what

everyone imagines when the term "burglary" is mentioned—*e.g.*, breaking into a home to steal valuables—that conviction, the Court holds, must be ignored.

I would give ACCA a more practical reading. When it is clear that a defendant necessarily admitted or the jury necessarily found that the defendant committed the elements of generic burglary, the conviction should qualify. Petitioner's burglary conviction meets that requirement, and I would therefore affirm the decision of the Court of Appeals.

I

Before petitioner was charged in the case now before us, he had already compiled a criminal record that included convictions in Washington State for assault and threatening to kill a judge, and convictions in California for robbery and burglary. See App. 11a–12a; 466 Fed.Appx. 563, 565 (C.A.9 2012). After his release from custody for these earlier crimes, petitioner fired a gun in the direction of a man who supposedly owed him money for methamphetamine, and as a result, he was charged in federal court with possession of a firearm by a convicted felon, in violation of § 922(g)(1). A jury found him guilty, and the District Court imposed an enhanced sentence under ACCA because he had the requisite number of previous convictions for "a violent felony or a serious drug offense." § 924(e). ACCA defines a "violent felony" to include a "burglary" that is "punishable by imprisonment for a term exceeding one year," § 924(e)(2)(B), and both the District Court and the Court of Appeals found that petitioner's California burglary conviction fit this definition.

While the concept of a conviction for burglary might seem simple, things have not worked out that way under our case law. In *Taylor v. United States*, 495 U.S. 575, 599, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), we held that "burglary" under ACCA means what we called "generic burglary," that is, the "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." Determining whether a burglary conviction qualifies under this definition is ***2296** easy if the elements set out in the state statute are the same as or narrower than the elements of generic burglary, see *ibid.*, but what if the state offense is broader? In that event, we have held, a federal court may sometimes apply what we have termed the "modified categorical approach," that is, it may examine some items in the state-court record, including charging documents, jury instructions, and statements made at guilty plea proceedings, to determine if the defendant was actually found to have committed the elements of the generic offense. See *Shepard v. United States*, 544 U.S. 13, 20, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005); *Taylor*, *supra*, at 602, 110 S.Ct. 2143.

Petitioner argues that his 1978 conviction for burglary under California Penal Code § 459 does not qualify as a burglary conviction for ACCA purposes because of the particular way in which this provision is worded. Section 459 provides that a "person who enters" certain locations "with intent to commit grand or petit larceny or any felony is guilty of burglary." Cal.Penal Code Ann. § 459 (West 2010). This provision is broader than generic burglary in two respects.

The first, which does not preclude application of the modified categorical approach, concerns the place burglarized. While generic burglary applies only to offenses involving the entry of a building, the California provision also reaches offenses involving the entry of some other locations, see *ibid.* Under our cases, however, a federal court considering whether to apply ACCA may determine, based on an examination of certain relevant documents, whether the conviction was actually based on the entry of a building and, if it was, may impose an increased sentence. See *Johnson v. United States*, 559 U.S. 133, 144, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010); *Nijhawan v. Holder*, 557 U.S. 29, 35, 129 S.Ct. 2294, 174 L.Ed.2d 22 (2009); *Shepard*, *supra*, at 26, 125 S.Ct. 1254.

The second variation is more consequential. Whereas generic burglary requires an entry that is unlawful or unprivileged, the California statute refers without qualification to "[e]very person who enters." § 459. Petitioner argues, and the Court agrees, that this discrepancy renders the modified categorical approach inapplicable to his California burglary conviction.

II

The Court holds that "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Ante*, at 2282. Because the Court's holding is based on the distinction between "divisible" and "indivisible" statutes, it is important to identify precisely what this taxonomy means.

My understanding is that a statute is divisible, in the sense used by the Court, only if the offense in question includes as separate elements all of the elements of the generic offense. By an element, I understand the Court to mean something on which a jury must agree by the vote required to convict under the law of the applicable jurisdiction. See *ante*, at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999)). And although the Court reserves decision on the question whether a sentencing court may take authoritative judicial decisions into account in identifying the elements of a statute, see *ante*, at 2291 – 2292 I will assume that a sentencing court may do so. While the elements of a criminal offense are generally set out in the statutory text, courts sometimes find that unmentioned elements are implicit. See, *e.g.*, *Neder v. United States*, 527 U.S. 1, 20, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (holding that federal mail fraud, wire ***2297** fraud, and bank fraud statutes require proof of materiality even though that element is not mentioned in the statutory text). I cannot think of any reason why an authoritative decision of this sort should be ignored, and the Court has certainly not provided any. I therefore proceed on the assumption that a statute is divisible if the offense, *as properly construed*, has the requisite elements.

The Court's holding that the modified categorical approach may be used only when a statute is divisible in this sense is not required by ACCA or by our prior cases and will cause serious practical problems.

A

Nothing in the text of ACCA mandates the Court's exclusive focus on the elements of an offense. ACCA increases the sentence of a defendant who has "three previous *convictions* ... for a violent felony," 18 U.S.C. § 924(e)(1) (emphasis added), and the Court claims that the word "convictions" mandates a narrow, elements-based inquiry, see *ante*, at 2287 – 2288. But "[i]n ordinary speech, when it is said that a person was convicted of or for doing something, the 'something' may include facts that go beyond the bare elements of the relevant criminal offense." *Moncrieffe v. Holder*, 569 U.S. ——, ——, 133 S.Ct. 1678, 1701, 185 L.Ed.2d 727 (2013) (ALITO, J., dissenting).

Nor is an exclusively elements-based inquiry mandated by ACCA's definition of a "violent felony" as "any crime ... that ... is burglary," § 924(e)(2)(B)(ii). In drafting that provision, Congress did not say "any crime that has *the elements* of burglary." Indeed, the fact that Congress referred to "elements" elsewhere in the same subparagraph, see § 924(e)(2)(B)(i) (defining "violent felony" to mean any crime that "has *as an element* the use, attempted use, or threatened use of physical force against the person of another" (emphasis added)), but omitted any reference to elements from § 924(e)(2)(B)(ii) suggests, if anything, that it did not intend to focus exclusively on elements. Cf. *Caraco Pharmaceutical Laboratories, Ltd. v. Novo Nordisk A/S*, 566 U.S. ——, ——, 132 S.Ct. 1670, 1682–83, 182 L.Ed.2d 678 (2012).

B

The Court says that our precedents require an elements-based approach and accuses the Court of Appeals of "flout[ing] our reasoning" in *Taylor*, *Shepard*, *Nijhawan*, and *Johnson*, see *ante*, at 2283 – 2285, 2288, but that charge is unfounded. In at least three of those cases, the Court thought that the modified categorical approach could be used in relation to statutes that may not have been divisible.

Shepard concerned prior convictions under two Massachusetts burglary statutes that applied not only to the entry of a "building" (as is the case with generic burglary) but also to the entry of a "ship, vessel, or vehicle." Mass. Gen. Laws Ann., ch. 266, § 16 (West 2000). See also § 18; 544 U.S., at 17, 125 S.Ct. 1254. And the *Shepard* Court did not think that this feature of the Massachusetts statutes precluded the application of the modified categorical approach. See *id.*, at 25–26, 125 S.Ct. 1254; *ante,* at 2283 – 2284. See also *Nijhawan,* 557 U.S., at 35, 129 S.Ct. 2294 (discussing *Shepard*).

In today's decision, the Court assumes that "building" and the other locations enumerated in the Massachusetts statutes, such as "vessel," were alternative elements, but that is questionable. It is quite likely that the entry of a building and the entry of a vessel were simply alternative means of satisfying an element. See ***2298** *Commonwealth v. Cabrera,* 449 Mass. 825, 827, 874 N.E.2d 654, 657 (2007) ("The elements of breaking and entering in the nighttime with intent to commit a felony are (1) breaking and (2) entering a building, ship, vessel or vehicle belonging to another (3) at night, (4) with the intent to commit a felony"). "[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes." *Schad v. Arizona,* 501 U.S. 624, 636, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) (plurality). The feature that distinguishes elements and means is the need for juror agreement, see *Richardson, supra,* at 817, 119 S.Ct. 1707, and therefore in determining whether the entry of a building and the entry of a vessel are elements or means, the critical question is whether a jury would have to agree on the nature of the place that a defendant entered.

A case that we decided earlier this Term illustrates why "building" and "vessel" may have been means and not separate elements. In *Lozman v. Riviera Beach,* 568 U.S. ——, 133 S.Ct. 735, 184 L.Ed.2d 604 (2013), we were required to determine whether a "floating home" (a buoyant but not very sea-worthy dwelling) was a "vessel." Seven of us thought it was not; two of us thought it might be. Compare *id.,* at ——, 133 S.Ct., at 739, with *id.,* at ——, 133 S.Ct., at 744–45. (SOTOMAYOR, J., dissenting). Suppose that a defendant in Massachusetts was charged with breaking into a structure like the *Lozman* floating home. In order to convict, would it be necessary for the jury to agree whether this structure was a "building" or a "vessel"? If some jurors insisted it was a building and others were convinced it was a vessel, would the jury be hung? The Court's answer is "yes." According to the Court, if a defendant had been charged with burglarizing the *Lozman* floating home and this Court had been sitting as the jury, the defendant would have escaped conviction for burglary, no matter how strong the evidence, because the "jury" could not agree on whether he burglarized a building or a vessel.

I have not found a Massachusetts decision squarely on point, but there is surely an argument that the Massachusetts Legislature did not want to demand juror agreement on this question. In other words, there is a strong argument that entry of a "building" and entry of a "vessel" are merely alternative means, not alternative elements. And if that is so, the reasoning in *Shepard* undermines the Court's argument that the modified categorical approach focuses solely on elements and not on conduct.

Johnson, like *Shepard,* involved a statute that may have set out alternative means, rather than alternative elements. Under the Florida statute involved in that case, a battery occurs when a person either "1. [a]ctually and intentionally touches or strikes another person against the will of the other; or 2. [i]ntentionally causes bodily harm to another person." Fla. Stat. § 784.03(1)(a) (2010). It is a distinct possibility (one not foreclosed by any Florida decision of which I am aware) that a conviction under this provision does not require juror agreement as to whether a defendant firmly touched or lightly struck the victim. Nevertheless, in *Johnson,* we had no difficulty concluding that the modified categorical approach could be applied. [1] See 559 U.S., at 137, 130 S.Ct. 1265. [2]

***2299** Far from mandating the Court's approach, these decisions support a practical understanding of the modified categorical approach. Thus, in *Shepard,* we observed that the factual circumstances of a defendant's prior conviction may be relevant to determining whether it qualifies as a violent felony under ACCA. See 544 U.S., at 20–21, 125 S.Ct. 1254 ("With such material in a pleaded case, a later court could generally tell whether the plea had 'necessarily' rested on the *fact* identifying the burglary as generic, just as the details of instructions could support that conclusion in the jury case, or the details of a generically limited charging document would do in any sort of case" (emphasis added; citation omitted)); *id.,* at 24, 125 S.Ct. 1254 (plurality opinion) ("Developments in the law since *Taylor* ... provide a further reason to adhere to the demanding requirement that ... a prior conviction 'necessarily' involved (and a prior plea necessarily admitted) *facts equating to* generic burglary" (emphasis

added)); *id.*, at 25, 125 S.Ct. 1254 (noting that, in the context of a nongeneric burglary statute, unless the charging documents "narro[w] the charge to generic limits, the only certainty of a generic finding lies in jury instructions, or bench-trial findings and rulings, or (in a pleaded case) in the defendant's own admissions or accepted *findings of fact* confirming the *factual basis* for a valid plea" (emphasis added)). And in *Nijhawan*, we departed from the categorical approach altogether and instead applied a "circumstance-specific" approach. See 557 U.S., at 36, 38, 129 S.Ct. 2294. If anything, then, *Nijhawan* undermines the majority's position that rigid adherence to elements is always required.

C

The Court fears that application of the modified categorical approach to statutes such as § 459 would be unfair to defendants, who "often ha[ve] little incentive to contest facts that are not elements of the charged offense" and "may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations." *Ante*, at 2289. This argument attributes to criminal defendants and their attorneys a degree of timidity that may not be realistic. But in any event, even if a defendant does not think it worthwhile to "squabbl[e]" about insignificant factual allegations, a defendant clearly has an incentive to dispute allegations that may have a bearing on his sentence. And that will ***2300** often be the case when alternative elements or means suggest different degrees of culpability. Cf. Cal.Penal Code Ann. § 460 (providing that burglary of certain inhabited locations enumerated in § 459 is punishable in the first degree, and that burglary of all other locations is punishable in the second degree).

D

The Court's approach, I must concede, does have one benefit: It provides an extra measure of assurance that a burglary conviction will not be counted as an ACCA predicate unless the defendant, if he went to trial, was actually found by a jury to have committed the elements of the generic offense. But this extra bit of assurance will generally be quite modest at best.

To see why this is so, compare what would happen under an indivisible burglary statute that simply requires entry invading a possessory right, and a divisible statute that has the following two alternative elements: (1) entry by trespass and (2) entry by invitation but with an undisclosed criminal intent. Under the former statute, the jury would be required to agree only that the defendant invaded a possessory right when entering the place in question, and therefore it would be possible for the jury to convict even if some jurors thought that the defendant entered by trespassing while others thought that he entered by invitation but with an undisclosed criminal intent. Under the latter statute, by contrast, the jury would have to agree either that he trespassed or that he entered by invitation but with an undisclosed criminal intent.

This requirement of unanimity would be of some practical value only if the evidence in a case pointed to both possibilities, and in a great many cases that will not be so. In cases prosecuted under the California burglary statute, I suspect, the evidence generally points either to a trespassory entry, typically involving breaking into a building or other covered place, or to an entry by invitation but with an undisclosed criminal intent (in many cases, shoplifting). Cases in which the evidence suggests that the defendant might have done either are probably not common. And in cases where there is evidence supporting both theories, the presence of a divisible statute containing alternative elements will not solve the problem: A guilty verdict will not reveal the alternative on which the jury agreed unless the jury was asked to return a special verdict, something that is not generally favored in criminal cases. See 6 LaFave § 24.10(a), at 543–544.

In cases that end with a guilty plea—and most do—the benefit of divisibility is even less. A judge who accepts a guilty plea is typically required to confirm that there is a factual basis for the plea, see 5 *id.*, § 21.4(f), at 835–840 (3d ed. 2007 and Supp. 2011–2012), and the proffer of a factual basis will generally focus exclusively on one of the alternative elements.

The Court nevertheless suggests that the extra modicum of assurance provided in cases involving divisible statutes is needed to prevent violations of the Sixth Amendment jury trial right, *ante*, at 2287 – 2289, but I disagree. So long as a judge applying

ACCA is determining, not what the defendant did when the burglary in question was committed, but what the jury in that case necessarily found or what the defendant, in pleading guilty, necessarily admitted, the jury trial right is not infringed. See *Almendarez–Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). When the modified categorical approach is used to decide whether "a jury was actually required to find all the elements of [a] generic [offense]," the defendant has already enjoyed his Sixth Amendment right to a jury determination ***2301** of those elements. *Taylor*, 495 U.S., at 602, 110 S.Ct. 2143.

III

While producing very modest benefits at most, the Court's holding will create several serious problems.

A

Determining whether a statute is divisible will often be harder than the Court acknowledges. What I have said about the statutes involved in *Shepard* and *Johnson* illustrates this point. The Court assumes that those statutes were divisible, but as I have explained, it is possible that they were not. See *supra*, at 2297 – 2298.

To determine whether a statute contains alternative elements, as opposed to merely alternative means of satisfying an element, a court called upon to apply ACCA will be required to look beyond the text of the statute, which may be deceptive. Take, for example, Michigan Compiled Laws Annotated § 750.82(1) (West 2004), which criminalizes assault with "a gun, revolver, pistol, knife, iron bar, club, brass knuckles, or other dangerous weapon." The Court seems to assume that a statute like this enumerates alternative elements, *ante*, at 2290 – 2291, but the Michigan courts have held otherwise. Under Michigan law, the elements of § 750.82(1) are "(1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v. Avant*, 235 Mich.App. 499, 505, 597 N.W.2d 864, 869 (1999). Although the statute lists numerous types of weapons, the particular type of weapon is not itself an element that the prosecution must prove beyond a reasonable doubt. Instead, the list of weapons in the statute merely enumerates alternative means of committing the crime. [3]

Even if a federal court applying ACCA discovers a state-court decision holding that a particular fact must be alleged in a charging document, its research is not at an end. Charging documents must generally include factual allegations that go beyond the bare elements of the crime—specifically, at least enough detail to permit the defendant to mount a defense. See 5 LaFave § 19.3(b), at 276. And some jurisdictions require fairly specific factual allegations. See, *e.g.*, N.Y. Crim. Proc. Law Ann. § 200.50 (West 2007) (enumerating detailed requirements for indictment); *People v. Swanson*, 308 Ill.App.3d 708, 712, 242 Ill.Dec. 351, 721 N.E.2d 630, 633 (1999) (vacating conviction for disorderly conduct for submitting a false police report because information "d [id] not describe with particularity the time, date, or location of the alleged domestic battery and the acts comprising the battery ... [or] the statement that was falsely reported"); *Edwards v. State*, 379 So.2d 336, 338 (Ala.Crim.App.1979) (it is insufficient for an indictment for robbery to allege the amount of money taken; it "must aver the denomination of the money taken or that the particular denomination is unknown to the grand jury"). Thus, the mere fact that state law requires a particular fact to be alleged in a charging document does not mean that this fact must be found by a jury or admitted by the defendant.

The only way to be sure whether particular items are alternative elements or simply alternative means of satisfying an element ***2302** may be to find cases concerning the correctness of jury instructions that treat the items one way or the other. And such cases may not arise frequently. One of the Court's reasons for adopting the modified categorical approach was to simplify the work of ACCA courts, see *Shepard*, 544 U.S., at 20, 125 S.Ct. 1254; *Taylor*, 495 U.S., at 601, 110 S.Ct. 2143, but the Court's holding today will not serve that end.

B

The Court's holding will also frustrate fundamental ACCA objectives. We have repeatedly recognized that Congress enacted ACCA to ensure (1) that violent, dangerous recidivists would be subject to enhanced penalties and (2) that those enhanced penalties would be applied uniformly, regardless of state-law variations. See, *e.g.*, *id.*, at 587–589, 110 S.Ct. 2143. See also *id.*, at 582, 110 S.Ct. 2143 (" '[I]n terms of fundamental fairness, the Act should ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases' " (quoting S.Rep. No. 98–190, p. 20 (1983))); 495 U.S., at 591, 110 S.Ct. 2143 (rejecting disparate results across states based on label given by State to a particular crime).

The Court's holding will hamper the achievement of these objectives by artificially limiting ACCA's reach and treating similar convictions differently based solely on the vagaries of state law. Defendants convicted of the elements of generic burglary in California will not be subject to ACCA, but defendants who engage in exactly the same behavior in, say, Virginia, will fall within ACCA's reach. See Va.Code Ann. § 18.2–90 (Lexis 2009).

I would avoid these problems by applying the modified categorical approach to § 459—and any other similar burglary statute from another State—and would ask whether the relevant portions of the state record clearly show that the jury necessarily found, or the defendant necessarily admitted, the elements of generic burglary. If the state-court record is inconclusive, then the conviction should not count. But where the record is clear, I see no reason for granting a special dispensation.

IV

When the modified categorical approach is applied to petitioner's conviction, it is clear that he "necessarily admitted"—and therefore was convicted for committing—the elements of generic burglary: the unlawful or unprivileged entry of a building with the intent to commit a crime.

Both the complaint and information alleged that petitioner "unlawfully and feloniously enter[ed]" a building (the "CentroMart") "with the intent to commit theft therein." App. 14a–17a. When the trial court inquired into the factual basis for petitioner's plea, the prosecutor stated that petitioner's crime involved "the breaking and entering of a grocery store." *Id.*, at 25a. Neither petitioner nor his attorney voiced any objection.[4] *Ibid.* In order to accept petitioner's plea, the trial court was required under California law to ensure that the plea had a factual basis, see ***2303** Cal.Penal Code Ann. § 1192.5 (1978); App. 26a, and we must presume that the plea proceedings were conducted in a regular manner, see *Parke v. Raley*, 506 U.S. 20, 29–30, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992). The unmistakable inference arising from the plea transcript is that the trial judge—quite reasonably—understood petitioner and his attorney to assent to the factual basis provided by the prosecutor. Both the District Court and the Court of Appeals concluded that petitioner had admitted and, as a practical matter, was convicted for having committed the elements of generic burglary, and we did not agree to review that fact-bound determination, see 567 U.S. ——, 133 S.Ct. 90, 183 L.Ed.2d 730 (2012) (granting certiorari "limited to Question 1 presented by the petition").

Even if that determination is reviewed, however, the lower courts' conclusion should be sustained. Under the California burglary statute, as interpreted by the State Supreme Court, a defendant must either (a) commit a trespass in entering the location in question or (b) enter in violation of some other possessory right. See *People v. Gauze*, 15 Cal.3d 709, 713–714, 125 Cal.Rptr. 773, 542 P.2d 1365, 1367 (1975).[5]

In this case, the judge who accepted petitioner's guilty plea must have relied on petitioner's implicit admission that he "broke" into the store, for if petitioner had admitted only that he entered the store, the judge would not have been able to assess whether he had invaded a possessory right. Nor would an admission to merely "entering" the store have permitted the judge to assess

whether petitioner entered with the intent to commit a crime; petitioner's admission to "breaking" was therefore critical to that element, as well. Cf. Black's Law Dictionary 236 (rev. 4th ed. 1968) ("Breaking" denotes the "tearing away or removal of any part of a house or of the locks, latches, or other fastenings intended to secure it, or otherwise exerting force to gain an entrance, with the intent to commit a felony").

We have explained that burglary under § 924(e) means "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor*, 495 U.S., at 598, 110 S.Ct. 2143. Based on petitioner's guilty plea and the *Shepard* documents, it is clear that petitioner necessarily admitted the elements of generic burglary. He unlawfully entered a building with the intent to commit a crime. Accordingly, I would hold that petitioner's conviction under § 459 qualifies as a conviction for "burglary" under § 924(e).

For these reasons, I would affirm the decision of the Court of Appeals, and I therefore respectfully dissent.

All Citations

133 S.Ct. 2276, 186 L.Ed.2d 438, 81 USLW 4490, 13 Cal. Daily Op. Serv. 6313, 2013 Daily Journal D.A.R. 7929, 24 Fla. L. Weekly Fed. S 343

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Compare, *e.g.*, 466 Fed.Appx. 563, 565 (C.A.9 2012) (case below) (applying the modified categorical approach to § 459); *United States v. Armstead*, 467 F.3d 943, 947–950 (C.A.6 2006) (applying that approach to a similar, indivisible statute), with, *e.g.*, *United States v. Beardsley*, 691 F.3d 252, 268–274 (C.A.2 2012) (holding that the modified categorical approach applies only to divisible statutes); *United States v. Giggey*, 551 F.3d 27, 40 (C.A.1 2008) (en banc) (same).

2 The dissent delves into the nuances of various States' laws in an effort to cast doubt on this understanding of our prior holdings, arguing that we used the modified categorical approach in cases like *Taylor*, *Shepard*, and *Johnson* "in relation to statutes that may not have been divisible" in the way that we have just described. *Post*, at 2297 (ALITO, J.). But if, as the dissent claims, the state laws at issue in those cases set out "merely alternative means, not alternative elements" of an offense, *post*, at 2298, that is news to us. And more important, it would have been news to the *Taylor*, *Shepard*, and *Johnson* Courts: All those decisions rested on the explicit premise that the laws "contain [ed] statutory phrases that cover several different ... crimes," not several different methods of committing one offense. *Johnson*, 559 U.S., at 144, 130 S.Ct. 1265 (citing *Nijhawan*, 557 U.S., at 41, 129 S.Ct. 2294). And if the dissent's real point is that distinguishing between "alternative elements" and "alternative means" is difficult, we can see no real-world reason to worry. Whatever a statute lists (whether elements or means), the documents we approved in *Taylor* and *Shepard*—*i.e.*, indictment, jury instructions, plea colloquy, and plea agreement—would reflect the crime's elements. So a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

3 The dissent, as we understand it, takes the same view as the Ninth Circuit; accordingly, each of the reasons—statutory, constitutional, and practical—that leads us to reject *Aguila–Montes* proves fatal to the dissent's position as well. The dissent several times obscures its call to explore facts with language from our categorical cases, asking whether "the relevant portions of the state record clearly show that the jury necessarily found, or the defendant necessarily admitted, the elements of [the] generic [offense]." *Post*, at 2302; see *Shepard*, 544 U.S., at 24, 125 S.Ct. 1254 (plurality opinion) (reiterating *Taylor* 's "demanding requirement that ... a prior conviction '*necessarily' involve[ ]* " a jury finding on each element of the generic offense) (emphasis added). But the dissent nowhere explains how a factfinder can have "necessarily found" a non-element—that is, a fact that by definition is *not* necessary to support a conviction. The dissent's fundamental view is that a sentencing court should be able to make reasonable "inference[s]" about what the factfinder really (even though not necessarily) found. See *post*, at 2302 – 2303. That position accords with our dissenting colleague's previously expressed skepticism about the categorical approach. See *Moncrieffe v. Holder*, 569 U.S. ——, ——, 133 S.Ct. 1678, 1701, 185 L.Ed.2d 727 (2013) (ALITO, J., dissenting) ("I would hold that the categorical approach is not controlling where the state conviction at issue was based on a state statute that encompasses both a substantial number of cases that qualify under the federal standard and a substantial number that do not. In such situations, it is appropriate to look beyond the elements of the state offense and to rely as

well on facts that were admitted in state court or that, taking a realistic view, were clearly proved"). But there are several decades of water over that dam, and the dissent offers no newly persuasive reasons for revisiting our precedents.

4 See also 1 C. Wright & A. Leipold, Federal Practice and Procedure: Criminal § 125, pp. 550–551 (4th ed. 2008) ("If a single statute sets forth several different offenses, [a] pleading ... that does not indicate which crime [the] defendant allegedly committed is insufficient"); 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 19.3(a), p. 263 (3d ed. 2007) ("[W]here a statute specifies several different ways in which the crime can be committed, [courts often] hold that the pleading must refer to the particular alternative presented in the individual case").

5 Several decisions treat "invasion of a possessory right" as an aspect of § 459's entry element, see, *e.g.*, *People v. Waidla*, 22 Cal.4th 690, 723, 94 Cal.Rptr.2d 396, 996 P.2d 46, 65 (2000); *Fortes v. Sacramento Munic. Ct. Dist.*, 113 Cal.App.3d 704, 712–714, 170 Cal.Rptr. 292, 296–297 (1980), but others view the issue of possessory right as bearing only on the affirmative defense of consent, see, *e.g.*, *People v. Sherow*, 196 Cal.App.4th 1296, 1303–1305, 1311, and n. 9, 128 Cal.Rptr.3d 255, 260–261, 266, and n. 9 (2011); *People v. Felix*, 23 Cal.App.4th 1385, 1397, 28 Cal.Rptr.2d 860, 867 (1994). And California's pattern jury instructions do *not* require the jury to find invasion of a possessory right before convicting a defendant of burglary. See 1 Cal. Jury Instr., Crim., No. 1700 (2012).

6 The Government here forfeited an alternative argument that § 459 qualifies as a predicate offense under ACCA's "residual clause," which covers statutes "involv[ing] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). We express no view on that argument's merits. Compare *United States v. Mayer*, 560 F.3d 948, 960–963 (C.A.9 2009) (holding that Oregon's burglary statute falls within the residual clause, even though it does not include all of generic burglary's elements), with *id.*, at 951 (Kozinski, C.J., dissenting from denial of rehearing en banc) (arguing that the panel opinion "is a train wreck in the making").

1 However, because the *Shepard* documents did not reveal whether Johnson had been found to have touched or struck, we had to determine whether the relatively innocuous phrase—"[a]ctually and intentionally touch[ing]" another person—constituted physical force for purposes of § 924(e)(2)(B)(i). See *Johnson*, 559 U.S., at 137, 130 S.Ct. 1265.

2 The remaining case, *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), may also have involved a statute that was not divisible, but the situation is less clear. There, the defendant had several Missouri burglary convictions, and Missouri had several different burglary provisions in effect at the time in question. See *id.*, at 578, n. 1, 110 S.Ct. 2143. The particular provision involved in each of those cases was not certain. *Ibid.* At least one of those provisions, however, may not have been divisible. That provision, Mo.Rev.Stat. § 560.070 (1969) (repealed), applied not only to buildings but also to "any booth or tent," "any boat or vessel," or a "railroad car." It is not entirely clear whether a Missouri court would have required jurors to agree on a particular choice from this list. In *State v. Vandergriff*, 403 S.W.2d 579, 581 (Mo.1966), the Missouri Supreme Court held that an information was deficient because it "omitted a description of the type of building that might be burglarized as defined by § 560.070, and thereby omitted an essential element of the offense of burglary in the second degree." Because an information must generally include factual details that go beyond the elements of an offense, see 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 19.3(b), p. 276 (3d ed. 2007) (hereinafter LaFave), it is possible that the Missouri court did not mean to say that the type of building was an element in the sense in which I understand the Court to use the term here.

3 The board game Clue, to which the Court refers, see *ante*, at 2290 – 2291, does not provide sound legal guidance. In that game, it matters whether Colonel Mustard bashed in the victim's head with a candlestick, wrench, or lead pipe. But in real life, the colonel would almost certainly not escape conviction simply because the jury was unable to agree on the particular type of blunt instrument that he used to commit the murder.

4 The Ninth Circuit has held that a court applying the modified categorical approach may rely on a prosecutor's statement as to the factual basis for a guilty plea when that statement is offered on the record in the defendant's presence and the defendant does not object. *United States v. Hernandez–Hernandez*, 431 F.3d 1212, 1219 (2005). Petitioner has not challenged the Ninth Circuit's rule, and that issue is not within the scope of the question on which we granted certiorari. Accordingly, I would apply it for purposes of this case.

5 The majority suggests that California law is ambiguous as to this requirement, see *ante*, at 2291 – 2292, n. 5, but any confusion appears to have arisen after petitioner's 1978 conviction and is therefore irrelevant for purposes of this case. Cf. *McNeill v. United States*, 563 U.S. ——, ——, 131 S.Ct. 2218, 2219, 180 L.Ed.2d 35 (2011) ("The only way to answer [ACCA's] backward-looking question [whether a previous conviction was for a serious drug offense] is to consult the law that applied at the time of that conviction").

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135 S.Ct. 2551
Supreme Court of the United States

Samuel James JOHNSON, Petitioner
v.
UNITED STATES.

No. 13–7120. | Argued Nov. 5, 2014. | Reargued April 20, 2015. | Decided June 26, 2015.

Synopsis
Background: Defendant pleaded guilty, pursuant to a plea agreement in the United States District Court for the District of Minnesota, Richard H. Kyle, J., to being an armed career criminal in possession of a firearm. He appealed his sentence. The United States Court of Appeals for the Eighth Circuit, 526 Fed.Appx. 708, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Scalia, held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA) violates the Constitution's guarantee of due process, overruling *James v. U.S.*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532, and *Sykes v. U.S.*, —— U.S. ——, 131 S.Ct. 2267, 180 L.Ed.2d 60, and abrogating *U.S. v. White*, 571 F.3d 365, *U.S. v. Daye*, 571 F.3d 225, and *U.S. v. Johnson*, 616 F.3d 85.

Reversed and remanded.

Justice Kennedy filed an opinion concurring in the judgment.

Justice Thomas filed an opinion concurring in the judgment.

Justice Alito filed a dissenting opinion.

West Codenotes

Held Unconstitutional
18 U.S.C.A. § 924(e)(2)(B)(ii)

2553 *Syllabus [*]

After petitioner Johnson pleaded guilty to being a felon in possession of a firearm, see 18 U.S.C. § 922(g), the Government sought an enhanced sentence under the Armed Career Criminal Act, which imposes an increased prison term upon a defendant with three prior convictions for ***2554** a "violent felony," § 924(e)(1), a term defined by § 924(e)(2)(B)'s residual clause to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." The Government argued that Johnson's prior conviction for unlawful possession of a short-barreled shotgun met this definition, making the third conviction of a violent felony. This Court had previously pronounced upon the meaning of the residual clause in *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532; *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490; *Chambers v. United States*, 555 U.S. 122, 129 S.Ct. 687, 172 L.Ed.2d 484; and *Sykes v. United States*, 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60, and had rejected suggestions by dissenting Justices in both *James* and *Sykes* that the clause is void for vagueness. Here, the District Court held that the residual clause does cover unlawful possession of a short-barreled shotgun, and imposed a 15–year sentence under ACCA. The Eighth Circuit affirmed.

Held : Imposing an increased sentence under ACCA's residual clause violates due process. Pp. 2555 - 2563.

(a) The Government violates the Due Process Clause when it takes away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903. Courts must use the "categorical approach" when deciding whether an offense is a violent felony, looking "only to the fact that the defendant has been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607. Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. *James, supra*, at 208, 127 S.Ct. 1586. Pp. 2555 – 2557.

(b) Two features of the residual clause conspire to make it unconstitutionally vague. By tying the judicial assessment of risk to a judicially imagined "ordinary case" of a crime rather than to real-world facts or statutory elements, the clause leaves grave uncertainty about how to estimate the risk posed by a crime. See *James, supra*, at 211, 127 S.Ct. 1586. At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. Taken together, these uncertainties produce more unpredictability and arbitrariness than the Due Process Clause tolerates. This Court's repeated failure to craft a principled standard out of the residual clause and the lower courts' persistent inability to apply the clause in a consistent way confirm its hopeless indeterminacy. Pp. 2557 – 2560.

(c) This Court's cases squarely contradict the theory that the residual clause is constitutional merely because some underlying crimes may clearly pose a serious potential risk of physical injury to another. See, *e.g.*, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89, 41 S.Ct. 298, 65 L.Ed. 516. Holding the residual clause void for vagueness does not put other criminal laws that use terms such as "substantial risk" in doubt, because those laws generally require gauging the riskiness of an individual's conduct on a particular occasion, not the riskiness of an idealized ordinary case of the crime. Pp. 2560 – 2562.

(d) The doctrine of *stare decisis* does not require continued adherence to *James* ***2555** and *Sykes*. Experience leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. *James* and *Sykes* opined about vagueness without full briefing or argument. And continued adherence to those decisions would undermine, rather than promote, the goals of evenhandedness, predictability, and consistency served by *stare decisis*. Pp. 2561 – 2563.

526 Fed.Appx. 708, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., and THOMAS, J., filed opinions concurring in the judgment. ALITO, J., filed a dissenting opinion.

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Opinion

Justice SCALIA delivered the opinion of the Court.

Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). We must decide whether this part of the definition of a violent felony survives the Constitution's prohibition of vague criminal laws.

I

[1] **[2]** Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); *Johnson v. United States*, 559 U.S. 133, 136, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). The Act defines "violent felony" as follows:

> "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* ***2556** *potential risk of physical injury to another*." § 924(e)(2)(B) (emphasis added).

The closing words of this definition, italicized above, have come to be known as the Act's residual clause. Since 2007, this Court has decided four cases attempting to discern its meaning. We have held that the residual clause (1) covers Florida's offense of attempted burglary, *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007); (2) does *not* cover New Mexico's offense of driving under the influence, *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008); (3) does *not* cover Illinois' offense of failure to report to a penal institution, *Chambers v. United States*, 555 U.S. 122, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009); and (4) does cover Indiana's offense of vehicular flight from a law-enforcement officer, *Sykes v. United States*, 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011). In both *James* and *Sykes*, the Court rejected suggestions by dissenting Justices that the residual clause violates the Constitution's prohibition of vague criminal laws. Compare *James*, 550 U.S., at 210, n. 6, 127 S.Ct. 1586, with *id.*, at 230, 127 S.Ct. 1586 (SCALIA, J., dissenting); compare *Sykes*, 564 U.S., at ——, 131 S.Ct., at 2276–2277, with *id.*, at ——, 131 S.Ct., at 2286–2288 (SCALIA, J., dissenting).

This case involves the application of the residual clause to another crime, Minnesota's offense of unlawful possession of a short-barreled shotgun. Petitioner Samuel Johnson is a felon with a long criminal record. In 2010, the Federal Bureau of Investigation began to monitor him because of his involvement in a white-supremacist organization that the Bureau suspected was planning to commit acts of terrorism. During the investigation, Johnson disclosed to undercover agents that he had manufactured explosives and that he planned to attack "the Mexican consulate" in Minnesota, "progressive bookstores," and " 'liberals.' " Revised Presentence Investigation in No. 0:12CR00104–001 (D. Minn.), p. 15, ¶ 16. Johnson showed the agents his AK–47 rifle, several semiautomatic firearms, and over 1,000 rounds of ammunition.

After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of § 922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson's previous offenses—including unlawful possession of a short-barreled shotgun, see Minn.Stat. § 609.67 (2006)—qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15–year prison term under the Act. The Court of Appeals affirmed. 526 Fed.Appx. 708 (C.A.8 2013) (*per curiam*). We granted certiorari to decide whether Minnesota's offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. 572 U.S. ——, 134 S.Ct.

1871, 188 L.Ed.2d 910 (2014). We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution's prohibition of vague criminal laws. 574 U.S. ——, 135 S.Ct. 939, 190 L.Ed.2d 718 (2015).

II

[3] **[4]** **[5]** The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). The prohibition of vagueness ***2557** in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *United States v. Batchelder*, 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).

[6] **[7]** In *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), this Court held that the Armed Career Criminal Act requires courts to use a framework known as the categorical approach when deciding whether an offense "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Under the categorical approach, a court assesses whether a crime qualifies as a violent felony "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay, supra*, at 141, 128 S.Ct. 1581.

[8] Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. *James, supra*, at 208, 127 S.Ct. 1586. The court's task goes beyond deciding whether creation of risk is an element of the crime. That is so because, unlike the part of the definition of a violent felony that asks whether the crime "has *as an element* the use ... of physical force," the residual clause asks whether the crime "*involves conduct* " that presents too much risk of physical injury. What is more, the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause confirms that the court's task also goes beyond evaluating the chances that the physical acts that make up the crime will injure someone. The act of making an extortionate demand or breaking and entering into someone's home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises because the extortionist might engage in violence *after* making his demand or because the burglar might confront a resident in the home *after* breaking and entering.

[9] We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.

A

Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *United States v. Mayer*, 560 F.3d 948, 952 (C.A.9 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc). To take an example, does the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary ***2558** case of the crime subsequently

plays out. *James* illustrates how speculative (and how detached from statutory elements) this enterprise can become. Explaining why attempted burglary poses a serious potential risk of physical injury, the Court said: "An armed would-be burglar may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner ... may give chase, and a violent encounter may ensue." 550 U.S., at 211, 127 S.Ct. 1586. The dissent, by contrast, asserted that any confrontation that occurs during an attempted burglary "is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away." *Id.*, at 226, 127 S.Ct. 1586 (opinion of SCALIA, J.). The residual clause offers no reliable way to choose between these competing accounts of what "ordinary" attempted burglary involves.

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." *Begay*, 553 U.S., at 143, 128 S.Ct. 1581. Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

[10] This Court has acknowledged that the failure of "persistent efforts ... to establish a standard" can provide evidence of vagueness. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91, 41 S.Ct. 298, 65 L.Ed. 516 (1921). Here, this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy. Three of the Court's previous four decisions about the clause concentrated on the level of risk posed by the crime in question, though in each case we found it necessary to resort to a different ad hoc test to guide our inquiry. In *James*, we asked whether "the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses," namely completed burglary; we concluded that it was. 550 U.S., at 203, 127 S.Ct. 1586. That rule takes care of attempted burglary, but offers no help at all with respect to the vast majority of offenses, which have no apparent analog among the enumerated crimes. "Is, for example, driving under the influence of alcohol more analogous to burglary, arson, extortion, or a crime involving use of explosives?" *Id.*, at 215, 127 S.Ct. 1586 (SCALIA, J., dissenting).

Chambers, our next case to focus on risk, relied principally on a statistical report prepared by the Sentencing Commission to conclude that an offender who fails to report to prison is not "significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a 'serious potential risk of physical ***2559** injury.' " 555 U.S., at 128–129, 129 S.Ct. 687. So much for failure to report to prison, but what about the tens of thousands of federal and state crimes for which no comparable reports exist? And even those studies that are available might suffer from methodological flaws, be skewed toward rarer forms of the crime, or paint widely divergent pictures of the riskiness of the conduct that the crime involves. See *Sykes*, 564 U.S., at —— – ——, 131 S.Ct., at 2285–2287 (SCALIA, J., dissenting); *id.*, at ——, n. 4, 131 S.Ct., at 2291, n. 4 (KAGAN, J., dissenting).

Our most recent case, *Sykes*, also relied on statistics, though only to "confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony." *Id.*, at ——, 131 S.Ct., at 2274 (majority opinion). But common sense is a much less useful criterion than it sounds—as *Sykes* itself illustrates. The Indiana statute involved in that case covered everything from provoking a high-speed car chase to merely failing to stop immediately after seeing a police officer's signal. See *id.*, at ——, 131 S.Ct., at 2289–2290 (KAGAN, J., dissenting). How does common sense help a federal court discern where the "ordinary case" of vehicular flight in Indiana lies along this spectrum? Common sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated crimes; there is no reason to expect it to fare any better with respect to thousands of unenumerated crimes. All in all, *James*, *Chambers*, and *Sykes* failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition.

The remaining case, *Begay*, which preceded *Chambers* and *Sykes*, took an entirely different approach. The Court held that in order to qualify as a violent felony under the residual clause, a crime must resemble the enumerated offenses "in kind as well as in degree of risk posed." 553 U.S., at 143, 128 S.Ct. 1581. The Court deemed drunk driving insufficiently similar to the listed crimes, because it typically does not involve "purposeful, violent, and aggressive conduct." *Id.*, at 144–145, 128 S.Ct. 1581 (internal quotation marks omitted). Alas, *Begay* did not succeed in bringing clarity to the meaning of the residual clause. It did not (and could not) eliminate the need to imagine the kind of conduct typically involved in a crime. In addition, the enumerated crimes are not much more similar to one another in kind than in degree of risk posed, and the concept of "aggressive conduct" is far from clear. *Sykes* criticized the "purposeful, violent, and aggressive" test as an "addition to the statutory text," explained that "levels of risk" would normally be dispositive, and confined *Begay* to "strict liability, negligence, and recklessness crimes." 564 U.S., at ——— – ———, 131 S.Ct., at 2275–2276.

The present case, our fifth about the meaning of the residual clause, opens a new front of uncertainty. When deciding whether unlawful possession of a short-barreled shotgun is a violent felony, do we confine our attention to the risk that the shotgun will go off by accident while in someone's possession? Or do we also consider the possibility that the person possessing the shotgun will later use it to commit a crime? The inclusion of burglary and extortion among the enumerated offenses suggests that a crime may qualify under the residual clause even if the physical injury is remote from the criminal act. But how remote is too remote? Once again, the residual clause yields no answers.

This Court is not the only one that has had trouble making sense of the residual ***2560** clause. The clause has "created numerous splits among the lower federal courts," where it has proved "nearly impossible to apply consistently." *Chambers*, 555 U.S., at 133, 129 S.Ct. 687 (ALITO, J., concurring in judgment). The most telling feature of the lower courts' decisions is not division about whether the residual clause covers this or that crime (even clear laws produce close cases); it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider. Some judges have concluded that deciding whether conspiracy is a violent felony requires evaluating only the dangers posed by the "simple act of agreeing [to commit a crime]," *United States v. Whitson*, 597 F.3d 1218, 1222 (C.A.11 2010) (*per curiam*); others have also considered the probability that the agreement will be carried out, *United States v. White*, 571 F.3d 365, 370–371 (C.A.4 2009). Some judges have assumed that the battery of a police officer (defined to include the slightest touching) could "explode into violence and result in physical injury," *United States v. Williams*, 559 F.3d 1143, 1149 (C.A.10 2009); others have felt that it "do[es] a great disservice to law enforcement officers" to assume that they would "explod[e] into violence" rather than "rely on their training and experience to determine the best method of responding," *United States v. Carthorne*, 726 F.3d 503, 514 (C.A.4 2013). Some judges considering whether statutory rape qualifies as a violent felony have concentrated on cases involving a perpetrator much older than the victim, *United States v. Daye*, 571 F.3d 225, 230–231 (C.A.2 2009); others have tried to account for the possibility that "the perpetrator and the victim [might be] close in age," *United States v. McDonald*, 592 F.3d 808, 815 (C.A.7 2010). Disagreements like these go well beyond disputes over matters of degree.

It has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise. Each of the uncertainties in the residual clause may be tolerable in isolation, but "their sum makes a task for us which at best could be only guesswork." *United States v. Evans*, 333 U.S. 483, 495, 68 S.Ct. 634, 92 L.Ed. 823 (1948). Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.

B

The Government and the dissent claim that there will be straightforward cases under the residual clause, because some crimes clearly pose a serious potential risk of physical injury to another. See *post*, at 2562 – 2563 (opinion of ALITO, J.). True enough, though we think many of the cases the Government and the dissent deem easy turn out not to be so easy after all. Consider just one of the Government's examples, Connecticut's offense of "rioting at a correctional institution." See *United States v. Johnson*, 616 F.3d 85 (C.A.2 2010). That certainly sounds like a violent felony—until one realizes that Connecticut defines this offense

to include taking part in "any disorder, disturbance, strike, riot or other organized disobedience to the rules and regulations" of the prison. Conn. Gen.Stat. § 53a–179b(a) (2012). Who is to say which the ordinary "disorder" most closely resembles—a full-fledged prison riot, a food-fight in the prison cafeteria, or a "passive and nonviolent [act] such as disregarding an order to move," *Johnson*, 616 F.3d, at 95 (Parker, J., dissenting)?

[11] In all events, although statements in some of our opinions could be read to ***2561** suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp. For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. *L. Cohen Grocery Co.*, 255 U.S., at 89, 41 S.Ct. 298. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"—even though spitting in someone's face would surely be annoying. *Coates v. Cincinnati*, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). These decisions refute any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality.

Resisting the force of these decisions, the dissent insists that "a statute is void for vagueness only if it is vague in all its applications." *Post*, at 2574. It claims that the prohibition of unjust or unreasonable rates in *L. Cohen Grocery* was "vague in all applications," even though one can easily envision rates so high that they are unreasonable by any measure. *Post*, at 2582. It seems to us that the dissent's supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications (and never mind the reality). If the existence of some clearly unreasonable rates would not save the law in *L. Cohen Grocery*, why should the existence of some clearly risky crimes save the residual clause?

[12] The Government and the dissent next point out that dozens of federal and state criminal laws use terms like "substantial risk," "grave risk," and "unreasonable risk," suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt. See *post*, at 2558 – 2559. Not at all. Almost none of the cited laws links a phrase such as "substantial risk" to a confusing list of examples. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue*, or colors that otherwise involve shades of red' assuredly does so." *James*, 550 U.S., at 230, n. 7, 127 S.Ct. 1586 (SCALIA, J., dissenting). More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly ... some matter of degree," *Nash v. United States*, 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232 (1913). The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect," this abstract inquiry offers significantly less predictability than one "[t]hat deals with the actual, not with an imaginary condition other than the facts." *International Harvester Co. of America v. Kentucky*, 234 U.S. 216, 223, 34 S.Ct. 853, 58 L.Ed. 1284 (1914).

[13] Finally, the dissent urges us to save the residual clause from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged, not the risk posed by the ordinary case of the defendant's crime. ***2562** See *post*, at 2578 – 2580. In other words, the dissent suggests that we jettison for the residual clause (though not for the enumerated crimes) the categorical approach adopted in *Taylor*, see 495 U.S., at 599–602, 110 S.Ct. 2143, and reaffirmed in each of our four residual-clause cases, see *James*, 550 U.S., at 202, 127 S.Ct. 1586; *Begay*, 553 U.S., at 141, 128 S.Ct. 1581; *Chambers*, 555 U.S., at 125, 129 S.Ct. 687; *Sykes*, 564 U.S., ——, 131 S.Ct., at 2272–2273. We decline the dissent's invitation. In the first place, the Government has not asked us to abandon the categorical approach in residual-clause cases. In addition, *Taylor* had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes. *Taylor* explained that the relevant part of the Armed Career Criminal Act "refers to 'a person who ... has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U.S., at 600, 110 S.Ct. 2143. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the

defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid.* *Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction. For example, if the original conviction rested on a guilty plea, no record of the underlying facts may be available. "[T]he only plausible interpretation" of the law, therefore, requires use of the categorical approach. *Id.*, at 602, 110 S.Ct. 2143.

C

That brings us to *stare decisis*. This is the first case in which the Court has received briefing and heard argument from the parties about whether the residual clause is void for vagueness. In *James*, however, the Court stated in a footnote that it was "not persuaded by [the principal dissent's] suggestion ... that the residual provision is unconstitutionally vague." 550 U.S., at 210, n. 6, 127 S.Ct. 1586. In *Sykes*, the Court again rejected a dissenting opinion's claim of vagueness. 564 U.S., at —— – ——, 131 S.Ct., at 2276–2277.

[14] The doctrine of *stare decisis* allows us to revisit an earlier decision where experience with its application reveals that it is unworkable. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Experience is all the more instructive when the decision in question rejected a claim of unconstitutional vagueness. Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast. Here, the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. Even after *Sykes* tried to clarify the residual clause's meaning, the provision remains a "judicial morass that defies systemic solution," "a black hole of confusion and uncertainty" that frustrates any effort to impart "some sense of order and direction." *United States v. Vann*, 660 F.3d 771, 787 (C.A.4 2011) (Agee, J., concurring).

[15] **[16]** This Court's cases make plain that even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience. See, *e.g.*, *United States v. Dixon*, 509 U.S. 688, 711, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); *Payne*, 501 U.S., at 828–830, 111 S.Ct. 2597 (1991). But *James* and *Sykes* opined about vagueness without full briefing ***2563** or argument on that issue—a circumstance that leaves us "less constrained to follow precedent," *Hohn v. United States*, 524 U.S. 236, 251, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). The brief discussions of vagueness in *James* and *Sykes* homed in on the imprecision of the phrase "serious potential risk"; neither opinion evaluated the uncertainty introduced by the need to evaluate the riskiness of an abstract ordinary case of a crime. 550 U.S., at 210, n. 6, 127 S.Ct. 1586, 564 U.S., at ——, 131 S.Ct., at 2276–2277. And departing from those decisions does not raise any concerns about upsetting private reliance interests.

[17] Although it is a vital rule of judicial self-government, *stare decisis* does not matter for its own sake. It matters because it "promotes the evenhanded, predictable, and consistent development of legal principles." *Payne, supra*, at 827, 111 S.Ct. 2597. Decisions under the residual clause have proved to be anything but evenhanded, predictable, or consistent. Standing by *James* and *Sykes* would undermine, rather than promote, the goals that *stare decisis* is meant to serve.

* * *

We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled. Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.

We reverse the judgment of the Court of Appeals for the Eighth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, concurring in the judgment.
In my view, and for the reasons well stated by Justice ALITO in dissent, the residual clause of the Armed Career Criminal Act is not unconstitutionally vague under the categorical approach or a record-based approach. On the assumption that the categorical approach ought to still control, and for the reasons given by Justice THOMAS in Part I of his opinion concurring in the judgment, Johnson's conviction for possession of a short-barreled shotgun does not qualify as a violent felony.

For these reasons, I concur in the judgment.

Justice THOMAS, concurring in the judgment.
I agree with the Court that Johnson's sentence cannot stand. But rather than use the Fifth Amendment's Due Process Clause to nullify an Act of Congress, I would resolve this case on more ordinary grounds. Under conventional principles of interpretation and our precedents, the offense of unlawfully possessing a short-barreled shotgun does not constitute a "violent felony" under the residual clause of the Armed Career Criminal Act (ACCA).

The majority wants more. Not content to engage in the usual business of interpreting statutes, it holds this clause to be unconstitutionally vague, notwithstanding the fact that on four previous occasions we found it determinate enough for judicial application. As Justice ALITO explains, that decision cannot be reconciled with our precedents concerning the vagueness doctrine. See *post,* at 2580 – 2581 (dissenting opinion). But even if it were a closer case under those decisions, I would be wary of holding the residual clause to be unconstitutionally vague. Although I have joined the Court in applying our modern vagueness ***2564** doctrine in the past, see *FCC v. Fox Television Stations, Inc.*, 567 U.S. ——, —— – ——, 132 S.Ct. 2307, 2319–2320, 183 L.Ed.2d 234 (2012), I have become increasingly concerned about its origins and application. Simply put, our vagueness doctrine shares an uncomfortably similar history with substantive due process, a judicially created doctrine lacking any basis in the Constitution.

I

We could have easily disposed of this case without nullifying ACCA's residual clause. Under ordinary principles of statutory interpretation, the crime of unlawfully possessing a short-barreled shotgun does not constitute a "violent felony" under ACCA. In relevant part, that Act defines a "violent felony" as a "crime punishable by imprisonment for a term exceeding one year" that either

> "(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 offense of unlawfully possessing a short-barreled shotgun neither satisfies the first clause of this definition nor falls within the enumerated offenses in the second. It therefore can constitute a violent felony only if it falls within ACCA's so-called "residual clause"—*i.e.,* if it "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii).

To determine whether an offense falls within the residual clause, we consider "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James v. United States,* 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007). The specific crimes listed in § 924(e)(2)(B)(ii)—arson, extortion, burglary, and an offense involving the use of explosives—offer a "baseline against which to measure the degree of risk" a crime must present to fall within that clause. *Id.,* at 208, 127 S.Ct. 1586. Those offenses do not provide a high threshold, see *id.,* at 203,

207–208, 127 S.Ct. 1586, but the crime in question must still present a " 'serious' "—a " 'significant' or 'important' "—risk of physical injury to be deemed a violent felony, *Begay v. United States*, 553 U.S. 137, 156, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008) (ALITO, J., dissenting); accord, *Chambers v. United States*, 555 U.S. 122, 128, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009).

To qualify as serious, the risk of injury generally must be closely related to the offense itself. Our precedents provide useful examples of the close relationship that must exist between the conduct of the offense and the risk presented. In *Sykes v. United States*, 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011), for instance, we held that the offense of intentional vehicular flight constitutes a violent felony because that conduct always triggers a dangerous confrontation, *id.*, at ——, 131 S.Ct., at 2274. As we explained, vehicular flights "by definitional necessity occur when police are present" and are done "in defiance of their instructions ... with a vehicle that can be used in a way to cause serious potential risk of physical injury to another." *Ibid.* In *James*, we likewise held that attempted burglary offenses "requir[ing] an overt act directed toward the entry of a structure" are violent felonies because the underlying conduct often results in a dangerous confrontation. 550 U.S., at 204, 206, 127 S.Ct. 1586. But we distinguished those crimes from "the more ***2565** attenuated conduct encompassed by" attempt offenses "that c[an] be satisfied by preparatory conduct that does not pose the same risk of violent confrontation," such as " 'possessing burglary tools.' " *Id.*, at 205, 206, and n. 4, 127 S.Ct. 1586. At some point, in other words, the risk of injury from the crime may be too attenuated for the conviction to fall within the residual clause, such as when an additional, voluntary act (*e.g.*, the *use* of burglary tools to enter a structure) is necessary to bring about the risk of physical injury to another.

In light of the elements of and reported convictions for the unlawful possession of a short-barreled shotgun, this crime does not "involv[e] conduct that presents a serious potential risk of physical injury to another," § 924(e)(2)(B)(ii). The acts that form the basis of this offense are simply too remote from a risk of physical injury to fall within the residual clause.

Standing alone, the elements of this offense—(1) unlawfully (2) possessing (3) a short-barreled shotgun—do not describe inherently dangerous conduct. As a conceptual matter, "simple possession [of a firearm], even by a felon, takes place in a variety of ways (*e.g.*, in a closet, in a storeroom, in a car, in a pocket) many, perhaps most, of which do not involve likely accompanying violence." *United States v. Doe*, 960 F.2d 221, 225 (C.A.1 1992). These weapons also can be stored in a manner posing a danger to no one, such as unloaded, disassembled, or locked away. By themselves, the elements of this offense indicate that the ordinary commission of this crime is far less risky than ACCA's enumerated offenses.

Reported convictions support the conclusion that mere possession of a short-barreled shotgun does not, in the ordinary case, pose a serious risk of injury to others. A few examples suffice. In one case, officers found the sawed-off shotgun locked inside a gun cabinet in an empty home. *State v. Salyers*, 858 N.W.2d 156, 157–158 (Minn.2015). In another, the firearm was retrieved from the trunk of the defendant's car. *State v. Ellenberger*, 543 N.W.2d 673, 674 (Minn.App.1996). In still another, the weapon was found missing a firing pin. *State v. Johnson*, 171 Wis.2d 175, 178, 491 N.W.2d 110, 111 (App.1992). In these instances and others, the offense threatened no one.

The Government's theory for why this crime should nonetheless qualify as a "violent felony" is unpersuasive. Although it does not dispute that the unlawful possession of a short-barreled shotgun can occur in a nondangerous manner, the Government contends that this offense poses a serious risk of physical injury due to the connection between short-barreled shotguns and other serious crimes. As the Government explains, these firearms are "weapons not typically possessed by law-abiding citizens for lawful purposes," *District of Columbia v. Heller*, 554 U.S. 570, 625, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), but are instead primarily intended for use in criminal activity. In light of that intended use, the Government reasons that the ordinary case of this possession offense will involve the *use* of a short-barreled shotgun in a serious crime, a scenario obviously posing a serious risk of physical injury.

But even assuming that those who unlawfully possess these weapons typically intend to use them in a serious crime, the risk that the Government identifies arises not from the act of possessing the weapon, but from the act of using it. Unlike attempted burglary (at least of the type at issue in *James*) or intentional vehicular flight—conduct that by itself often or always invites a dangerous confrontation—possession of a short-barreled shotgun poses a threat *only* when an offender decides ***2566** to

engage in additional, voluntary conduct that is not included in the elements of the crime. Until this weapon is assembled, loaded, or used, for example, it poses no risk of injury to others in and of itself. The risk of injury to others from mere possession of this firearm is too attenuated to treat this offense as a violent felony. I would reverse the Court of Appeals on that basis.

II

As the foregoing analysis demonstrates, ACCA's residual clause can be applied in a principled manner. One would have thought this proposition well established given that we have already decided four cases addressing this clause. The majority nonetheless concludes that the operation of this provision violates the Fifth Amendment's Due Process Clause.

Justice ALITO shows why that analysis is wrong under our precedents. See *post*, at 2580 – 2583 (dissenting opinion). But I have some concerns about our modern vagueness doctrine itself. Whether that doctrine is defensible under the original meaning of "due process of law" is a difficult question I leave for the another day, but the doctrine's history should prompt us at least to examine its constitutional underpinnings more closely before we use it to nullify yet another duly enacted law.

A

We have become accustomed to using the Due Process Clauses to invalidate laws on the ground of "vagueness." The doctrine we have developed is quite sweeping: "A statute can be impermissibly vague ... if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). Using this framework, we have nullified a wide range of enactments. We have struck down laws ranging from city ordinances, *Papachristou v. Jacksonville*, 405 U.S. 156, 165–171, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), to Acts of Congress, *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89–93, 41 S.Ct. 298, 65 L.Ed. 516 (1921). We have struck down laws whether they are penal, *Lanzetta v. New Jersey*, 306 U.S. 451, 452, 458, 59 S.Ct. 618, 83 L.Ed. 888 (1939), or not, *Keyishian v. Board of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 597–604, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). [1] We have struck down laws addressing subjects ranging from abortion, *Colautti v. Franklin*, 439 U.S. 379, 390, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), and obscenity, *Winters v. New York*, 333 U.S. 507, 517–520, 68 S.Ct. 665, 92 L.Ed. 840 (1948), to the minimum wage, *Connally v. General Constr. Co.*, 269 U.S. 385, 390–395, 46 S.Ct. 126, 70 L.Ed. 322 (1926), and antitrust, *Cline v. Frink Dairy Co.*, 274 U.S. 445, 453–465, 47 S.Ct. 681, 71 L.Ed. 1146 (1927). We have even struck down a ***2567** law using a term that has been used to describe criminal conduct in this country since before the Constitution was ratified. *Chicago v. Morales*, 527 U.S. 41, 51, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (invalidating a "loitering" law); see *id.*, at 113, and n. 10, 119 S.Ct. 1849 (THOMAS, J., dissenting) (discussing a 1764 Georgia law requiring the apprehension of "all able bodied persons ... who shall be found loitering").

That we have repeatedly used a doctrine to invalidate laws does not make it legitimate. Cf., *e.g.*, *Dred Scott v. Sandford*, 19 How. 393, 450–452, 15 L.Ed. 691 (1857) (stating that an Act of Congress prohibiting slavery in certain Federal Territories violated the substantive due process rights of slaveowners and was therefore void). This Court has a history of wielding doctrines purportedly rooted in "due process of law" to achieve its own policy goals, substantive due process being the poster child. See *McDonald v. Chicago*, 561 U.S. 742, 811, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment) ("The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not"). Although our vagueness doctrine is distinct from substantive due process, their histories have disquieting parallels.

1

The problem of vague penal statutes is nothing new. The notion that such laws may be void under the Constitution's Due Process Clauses, however, is a more recent development.

Before the end of the 19th century, courts addressed vagueness through a rule of strict construction of penal statutes, not a rule of constitutional law. This rule of construction—better known today as the rule of lenity—first emerged in 16th-century England in reaction to Parliament's practice of making large swaths of crimes capital offenses, though it did not gain broad acceptance until the following century. See Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 749–751 (1935); see also 1 L. Radzinowicz, A History of English Criminal Law and Its Administration From 1750, pp. 10–11 (1948) (noting that some of the following crimes triggered the death penalty: "marking the edges of any current coin of the kingdom," "maliciously cutting any hop-binds growing on poles in any plantation of hops," and "being in the company of gypsies"). Courts relied on this rule of construction in refusing to apply vague capital-offense statutes to prosecutions before them. As an example of this rule, William Blackstone described a notable instance in which an English statute imposing the death penalty on anyone convicted of "stealing sheep, *or other cattle* " was "held to extend to nothing but mere sheep" as "th[e] general words, 'or other cattle,' [were] looked upon as much too loose to create a capital offence." 1 Commentaries on the Laws of England 88 (1765). [2]

Vague statutes surfaced on this side of the Atlantic as well. Shortly after the First Congress proposed the Bill of Rights, for instance, it passed a law providing ***2568** "[t]hat every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license," must forfeit the offending goods. Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137–138. At first glance, punishing the unlicensed possession of "merchandise ... usually vended to the Indians," *ibid.*, would seem far more likely to "invit [e] arbitrary enforcement," *ante*, at 2557, than does the residual clause.

But rather than strike down arguably vague laws under the Fifth Amendment Due Process Clause, antebellum American courts —like their English predecessors—simply refused to apply them in individual cases under the rule that penal statutes should be construed strictly. See, *e.g., United States v. Sharp*, 27 F.Cas. 1041 (No. 16,264) (C.C.Pa. 1815) (Washington, J.). In *Sharp*, for instance, several defendants charged with violating an Act rendering it a capital offense for "any seaman" to "make a revolt in [a] ship," Act of Apr. 30, 1790, § 8, 1 Stat. 114, objected that "the offence of making a revolt, [wa]s not sufficiently defined by this law, or by any other standard, to which reference could be safely made; to warrant the court in passing a sentence upon [them]." 27 F.Cas., at 1043. Justice Washington, riding circuit, apparently agreed, observing that the common definitions for the phrase "make a revolt" were "so multifarious, and so different" that he could not "avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature." *Ibid*. Remarking that "[l]aws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid," he refused to "recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be." *Ibid.*

Such analysis does not mean that federal courts believed they had the power to invalidate vague penal laws as unconstitutional. Indeed, there is good evidence that courts at the time understood judicial review to consist "of a refusal to give a statute effect as operative law in resolving a case," a notion quite distinct from our modern practice of " 'strik[ing] down' legislation." Walsh, Partial Unconstitutionality, 85 N.Y.U. L. Rev. 738, 756 (2010). The process of refusing to apply such laws appeared to occur on a case-by-case basis. For instance, notwithstanding his doubts expressed in *Sharp*, Justice Washington, writing for this Court, later rejected the argument that lower courts could arrest a judgment under the same ship-revolt statute because it "does not define the offence of endeavouring to make a revolt." *United States v. Kelly*, 11 Wheat. 417, 418, 6 L.Ed. 508 (1826). The Court explained that "it is ... competent to the Court to give a judicial definition" of "the offence of endeavouring to make a revolt," and that such definition "consists in the endeavour of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander

to some other person." *Id.*, at 418–419. In dealing with statutory indeterminacy, federal courts saw themselves engaged in construction, not judicial review as it is now understood. [3]

***2569 2**

Although vagueness concerns played a role in the strict construction of penal statutes from early on, there is little indication that anyone before the late 19th century believed that courts had the power under the Due Process Clauses to nullify statutes on that ground. Instead, our modern vagueness doctrine materialized after the rise of substantive due process. Following the ratification of the Fourteenth Amendment, corporations began to use that Amendment's Due Process Clause to challenge state laws that attached penalties to unauthorized commercial conduct. In addition to claiming that these laws violated their substantive due process rights, these litigants began—with some success—to contend that such laws were unconstitutionally indefinite. In one case, a railroad company challenged a Tennessee law authorizing penalties against any railroad that demanded "more than a just and reasonable compensation" or engaged in "unjust and unreasonable discrimination" in setting its rates. *Louisville & Nashville R. Co. v. Railroad Comm'n of Tenn.*, 19 F. 679, 690 (C.C.M.D.Tenn.1884) (internal quotation marks deleted). Without specifying the constitutional authority for its holding, the Circuit Court concluded that "[n]o citizen ... can be constitutionally subjected to penalties and despoiled of his property, in a criminal or quasi criminal proceeding, under and by force of such indefinite legislation." *Id.*, at 693 (emphasis deleted).

Justice Brewer—widely recognized as "a leading spokesman for 'substantized' due process," Gamer, Justice Brewer and Substantive Due Process: A Conservative Court Revisited, 18 Vand. L. Rev. 615, 627 (1965)—employed similar reasoning while riding circuit, though he did not identify the constitutional source of judicial authority to nullify vague laws. In reviewing an Iowa law authorizing fines against railroads for charging more than a "reasonable and just" rate, Justice Brewer mentioned in dictum that "no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it." *Chicago & N.W.R. Co. v. Dey*, 35 F. 866, 876 (C.C.S.D.Iowa 1888).

Constitutional vagueness challenges in this Court initially met with some resistance. Although the Court appeared to acknowledge the possibility of unconstitutionally indefinite enactments, it repeatedly rejected vagueness challenges to penal laws addressing railroad rates, *Railroad Comm'n Cases*, 116 U.S. 307, 336–337, 6 S.Ct. 1191, 29 L.Ed. 636 (1886), liquor sales, *Ohio ex rel. Lloyd v. Dollison*, 194 U.S. 445, 450–451, 24 S.Ct. 703, 48 L.Ed. 1062 (1904), and anticompetitive conduct, *Nash v. United States*, 229 U.S. 373, 376–378, 33 S.Ct. 780, 57 L.Ed. 1232 (1913); *Waters–Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86, 108–111, 29 S.Ct. 220, 53 L.Ed. 417 (1909).

***2570** In 1914, however, the Court nullified a law on vagueness grounds under the Due Process Clause for the first time. In *International Harvester Co. of America v. Kentucky*, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284 (1914), a tobacco company brought a Fourteenth Amendment challenge against several Kentucky antitrust laws that had been construed to render unlawful "any combination [made] ... for the purpose or with the effect of fixing a price that was greater or less than the real value of the article," *id.*, at 221, 34 S.Ct. 853. The company argued that by referring to "real value," the laws provided "no standard of conduct that it is possible to know." *Ibid.* The Court agreed. *Id.*, at 223–224, 34 S.Ct. 853. Although it did not specify in that case which portion of the Fourteenth Amendment served as the basis for its holding, *ibid.*, it explained in a related case that the lack of a knowable standard of conduct in the Kentucky statutes "violated the fundamental principles of justice embraced in the conception of due process of law." *Collins v. Kentucky*, 234 U.S. 634, 638, 34 S.Ct. 924, 58 L.Ed. 1510 (1914).

3

Since that time, the Court's application of its vagueness doctrine has largely mirrored its application of substantive due process. During the *Lochner* era, a period marked by the use of substantive due process to strike down economic regulations, *e.g.*, *Lochner v. New York*, 198 U.S. 45, 57, 25 S.Ct. 539, 49 L.Ed. 937 (1905), the Court frequently used the vagueness doctrine to

invalidate economic regulations penalizing commercial activity. [4] Among the penal laws it found to be impermissibly vague were a state law regulating the production of crude oil, *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 242–243, 52 S.Ct. 559, 76 L.Ed. 1062 (1932), a state antitrust law, *Cline*, 274 U.S., at 453–465, 47 S.Ct. 681, a state minimum-wage law, *Connally*, 269 U.S., at 390–395, 46 S.Ct. 126, and a federal price-control statute, *L. Cohen Grocery Co.*, 255 U.S., at 89–93, 41 S.Ct. 298. [5]

***2571** Around the time the Court began shifting the focus of its substantive due process (and equal protection) jurisprudence from economic interests to "discrete and insular minorities," see *United States v. Carolene Products Co.*, 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), the target of its vagueness doctrine changed as well. The Court began to use the vagueness doctrine to invalidate noneconomic regulations, such as state statutes penalizing obscenity, *Winters*, 333 U.S., at 517–520, 68 S.Ct. 665, and membership in a gang, *Lanzetta*, 306 U.S., at 458, 59 S.Ct. 618.

Successful vagueness challenges to regulations penalizing commercial conduct, by contrast, largely fell by the wayside. The Court, for instance, upheld a federal regulation punishing the knowing violation of an order instructing drivers transporting dangerous chemicals to " 'avoid, so far as practicable ... driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings,' " *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 338–339, 343, 72 S.Ct. 329, 96 L.Ed. 367 (1952). And notwithstanding its earlier conclusion that an Oklahoma law requiring state employees and contractors to be paid " 'not less than the current rate of per diem wages in the locality where the work is performed' " was unconstitutionally vague, *Connally*, *supra*, at 393, 46 S.Ct. 126, the Court found sufficiently definite a federal law forbidding radio broadcasting companies from attempting to compel by threat or duress a licensee to hire " 'persons in excess of the number of employees needed by such licensee to perform actual services,' " *United States v. Petrillo*, 332 U.S. 1, 3, 6–7, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947).

In more recent times, the Court's substantive due process jurisprudence has focused on abortions, and our vagueness doctrine has played a correspondingly significant role. In fact, our vagueness doctrine served as the basis for the first draft of the majority opinion in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), on the theory that laws prohibiting all abortions save for those done "for the purpose of saving the life of the mother" forced abortionists to guess when this exception would apply on penalty of conviction. See B. Schwartz, The Unpublished Opinions of the Burger Court 116–118 (1988) (reprinting first draft of *Roe*). *Roe*, of course, turned out as a substantive due process opinion. See 410 U.S., at 164, 93 S.Ct. 705. But since then, the Court has repeatedly deployed the vagueness doctrine to nullify even mild regulations of the abortion industry. See *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 451–452, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (nullifying law requiring " 'that the remains of the unborn child [be] disposed of in a humane and sanitary manner' "); *Colautti*, 439 U.S., at 381, 99 S.Ct. 675 (nullifying law mandating abortionists adhere to a prescribed standard of care if "there is 'sufficient reason to believe that the fetus may be viable' "). [6]

***2572** In one of our most recent decisions nullifying a law on vagueness grounds, substantive due process was again lurking in the background. In *Morales*, a plurality of this Court insisted that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment," 527 U.S., at 53, 119 S.Ct. 1849, a conclusion that colored its analysis that an ordinance prohibiting loitering was unconstitutionally indeterminate, see *id.*, at 55, 119 S.Ct. 1849 ("When vagueness permeates the text of" a penal law "infring[ing] on constitutionally protected rights," "it is subject to facial attack").

I find this history unsettling. It has long been understood that one of the problems with holding a statute "void for 'indefiniteness' " is that " 'indefiniteness' ... is itself an indefinite concept," *Winters*, *supra*, at 524, 68 S.Ct. 665 (Frankfurter, J., dissenting), and we as a Court have a bad habit of using indefinite concepts—especially ones rooted in "due process"—to invalidate democratically enacted laws.

B

It is also not clear that our vagueness doctrine can be reconciled with the original understanding of the term "due process of law." Our traditional justification for this doctrine has been the need for notice: "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008); accord, *ante*, at 2564. Presumably, that justification rests on the view expressed in *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L.Ed. 372 (1856), that "due process of law" constrains the legislative branch by guaranteeing "usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country," *id.*, at 277. That justification assumes further that providing "a person of ordinary intelligence [with] fair notice of what is prohibited," *Williams, supra*, at 304, 128 S.Ct. 1830, is one such usage or mode. [7]

To accept the vagueness doctrine as founded in our Constitution, then, one must reject the possibility "that the Due Process Clause requires only that our Government must proceed according to the 'law of the land'—that is, according to ***2573** written constitutional and statutory provisions," which may be all that the original meaning of this provision demands. *Hamdi v. Rumsfeld*, 542 U.S. 507, 589, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (THOMAS, J., dissenting) (some internal quotation marks omitted); accord, *Turner v. Rogers*, 564 U.S. ——, ——, 131 S.Ct. 2507, 2521, 180 L.Ed.2d 452 (2011) (THOMAS, J., dissenting). Although *Murray's Lessee* stated the contrary, 18 How., at 276, a number of scholars and jurists have concluded that "considerable historical evidence supports the position that 'due process of law' was a separation-of-powers concept designed as a safeguard against unlicensed executive action, forbidding only deprivations not authorized by legislation or common law." D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, p. 272 (1985); see also, *e.g.*, *In re Winship*, 397 U.S. 358, 378–382, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Black, J., dissenting). Others have disagreed. See, *e.g.*, Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1679 (2012) (arguing that, as originally understood, "the principle of due process" required, among other things, that "statutes that purported to empower the other branches to deprive persons of rights without adequate procedural guarantees [be] subject to judicial review").

I need not choose between these two understandings of "due process of law" in this case. Justice ALITO explains why the majority's decision is wrong even under our precedents. See *post*, at 2580 – 2583 (dissenting opinion). And more generally, I adhere to the view that " '[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face,' " *Morales, supra*, at 112, 119 S.Ct. 1849 (THOMAS, J., dissenting), and there is no question that ACCA's residual clause meets that description, see *ante*, at 2568 (agreeing with the Government that "there will be straightforward cases under the residual clause").

* * *

I have no love for our residual clause jurisprudence: As I observed when we first got into this business, the Sixth Amendment problem with allowing district courts to conduct factfinding to determine whether an offense is a "violent felony" made our attempt to construe the residual clause " 'an unnecessary exercise.' " *James*, 550 U.S., at 231, 127 S.Ct. 1586 (THOMAS, J., dissenting). But the Court rejected my argument, choosing instead to begin that unnecessary exercise. I see no principled way that, four cases later, the Court can now declare that the residual clause has become too indeterminate to apply. Having damaged the residual clause through our misguided jurisprudence, we have no right to send this provision back to Congress and ask for a new one. I cannot join the Court in using the Due Process Clause to nullify an Act of Congress that contains an unmistakable core of forbidden conduct, and I concur only in its judgment.

Justice ALITO, dissenting.

The Court is tired of the Armed Career Criminal Act of 1984 (ACCA) and in particular its residual clause. Anxious to rid our docket of bothersome residual clause cases, the Court is willing to do what it takes to get the job done. So brushing aside *stare decisis*, the Court holds that the residual clause is unconstitutionally vague even though we have twice rejected that very argument within the last eight years. The canons of interpretation get no greater respect. Inverting the canon that ***2574** a statute should be construed if possible to avoid unconstitutionality, the Court rejects a reasonable construction of the residual clause that would avoid any vagueness problems, preferring an alternative that the Court finds to be unconstitutionally vague. And the Court is not stopped by the well-established rule that a statute is void for vagueness only if it is vague in all its applications. While conceding that some applications of the residual clause are straightforward, the Court holds that the clause is now void in its entirety. The Court's determination to be done with residual clause cases, if not its fidelity to legal principles, is impressive.

I

A

Petitioner Samuel Johnson (unlike his famous namesake) has led a life of crime and violence. His presentence investigation report sets out a résumé of petty and serious crimes, beginning when he was 12 years old. Johnson's adult record includes convictions for, among other things, robbery, attempted robbery, illegal possession of a sawed-off shotgun, and a drug offense.

In 2010, the Federal Bureau of Investigation (FBI) began monitoring Johnson because of his involvement with the National Socialist Movement, a white-supremacist organization suspected of plotting acts of terrorism. In June of that year, Johnson left the group and formed his own radical organization, the Aryan Liberation Movement, which he planned to finance by counterfeiting United States currency. In the course of the Government's investigation, Johnson "disclosed to undercover FBI agents that he manufactured napalm, silencers, and other explosives for" his new organization. 526 Fed.Appx. 708, 709 (C.A.8 2013) (*per curiam*). He also showed the agents an AK–47 rifle, a semiautomatic rifle, a semiautomatic pistol, and a cache of approximately 1,100 rounds of ammunition. Later, Johnson told an undercover agent: "You know I'd love to assassinate some ... hoodrats as much as the next guy, but I think we really got to stick with high priority targets." Revised Presentence Investigation Report (PSR) ¶ 15. Among the top targets that he mentioned were "the Mexican consulate," "progressive bookstores," and individuals he viewed as "liberals." PSR ¶ 16.

In April 2012, Johnson was arrested, and he was subsequently indicted on four counts of possession of a firearm by a felon and two counts of possession of ammunition by a felon, in violation of 18 U.S.C. §§ 922(g) and § 924(e). He pleaded guilty to one of the firearms counts, and the District Court sentenced him to the statutory minimum of 15 years' imprisonment under ACCA, based on his prior felony convictions for robbery, attempted robbery, and illegal possession of a sawed-off shotgun.

B

ACCA provides a mandatory minimum sentence for certain violations of § 922(g), which prohibits the shipment, transportation, or possession of firearms or ammunition by convicted felons, persons previously committed to a mental institution, and certain others. Federal law normally provides a maximum sentence of 10 years' imprisonment for such crimes. See § 924(a)(2). Under ACCA, however, if a defendant convicted under § 922(g) has three prior convictions "for a violent felony or a serious drug offense," the sentencing court must impose a sentence of at least 15 years' imprisonment. § 924(e)(1).

ACCA's definition of a "violent felony" has three parts. First, a felony qualifies if it "has as an element the use, attempted use, or threatened use of physical force ***2575** against the person of another." § 924(e)(2)(B)(i). Second, the Act specifically names

four categories of qualifying felonies: burglary, arson, extortion, and offenses involving the use of explosives. See § 924(e)(2)(B)(ii). Third, the Act contains what we have called a "residual clause," which reaches any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Ibid.*

The present case concerns the residual clause. The sole question raised in Johnson's certiorari petition was whether possession of a sawed-off shotgun under Minnesota law qualifies as a violent felony under that clause. Although Johnson argued in the lower courts that the residual clause is unconstitutionally vague, he did not renew that argument here. Nevertheless, after oral argument, the Court raised the question of vagueness on its own. The Court now holds that the residual clause is unconstitutionally vague in all its applications. I cannot agree.

II

I begin with *stare decisis*. Eight years ago in *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), Justice SCALIA, the author of today's opinion for the Court, fired an opening shot at the residual clause. In dissent, he suggested that the residual clause is void for vagueness. *Id.*, at 230, 127 S.Ct. 1586. The Court held otherwise, explaining that the standard in the residual clause "is not so indefinite as to prevent an ordinary person from understanding" its scope. *Id.*, at 210, n. 6, 127 S.Ct. 1586.

Four years later, in *Sykes v. United States*, 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011), Justice SCALIA fired another round. Dissenting once again, he argued that the residual clause is void for vagueness and rehearsed the same basic arguments that the Court now adopts. See *id.*, at —— – ——, 131 S.Ct., at 2273–2274; see also *Derby v. United States*, 564 U.S. ——, —— – ——, 131 S.Ct. 2858, 2859–2860, 180 L.Ed.2d 904 (2011) (SCALIA, J., dissenting from denial of certiorari). As in *James*, the Court rejected his arguments. See *Sykes*, 564 U.S., at ——, 131 S.Ct., at 2276–2277. In fact, Justice SCALIA was the *only* Member of the *Sykes* Court who took the position that the residual clause could not be intelligibly applied to the offense at issue. The opinion of the Court, which five Justices joined, expressly held that the residual clause "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law.' " *Id.*, at —— – ——, 131 S.Ct., at 2277 (quoting *Chicago v. Morales*, 527 U.S. 41, 58, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality opinion)). Justice THOMAS's concurrence, while disagreeing in part with the Court's interpretation of the residual clause, did not question its constitutionality. See *Sykes*, 564 U.S., at ——, 131 S.Ct., at —— (opinion concurring in judgment). And Justice KAGAN's dissent, which Justice GINSBURG joined, argued that a proper application of the provision required a different result. See *id.*, at ——, 131 S.Ct., at ——. Thus, eight Members of the Court found the statute capable of principled application.

It is, of course, true that "[*s*]*tare decisis* is not an inexorable command." *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). But neither is it an empty Latin phrase. There must be good reasons for overruling a precedent, and there is none here. Nothing has changed since our decisions in *James* and *Sykes*—nothing, that is, except the Court's weariness with ACCA cases.

Reprising an argument that Justice SCALIA made to no avail in ***2576** *Sykes*, *supra*, at ——, 131 S.Ct., at 2287 (dissenting opinion), the Court reasons that the residual clause must be unconstitutionally vague because we have had trouble settling on an interpretation. See *ante*, at 2558 – 2559. But disagreement about the meaning and application of the clause is not new. We were divided in *James* and in *Sykes* and in our intervening decisions in *Begay v. United States*, 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008), and *Chambers v. United States*, 555 U.S. 122, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009). And that pattern is not unique to ACCA; we have been unable to come to an agreement on many recurring legal questions. The Confrontation Clause is one example that comes readily to mind. See, *e.g.*, *Williams v. Illinois*, 567 U.S. ——, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012); *Bullcoming v. New Mexico*, 564 U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011); *Melendez–Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). Our disagreements about the meaning of that provision do not prove that the Confrontation Clause has no ascertainable meaning. Likewise, our disagreements on the residual clause do not prove that it is unconstitutionally vague.

The Court also points to conflicts in the decisions of the lower courts as proof that the statute is unconstitutional. See *ante*, at 2559 – 2560. The Court overstates the degree of disagreement below. For many crimes, there is no dispute that the residual clause applies. And our certiorari docket provides a skewed picture because the decisions that we are asked to review are usually those involving issues on which there is at least an arguable circuit conflict. But in any event, it has never been thought that conflicting interpretations of a statute justify judicial elimination of the statute. One of our chief responsibilities is to resolve those disagreements, see Supreme Court Rule 10, not to strike down the laws that create this work.

The Court may not relish the task of resolving residual clause questions on which the Circuits disagree, but the provision has not placed a crushing burden on our docket. In the eight years since *James*, we have decided all of three cases involving the residual clause. See *Begay*, *supra* ; *Chambers*, *supra* ; *Sykes*, *supra*. Nevertheless, faced with the unappealing prospect of resolving more circuit splits on various residual clause issues, see *ante*, at 2559, six Members of the Court have thrown in the towel. That is not responsible.

III

Even if we put *stare decisis* aside, the Court's decision remains indefensible. The residual clause is not unconstitutionally vague.

A

The Fifth Amendment prohibits the enforcement of vague criminal laws, but the threshold for declaring a law void for vagueness is high. "The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). Rather, it is sufficient if a statute sets out an "ascertainable standard." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89, 41 S.Ct. 298, 65 L.Ed. 516 (1921). A statute is thus void for vagueness only if it wholly "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." ***2577** *United States v. Williams*, 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).

The bar is even higher for sentencing provisions. The fair notice concerns that inform our vagueness doctrine are aimed at ensuring that a " 'person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly.' " *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). The fear is that vague laws will " 'trap the innocent.' " 455 U.S., at 498, 102 S.Ct. 1186. These concerns have less force when it comes to sentencing provisions, which come into play only after the defendant has been found guilty of the crime in question. Due process does not require, as Johnson oddly suggests, that a "prospective criminal" be able to calculate the precise penalty that a conviction would bring. Supp. Brief for Petitioner 5; see *Chapman v. United States*, 500 U.S. 453, 467–468, 111 S.Ct. 1919, 114 L.Ed.2d 524 (1991) (concluding that a vagueness challenge was "particularly" weak "since whatever debate there is would center around the appropriate sentence and not the criminality of the conduct").

B

ACCA's residual clause unquestionably provides an ascertainable standard. It defines "violent felony" to include any offense that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). That language is by no means incomprehensible. Nor is it unusual. There are scores of federal and state laws that employ similar standards. The Solicitor General's brief contains a 99–page appendix setting out some of these laws. See App. to Supp. Brief

for United States; see also *James*, *supra*, at 210, n. 6, 127 S.Ct. 1586. If all these laws are unconstitutionally vague, today's decision is not a blast from a sawed-off shotgun; it is a nuclear explosion.

Attempting to avoid such devastation, the Court distinguishes these laws primarily on the ground that almost all of them "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion*." *Ante*, at 2561 (emphasis in original). The Court thus admits that, "[a]s a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Ibid.* Its complaint is that the residual clause "requires application of the 'serious potential risk' standard to an *idealized ordinary case of the crime*." *Ibid*. (emphasis added). Thus, according to the Court, ACCA's residual clause is unconstitutionally vague because its standard must be applied to "an idealized ordinary case of the crime" and not, like the vast majority of the laws in the Solicitor General's appendix, to "real-world conduct."

ACCA, however, makes no reference to "an idealized ordinary case of the crime." That requirement was the handiwork of this Court in *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). And as I will show, the residual clause can reasonably be interpreted to refer to "real-world conduct." [1]

***2578 C**

When a statute's constitutionality is in doubt, we have an obligation to interpret the law, if possible, to avoid the constitutional problem. See, *e.g.*, *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). As one treatise puts it, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts § 38, p. 247 (2012). This canon applies fully when considering vagueness challenges. In cases like this one, "our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n v. Letter Carriers*, 413 U.S. 548, 571, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); see also *Skilling v. United States*, 561 U.S. 358, 403, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). Indeed, " '[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *Id.*, at 406, 130 S.Ct. 2896 (quoting *Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895); emphasis deleted); see also *Ex parte Randolph*, 20 F.Cas. 242, 254 (No. 11,558) (C.C.Va.1833) (Marshall, C.J.).

The Court all but concedes that the residual clause would be constitutional if it applied to "real-world conduct." Whether that is the *best* interpretation of the residual clause is beside the point. What matters is whether it is a reasonable interpretation of the statute. And it surely is that.

First, this interpretation heeds the pointed distinction that ACCA draws between the "element[s]" of an offense and "conduct." Under § 924(e)(2)(B)(i), a crime qualifies as a "violent felony" if one of its "element [s]" involves "the use, attempted use, or threatened use of physical force against the person of another." But the residual clause, which appears in the very next subsection, § 924(e)(2)(B)(ii), focuses on "conduct"—specifically, "conduct that presents a serious potential risk of physical injury to another." The use of these two different terms in § 924(e) indicates that "conduct" refers to things done during the commission of an offense that are not part of the elements needed for conviction. Because those extra actions vary from case to case, it is natural to interpret "conduct" to mean real-world conduct, not the conduct involved in some Platonic ideal of the offense.

Second, as the Court points out, standards like the one in the residual clause almost always appear in laws that call for application by a trier of fact. This strongly suggests that the residual clause calls for the same sort of application.

Third, if the Court is correct that the residual clause is nearly incomprehensible when interpreted as applying to an "idealized ordinary case of the crime," then that is telling evidence that this is not what Congress intended. When another interpretation

is ready at hand, why should we assume that Congress gave the clause a meaning that is impossible—or even, exceedingly difficult—to apply?

D

Not only does the "real-world conduct" interpretation fit the terms of the residual ***2579** clause, but the reasons that persuaded the Court to adopt the categorical approach in *Taylor* either do not apply or have much less force in residual clause cases.

In *Taylor*, the question before the Court concerned the meaning of "burglary," one of ACCA's enumerated offenses. The Court gave three reasons for holding that a judge making an ACCA determination should generally look only at the elements of the offense of conviction and not to other things that the defendant did during the commission of the offense. First, the Court thought that ACCA's use of the term "convictions" pointed to the categorical approach. The Court wrote: "Section 924(e)(1) refers to 'a person who ... has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U.S., at 600, 110 S.Ct. 2143. Second, the Court relied on legislative history, noting that ACCA had previously contained a generic definition of burglary and that "the deletion of [this] definition ... may have been an inadvertent casualty of a complex drafting process." *Id.*, at 589–590, 601, 110 S.Ct. 2143. Third, the Court felt that "the practical difficulties and potential unfairness of a factual approach [were] daunting." *Id.*, at 601, 110 S.Ct. 2143.

None of these three grounds dictates that the categorical approach must be used in residual clause cases. The second ground, which concerned the deletion of a generic definition of burglary, obviously has no application to the residual clause. And the first ground has much less force in residual clause cases. In *Taylor*, the Court reasoned that a defendant has a "conviction" for burglary only if burglary is the offense set out in the judgment of conviction. For instance, if a defendant commits a burglary but pleads guilty, under a plea bargain, to possession of burglar's tools, the *Taylor* Court thought that it would be unnatural to say that the defendant had a *conviction* for burglary. Now consider a case in which a gang member is convicted of illegal possession of a sawed-off shotgun and the evidence shows that he concealed the weapon under his coat, while searching for a rival gang member who had just killed his brother. In that situation, it is not at all unnatural to say that the defendant had a conviction for a crime that "involve[d] *conduct* that present[ed] a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii) (emphasis added). At the very least, it would be a reasonable way to describe the defendant's conviction.

The *Taylor* Court's remaining reasons for adopting the categorical approach cannot justify an interpretation that renders the residual clause unconstitutional. While the *Taylor* Court feared that a conduct-specific approach would unduly burden the courts, experience has shown that application of the categorical approach has not always been easy. Indeed, the Court's main argument for overturning the statute is that this approach is unmanageable in residual clause cases.

As for the notion that the categorical approach is more forgiving to defendants, there is a strong argument that the opposite is true, at least with respect to the residual clause. Consider two criminal laws: Injury occurs in 10% of cases involving the violation of statute A, but in 90% of cases involving the violation of statute B. Under the categorical approach, a truly dangerous crime under statute A might not qualify as a violent felony, while a crime with no measurable risk of harm under statute B would count against the defendant. Under a conduct-specific inquiry, on the other hand, a defendant's actual conduct would determine whether ACCA's mandatory penalty applies.

***2580** It is also significant that the allocation of the burden of proof protects defendants. The prosecution bears the burden of proving that a defendant has convictions that qualify for sentencing under ACCA. If evidentiary deficiencies, poor recordkeeping, or anything else prevents the prosecution from discharging that burden under the conduct-specific approach, a defendant would not receive an ACCA sentence.

Nor would a conduct-specific inquiry raise constitutional problems of its own. It is questionable whether the Sixth Amendment creates a right to a jury trial in this situation. See *Almendarez–Torres v. United States*, 523 U.S. 224, 118 S.Ct. 1219, 140

L.Ed.2d 350 (1998). But if it does, the issue could be tried to a jury, and the prosecution could bear the burden of proving beyond a reasonable doubt that a defendant's prior crimes involved conduct that presented a serious potential risk of injury to another. I would adopt this alternative interpretation and hold that the residual clause requires an examination of real-world conduct.

The Court's only reason for refusing to consider this interpretation is that "the Government has not asked us to abandon the categorical approach in residual-clause cases." *Ante,* at 2562. But the Court cites no case in which we have suggested that a saving interpretation may be adopted only if it is proposed by one of the parties. Nor does the Court cite any secondary authorities advocating this rule. Cf. Scalia, Reading Law § 38 (stating the canon with no such limitation). On the contrary, we have long recognized that it is "our plain duty to adopt that construction which will save [a] statute from constitutional infirmity," where fairly possible. *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 407, 29 S.Ct. 527, 53 L.Ed. 836 (1909). It would be strange if we could fulfill that "plain duty" only when a party asks us to do so. And the Court's refusal to consider a saving interpretation not advocated by the Government is hard to square with the Court's adoption of an argument that petitioner chose not to raise. As noted, Johnson did not ask us to hold that the residual clause is unconstitutionally vague, but the Court interjected that issue into the case, requested supplemental briefing on the question, and heard reargument. The Court's refusal to look beyond the arguments of the parties apparently applies only to arguments that the Court does not want to hear.

E

Even if the categorical approach is used in residual clause cases, however, the clause is still not void for vagueness. "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined" on an as-applied basis. *United States v. Mazurie,* 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright,* 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Thus, in a due process vagueness case, we will hold that a law is facially invalid "only if the enactment is impermissibly vague in *all* of its applications." *Hoffman Estates,* 455 U.S., at 494–495, 102 S.Ct. 1186 (emphasis added); see also *Chapman,* 500 U.S., at 467, 111 S.Ct. 1919.[2]

In concluding that the residual clause is facially void for vagueness, the Court flatly ***2581** contravenes this rule. The Court admits "that there will be straightforward cases under the residual clause." *Ante,* at 2560. But rather than exercising the restraint that our vagueness cases prescribe, the Court holds that the residual clause is unconstitutionally vague even when its application is clear.

The Court's treatment of this issue is startling. Its facial invalidation precludes a sentencing court that is applying ACCA from counting convictions for even those specific offenses that this Court previously found to fall within the residual clause. See *James,* 550 U.S., at 203–209, 127 S.Ct. 1586 (attempted burglary); *Sykes,* 564 U.S., at —— – ——, 131 S.Ct., at 2272–2275 (flight from law enforcement in a vehicle). Still worse, the Court holds that vagueness bars the use of the residual clause in other cases in which its applicability can hardly be questioned. Attempted rape is an example. See, *e.g.*, *Dawson v. United States,* 702 F.3d 347, 351–352 (C.A.6 2012). Can there be any doubt that "an idealized ordinary case of th[is] crime" "involves conduct that presents a serious potential risk of physical injury to another"? How about attempted arson,[3] attempted kidnapping,[4] solicitation to commit aggravated assault,[5] possession of a loaded weapon with the intent to use it unlawfully against another person,[6] possession of a weapon in prison,[7] or compelling a person to act as a prostitute?[8] Is there much doubt that those offenses "involve conduct that presents a serious potential risk of physical injury to another"?

Transforming vagueness doctrine, the Court claims that we have never actually *held* that a statute may be voided for vagueness only when it is vague in all its applications. But that is simply wrong. In *Hoffman Estates,* we reversed a Seventh Circuit decision that voided an ordinance prohibiting the sale of certain items. See 455 U.S., at 491, 102 S.Ct. 1186. The Seventh Circuit struck

down the ordinance because it was "unclear in *some* of its applications," but we reversed and emphasized that a law is void for vagueness "only if [it] is impermissibly vague in all of its applications." *Id.*, at 494–495, 102 S.Ct. 1186; see also *id.*, at 495, n. 7, 102 S.Ct. 1186 (collecting cases). Applying that principle, we held that the "facial challenge [wa]s unavailing" because "at least some of the items sold ... [we]re covered" by the ***2582** ordinance. *Id.*, at 500, 102 S.Ct. 1186. These statements were not dicta. They were the holding of the case. Yet the Court does not even mention this binding precedent.

Instead, the Court says that the facts of two *earlier* cases support a broader application of the vagueness doctrine. See *ante*, at 2560 – 2561. That, too, is incorrect. Neither case remotely suggested that mere overbreadth is enough for facial invalidation under the Fifth Amendment.

In *Coates v. Cincinnati*, 402 U.S. 611, 612, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), we addressed an ordinance that restricted free assembly and association rights by prohibiting "annoying" conduct. Our analysis turned in large part on those First Amendment concerns. In fact, we specifically explained that the "vice of the ordinance lies not alone in its violation of the due process standard of vagueness." *Id.*, at 615, 91 S.Ct. 1686. In the present case, by contrast, no First Amendment rights are at issue. Thus, *Coates* cannot support the Court's rejection of our repeated statements that "vagueness challenges to statutes which *do not involve First Amendment freedoms* must be examined in light of the facts ... at hand." *Mazurie, supra*, at 550, 95 S.Ct. 710 (emphasis added).

Likewise, *L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, proves precisely the opposite of what the Court claims. In that case, we struck down a statute prohibiting " 'unjust or unreasonable rate[s]' " because it provided no "ascertainable standard of guilt" and left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.*, at 89, 41 S.Ct. 298. The clear import of this language is that the law at issue was impermissibly vague in all applications. And in the years since, we have never adopted the majority's contradictory interpretation. On the contrary, we have characterized the case as involving a statute that could "not constitutionally be applied to any set of facts." *United States v. Powell*, 423 U.S. 87, 92, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975). Thus, our holdings and our dicta prohibit the Court's expansion of the vagueness doctrine. The Constitution does not allow us to hold a statute void for vagueness unless it is vague in all its applications.

IV

Because I would not strike down ACCA's residual clause, it is necessary for me to address whether Johnson's conviction for possessing a sawed-off shotgun qualifies as a violent felony. Under either the categorical approach or a conduct-specific inquiry, it does.

A

The categorical approach requires us to determine 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, 127 S.Ct. 1586. This is an "inherently probabilistic" determination that considers the circumstances and conduct that ordinarily attend the offense. *Id.*, at 207, 127 S.Ct. 1586. The mere fact that a crime *could* be committed without a risk of physical harm does not exclude it from the statute's reach. See *id.*, at 207–208, 127 S.Ct. 1586. Instead, the residual clause speaks of "potential risk[s]," § 924(e)(2)(B)(ii), a term suggesting "that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty." *James, supra*, at 207–208, 127 S.Ct. 1586.

Under these principles, unlawful possession of a sawed-off shotgun qualifies as a violent felony. As we recognized in *District of Columbia v. Heller*, 554 U.S. 570, 625, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), sawed-off shotguns are "not typically possessed by law-abiding citizens for ***2583** lawful purposes." Instead, they are uniquely attractive to violent criminals. Much

easier to conceal than long-barreled shotguns used for hunting and other lawful purposes, short-barreled shotguns can be hidden under a coat, tucked into a bag, or stowed under a car seat. And like a handgun, they can be fired with one hand—except to more lethal effect. These weapons thus combine the deadly characteristics of conventional shotguns with the more convenient handling of handguns. Unlike those common firearms, however, they are not typically possessed for lawful purposes. And when a person illegally possesses a sawed-off shotgun during the commission of a crime, the risk of violence is seriously increased. The ordinary case of unlawful possession of a sawed-off shotgun therefore "presents a serious potential risk of physical injury to another." § 922(e)(2)(B)(ii).

Congress' treatment of sawed-off shotguns confirms this judgment. As the Government's initial brief colorfully recounts, sawed-off shotguns were a weapon of choice for gangsters and bank robbers during the Prohibition Era. See Brief for United States 4.[9] In response, Congress enacted the National Firearms Act of 1934, which required individuals possessing certain especially dangerous weapons—including sawed-off shotguns—to register with the Federal Government and pay a special tax. 26 U.S.C. §§ 5845(a)(1)-(2). The Act was passed on the understanding that "while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a ... sawed-off shotgun." H.R.Rep. No. 1780, 73d Cong., 2d Sess., 1 (1934). As amended, the Act imposes strict registration requirements for any individual wishing to possess a covered shotgun, see, *e.g.*, §§ 5822, 5841(b), and illegal possession of such a weapon is punishable by imprisonment for up to 10 years. See §§ 5861(b)-(d), 5871. It is telling that this penalty exceeds that prescribed by federal law for quintessential violent felonies.[10] It thus seems perfectly clear that Congress has long regarded the illegal possession of a sawed-off shotgun as a crime that poses a serious risk of harm to others.

The majority of States agree. The Government informs the Court, and Johnson does not dispute, that 28 States have followed Congress' lead by making it a crime to possess an unregistered sawed-off shotgun, and 11 other States and the District of Columbia prohibit private possession of sawed-off shotguns entirely. See Brief for United States 8–9 (collecting statutes). Minnesota, where petitioner was convicted, ***2584** has adopted a blanket ban, based on its judgment that "[t]he sawed-off shotgun has no legitimate use in the society whatsoever." *State v. Ellenberger*, 543 N.W.2d 673, 676 (Minn.App.1996) (internal quotation marks and citation omitted). Possession of a sawed-off shotgun in Minnesota is thus an inherently criminal act. It is fanciful to assume that a person who chooses to break the law and risk the heavy criminal penalty incurred by possessing a notoriously dangerous weapon is unlikely to use that weapon in violent ways.

B

If we were to abandon the categorical approach, the facts of Johnson's offense would satisfy the residual clause as well. According to the record in this case, Johnson possessed his sawed-off shotgun while dealing drugs. When police responded to reports of drug activity in a parking lot, they were told by two people that "Johnson and another individual had approached them and offered to sell drugs." PSR ¶ 45. The police then searched the vehicle where Johnson was seated as a passenger, and they found a sawed-off shotgun and five bags of marijuana. Johnson admitted that the gun was his.

Understood in this context, Johnson's conduct posed an acute risk of physical injury to another. Drugs and guns are never a safe combination. If one of his drug deals had gone bad or if a rival dealer had arrived on the scene, Johnson's deadly weapon was close at hand. The sawed-off nature of the gun elevated the risk of collateral damage beyond any intended targets. And the location of the crime—a public parking lot—significantly increased the chance that innocent bystanders might be caught up in the carnage. This is not a case of "mere possession" as Johnson suggests. Brief for Petitioner i. He was not storing the gun in a safe, nor was it a family heirloom or collector's item. He illegally possessed the weapon in case he needed to use it during another crime. A judge or jury could thus conclude that Johnson's offense qualified as a violent felony.

There should be no doubt that Samuel Johnson was an armed career criminal. His record includes a number of serious felonies. And he has been caught with dangerous weapons on numerous occasions. That this case has led to the residual clause's demise

is confounding. I only hope that Congress can take the Court at its word that either amending the list of enumerated offenses or abandoning the categorical approach would solve the problem that the Court perceives.

All Citations

135 S.Ct. 2551, 192 L.Ed.2d 569, 83 USLW 4576, 15 Cal. Daily Op. Serv. 6800, 2015 Daily Journal D.A.R. 7362, 25 Fla. L. Weekly Fed. S 459

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 By "penal," I mean laws "authoriz[ing] criminal punishment" as well as those "authorizing fines or forfeitures ... [that] are enforced through civil rather than criminal process." Cf. C. Nelson, Statutory Interpretation 108 (2011) (discussing definition of "penal" for purposes of rule of lenity). A law requiring termination of employment from public institutions, for instance, is not penal. See *Keyishian*, 385 U.S., at 597–604, 87 S.Ct. 675. Nor is a law creating an "obligation to pay taxes." *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 271, 56 S.Ct. 229, 80 L.Ed. 220 (1935). Conversely, a law imposing a monetary exaction as a punishment for noncompliance with a regulatory mandate is penal. See *National Federation of Independent Business v. Sebelius*, 567 U.S. ——, —— – ——, 132 S.Ct. 2566, 2650–2656, 183 L.Ed.2d 450 (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting).

2 At the time, the ordinary meaning of the word "cattle" was not limited to cows, but instead encompassed all "[b]easts of pasture; not wild nor domestick." 1 S. Johnson, A Dictionary of the English Language (4th ed. 1773). Parliament responded to the judicial refusal to apply the provision to "cattle" by passing "another statute, 15 Geo. II. c. 34, extending the [law] to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name." 1 Blackstone, Commentaries on the Laws of England, at 88.

3 Early American state courts also sometimes refused to apply a law they found completely unintelligible, even outside of the penal context. In one antebellum decision, the Pennsylvania Supreme Court did not even attempt to apply a statute that gave the Pennsylvania state treasurer " 'as many votes' " in state bank elections as " 'were held by *individuals* ' " without providing guidance as to which individuals it was referring. *Commonwealth v. Bank of Pennsylvania*, 3 Watts & Serg. 173, 177 (1842). Concluding that it had "seldom, if ever, found the language of legislation so devoid of certainty," the court withdrew the case. *Ibid.*; see also *Drake v. Drake*, 15 N.C. 110, 115 (1833) ("Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative"). This practice is distinct from our modern vagueness doctrine, which applies to laws that are intelligible but vague.

4 During this time, the Court would apply its new vagueness doctrine outside of the penal context as well. In *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 45 S.Ct. 295, 69 L.Ed. 589 (1925), a sugar dealer raised a defense to a breach-of-contract suit that the contracts themselves were unlawful under several provisions of the Lever Act, including one making it " 'unlawful for any person ... to make any unjust or unreasonable ... charge in ... dealing in or with any necessaries,' or to agree with another 'to exact excessive prices for any necessaries,' " *id.*, at 238, 45 S.Ct. 295. Applying *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 (1921), which had held that provision to be unconstitutionally vague, the Court rejected the dealer's argument. 267 U.S., at 238–239, 45 S.Ct. 295. The Court explained that "[i]t was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." *Id.*, at 239, 45 S.Ct. 295. That doctrine thus applied to penalties as well as "[a]ny other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it." *Ibid.*

5 Vagueness challenges to laws regulating speech during this period were less successful. Among the laws the Court found to be sufficiently definite included a state law making it a misdemeanor to publish, among other things, materials " 'which shall tend to encourage or advocate disrespect for law or for any court or courts of justice,' " *Fox v. Washington*, 236 U.S. 273, 275–277, 35 S.Ct. 383, 59 L.Ed. 573 (1915), a federal statute criminalizing candidate solicitation of contributions for " 'any political purpose whatever,' " *United States v. Wurzbach*, 280 U.S. 396, 398–399, 50 S.Ct. 167, 74 L.Ed. 508 (1930), and a state prohibition on becoming a member of any organization that advocates using unlawful violence to effect " 'any political change,' " *Whitney v. California*, 274 U.S. 357, 359–360, 368–369, 47 S.Ct. 641, 71 L.Ed. 1095 (1927). But see *Stromberg v. California*, 283 U.S. 359, 369–370, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (holding state statute punishing the use of any symbol " 'of opposition to organized government' " to be impermissibly vague).

6 All the while, however, the Court has rejected vagueness challenges to laws punishing those on the other side of the abortion debate. When it comes to restricting the speech of abortion opponents, the Court has dismissed concerns about vagueness with the observation

that " 'we can never expect mathematical certainty from our language,' " *Hill v. Colorado*, 530 U.S. 703, 733, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), even though such restrictions are arguably "at least as imprecise as criminal prohibitions on speech the Court has declared void for vagueness in past decades," *id.*, at 774, 120 S.Ct. 2480 (KENNEDY, J., dissenting).

7 As a general matter, we should be cautious about relying on general theories of "fair notice" in our due process jurisprudence, as they have been exploited to achieve particular ends. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), for instance, the Court held that the Due Process Clause imposed limits on punitive damages because the Clause guaranteed "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose," *id.*, at 574, 116 S.Ct. 1589. That was true even though "when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts," and "no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 26–27, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (SCALIA, J., concurring in judgment). Even under the view of the Due Process Clause articulated in *Murray's Lessee*, then, we should not allow nebulous principles to supplant more specific, historically grounded rules. See 499 U.S., at 37–38, 111 S.Ct. 1032 (opinion of SCALIA, J.).

1 The Court also says that the residual clause's reference to the enumerated offenses is "confusing." *Ante*, at 2561. But this is another argument we rejected in *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), and *Sykes v. United States*, 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011), and it is no more persuasive now. Although the risk level varies among the enumerated offenses, all four categories of offenses involve conduct that presents a serious potential risk of harm to others. If the Court's concern is that some of the enumerated offenses do not seem especially risky, all that means is that the statute "sets a low baseline level for risk." *Id.*, at ——, 131 S.Ct., at 2278 (THOMAS, J., concurring in judgment).

2 This rule is simply an application of the broader rule that, except in First Amendment cases, we will hold that a statute is facially unconstitutional only if "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). A void-for-vagueness challenge is a facial challenge. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494–495, and nn. 5, 6, 7, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *Chicago v. Morales*, 527 U.S. 41, 79, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (SCALIA, J., dissenting). Consequently, there is no reason why the no-set-of-circumstances rule should not apply in this context. I assume that the Court does not mean to abrogate the no-set-of-circumstances rule in its entirety, but the Court provides no justification for its refusal to apply that rule here. Perhaps the Court has concluded, for some undisclosed reason, that void-for-vagueness claims are different from all other facial challenges not based on the First Amendment. Or perhaps the Court has simply created an ACCA exception.

3 *United States v. Rainey*, 362 F.3d 733, 735–736 (C.A.11) (*per curiam*), cert. denied, 541 U.S. 1081, 124 S.Ct. 2433, 158 L.Ed.2d 996 (2004).

4 *United States v. Kaplansky*, 42 F.3d 320, 323–324 (C.A.6 1994) (en banc).

5 *United States v. Benton*, 639 F.3d 723, 731–732 (C.A.6), cert. denied, 565 U.S. ——, 132 S.Ct. 599, 181 L.Ed.2d 439 (2011).

6 *United States v. Lynch*, 518 F.3d 164, 172–173 (C.A.2 2008), cert. denied, 555 U.S. 1177, 129 S.Ct. 1316, 173 L.Ed.2d 595 (2009).

7 *United States v. Boyce*, 633 F.3d 708, 711–712 (C.A.8 2011), cert. denied, 565 U.S. ——, 132 S.Ct. 1002, 181 L.Ed.2d 744 (2012).

8 *United States v. Brown*, 273 F.3d 747, 749–751 (C.A.7 2001).

9 Al Capone's south-side Chicago henchmen used sawed-off shotguns when they executed their rivals from Bugs Moran's north-side gang during the infamous Saint Valentine's Day Massacre of 1929. See 7 Chicago Gangsters Slain by Firing Squad of Rivals, Some in Police Uniforms, N.Y. Times, Feb. 15, 1929, p. A1. Wild Bill Rooney was gunned down in Chicago by a "sawed-off shotgun [that] was pointed through a rear window" of a passing automobile. Union Boss Slain by Gang in Chicago, N.Y. Times, Mar. 20, 1931, p. 52. And when the infamous outlaws Bonnie and Clyde were killed by the police in 1934, Clyde was found "clutching a sawed-off shotgun in one hand." Barrow and Woman are Slain by Police in Louisiana Trap, N.Y. Times, May 24, 1934, p. A1.

10 See, *e.g.*, 18 U.S.C. § 111(a) (physical assault on federal officer punishable by not more than eight years' imprisonment); § 113(a)(7) (assault within maritime or territorial jurisdiction resulting in substantial bodily injury to an individual under the age of 16 punishable by up to five years' imprisonment); § 117(a) ("assault, sexual abuse, or serious violent felony against a spouse or intimate partner" by a habitual offender within maritime or territorial jurisdiction punishable by up to five years' imprisonment, except in cases of "substantial bodily injury").

805 F.3d 1204
United States Court of Appeals,
Tenth Circuit.

UNITED STATES of America, Plaintiff–Appellee,
v.
Jonathan Matthew MADRID, Defendant–Appellant.

No. 14–2159. | Nov. 2, 2015.

Synopsis
Background: Defendant pleaded guilty in the United States District Court for the District of New Mexico to possession of methamphetamine with intent to distribute. Defendant appealed his sentence.

Holdings: The Court of Appeals, Lucero, Circuit Judge, held that:

[1] de novo review applied;

[2] defendant's prior Texas conviction for aggravated sexual assault of a child did not qualify as crime of violence under elements approach;

[3] his prior conviction was not forcible sex offense;

[4] residual clause of Sentencing Guidelines was unconstitutionally vague; and

[5] applying "crime of violence" sentencing enhancement was plain error.

Sentence vacated and remanded for resentencing.

West Codenotes

Held Unconstitutional
U.S.S.G. § 4B1.2(a)(2), 18 U.S.C.A.

Attorneys and Law Firms

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Before TYMKOVICH, Chief Judge, LUCERO and MATHESON, Circuit Judges.

Opinion

LUCERO, Circuit Judge.

At issue is whether appellant Jonathan Madrid's prior conviction for statutory rape in Texas qualifies as a crime of violence under the United States Sentencing Guidelines. Applying the familiar modified categorical approach, and in light of *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), we hold that it does not. Exercising jurisdiction under 28 U.S.C. § 1291, we vacate Madrid's sentence and remand for resentencing.

I

In 2014, Madrid pled guilty to possession of methamphetamine with intent to distribute. A Presentence Investigation Report ("PSR") classified him as a "career offender," which is defined as having "at least two prior felony convictions of either a crime of violence or a controlled substance ***1207** offense." U.S.S.G. § 4B1.1. The determination that Madrid was a career offender increased his advisory guideline range from 92–115 months to 188–235 months, and was based in part on Madrid's 2004 Texas conviction for aggravated sexual assault of a child. Tex. Penal Code § 22.021(a)(1)(B)(i) & (a)(2)(B) (2004). [1] Over Madrid's objections, the district court adopted the PSR, finding that the Texas conviction qualified as a crime of violence. [2] Madrid timely appealed.

II

[1] The only issue Madrid raises on appeal is whether his 2004 conviction qualifies as a crime of violence, justifying his enhanced sentencing recommendation. We review this determination de novo. *United States v. Dennis*, 551 F.3d 986, 988 (10th Cir.2008). Under the Guidelines, an offense is a crime of violence if: (1) it "has as an element the use, attempted use, or threatened use of physical force against the person of another"; (2) it is one of the offenses enumerated in the Guidelines or accompanying commentary as a crime of violence; or (3) it "otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. § 4B1.2(a)(1)-(2).

[2] To determine whether a conviction fits into one of these generic categories, we use one of two methods of analysis: the categorical or modified categorical approach. The Supreme Court's recent decision in *Descamps v. United States*, —— U.S. ——, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), explains that the modified categorical approach applies when the statute is "divisible"; that is, when it "lists multiple, alternative elements, and so effectively creates several different crimes." *Id.* at 2285. We use the modified categorical approach to "identify, from among several alternatives, the crime of conviction" in the case at hand. *Id.* We then compare that crime to "the generic offense"—the generic categories listed above—to determine whether it qualifies as a crime of violence. *Id.* We focus only "on the elements, rather than the facts, of a crime" to determine whether it is categorically a crime of violence under all circumstances. *Id.*

[3] The Texas statute under which Madrid was convicted is divisible, as it contains alternative elements creating different crimes. We therefore review the state court indictment and entry of judgment to determine which of those crimes was Madrid's crime of conviction and whether it is categorically a crime of violence. In making that determination, we do not consider the particular facts underlying Madrid's offense. Pursuant to these documents, the parties agree that Madrid was convicted under Texas Penal Code § 22.021(a)(1)(B)(i) & (a)(2)(B). At the time of his conviction in 2004, these statutory subsections provided that: "[a] person commits [aggravated sexual assault] ... if the person ... intentionally or knowingly ... causes the penetration of the anus or sexual organs of a child by any means ... and ... the victim is younger than 14 years of age." § 22.021(a)(1)(B)(i) & (a)(2)(B). To uphold Madrid's sentence, his 2004 conviction under this portion of the statute must fit into one of the three Guidelines categories that make the prohibited conduct a crime of violence.

A

[4] **[5]** The parties do not dispute whether Madrid's conviction "has as an element the use, attempted use, or threatened ***1208** use of physical force against the person of another." § 4B1.2(a)(1). A plain reading of the statutory text reveals that it does not. *Cf. Dennis*, 551 F.3d at 989. Rather, the statute criminalizes "intentionally or knowingly ... caus[ing] the penetration of the anus or sexual organs of a child by any means ... if ... the victim is younger than 14 years of age." § 22.021(a)(1)(B)(i) & (a)(2)(B). The crime has three components: a mens rea element, a physical act element, and an age element. Notably absent is any requirement of force or lack of consent. Under the modified categorical approach, we do not need to go further. The portion of the statute under which Madrid was convicted can be satisfied without the use, attempted use, or threatened use of force.

B

[6] **[7]** We are also asked to determine whether Madrid's conviction for statutory rape constitutes one of the offenses enumerated in the Guidelines. Of the crimes listed, only one is relevant to our inquiry; Commentary to the applicable Guideline lists "forcible sex offenses" as crimes of violence. § 4B1.2 cmt. n.1.[3] Having already concluded that force is not an element of the crime, we must determine if Madrid's conviction nonetheless qualifies as a "forcible sex offense."[4] As we recently held in *United States v. Wray*, 776 F.3d 1182, 1187 (10th Cir.2015), statutory rape is not per se a forcible sex offense. And we conclude, under the language of the 2004 Texas statute, that Madrid's conviction is not a forcible sex offense within the meaning of § 4B1.2.

We have previously recognized that force does not need to be physical, but can be coercive. *United States v. Romero–Hernandez*, 505 F.3d 1082, 1088–89 (10th Cir.2007). However, force must be a part of the criminal statute, not the factual conduct of the defendant, for a conviction to qualify under the modified categorical approach. Thus, as we have previously held, a statute encompassing situations in which the victim may factually consent to sexual activity is not a forcible sex offense. *Wray*, 776 F.3d at 1188. In *Wray*, we held that a Colorado statutory rape law which requires a 10–year age difference is not a forcible sex offense because "[t]he absence of legal consent does not preclude the possibility, in the context of statutory rape, of factual consent." *Id.* We so held because the Colorado statute distinguished between forcible and non-forcible sexual assaults. *Id.* Like the Colorado statute at issue in *Wray*, the Texas statute distinguishes between forcible and non-forcible sexual assault. *Compare* § 22.021(a)(1)(A)(i) (including the phrase "without that person's consent") *with* § 22.021(a)(1)(B)(i) (identically worded to § 22.021(a)(1)(A)(i) but omitting the phrase "without that person's consent").[5] The ***1209** subsections under which Madrid was convicted criminalize sexual relations with a child under the age of fourteen, but are silent as to the issue of factual consent. Thus, as in *Wray*, we respect this distinction by holding that Madrid's Texas conviction does not qualify as a forcible sex offense under § 4B1.2 cmt. n.1.[6]

This holding does not contradict our precedent recognizing that statutes which require a showing of coercive force qualify as forcible sex offenses. For example, we have held that a conviction for aggravated incest qualifies as a crime of violence. This is because the "power asymmetry implicit" in the crime of sexual penetration between an adult and his natural child necessarily includes coercive force. *United States v. Vigil*, 334 F.3d 1215, 1220 (10th Cir.2003). The government invites us to conclude that an element of coercive force may be found in the Texas statute because of the power imbalance between an adult assailant and a child victim. Perhaps we would so conclude if we considered the specific facts of Madrid's conviction, as the government urges through its repeated reference to the age of the victim and details of Madrid's crime. But our inquiry is limited to the statute itself, not the underlying facts of the crime; we look at the Texas statute to determine if proving force is a necessary part of the conviction, not whether the conviction is for an offense in which force was factually used. *See Descamps*, 133 S.Ct. at 2283–84.[7]

Unlike the portion of the incest statute at issue in *Vigil*, the Texas statute does not *require* the perpetrator to occupy a position of power or control. Under the plain text of the statute, two 13–year–old children engaging in consensual sexual activities could both be convicted of this crime, as could a 14–year–old engaging in consensual sexual activities with a 13–year–old. A limited age differential between the victim and perpetrator is not an affirmative defense to § 22.021(a)(1)(B)(i) & (a)(2)(B). *See* Tex.

Pen.Code § 22.011(e)(2)(A) & (B)(i) (limiting defense of three-year-or-less age differential to crimes in which the victim is over the age of fourteen).

***1210** Because the statute under which Madrid was convicted does not necessarily require force or coercion, we hold that Madrid's conviction does not qualify as a forcible sex offense. [8]

C

Having concluded that Madrid's conviction does not have as an element the use, threatened use, or attempted use of force, and that it is not a forcible sex offense, we turn to whether his conviction can be a considered a crime of violence under the residual clause of the Guidelines. In light of the Supreme Court's decision in *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), we hold that the residual clause is unconstitutionally vague, and cannot be used to justify the enhancement of Madrid's sentence.

1

[8] After briefing was complete in this case, the Supreme Court held that the residual clause of the Armed Career Criminal Act ("ACCA") defining "violent felony" was unconstitutionally vague. *Johnson*, 135 S.Ct. at 2557; *see also United States v. Snyder*, 793 F.3d 1241, 1245–46 (10th Cir.2015) (applying *Johnson*). The ACCA residual clause is "virtually identical" to the residual clause of the Guidelines, and as such, this Court has consistently applied the same analysis to both clauses. *See United States v. Thomas*, 643 F.3d 802, 805 (10th Cir.2011) ("Because of [the] commonality of language in the residual clauses of the ACCA and USSG § 4B1.2(a), we have consistently interpreted them identically."); *see also Wray*, 776 F.3d at 1184–85; *United States v. McConnell*, 605 F.3d 822, 828 (10th Cir.2010).

In *Johnson*, the Supreme Court clarified that a void for vagueness challenge can be sustained if the challenged provision is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." 135 S.Ct. at 2556. Although the first prong focuses on informing individuals of the potential criminal repercussions of their actions, the second prong addresses "arbitrary enforcement by judges." *Id.* at 2557.

[9] *Johnson* is unambiguous. The vagueness doctrine exists not only to provide notice to individuals, but also to prevent judges from imposing arbitrary or systematically inconsistent sentences. The Supreme Court made this clear when it struck down the ACCA residual clause because of the "unavoidable uncertainty and arbitrariness of adjudication" that it created. *Id.* at 2562. Moreover, the Court noted that its own "repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy." *Id.*

The concerns about judicial inconsistency that motivated the Court in *Johnson* lead us to conclude that the residual clause of the Guidelines is also unconstitutionally vague. If one iteration of the clause is unconstitutionally vague, so too is the other. *Cf., e.g., United States v. Tiger*, 538 F.3d 1297, 1298 (10th Cir.2008) (remanding ***1211** § 4B1.2(a) sentencing enhancement because a Supreme Court decision construing the ACCA "applies equally to the sentencing guidelines"). Given our reliance on the ACCA for guidance in interpreting § 4B1.2, it stretches credulity to say that we could apply the residual clause of the Guidelines in a way that is constitutional, when courts cannot do so in the context of the ACCA.

[10] That the Guidelines are advisory, and not statutory, does not change our analysis. The Supreme Court has held that the Guidelines are subject to constitutional challenge "notwithstanding the fact that sentencing courts possess discretion to deviate from the recommended sentencing range." *Peugh v. United States*, —— U.S. ——, 133 S.Ct. 2072, 2082, 186 L.Ed.2d 84 (2013) (citation omitted). Further, the Guidelines are the mandatory starting point for a sentencing determination; a district court can be reversed for failing to correctly apply them despite the ability to later deviate from the recommended range. *Gall*

v. United States, 552 U.S. 38, 49–51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007). Because the Guidelines are the beginning of all sentencing determinations, and in light of the "unavoidable uncertainty and arbitrariness of adjudication under the residual clause," *Johnson*, 135 S.Ct. at 2562, we hold that the residual clause of § 4B1.2(a)(2) is void for vagueness. [9]

2

[11] [12] Having held that the residual clause of § 4B1.2 is unconstitutionally vague, we must also determine the impact of this holding on Madrid's sentence. Because Madrid did not assert below that the residual clause is void for vagueness, we review for plain error. *See* Fed. R. Crim P. 52(b). Plain error occurs "when there is (1) error, (2) that is plain, which (3) affects substantial rights, and which (4) seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Frost*, 684 F.3d 963, 971 (10th Cir.2012) (quotation omitted).

***1212 [13]** Because the residual clause is unconstitutionally vague following *Johnson*, sentencing Madrid under the residual clause was an error. And when case law alters the legal analysis between the time of trial and the time of appeal, "it is enough that an error be 'plain' at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997). As discussed *infra*, the residual clause is unconstitutionally vague at the time of this appeal. [10]

"To satisfy the third prong of the plain error test, [the defendant] must demonstrate that the error affected his substantial rights, i.e., that the error disturbed 'the outcome of the district court proceedings.' " *United States v. Taylor*, 413 F.3d 1146, 1154 (10th Cir.2005). Madrid must show "a reasonable probability that, but for the error claimed, the result of the proceeding would have been different." *United States v. Gonzalez–Huerta*, 403 F.3d 727, 733 (10th Cir.2005) (citation omitted). The enhancement of Madrid's sentence due to his classification as a career offender is sizable: without it, the recommended range under the Guidelines was 92–115 months, compared to 188–235 months with the enhancement. As he was sentenced to the shortest recommended sentence within the enhanced recommendation (188 months), it seems reasonably probable that, without the enhancement, Madrid's recommended sentence would be much shorter.

Finally, to satisfy the fourth prong, the error must implicate "core notions of justice," or "fundamental fairness issues." *United States v. Sierra–Castillo*, 405 F.3d 932, 941–42 (10th Cir.2005). We have recognized that when the "correct application of the sentencing laws would likely significantly reduce the length of the sentence," circuit courts have almost uniformly held the error to implicate fundamental fairness issues. *See United States v. Brown*, 316 F.3d 1151, 1161 (10th Cir.2003) ("[F]airness is undermined where a court's error impose[s] a longer sentence than might have been imposed had the court not plainly erred." (emphasis omitted)). Madrid received an enhanced sentence under an unconstitutional sentencing Guideline, undermining the fundamental fairness of his sentencing proceedings.

We thus hold that Madrid has established plain error on appeal and is entitled to resentencing.

***1213 III**

Under the plain language of § 22.021(a)(1)(B)(i) & (a)(2)(B), it is not necessary for the Government to prove that the defendant used force—coercive or otherwise—in the commission of the crime. Madrid's Texas conviction thus does not qualify as a crime of violence under the § 4B1.2(a)(1) elements approach. For the same reason, it does not qualify as a "forcible sex offense" under § 4B1.2 cmt. n.1, a conclusion further compelled by our holding in *Wray*, 776 F.3d at 1188. In light of *Johnson*, reliance upon the § 4B1.2(a)(2) residual clause to enhance Madrid's sentence is unconstitutional. Madrid's Texas conviction therefore does not qualify as a "crime of violence" under § 4B1.2.

We accordingly **REMAND** to the district court with instructions to **VACATE** Madrid's sentence and to resentence in a manner not inconsistent with this opinion.

All Citations

805 F.3d 1204

Footnotes

1 All citations to § 22.021 herein refer to the 2004 version of the Texas statute, unless otherwise specified.

2 Madrid does not dispute that his New Mexico conviction for cocaine trafficking qualifies as a controlled substance offense.

3 Such commentary is authoritative "unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993).

4 The explicit inclusion in the Guidelines of "*forcible* sex offenses" makes the analysis between the force-as-an-element crimes of violence and the enumerated crimes of violence very similar when applied to sex offenses. This analysis is less similar in the case of other enumerated crimes for which force is not an inherent part of the offense (e.g., extortion, arson, burglary, etc.).

5 That a conviction under § 22.021(a)(1)(B)(i) & (a)(2)(B) does not qualify as a "forcible sex offense" is further confirmed by a subsequent amendment to the statute by the Texas Legislature. As amended, the statute includes an increased penalty if "the victim of the offense is younger than fourteen years of age at the time the offense is committed and the actor commits the offense in a manner described by Subsection (a)(2)(A)." § 22.021(f)(2) (2015). Section 22.021(a)(2)(A) includes a list of aggravating factors that involve force or coercion, such as "caus [ing] serious bodily injury," § 22.021(a)(2)(A)(i), "plac[ing] the victim in fear [of] death, serious bodily injury, or kidnapping," § 22.021(a)(2)(A)(ii), "us[ing] or exhibit[ing] a deadly weapon," § 22.021(a)(2)(A)(iv), and administering common "date rape" drugs, § 22.021(a)(2)(A)(vi). The statute thus provides a harsher penalty for sexual acts with children under the age of fourteen when force or coercion is involved than for an ordinary conviction for statutory rape under § 22.021(a)(2)(B).

6 In *United States v. Rooks*, 556 F.3d 1145 (10th Cir.2009), we held that § 22.011(a)(1)(A) qualifies as a crime of violence because it requires sexual penetration "*without* consent." *Rooks*, 556 F.3d at 1148 (emphasis added) (discussing Tex. Penal Code § 22.011(a)(1)(A) (1990)). But *Rooks* explicitly reserved the question of whether "the statutory rape covered by § 22.011(a)(2) would be a crime of violence." *Id.* Moreover, although *Rooks* recognized that "there is some support" to consider § 22.011(a)(1)(A) a crime of violence under the § 4B1.2(a)(1) elements approach, it held that § 22.011(a)(1)(A) qualifies as a crime of violence under the § 4B1.2(a)(2) residual clause, which, as discussed *infra*, we now hold to be unconstitutional. *Rooks*, 556 F.3d at 1149.

7 The government also argues that force can be inferred because the Texas Supreme Court held in *In re B.W.*, 313 S.W.3d 818 (Tex.2010), that sexual conduct with individuals under the age of fourteen is forcible as a matter of law. But the Texas Supreme Court held no such thing. Rather, it held that a 13–year–old child could not be adjudicated delinquent for prostitution because she could not legally consent to sex. *Id.* at 820–21. It did not conclude that a child under the age of fourteen cannot factually consent to sexual activity, and explicitly distinguished factual and legal consent. *Id.* at 824.

8 *United States v. Reyes–Alfonso*, 653 F.3d 1137 (10th Cir.2011), is also inapposite because it involved a sentencing under § 2L1.2(b), which concerns sentence enhancements for defendants convicted of unlawfully entering or remaining in the United States. *Reyes–Alfonso*, 653 F.3d at 1141. Unlike § 4B1.2, § 2L1.2 explicitly defines sexual abuse of a minor and statutory rape as "crimes of violence." § 2L1.2 cmt. n. 1(B)(iii). As we explained in *Wray*, "[t]he express inclusion in one part of the Guidelines of statutory rape and 'forcible sex offenses' where consent is not legally valid suggests, at a minimum, that statutory rape offenses not precluding the possibility of factual consent are not per se 'forcible sex offenses' under § 4B1.2." 776 F.3d at 1188.

9 We have previously noted that there is a conflict among the circuits in regard to whether the Guidelines may be challenged on vagueness grounds. *See United States v. Bennett*, 329 F.3d 769, 777 n. 6 (10th Cir.2003). At least three courts of appeals have held or assumed that the Guidelines can be challenged on vagueness grounds. *See United States v. Gallagher*, 99 F.3d 329, 334 (9th Cir.1996) ("[V]ague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute."); *see also United States v. Maurer*, 639 F.3d 72 (3d Cir.2011) (holding guideline was not unconstitutionally vague on the merits); *United States v. Savin*, 349 F.3d 27, 38 (2d Cir.2003) (same). Three appellate courts have disagreed with this result, holding that the Guidelines may not be challenged for vagueness. *See United States v. Tichenor*, 683 F.3d 358, 363–66 (7th Cir.2012), *United States v. Smith*, 73 F.3d 1414, 1417–18 (6th Cir.1996); *United States v. Wivell*, 893 F.2d 156, 159–60 (8th Cir.1990). These cases, however, all predate *Peugh*, 133 S.Ct. at 2082, in which the Supreme Court held that the Guidelines could be challenged as a violation of the ex post facto clause, despite being merely advisory. Further, the Sixth Circuit and

Eighth Circuit already appear to have shifted course in light of *Johnson*. *See UnitedStates v. Taylor*, No. 14–2635 803 F.3d 931, 933, 2015 WL 5918562, at *2 (8th Cir. Oct. 9, 2015) (to be published in F.3d) ("That the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful after *Johnson* "); *United States v. Franklin*, No. 14–5093, —F.3d ——, ——, 2015 WL 4590812, at *11 (6th Cir. July 31, 2015) (unpublished) (vacating and remanding an enhancement under the residual clause of the Guidelines "in light of Johnson"); *United States v. Harbin*, 610 Fed.Appx. 562, 563 (6th Cir.2015) (unpublished) (vacating and remanding an enhancement under the residual clause, § 4B1.2(a)(2), because defendant "is entitled to the same relief as offenders sentenced under the residual clause of the ACCA").

10 It is worth noting that other circuits have recognized that *Johnson* calls into question whether the Guidelines can be challenged for vagueness. Although the Sixth Circuit has already held that *Johnson* applies to the Guidelines, *see, e.g.*, *United States v. Franklin*, 2015 WL 4590812, at *11, the Seventh and First Circuits have recognized that this remains an open question, despite some circuits previously holding the Guidelines not subject to vagueness challenges. *United States v. Rollins*, 800 F.3d 859, 865 (7th Cir.2015) (to be published in F.3d) ("Accordingly, we do not address *Johnson's* effect on the career-offender guideline; that question remains open in this circuit."); *United States v. Castro–Vazquez*, 802 F.3d 28, 38, 2015 WL 5172839, at *9 (1st Cir.2015) (to be published in F.3d) ("We do not decide whether the residual clause of the guidelines fails under *Johnson*."). Though the Eleventh Circuit recently held the Guidelines are not subject to constitutional challenge, the cited cases supporting its holding all predate *Peugh* and *Johnson*, and the Eleventh Circuit does not address the "arbitrary enforcement by judges" with which *Johnson* was concerned. *United States v. Matchett*, 802 F.3d 1185, 1193–95, 2015 WL 5515439, at *6–7 (11th Cir.2015) (to be published in F.3d). Further, an error may be plain "even if ... there are no Supreme Court or Tenth Circuit cases that have directly opined on the question. Indeed, even if there is a split among our sister circuits ... that would not necessarily prevent us from concluding that ... [there] was clear or obvious error." *United States v. Goodwin*, No. 13–1466, —— F.3d ——, ——, 2015 WL 5167789, at *3 n. 2 (10th Cir. Sept. 4, 2015) (unpublished) (citations omitted).

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803 F.3d 1110
United States Court of Appeals,
Ninth Circuit.

James Garcia DIMAYA, Petitioner,
v.
Loretta E. LYNCH, Attorney General, Respondent.

No. 11–71307. | Argued and Submitted Sept. 1, 2015. | Filed Oct. 19, 2015.

Synopsis

Background: Native and citizen of the Philippines filed petition for review of Board of Immigration Appeals' (BIA) determination that his California convictions for first-degree residential burglary were categorically "crimes of violence" rendering him removable for having been convicted of aggravated felony.

[Holding:] The Court of Appeals, Reinhardt, Circuit Judge, held that Immigration and Nationality Act's (INA) definition of "aggravated felony" was unconstitutionally vague.

Petition granted.

Callahan, Circuit Judge, dissented and filed opinion.

West Codenotes

Held Unconstitutional
8 U.S.C.A. § 1101(a)(43)(F)

Attorneys and Law Firms

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On Petition for Review of an Order of the Board of Immigration Appeals. Agency No. A043–888–256.

Before: STEPHEN REINHARDT, KIM McLANE WARDLAW, and CONSUELO M. CALLAHAN, Circuit Judges.

Opinion by Judge REINHARDT; Dissent by Judge CALLAHAN.

OPINION

REINHARDT, Circuit Judge:

Petitioner James Garcia Dimaya seeks review of the Board of Immigration Appeals' (BIA) determination that a conviction for burglary under California Penal Code Section 459 is categorically a "crime of violence" as defined by 8 U.S.C. § 1101(a)(43)(F), a determination which rendered petitioner removable for having been convicted of an aggravated felony. During the pendency of petitioner's appeal, the United States Supreme Court decided *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), which held that the Armed Career Criminal Act's ("ACCA") so-called "residual clause" definition of a "violent felony" is unconstitutionally vague. In this case, we consider whether language similar to ACCA's residual clause that is incorporated into § 1101(a)(43)(F)'s definition of a crime of violence is also void for vagueness. We hold that it suffers from the same indeterminacy as ACCA's residual clause and, accordingly, grant the petition for review.

I

Petitioner, a native and citizen of the Philippines, was admitted to the United States in 1992 as a lawful permanent resident. In both 2007 and 2009, petitioner was convicted of first-degree residential burglary under California Penal Code section 459 and sentenced each time to two years in prison. If a non-citizen is convicted of an aggravated felony, he is subject to removal. 8 U.S.C. § 1227(a)(2)(A)(iii). Citing petitioner's two first-degree burglary convictions, the Department of Homeland Security ("DHS") charged that petitioner was removable because he had been convicted of a "crime of violence ... for which the term of imprisonment [was] at least one year"—an aggravated felony under 8 U.S.C. § 1101(a)(43)(F). [1] That statute ***1112** defines a "crime of violence" by reference to 18 U.S.C. § 16, which provides the following definition:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The Immigration Judge (IJ) agreed with DHS that first-degree burglary in California is a crime of violence. Citing § 16(b) and *United States v. Becker*, 919 F.2d 568, 573 (9th Cir.1990), the IJ explained that "unlawful entry into a residence is by its very nature an offense where is apt to be violence [sic], whether in the efforts of the felon to escape or in the efforts of the occupant to resist the felon." Because the charging documents for each conviction alleged an unlawful entry, and because the term of imprisonment for each conviction was greater than one year, the IJ determined that these convictions were crimes of violence. On the basis of this conclusion, the IJ held that petitioner was removable and ineligible for any relief. The BIA dismissed petitioner's appeal on the same ground. Citing § 16(b) and *Becker*, the BIA concluded that "[e]ntering a dwelling with intent to commit a felony is an offense that by its nature carries a substantial risk of the use of force," and therefore affirmed the IJ's holding that petitioner was convicted of a crime of violence. [2]

Petitioner filed a timely petition with this Court for review of the BIA's decision. After the parties argued this case, the United States Supreme Court decided *Johnson* and, because the definition of a crime of violence that the BIA relied on in this case is similar to the unconstitutional language in ACCA's residual clause, [3] we ordered supplemental briefing and held a supplemental oral argument regarding whether § 16(b), as incorporated into the INA, is also unconstitutionally vague. We have jurisdiction under 8 U.S.C. § 1252(a)(2)(D) to review questions of law, including whether language in the immigration statutes is void for vagueness. *See Alphonsus v. Holder*, 705 F.3d 1031, 1036–37 (9th Cir.2013). That question, as a pure question of law, receives *de novo* review from this Court. *Aguilar–Ramos v. Holder*, 594 F.3d 701, 704 (9th Cir.2010).

II

[1] **[2]** The Fifth Amendment's Due Process Clause "requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Alphonsus*, 705 F.3d at 1042 (quoting *Kolender* ***1113** *v. Lawson*, 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983)). Although most often invoked in the context of criminal statutes, the prohibition on vagueness also applies to civil statutes, including those concerning the criteria for deportation. *Jordan v. De George*, 341 U.S. 223, 231, 71 S.Ct. 703, 95 L.Ed. 886 (1951) ("Despite the fact that this is not a criminal statute, we shall nevertheless examine the application of the vagueness doctrine to this case. We do this in view of the grave nature of deportation."); *see also A.B. Small Co. v. Am. Sugar Ref. Co.*, 267 U.S. 233, 239, 45 S.Ct. 295, 69 L.Ed. 589 (1925) ("The defendant attempts to distinguish [prior vagueness] cases because they were criminal prosecutions. But that is not an adequate distinction. The ground or principle of the decisions was not such as to be applicable only to criminal prosecutions.").

Previously, we have recognized the vagueness doctrine's applicability in the context of withholding of removal "because of the harsh consequences attached to ... denial of withholding of removal." *Alphonsus*, 705 F.3d at 1042 (citing *Jordan*, 341 U.S. at 230–31, 71 S.Ct. 703). In this case, Petitioner challenges a statute as unconstitutionally vague in the context of denial of cancellation of removal.

For due process purposes, this context is highly analogous to denial of withholding of removal because both pose the harsh consequence of almost certain deportation. Under withholding of removal, a non-citizen who is otherwise removable cannot be deported to his home country if he establishes that his "life or freedom would be threatened in that country because of [his] race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1231(b)(3)(A). Under cancellation of removal, immigration authorities may cancel the removal of a lawful permanent resident who satisfies certain criteria based on length of residency, good behavior, and exceptional hardship. *Id.* § 1229b(b)(1). Non-citizens who commit certain criminal offenses are ineligible for these forms of relief. *See id.* §§ 1231(b)(3)(B)(ii), 1229b(b)(1)(C). As with denial of withholding of removal, then, denial of cancellation of removal renders an alien ineligible for relief, making deportation "a virtual certainty." *United States v. Bonilla*, 637 F.3d 980, 984 (9th Cir.2011).

[3] The government argues that our circuit's reliance on *Jordan* "is misguided as *Jordan* did not authorize vagueness challenges to deportation statutes." We find this suggestion baffling. *Jordan* considered whether the term "crime involving moral turpitude" in section 19(a) of the Immigration Act of 1917, a type of offense that allowed for a non-citizen to "be taken into custody and *deported*," was void for vagueness. 341 U.S. at 225–31, 71 S.Ct. 703 (emphasis added). In considering this challenge, the Court explicitly rejected the argument that the vagueness doctrine did not apply. *Id.* at 231, 71 S.Ct. 703. The government also argues that subsequent Supreme Court decisions rejected due process challenges to various immigration statutes. *See Marcello v. Bonds*, 349 U.S. 302, 314, 75 S.Ct. 757, 99 L.Ed. 1107 (1955); *Galvan v. Press*, 347 U.S. 522, 530–31, 74 S.Ct. 737, 98 L.Ed. 911 (1954); *Harisiades v. Shaughnessy*, 342 U.S. 580, 588–91, 72 S.Ct. 512, 96 L.Ed. 586 (1952). None of these cases, however, suggests that the Due Process Clause does not apply to deportation proceedings. Nor could they, for it "is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings." *Demore v. Kim*, 538 U.S. 510, 523, 123 S.Ct. 1708, 155 L.Ed.2d 724 (2003) (internal quotation marks omitted).

As the Supreme Court recognized in *Jordan*, a necessary component of a non- ***1114** citizen's right to due process of law is the prohibition on vague deportation statutes. Recently, the Supreme Court noted the need for "efficiency, fairness, and predictability in the administration of immigration law." *Mellouli v. Lynch*, —— U.S. ——, 135 S.Ct. 1980, 1987, 192 L.Ed.2d 60 (2015). Vague immigration statutes significantly undermine these interests by impairing non-citizens' ability to "anticipate the immigration consequences of guilty pleas in criminal court." *Id.* (internal quotation marks omitted); *see also Padilla v. Kentucky*, 559 U.S. 356, 364, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010) ("[A]ccurate legal advice for noncitizens accused of crimes has never been more important" because "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." (footnote omitted)). For

these reasons, we reaffirm that petitioner may bring a void for vagueness challenge to the definition of a "crime of violence" in the INA. [4]

III

To understand *Johnson* 's effect on this case, it is helpful to view § 16(b), as incorporated into the INA, alongside the residual clause at issue in *Johnson.* The INA provides for the removal of non-citizens who have been "convicted of an aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). Its definition of an aggravated felony includes numerous offenses, including "a crime of violence (as defined in section 16 of Title 18 ...)." 8 U.S.C. § 1101(a)(43)(F). The subsection of 18 U.S.C. § 16 that the BIA relied on in this case defines a crime of violence as an "offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). Had Congress written out the relevant definition in full instead of relying on cross-referencing, a lawful permanent resident would be removable if "convicted of an offense that is a felony and that, by its nature, *involves a substantial risk that physical force against the person or property of another may be used* in the course of committing the offense" (emphasis added). The language in ACCA that *Johnson* held unconstitutional is similar. The ACCA provision defined a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year [i.e., a felony] ... that ... *involves conduct that presents a serious potential risk of physical injury to another*." 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added). Importantly, both the provision at issue here and ACCA's residual clause are subject to the same mode of analysis. Both are subject to the categorical approach, which demands that courts "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." [5] *Leocal* ***1115** *v. Ashcroft,* 543 U.S. 1, 7, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004). Specifically, courts considering both § 16(b) and the residual clause must decide what a " 'usual or ordinary' violation" of the statute entails and then determine how great a risk of injury that "ordinary case" presents. *Rodriguez–Castellon v. Holder,* 733 F.3d 847, 854 (9th Cir.2013) (quoting *United States v. Ramos–Medina,* 706 F.3d 932, 938 (9th Cir.2013)).

In *Johnson,* the Supreme Court recognized two features of ACCA's residual clause that "conspire[d] to make it unconstitutionally vague." 135 S.Ct. at 2557. First, the Court explained, the clause left "grave uncertainty" about "deciding what kind of conduct the 'ordinary case' of a crime involves." *Id.* That is, the provision "denie[d] fair notice to defendants and invite[d] arbitrary enforcement by judges" because it "tie[d] the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* Second, the Court stated, ACCA's residual clause left "uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558. By combining these two indeterminate inquiries, the Court held, "the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates." [6] *Id.* On that ground it held the residual clause void for vagueness. The Court's reasoning applies with equal force to the similar statutory language and identical mode of analysis used to define a crime of violence for purposes of the INA. The result is that because of the same combination of indeterminate inquiries, § 16(b) is subject to identical unpredictability and arbitrariness as ACCA's residual clause. In sum, a careful analysis of the two sections, the one at issue here and the one at issue in *Johnson,* shows that they are subject to the same constitutional defects and that *Johnson* dictates that § 16(b) be held void for vagueness.

A

In *Johnson,* the Supreme Court condemned ACCA's residual clause for asking judges "to imagine how the idealized ordinary case of the crime subsequently plays out." *Id.* at 2557–58. To illustrate its point, the Court asked rhetorically whether the "ordinary instance" of witness tampering involved "offering a witness a bribe" or instead "threatening a witness with violence." *Id.* at 2557; *see also id.* at 2558 (It is just as likely that "a violent encounter may ensue" during an attempted burglary as it is that "any confrontation that occurs ... 'consist[s] of nothing more than the occupant's yelling "Who's there?" from his window, and the burglar's running ***1116** away.' " (quoting *James v. United States,* 550 U.S. 192, 211, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), and *id.* at 226, 127 S.Ct. 1586 (Scalia, J., dissenting))). [7]

As with ACCA's residual clause, the INA's crime of violence provision requires courts to "inquire whether 'the conduct encompassed by the elements of the offense, in the ordinary case, presents' " a substantial risk of force. *Delgado–Hernandez v. Holder*, 697 F.3d 1125, 1128 (9th Cir.2012) (quoting *James*, 550 U.S. at 208, 127 S.Ct. 1586); *see also Rodriguez–Castellon*, 733 F.3d at 854. We see no reason why this aspect of *Johnson* would not apply here, and indeed the government concedes that it does. As with the residual clause, the INA's definition of a crime of violence at issue in this case offers "no reliable way to choose between these competing accounts" of what a crime looks like in the ordinary case. *Johnson*, 135 S.Ct. at 2558.

B

In many circumstances, of course, statutes require judges to apply standards that measure various degrees of risk. *See* Supplemental Brief for Respondent at 1a, *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (No. 13–7120) (cataloguing federal statutes). The vast majority of those statutes pose no vagueness problems because they "call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." [8] *Johnson*, 135 S.Ct. at 2561. The statute at issue in *Johnson* was not one of those statutes, however. Nor is the provision at issue here. If the uncertainty involved in describing the "ordinary case" of a crime was not enough, its combination with the uncertainty in determining the degree of risk was. ACCA's violent felony definition requires judges to apply "an imprecise 'serious potential risk' [9] standard ***1117** ... to [the] judge-imagined abstraction" of a crime in the ordinary case. *Id.* at 2558. The same is equally true of the INA's definition of a crime of violence at issue here. Section 16(b) gives judges no more guidance than does the ACCA provision as to what constitutes a substantial enough risk of force to satisfy the statute. Accordingly, *Johnson* 's holding with respect to the imprecision of the serious potential risk standard is also clearly applicable to § 16(b). As with ACCA's residual clause, § 16(b)'s definition of a crime of violence, combines "indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as" a crime of violence. [10] 135 S.Ct. at 2558.

C

Notwithstanding the undeniable identity of the constitutional defects in the two statutory provisions, the government and dissent offer several unpersuasive arguments in an attempt to save the INA provision at issue in this case. First, the government and dissent argue that the Supreme Court found ACCA's standard to be arbitrary in part because the residual clause "force[d] courts to interpret 'serious potential risk' in light of the four enumerated crimes" in the provision, [11] crimes which are "far from clear in respect to the degree of risk each poses." *Id.* (quoting *Begay v. United States*, 553 U.S. 137, 143, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008) (internal quotation marks omitted)). It is true that, after the Court set forth its holding in *Johnson*, it cited the provision's four enumerated offenses in responding to the government's argument that the Court's holding would cast doubt on the many criminal statutes that include language similar to the indeterminate term "serious potential risk." *Id.* at 2561. In doing so, however, it stated that while the ***1118** listed offenses added to the uncertainty, the fundamental reason for the Court's holding was the residual clause's "application of the 'serious potential risk' standard to an idealized ordinary case of the crime." [12] *Id.* In short, this response clearly reiterated that what distinguishes ACCA's residual clause from many other provisions in criminal statutes was, consistent with its fundamental holding, the use of the "ordinary case" analysis. *Johnson* therefore made plain that the residual clause was void for vagueness in and of itself for the reasons stated in reaching its decision, and not because of the clause's relation to the four listed offenses. [13]

Next, the government argues that ACCA's residual clause requires courts to consider the risk that would arise after completion of the offense, *see Johnson*, 135 S.Ct. at 2557, and that § 16(b) applies only to violence occurring "in the course of committing the offense," 18 U.S.C. § 16(b). First, we doubt that this phrase actually creates a distinction between the two clauses. For example, we have consistently held that California's burglary statute (the very statute at issue in this case) is a crime of violence for the

purposes of the INA precisely because of the risk that violence will ensue after the defendant has committed the acts necessary to constitute the offense. *Lopez–Cardona v. Holder*, 662 F.3d 1110, 1112 (9th Cir.2011) (describing the risk that a burglar "will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension" (quoting *Becker*, 919 F.2d at 571)). [14] By the time the risk of physical force against an occupant arises, however, the defendant has frequently already satisfied the elements of the offense of burglary under California law. *See* Cal.Penal Code § 459 (defining burglary as "enter[ing] any house, room, apartment, [etc.] ... with intent to commit grand or petit larceny or any felony"). More important, even if such a distinction did exist, it would not save the INA's definition of a crime of violence from unconstitutionality. The Court, in *Johnson*, held ACCA's residual clause to be unconstitutionally vague because it combined the indeterminate inquiry of "how to measure the risk posed by a crime" in the ordinary case with "indeterminacy about how much risk it takes for the crime to qualify as a violent felony." 135 S.Ct. at 2558. This reasoning applies equally whether the inquiry ***1119** considers the risk of violence posed by the commission and the aftereffects of a crime, or whether it is limited to consideration of the risk of violence posed by acts necessary to satisfy the elements of the offense. [15]

The government also argues that § 16(b) has not generated the same degree of confusion among courts that ACCA's residual clause generated. It notes that, in contrast to the five residual clause cases that the Supreme Court has decided in addition to *Johnson*, the Court has decided only a single case interpreting section 16(b). *See Leocal*, 543 U.S. at 10–11, 125 S.Ct. 377. That the Supreme Court has decided more residual clause cases than § 16(b) cases, however, does not indicate that it believes the latter clause to be any more capable of consistent application. We can discern very little regarding the merits of an issue from the composition of the Supreme Court's docket. The Court has

> repeatedly indicated that a denial of certiorari means only that, for one reason or another which is seldom disclosed, and not infrequently for conflicting reasons which may have nothing to do with the merits and certainly may have nothing to do with any view of the merits taken by a majority of the Court, there were not four members of the Court who thought the case should be heard.

Daniels v. Allen, 344 U.S. 443, 492, 73 S.Ct. 437, 97 L.Ed. 469 (1953); *see also Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 n. 1, 93 S.Ct. 647, 34 L.Ed.2d 577 (1973) (describing the "well-settled view that denial of certiorari imparts no implication or inference concerning the Court's view of the merits"). Moreover, the Supreme Court in recent years has decided substantially more federal criminal appeals than immigration appeals. The Court's history of deciding ACCA residual clause cases in greater numbers than INA crime of violence cases is thus consistent with its greater interest in federal criminal cases than in immigration cases. In fact, over this period the ratio of federal criminal cases to immigration cases significantly exceeds the ratio of ACCA residual clause cases to INA crime of violence cases on which the government relies. [16]

***1120 IV**

[4] In *Johnson*, the Supreme Court held that ACCA's residual clause "produces more unpredictability and arbitrariness than the Due Process Clause tolerates" by "combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony." 135 S.Ct. at 2558. Although the government can point to a couple of minor distinctions between the text of the residual clause and that of the INA's definition of a crime of violence, none undermines the applicability of *Johnson* 's fundamental holding to this case. As with ACCA, section 16(b) (as incorporated in 8 U.S.C. § 1101(a)(43)(F)) requires courts to 1) measure the risk by an indeterminate standard of a "judicially imagined 'ordinary case,' " not by real world-facts or statutory elements and 2) determine by vague and uncertain standards when a risk is sufficiently substantial. Together, under *Johnson*, these uncertainties render the INA provision unconstitutionally vague. [17]

We **GRANT** the petition for review and **REMAND** to the BIA for further proceedings consistent with this opinion.

CALLAHAN, Circuit Judge, dissenting:

Contrary to the majority's perspective, the Supreme Court's opinion in *Johnson v. United States*, —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015), does not infect 18 U.S.C. § 16(b)—or other statutes—with unconstitutional vagueness. Rather, the Supreme Court carefully explained that the statute there in issue, a provision of the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(2)(B), is unconstitutionally vague for two specific reasons: the clause (1) "leaves grave uncertainty about how to estimate the risk posed by a crime"; and (2) "leaves uncertainty about how much risk it takes for a crime to qualify as a violent crime." *Id.* at 2557–58. In contrast, § 16(b), as it has been interpreted by the Supreme Court and the Ninth Circuit, has neither of these shortcomings. The majority's contrary conclusion fails to appreciate the purpose of § 16(b), elevates the Supreme Court's reference to "ordinary cases" from an example to a rule, and ignores the Court's statement that it was not calling other statutes into question (which explains why the Court did not even mention *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004)). Accordingly, I dissent.

Our criminal and immigration laws are not as simple as the majority opinion implies. Accordingly, I first describe the purpose of § 16 and how courts have interpreted the statute, before reviewing the Supreme Court's decision in *Johnson*, and concluding that the twin concerns expressed by the Supreme Court in *Johnson* do not infect § 16(b).

I.

Title 18 U.S.C. § 16 contains two distinct definitions of "crime of violence," with distinct purposes, effects, and judicial pedigrees. Subsection (a) defines "crime of violence" as "an offense that has as an *element* the use, attempted use, or threatened use of physical force against the person or property of another." (emphasis added). Subsection (b) sets forth a distinct definition that covers offenses that ***1121** are not within subsection (a)'s definition. It states that "crime of violence" means "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." It follows that an offense that is a "crime of violence" under subsection (a) also meets the criteria in subsection (b), but that subsection (b) covers offenses that do not meet the criteria in subsection (a). These subsections serve different functions with different consequences.

An appreciation of the differences between the subsections and their roles informs my understanding of the Supreme Court's opinions in *Descamps v. United States*, —— U.S. ——, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), and *Moncrieffe v. Holder*, —— U.S. ——, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013). Although the terms "crime of violence," "violent felony," and "aggravated felonies" may appear to be synonymous to a lay person, courts have recognized that, as used in their statutory contexts, they are distinct terms of art covering distinct acts with different legal consequences.

A.

In *Descamps*, the Government sought an enhancement of Descamps' sentence under the ACCA, 18 U.S.C. § 924(e), on the basis that his California conviction for burglary was a "violent felony." [1] *Descamps*, 133 S.Ct. at 2281–82. In *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), the Supreme Court had established a "rule for determining when a defendant's prior conviction counts as one of ACCA's enumerated predicate offenses." *Descamps*, 133 S.Ct. at 2283. In other words, *Taylor* focused on whether the state crime and the enumerated federal predicate offense had the same elements. In *Taylor*, the Court first determined the federal definition of burglary, and then considered how courts were to determine whether a state conviction met that definition. [2] The Court, concerned with the substantive and practical problems of determining that the state conviction met the criteria for a federal offense, set forth a "categorical approach" instructing sentencing courts to look at the statutory definitions and not to the particular facts underlying a conviction. [3] *Descamps*, 133 S.Ct. at 2283 (citing *Taylor*, 495 U.S. at 600, 110 S.Ct. 2143).

***1122** In *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), the Court had established the "modified categorical approach," which allows a sentencing court to scrutinize a restricted set of materials to determine whether a state conviction matches the generic federal offense. The Supreme Court later explained in *Descamps* that the modified categorical approach was a tool "to identify, from among several alternatives, the crime of conviction so that the court can compare it to the generic offense." [4] 133 S.Ct. at 2285. The Court reiterated that its "elements-centric" approach was based on three grounds: (1) "it comports with ACCA's test and history"; (2) "it avoids the Sixth Amendment concerns that would arise from sentencing courts making findings of fact that properly belong to juries"; and (3) "it averts the practical difficulties and potential unfairness of a factual approach." *Id.* at 2287 (internal citation omitted).

Similar concerns with fairness underlie the Supreme Court's opinion in *Moncrieffe*, 133 S.Ct. 1678. The Court stated that it granted certiorari "to resolve a conflict among the Courts of Appeals with respect to whether a conviction under a statute that criminalizes conduct described by both [21 U.S.C.] § 841's felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that 'proscribes conduct punishable as a felony under' the CSA [Controlled Substance Act]." *Id.* at 1684. This, in turn, required a determination of whether the state conviction qualified as an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U.S.C. § 1101 *et seq.* [5] *Id.* The Court, accordingly, applied the categorical approach "to determine whether the state offense is comparable to an offense listed in the INA." *Id.* It explained that in order to satisfy the categorical approach, the state drug offense "must 'necessarily' proscribe conduct that is an offense under the CSA, and the CSA must 'necessarily' prescribe felony punishment for that offense." *Id.* at 1685. The Court concluded that Moncrieffe's state conviction failed to meet this standard, and accordingly, he was not convicted of an aggravated felony. *Id.* at 1687.

In both *Descamps* and *Moncrieffe*, the critical inquiry was whether the underlying state criminal conviction fit within a generic federal definition of a crime so that a defendant could be expected to have asserted all relevant defenses in his state trial. The underlying concerns had been set forth by the Supreme Court in *Shepard:*

> Developments in the law since *Taylor*, and since the First Circuit's decision in [*United States v.*] *Harris* [964 F.2d 1234 (1st Cir.1992)], provide a further reason to adhere to the demanding requirement ***1123** that any sentence under the ACCA rest on a showing that a prior conviction "necessarily" involved (and a prior plea necessarily admitted) facts equating to generic burglary. The *Taylor* Court, indeed, was prescient in its discussion of problems that would follow from allowing a broader evidentiary enquiry. "If the sentencing court were to conclude, from its own review of the record, that the defendant [who was convicted under a nongeneric burglary statute] actually committed a generic burglary, could the defendant challenge this conclusion as abridging his right to a jury trial?" 495 U.S. at 601, 110 S.Ct. 2143. The Court thus anticipated the very rule later imposed for the sake of preserving the Sixth Amendment right, that any fact other than a prior conviction sufficient to raise the limit of the possible federal sentence must be found by a jury, in the absence of any waiver of rights by the defendant. *Jones v. United States*, 526 U.S. 227, 243, n. 6 [119 S.Ct. 1215, 143 L.Ed.2d 311] (1999); see also *Apprendi v. New Jersey*, 530 U.S. 466, 490 [120 S.Ct. 2348, 147 L.Ed.2d 435] (2000).

544 U.S. at 24, 125 S.Ct. 1254 (alteration in original). Thus, for purposes such as sentencing under the ACCA, a state conviction is only an aggravated felony under § 16(a) if the court can fairly conclude that the conviction included all the elements of a federal offense.

B.

While 18 U.S.C. § 16(a) looks to whether the state conviction contained the elements of a federal offense, the Supreme Court and the circuit courts have recognized that § 16(b) asks a different question with different parameters and consequences. In *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377, a unanimous Court held that a Florida conviction for driving under the influence of alcohol was not a crime of violence under § 16(a) or § 16(b). *Id.* at 4, 125 S.Ct. 377. The opinion describes § 16(b) as follows:

> Section 16(b) sweeps more broadly than § 16(a), defining a crime of violence as including "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." But § 16(b) does not thereby encompass all negligent misconduct, such as the negligent operation of a vehicle. It simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense.... The classic example is burglary. A burglary would be covered under § 16(b) not because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that the burglar will use force against a victim in completing the crime.

543 U.S. at 10, 125 S.Ct. 377 (footnote omitted). Thus, when applying § 16(b), courts do not ask whether the state conviction contained the elements of a federal offense, but whether there was a "risk that the use of physical force against another might be required in committing" the state crime. 18 U.S.C. § 16(b).

We most recently recognized this distinct treatment of § 16(b) in *Rodriguez–Castellon v. Holder*, 733 F.3d 847 (9th Cir.2013). In this opinion, rendered after the Supreme Court issued its decision in *Descamps*, we explained:

> Under 18 U.S.C. § 16, the phrase "crime of violence" has two meanings. First, under § 16(a), a state crime of conviction is a crime of violence if it "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." ... ***1124** Second, even if the state crime does not include one of the elements listed in § 16(a), it is a "crime of violence" under § 16(b) if it is: (i) a felony; and (ii) "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16(b). The Supreme Court has explained that § 16(b) criminalizes conduct that "naturally involve[s] a person acting in disregard of the risk that physical force might be used against another in committing an offense." *Leocal v. Ashcroft*, 543 U.S. 1, 10, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004).

733 F.3d at 853–54.

Our holding in *Rodriguez–Castellon* is consistent with our prior opinions recognizing that first-degree burglary under California Penal Code § 459 remains an "aggravated felony" under § 16(b) even if the state crime did not include an element of the federal crime and thus was not an "aggravated felony" under § 16(a). *See United States v. Ramos–Medina*, 706 F.3d 932, 937–38 (9th Cir.2013).

In *Chuen Piu Kwong v. Holder*, 671 F.3d 872 (9th Cir.2011), we explained:

> The question for decision, then, is whether Kwong's [burglary] offense "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of [its commission]." 18 U.S.C. § 16(b).
>
> We answered that question in the affirmative some time ago in *United States v. Becker*, 919 F.2d 568, 573 (9th Cir.1990), where we held that "first-degree burglary under California law is a 'crime of violence' " as defined by 18 U.S.C. § 16(b). *See also United States v. Park*, 649 F.3d 1175, 1178–79 (9th Cir.2011). We pointed out in *Becker* that "[a]ny time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension." 919 F.2d at 571 (footnote omitted). [6]

Id. at 878.

Similarly, in *United States v. Avila*, 770 F.3d 1100, 1105 (4th Cir.2014), the Fourth Circuit concluded that "California first-degree burglary qualifies as a crime of violence under the residual clause of 18 U.S.C. § 16(b)." It held that it need look no further than the Supreme Court's opinion in *Leocal*, 543 U.S. at 10, 125 S.Ct. 377, in concluding that burglary was the classic example of an offense covered by § 16(b).

Thus, the Supreme Court, our prior decisions, and the Fourth Circuit, all recognize that the inquiries under § 16(a) and ***1125** § 16(b) are distinct, and that even though a state conviction for burglary may not include an element of a generic federal offense, as required to come within § 16(a), a burglary conviction nonetheless involves a substantial risk of physical force, and thus is covered by § 16(b).

II.

Having set forth the scope of § 16(b) and the courts' treatment of the section, I turn to the Supreme Court's opinion in *Johnson.*

A.

The Supreme Court held that the residual clause of the Armed Career Criminal Act of 1984 violates the Constitution's guarantee of due process.[7] The Court concluded "that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges." *Johnson,* 135 S.Ct. at 2557. The Court concluded that two features of the residual clause "conspire to make it unconstitutional." *Id.* at 2557. "In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* Second, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2558.

> By asking whether the crime "otherwise involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." *Begay [v. United States*], 553 U.S. [137] 143 [128 S.Ct. 1581, 170 L.Ed.2d 490 (2008)].... By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.
>
> *Id.* at 2558.

The Court then reviewed its prior efforts to establish a standard and concluded that "*James, Chambers,* and *Sykes* failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition."[8] *Id.* at 2559. The Court further noted that in the lower courts, the residual clause has created numerous splits and the clause has proved nearly impossible to apply consistently.[9] *Id.* at 2560. The Court concluded that ***1126** "[n]ine years' experience trying to derive meaning from the residual clause convinces us that we have embarked on a failed enterprise." *Id.*

The Court stated, in rejecting the argument that because there may be straightforward cases under the residual clause, the clause is not constitutionally vague:

> The Government and the dissent next point out that dozens of federal and state criminal laws use terms like "substantial risk," "grave risk," and "unreasonable risk," suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt. *See post,* at 2558–2559. Not at all. Almost none of the cited laws links a phrase such as "substantial risk" to a confusing list of examples. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, navy blue, or colors that otherwise involve shades of red' assuredly does so." *James,* 550 U.S., at 230, n. 7, 127 S.Ct. 1586, (Scalia, J., dissenting). More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages on a particular occasion. As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly ...

> some matter of degree," *Nash v. United States*, 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232 (1913). The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect," this abstract inquiry offers significantly less predictability than one "[t]hat deals with the actual, not with an imaginary condition other than the facts." *Int. Harvester Co. of Am. v. Kentucky*, 234 U.S. 216, 223, 34 S.Ct. 853, 58 L.Ed. 1284 (1914).

Id. at 2561.

The Court also declined the dissent's invitation "to save the residual clause from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged, not the risk posed by the ordinary case of the defendant's crime." *Id.* at 2562. It explained:

> In the first place, the Government has not asked us to abandon the categorical approach in residual-clause cases. In addition, *Taylor* had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes. *Taylor* explained that the relevant part of the Armed Career Criminal Act "refers to 'a person who ... has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U.S. at 600, 110 S.Ct. 2143. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Ibid. Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction.

Id. at 2562.

Finally, the opinion's penultimate paragraph reads:

> We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled. Today's decision ***1127** does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.

Id. at 2563.

B.

I read *Johnson* as setting forth a two-part test: whether the statute in issue (1) "leaves grave uncertainty about how to estimate the risk posed by the crime"; and (2) "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id.* at 2557–58. Applying this test, the Court faulted the residual clause for requiring potential risk to be determined in light of "four enumerated crimes—burglary, arson, extortion, and crimes involving the use of explosives ... [which] are far from clear in respect to the degree of risk each poses." *Id.* at 2558 (internal citation omitted). The Court's concern was clarified by its reference to a prior dissent by Justice Scalia: "The phrase 'shades of red,' standing alone does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, navy blue or colors that otherwise involve shades of red' assuredly does so." *Id.* at 2561.

The Court also faulted the residual clause for tying "the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements." *Id.* at 2557. However, the Court specifically stated that it was not abandoning the categorical approach, which, as noted, looks to the "ordinary case." *See Descamps*, 133 S.Ct. at 2285 (holding the categorical approach's central feature is "a focus on the elements, rather than the facts, of a crime"). It is true that *Descamps*, like § 16(a), looks to the elements of a crime, not to the potential risk from the crime. Nonetheless, in declining the dissent's suggestion that it "jettison for the residual clause ... the categorical approach," the Court recognized that there were "good reasons to adopt

the categorical approach," one of which is "the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction." *Johnson*, 135 S.Ct. at 2562. Thus, *Johnson* does not prohibit all use of the "ordinary case." It only prohibits uses that leave uncertain both how to estimate the risk and amount of risk necessary to qualify as a violent crime.

Indeed, such an interpretation seems compelled in light of the fact that *Johnson* did not even mention *Leocal v. Ashcroft*, 543 U.S. 1, 125 S.Ct. 377. In *Leocal*, the Supreme Court recognized the breadth of § 16(b) and noted that it "simply covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing the offense." *Id.* at 10, 125 S.Ct. 377.

Finally, I note that perhaps in an attempt to foreclose approaches such as that offered by today's majority in this appeal, the Supreme Court concluded by stating that its decision "does not call into question application of the Act to the four enumerated offenses [which include burglary] or the remainder of the Act's definition of a violent felony." *Johnson*, 135 S.Ct. at 2563.

III.

After such an esoteric discussion, it would be easy to lose sight of what is at issue in this case. Dimaya, a native and citizen of the Philippines, was twice convicted of first-degree residential burglary under California Penal Code § 459 and sentenced each time to two years in prison. The Department of Homeland Security charged Dimaya with being removable because he had been convicted of an aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which is a "crime of violence ... for which the term of imprisonment ***1128** [was] at least one year." That statute in turn defines "crime of violence" by reference to 18 U.S.C. § 16. Thus, we are asked whether the statutory scheme is somehow so vague or ambiguous as to preclude the BIA from concluding that Dimaya's two first-degree burglaries under California law are "crimes of violence" under § 16(b). Supreme Court precedent and our case law answer the question in the negative.

There is no uncertainty as to how to estimate the risk posed by Dimaya's burglary crimes. The Supreme Court held in *Leocal* that § 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." 543 U.S. at 10, 125 S.Ct. 377. The court emphasized that burglary as "the classic example" of a crime covered by 16(b) because "burglary, by its nature involves a substantial risk that the burglar will use force against a victim in completing the crime." [10] *Id. See also Taylor*, 495 U.S. at 599, 110 S.Ct. 2143 (a person has been convicted of a crime for sentencing enhancement "if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime").

We have consistently followed this line of reasoning. *See United States v. Becker*, 919 F.2d 568, 571 (9th Cir.1990) ("Any time a burglar enters a dwelling with felonious or larcenous intent there is a risk that in the course of committing the crime he will encounter one of its lawful occupants, and use physical force against that occupant either to accomplish his illegal purpose or to escape apprehension."); *Lopez–Cardona v. Holder*, 662 F.3d 1110, 1113 (9th Cir.2011) (noting that "*Becker* itself recognized that the California crime of burglary might not be a 'crime of violence' under a federal statute defining the term by reference to the generic crime, even though it is a 'crime of violence' under the risk-focused text of § 16(b)"); *Chuen Piu Kwong*, 671 F.3d at 877 (reaffirming that "first-degree burglary under [Cal.Penal Code] § 459 is a crime of violence because it involves a substantial risk that physical force may be used in the course of committing the offense.").

Nor is there any uncertainty as to "how much risk it takes for a crime to qualify as a violent felony," *Johnson*, 135 S.Ct. at 2558, when burglary is at issue. Section 16(b) itself requires a "substantial risk" of the use of physical force. As noted, neither the Supreme Court nor the Ninth Circuit has had any trouble in applying this standard. *See Leocal*, 543 U.S. at 10, 125 S.Ct. 377; *Chuen Piu Kwong*, 671 F.3d at 877; *Becker*, 919 F.2d at 571. Any person intent on committing a burglary inherently contemplates the risk of using force should his nefarious scheme be detected. Is this not what the Supreme Court was referring

to when it noted "we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct"? *Johnson*, 135 S.Ct. at 2561. [11]

***1129 IV.**

In *Johnson*, after nine years of trying to derive meaning from the residual clause, the Supreme Court held that it was unconstitutionally vague. Section 16(b) is not the ACCA's residual clause; nor has its standard proven to be unworkably vague. Over a decade ago, the Supreme Court in *Leocal* held that § 16(b) "covers offenses that naturally involve a person acting in disregard of the risk that physical force might be used against another in committing an offense." 543 U.S. at 10, 125 S.Ct. 377. Moreover, as the Supreme Court recognized, the statute sets forth the test of a "substantial risk that physical force against the person or property of any may be used in the course of committing the offense." 18 U.S.C. § 16(b). Certainly, there is no unconstitutional vagueness in this case, which involves the hallmark "crime of violence," burglary. *See Leocal*, 543 U.S. at 10, 125 S.Ct. 377. The Supreme Court will be surprised to learn that its opinion in *Johnson* rendered § 16(b) unconstitutionally vague, particularly as its opinion did not even mention *Leocal* and specifically concluded with the statement limiting its potential scope. [12] I fear that we have again ventured where no court has gone before and that the Supreme Court will have to intervene to return us to our proper orbit. Accordingly, I dissent.

All Citations

803 F.3d 1110, 15 Cal. Daily Op. Serv. 11,371, 2015 Daily Journal D.A.R. 11,532

Footnotes

1 DHS also charged that petitioner was removable for having committed two crimes of moral turpitude, *see* 8 U.S.C. § 1227(a)(2)(A)(ii), and for having committed a "theft offense ... or burglary offense for which the term of imprisonment [was] at least one year"—an aggravated felony under 8 U.S.C. § 1101(a)(43)(G). Although the Immigration Judge (IJ) agreed with DHS that petitioner was removable on either of these two grounds, the Board of Immigration Appeals (BIA) dismissed petitioner's appeal on the sole ground that he was removable for having committed a crime of violence under 8 U.S.C. § 1101(a)(43)(F). Therefore, whether the relevant definition of a "crime of violence" is constitutional is the only issue we reach.

2 Notwithstanding the fact that the BIA appeared to consider only the petitioner's 2007 conviction, the government argues in this case that both of petitioner's first-degree burglary convictions are crimes of violence under 18 U.S.C. § 16(b). This discrepancy is immaterial, as the same analysis applies to both convictions.

3 The subsection of ACCA that includes the residual clause defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year ... that ... 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)(ii) (emphasis added). As the Court noted in *Johnson*, the italicized words of this definition are known as the residual clause. 135 S.Ct. at 2555–56.

4 Several other Circuit Courts of Appeals have also entertained void for vagueness challenges to immigration statutes. *See Mhaidli v. Holder*, 381 Fed.Appx. 521, 525–26 (6th Cir.2010) (unpublished); *Arriaga v. Mukasey*, 521 F.3d 219, 222 (2d Cir.2008); *Garcia–Meza v. Mukasey*, 516 F.3d 535, 536 (7th Cir.2008).

5 Although it is largely irrelevant for the purposes of this case, the dissent's characterization of the categorical approach is incorrect. The dissent correctly explains that categorical approach cases such as *Descamps v. United States*, —— U.S. ——, 133 S.Ct. 2276, 186 L.Ed.2d 438 (2013), *Shepard v. United States*, 544 U.S. 13, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005), and *Taylor v. United States*, 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990) hold that a state conviction must include all elements of the equivalent federal generic offense to qualify as a violent felony. The dissent then goes on to assert, incorrectly, that those cases, which deal with ACCA, shed light on how to interpret § 16(a). *Taylor*, *Shepard*, and *Descamps* tell us nothing about § 16(a), however, because they do not interpret § 924(e)(2)(B)(i)—the subsection of ACCA with language identical to § 16(a). Instead, those cases consider a different subsection—the list of *enumerated felonies* that appears in § 924(e)(2)(B)(ii), of which burglary is one. *See Descamps*, 133 S.Ct. at 2281; *Shepard*, 544 U.S. at 16–17, 125 S.Ct. 1254; *Taylor*, 495 U.S. at 581–82, 110 S.Ct. 2143. Because § 16 does not include any enumerated felonies in either subsection (a) or (b), those cases are inapplicable.

6 The dissent essentially agrees with this reading except that it argues that *Johnson* "only prohibits uses [of § 16(b)] that leave uncertain both how to estimate the risk and amount of risk necessary to qualify as a violent crime." Nothing in *Johnson,* however, suggests that the Court considered the constitutionality of ACCA's residual clause in reference to the crime Johnson actually committed. To the contrary, the Court never discussed Johnson's predicate offense—unlawful possession of a short-barreled shotgun—but instead held in absolute terms that "imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process." *Johnson,* 135 S.Ct. at 2563. *Johnson* therefore clearly holds that the residual clause is unconstitutionally vague in all instances, not just for some subset of crimes.

7 "Does the ordinary burglar invade an occupied home by night or an unoccupied home by day?" *Johnson,* 135 S.Ct. at 2558. It seems that one arrives at a different answer about what the "ordinary case" of burglary involves whether one uses "[g]ut instinct" or "statistical analysis." *Id.* at 2557 (quoting *United States v. Mayer,* 560 F.3d 948, 952 (9th Cir.2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)). Although many people surely imagine the possibility of a violent encounter when they picture burglary, recent government statistics show that only about seven percent of burglaries nationwide involved incidents of violence. Bureau of Justice Statistics, *National Crime Victimization Survey: Victimization During Household Burglaries* 1 (Sept. 2010), http://www.bjs.gov/content/pub/pdf/vdhb.pdf. Such statistics only highlight the arbitrary nature of this inquiry, even in the seemingly easy case of burglary.

8 The dissent argues that any "person intent on committing a burglary inherently contemplates the risk of using force should his nefarious scheme be detected" and then asks "Is this not what the Supreme Court was referring to when it noted 'we do not doubt the constitutionality of laws that call for application of a qualitative standard such as "substantial risk" to real-world conduct?' " Dissent at 1126 (quoting *Johnson,* 135 S.Ct. at 2561). Plainly not. As the dissent's use of the word "inherently" proves, the dissent's argument does not rest on the facts of an actual burglary but instead on the dissent's conception of burglary in the ordinary case. A statute that allowed courts to evaluate the record to determine whether a defendant actually engaged in violence would fall within the language the dissent cites. However, as the Supreme Court has repeatedly made clear, when applying the categorical approach that ACCA and § 16(b) demand, courts must consider "what offense the noncitizen was 'convicted of' ... not what acts he committed." *Moncrieffe,* 133 S.Ct. at 1678.

9 ACCA's residual clause required courts to evaluate whether an offense posed "a serious potential risk" while the relevant INA definition asks whether an offense poses "a substantial risk." *Compare* 18 U.S.C. § 924(e)(2)(B)(ii), *with id.* § 16(b). Measuring whether an offense poses a "substantial" risk, however, is no less arbitrary than measuring whether it poses a "serious potential" one, and the government offers no suggestion to the contrary.

10 At the supplemental oral argument, the government argued that two recent decisions from other circuit courts of appeals conflict with our holding in this case. *See Ortiz v. Lynch,* 796 F.3d 932 (8th Cir.2015); *United States v. Fuertes,* No. 13–4755, —— F.3d ——, 2015 WL 4910113 (4th Cir. Aug. 18, 2015). Neither case, however, is of any help to the government. The Eighth Circuit noted that *Ortiz* "does not implicate the analysis in" *Johnson* because, in *Ortiz,* the government argued that the petitioner's conviction qualified as a crime of violence under § 16(a), a completely different statutory definition. *Ortiz,* 796 F.3d at 935–36 & n. 2. Indeed § 16(a) is highly similar to analogous language in ACCA, 18 U.S.C. § 924(e)(2)(B)(i), that *Johnson* left untouched. 135 S.Ct. at 2563 ("Today's decision does not call into question ... the remainder of the Act's definition of a violent felony."). *Fuertes* is of even less help, if possible. There, the Fourth Circuit held that it did not need to reach the question whether *Johnson* applied to language similar to § 16(b) that appears in 18 U.S.C. § 924(c)(3)(B) because, in any case, the defendant's offense did not satisfy the statutory language in question. *See Fuertes,* —— F.3d at —— – —— & —— n. 5, 2015 WL 4910113 at *9–10 & 9 n. 5. Finally, the dissent cites *In re Gieswein,* No. 15–6138, 802 F.3d 1143, 2015 WL 5534388 (10th Cir. Sept. 21, 2015), in which the Tenth Circuit noted that the "definition [that survived *Johnson*] of 'violent felony' under the ACCA includes a felony conviction for 'burglary.' " *Id.* at —— n. 2, 2015 WL 4910113 at *2 n. 2. Yes, but only because the portion of ACCA that survived includes a list of four enumerated felonies, of which burglary is one. That, after *Johnson,* ACCA continues to cover burglary through one of its enumerated offenses says nothing about whether § 16(b) can be constitutionally applied to burglary or any other offense.

11 The relevant provision of ACCA defined a "violent felony" as any felony that 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)(ii). As noted above in footnote 3, the "residual clause" is defined as the portion of provision that follows "explosives."

12 The Solicitor General's brief in *Johnson* also recognized that because section 16(b), as applied in the INA, "requires a court to identify the ordinary case of the commission of the offense," it is "equally susceptible to [Johnson's] central objection to the residual clause." Supplemental Brief for Respondent at 22–23, *Johnson v. United States,* —— U.S. ——, 135 S.Ct. 2551, 192 L.Ed.2d 569 (2015) (No. 13–7120).

13 Although *Johnson* concluded that the enumerated offenses added to the residual clause's indeterminacy, it could well be argued that, if anything, § 16(b) is more vague than the residual clause because of its lack of enumerated examples. To be sure, ACCA's enumerated examples are "far from clear in respect to the degree of risk each poses." *Johnson,* 135 S.Ct. at 2558. However, they

provide at least *some* guidance as to the sort of offenses Congress intended for the provision to cover. Section 16(b), by contrast, provide no such guidance at all.

14 In holding that burglary under California law constituted a crime of violence in *Lopez–Cardona*, we were not asked to consider the question of § 16(b)'s constitutionality; nor did we do so. For the same reason, the dissent's lengthy discussion of this court's prior holdings regarding burglary and § 16(b) is irrelevant. Here, we do not consider what offenses fall within § 16(b) but instead whether the provision may be constitutionally applied. That latter question is answered here and, as a result, all of our prior cases relating to which offenses fall within the scope of that provision are to that extent of no further force or effect.

15 The government also suggested at the supplemental oral argument that our decision in this case would require holding that *Johnson* overruled *Leocal v. Ashcroft,* 543 U.S. 1, 125 S.Ct. 377, 160 L.Ed.2d 271 (2004), which stated in dicta that burglary is the "classic example" of an offense that would satisfy § 16(b). *Id.* at 10, 125 S.Ct. 377. The dissent now adopts a related argument: that this statement from *Leocal* proves that "there is no unconstitutional vagueness in this case." Dissent at 1129. In deciding whether the offense of "driving under the influence of alcohol ... and causing serious bodily injury" qualified as a crime of violence, however, *Leocal* said nothing about whether the statutory language in § 16(b) is void for vagueness. Moreover, *Johnson* casts doubt on the notion that burglary could easily be characterized as a crime that involves a substantial risk of violence under § 16(b). *See* 135 S.Ct. at 2557 ("The act of ... breaking and entering into someone's home does not, in and of itself, normally cause physical injury."). Finally, even if there were some "straightforward cases" or categories of cases under § 16(b), *Johnson* squarely rejected the argument that "a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp," *id.* at 2561–62, and clearly stated that the residual clause was void for vagueness in all applications, *id.* at 2563. There is therefore no need in this opinion to consider the continued validity of the statement in *Leocal* cited by the government and dissent.

16 During the nine terms preceding the 2015 term, the Supreme Court decided a total of 85 federal criminal appeals versus only 12 immigration appeals. These statistics come from the Harvard Law Review, which compiles statistics each year after the completion of the Supreme Court term. Every version of "The Statistics" includes a table that records the number of cases decided each year by "subject matter." They are available at http://harvardlawreview.org/category/statistics/.

17 Our decision does not reach the constitutionality of applications of 18 U.S.C. § 16(b) outside of 8 U.S.C. § 1101(a)(43)(F) or cast any doubt on the constitutionality of 18 U.S.C. § 16(a)'s definition of a crime of violence.

1 The statute, 18 U.S.C. § 924(e)(2)(B), reads, in relevant part:

> the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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.

2 In *Taylor,* the Court stated: "[w]e conclude that a person has been convicted of burglary for purposes of a § 924(e) enhancement if he is convicted of any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." 495 U.S. at 599, 110 S.Ct. 2143.

3 In *Taylor*, the Supreme Court noted:

> Our present concern is only to determine what offenses should count as "burglaries" for enhancement purposes. The Government remains free to argue that any offense—including offenses similar to generic burglary—should count towards enhancement as one that "otherwise involves conduct that presents a serious potential risk of physical injury to another" under § 924(e)(2)(B)(ii).

495 U.S. at 600 n. 9, 110 S.Ct. 2143.

4 The Supreme Court explained:

> The modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's. All the modified approach adds is a mechanism for making that comparison when a statute lists multiple, alternative elements, and so effectively creates "several different ... crimes." *Nijhawan [v. Holder*], 557 U.S. [29] 41 [129 S.Ct. 2294, 174 L.Ed.2d 22 (2009)]. If at least one, but not all of those crimes matches the generic version, a court needs a way to find out which the defendant was convicted of.

Descamps, 133 S.Ct. at 2285.

5 The INA provides that an alien "convicted of an aggravated felony" is removable, § 1227; is not eligible for asylum, § 1158(b)(2)(a)(ii); and is not eligible for cancellation of removal or adjustment of status, § 1229b(a)(3).

6 In response to Kwong's argument that California's definition of first-degree burglary is broader than the generic federal definition, the Ninth Circuit held:

> These arguments are foreclosed, however, by our recent decision in *Lopez–Cardona v. Holder*, 662 F.3d 1110 (9th Cir.2011). *Lopez–Cardona* flatly held that, under *Becker*, first-degree burglary in violation of California Penal Code § 459 was a crime of violence within the meaning of 18 U.S.C. § 16(b). *Id.* at 1113. It also held that *Aguila–Montes* had no effect on that conclusion because *Aguila–Montes* was based on a different definition of "crime of violence"; *Aguila–Montes* held only that a conviction under California Penal Code § 459 did not constitute a conviction for generic burglary. *Lopez–Cardona*, 662 F.3d at 1113. *Aguila–Montes* accordingly did not contradict or affect Becker's holding that first-degree burglary under § 459 is a crime of violence because it involves a substantial risk that physical force may be used in the course of committing the offense. *Id.* at 1111–12.
>
> 671 F.3d at 877–78.

7 The residual clause of the ACCA increased the prison term of a defendant who had been convicted of "any crime punishable by imprisonment for a term exceeding one year" that "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).

8 *James v. United States*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007); *Chambers v. United States*, 555 U.S. 122, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009); and *Sykes v. United States*, —— U.S. ——, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011).

9 The Court commented:

> The most telling feature of the lower courts' decisions is not division about whether the residual clause covers this or that crime (even clear laws produce close cases); it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider.
>
> *Id.* at 2560.

10 This statement from *Leocal* forecloses, for purposes of § 16(b), attempts to distinguish burglary convictions based on statutes that cover structures other than dwellings or do not require unlawful entry. Neither of these distinctions change the "nature" of the offense nor ameliorates the "substantial risk that the burglar will use force against a victim in completing the crime."

11 I am not alone in questioning the application of *Johnson* beyond the ACCA's residual clause. Although the opinion has only been on the books for a little over three months, the Eighth Circuit in *Ortiz v. Lynch*, 796 F.3d 932, 935 n. 2 (8th Cir.2015), noted that *Johnson* "does not implicate the analysis in this case where the analogous language comes not from the residual clause, but the first definition of 'violent felony' in ACCA." Similarly, in *In re Gieswein*, 802 F.3d 1143, No. 15–6138, 2015 WL 5534388 (10th Cir. Sept. 21, 2015), the Tenth Circuit noted that the holding in *Johnson* applies only to the residual-clause definition of violent felony. Although it did not reach the merits of the issue, the court noted that the "surviving definition of 'violent felony' under the ACCA includes a felony conviction for 'burglary.' " *Id.* at n. 2.

12 There can be no doubt as to the majority's intent. Footnote 14 of the majority opinion asserts that "all of our prior cases relating to which offenses fall within the scope of [§ 16(b)] are to that extent of no further force or effect."

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