THE RECKLESS MISAPPLICATION OF *VOISINE* TO THE ARMED CAREER CRIMINAL ACT

by
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This Article explores the misapplication of Voisine v. United States *to the Armed Career Criminal Act ("ACCA"). Under the ACCA, possessing a firearm with three "violent" felonies results in a mandatory sentence enhancement. Courts have faltered, however, by mandating sentence enhancement when the predicate crimes were committed with the mental state of recklessness. Voisine itself had no bearing on the ACCA, but courts have nonetheless extended its reasoning to violent felonies and the ACCA.*

As such, this Article argues that reckless offenses should never qualify as predicate offenses under the ACCA because they are not rightly labeled as violent felonies which must be "purposeful, violent, and aggressive." Public policy and the rule of lenity support the conclusion that sentence enhancements under the ACCA should not be applied when the defendant's prior convictions were based on reckless conduct. Finally, the ACCA's sentence enhancement was intended to punish "the very worst offenders with the worst records"—predicate crimes committed with a reckless mens rea are not what Congress had in mind.

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INTRODUCTION

In Minnesota, a jury found Corey Fogg guilty of possessing a firearm as a felon in violation of 18 U.S.C. § 922(g)(1).[1] Normally, a "felon-in-possession" offense results in a sentence between zero to ten years.[2] For Fogg, the district court determined that he had three prior violent felony convictions under the Armed Career Criminal Act[3] ("ACCA") and subsequently enhanced his sentence to 235 months.[4] On appeal, Fogg argued that his prior conviction for drive-by shooting under Minnesota law[5] should not qualify as a violent felony because a conviction was sustainable with a mens rea of "recklessness."[6] The Eighth Circuit rejected Fogg's argument and instead held that because "Fogg's prior conviction of drive by shooting required a mens rea of recklessness . . . it qualified as a violent felony under the ACCA's force clause."[7] The *Fogg* court specifically relied on the Supreme Court's decision in *Voisine v. United States*,[8] which analyzed a similarly worded force clause, and determined that "[r]eckless conduct . . . constitutes a 'use' of force under the ACCA."[9]

Conversely, in Maine, George Bennett was convicted of numerous drug charges and a violation of 18 U.S.C. § 922(g)(1).[10] During sentencing, the

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[1] United States v. Fogg, 836 F.3d 951, 953 (8th Cir. 2016).

[2] 18 U.S.C. § 924(a)(2) (2012).

[3] *Id.* § 924(e).

[4] *Fogg*, 836 F.3d at 953.

[5] MINN. STAT. § 609.66 subdiv. 1e (2018).

[6] *Fogg*, 836 F.3d at 956.

[7] *Id.*

[8] Voisine v. United States, 136 S. Ct. 2272 (2016).

[9] *Fogg*, 836 F.3d at 956; *see also* United States v. Rice, 813 F.3d 704 (8th Cir. 2016) (establishing that the Eighth Circuit analyzes the force clause at issue in *Voisine* in the same way as the ACCA).

[10] Bennett v. United States, 868 F.3d 1, 2–3 (1st Cir. 2017), *withdrawn*, 870 F.3d 34, 36 (1st Cir. 2017). Although the original *Bennett* decision was vacated because the defendant passed away, the First Circuit extended the holding as precedent. *See* United States v. Windley, 864 F.3d

Probation Office drafted a pre-sentence investigation report that asserted Bennett had three predicate violent felonies, thus subjecting him to the ACCA.[11] Bennett appealed his sentence, arguing that the district court erred in concluding that his conviction for aggravated assault under Maine law[12] was a violent felony since a conviction could rest on a *mens rea* of recklessness.[13] The Maine statute defined "recklessness" in the same way as did the Model Penal Code.[14] Similar to the government's argument in *Fogg*, the United States claimed that the holding in *Voisine* extended reckless offenses to the force clause under the ACCA.[15]

Unlike the Eighth Circuit in *Fogg*, the First Circuit in *Bennett* disagreed with the government's contention and instead held that the statute at issue in *Voisine*[16] was different in context from the ACCA.[17] The *Bennett* court specifically focused on the fact that, unlike the statute in *Voisine*, "the exclusion of reckless aggravated assault from the definition of a 'violent felony' would not risk rendering [the] ACCA broadly 'inoperative' in the way that the exclusion of reckless assault would risk rendering broadly inoperative [18 U.S.C.] § 922(g)(9)."[18] Although both defendants had predicate offenses that could be committed recklessly,[19] Fogg's sentence had a mandatory minimum of 15 years in accordance with the ACCA, whereas Bennett was not subject to the same sentencing enhancement.

This Article argues that sentences like Fogg's are incorrect because reckless offenses should never qualify as predicate offenses and courts that have extended the reasoning in *Voisine* to the ACCA have done so erroneously. First, because offenses committed "recklessly" only require defendants to consciously disregard substantial and unjustifiable risks associated with their conduct,[20] they fail to meet the Court's historic definition of "violent felony."[21] Second, specific policy considerations

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36, 37 (1st Cir. 2017) (per curiam).

[11] *Bennett*, 868 F.3d at 3.

[12] ME. STAT. tit. 17-A, § 208 (2015).

[13] *Bennett*, 868 F.3d at 5.

[14] *Id.* at 4. *Compare* ME. STAT. tit. 17-A, § 35(3)(A) ("A person acts recklessly . . . when the person consciously disregards a risk . . . ."), *with* MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985) ("A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct.").

[15] *Bennett*, 868 F.3d at 17.

[16] The statute at issue in *Voisine* was 18 U.S.C. § 921(a)(33)(A), which prevents individuals convicted of "misdemeanor crime[s] of domestic violence" from possessing firearms. *Id.* at 15.

[17] *Id.* at 21.

[18] *Id.* at 23 (citing Voisine v. United States, 136 S. Ct. 2272, 2280 (2016)).

[19] *Compare* United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016), *with Bennett*, 868 F.3d at 4.

[20] MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985).

[21] *See* Begay v. United States, 553 U.S. 137, 144–45 (2008) (determining that predicate

regarding the statute at issue in *Voisine* versus the ACCA only further indicates that it would be improper to allow for offenses committed recklessly to qualify as predicate offenses.[22] Third, and finally, because the categorical approach prevents a court from examining the underlying facts of a defendant's conviction, interpretation of offenses committed recklessly would prove unworkable.[23] Instead, because the rule of lenity[24] is directly implicated by the categorical approach[25] when analyzing predicate offenses under the ACCA, courts should continue to disallow offenses committed recklessly to qualify as "violent felonies."

I. AN OVERVIEW OF THE ACCA

The ACCA is a mandatory sentencing enhancement for convictions under 18 U.S.C. § 922(g).[26] To qualify under the ACCA, a defendant needs three qualifying predicate crimes on his or her record deemed "violent felonies."[27] The ACCA defines "violent felony" as:

> [A]ny crime punishable by imprisonment for a term exceeding one year . . . that
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> (i) has an element the use, attempted use, or threatened use of physical force against the person of another; or
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> (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* . . . .[28]

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offenses had to be "*purposeful*, violent, and aggressive" to constitute a "violent felony" under the ACCA (emphasis added) (internal quotation marks omitted)).

[22] *Cf. Voisine*, 136 S. Ct. at 2280 n.4 (reasoning that courts could continue to read different statutes using similar language as 18 U.S.C. § 921(a)(33)(A) differently because "of differences in their contexts and purposes"); *see also Fogg*, 836 F.3d at 957 n.2 (Bright, J., concurring in part and dissenting in part).

[23] *See* Cornelia J.B. Gordon, Note, *Interpreting* Begay *After* Sykes*: Why Reckless Offenses Should be Eligible to Qualify as Violent Felonies Under the ACCA's Residual Clause*, 63 DUKE L.J. 955, 995–96 (2014) (admitting that even if "reckless" offenses could have qualified under the now unconstitutional residual clause, there would still be problematic statutes to interpret).

[24] Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 FORDHAM L. REV. 885, 885 (2004) ("[T]he 'rule of lenity'—the common law doctrine, also known as 'strict construction,'. . . directs courts to construe statutory ambiguities in favor of criminal defendants.").

[25] *See* Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013) (discussing the categorical approach and the presumption throughout the analysis that the defendant is convicted on the least of the acts criminalized).

[26] 18 U.S.C. § 922(g) (2012) prohibits certain groups of people, including convicted felons and illegal aliens, from shipping, transporting, possessing, or receiving firearms or ammunition in or affecting interstate or foreign commerce.

[27] 18 U.S.C. § 924(e)(1).

[28] *Id.* § 924(e)(2)(B) (emphasis added). The emphasized portion is the residual clause, which

In the past, a defendant's prior conviction would count as a "violent felony" if the predicate offense fell under one of the three clauses found in the ACCA: (1) the force clause;[29] (2) the enumerated offenses clause;[30] or (3) the residual clause.[31]

A. Legislative History of the ACCA

Unlike the mandatory minimum of fifteen years imposed by the ACCA,[32] the underlying felon in possession statute, 18 U.S.C. § 922(g), only allows a maximum term of ten years imprisonment.[33] Unsurprisingly, a survey conducted in 2012 found that the average sentence for defendants convicted only under § 922(g) was 46 months, which is vastly less than the average sentence of 180 months for individuals sentenced under the ACCA.[34] The ACCA enhances a defendant's sentence for both cases involving possession of a firearm or ammunition.[35]

The ACCA was a component of the Comprehensive Crime Control Act passed in 1984.[36] However, an initial version of the bill was proposed as the Career Criminal Life Sentence Act in 1981.[37] Rather than using the three predicate offenses provision that is known today, the original bill punished offenders for only two prior convictions of robbery or burglary under state law.[38] President Ronald Reagan vetoed this original bill in 1983 due to federalism concerns because it allowed federal prosecutors to take jurisdiction over state offenses.[39]

After this initial defeat, the Comprehensive Crime Control Act was amended

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is now unconstitutional. *See* Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).

[29] *Id.* § 924(e)(2)(B)(i).

[30] *Id.* § 924(e)(2)(B)(ii).

[31] The enumerated offenses clause and the residual clause are found within the same subsection. *See id.* However, the residual clause no longer applies as it was held to be "unconstitutionally vague." *See Johnson*, 135 S. Ct. at 2557.

[32] 18 U.S.C. § 924(e)(1).

[33] *Id.* § 924(a)(2).

[34] *Quick Facts: Felon in Possession of a Firearm*, U.S. SENT'G COMMISSION, https://www.ussc.gov/sites/default/files/pdf/research-and-publications/quick-facts/Quick_Facts_Felon_in_Possession_of_a_Firearm.pdf (last visited Oct. 31, 2019).

[35] United States v. Cardoza, 129 F.3d 6, 9 (1st Cir. 1997) (imposing a 19-year enhanced sentence against the defendant for the possession of *one* bullet).

[36] Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976 (codified as amended in scattered sections of Title 18 of the United States Code.).

[37] Amanda J. Schackart, Comment, *Finding Intent Without* Mens Rea*: A Modified Categorical Approach to Sentencing Under the United States Sentencing Guidelines*, 5 SEVENTH CIRCUIT REV. 71, 75 (2009).

[38] *Id.*

[39] James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 546 (2009).

and reintroduced by Senator Arlen Specter and Congressman Ron Wyden.[40] During a hearing on the bill before the House Committee on the Judiciary,[41] the American Bar Association, the National District Attorneys Association, and the Department of Justice all expressed considerable concerns about various federalism issues still associated with the legislation,[42] specifically that it "permitt[ed] a radical expansion of Federal jurisdiction over common law crimes."[43] Because of these concerns, Congressman William Hughes introduced an amendment to the bill that significantly altered it by changing it to a sentencing enhancement.[44]

In enacting the ACCA, Congress specifically targeted criminals whom it viewed as most likely to reoffend and physically injure others.[45] Prior to the passage of the ACCA, states were tasked with dealing with violent felonies.[46] However, Congress believed that state resources were insufficient and incapable of handling such a massive problem.[47] Although it would appear that states could simply lock up violent offenders for a longer amount of time, Congress felt the need to assist state jurisdictions in keeping repeat offenders behind bars because of a growing belief that "a relatively small number of people were committing numerous violent crimes, and state authorities were often unable to obtain long sentences."[48] In turn, Congress viewed the ACCA as a "great service to the public" because it allowed the federal government to "assist local prosecutors . . . in keeping . . . violent career offenders off the streets."[49]

Originally, the ACCA only allowed for a mandatory-minimum sentence for defendants convicted of firearm offenses if they had three qualifying prior convictions "for robbery or burglary."[50] This was subsequently amended in 1986 to include the language that is currently used today,[51] which importantly defines

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[40] *Id.*

[41] H.R. REP. NO. 98-1073, at 7 (1984).

[42] Levine, *supra* note 39, at 546.

[43] H.R. REP. NO. 98-1073, at 5.

[44] Levine, *supra* note 39, at 546; *see also* Schackart, *supra* note 37, at 75–76.

[45] Begay v. United States, 553 U.S. 137, 146 (2008); Taylor v. United States, 495 U.S. 575, 581 (1990); Levine, *supra* note 39, at 547.

[46] *See* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1177 (2010); *see also Taylor*, 495 U.S. at 581 ("The Act was intended to supplement the States' law enforcement efforts against 'career' criminals.").

[47] *See* Russell, *supra* note 46, at 1177–78.

[48] *Id.* at 1177 (citing *Taylor*, 495 U.S. at 581).

[49] *Armed Career Criminal Legislation: Hearing before the Subcomm. on Crime of the Comm. on the Judiciary*, 99th Cong. 7 (1986) (statement of Rep. McCollum).

[50] Stokeling v. United States, 139 S. Ct. 544, 550 (2019) (citing 18 U.S.C. App. § 1202(a) (1982 ed., Supp. II)).

[51] *See* 18 U.S.C. § 924(e)(2)(B) (Supp. IV 1982).

"violent felony" more broadly and includes the provision that a sentencing enhancement is only proper if the defendant had three qualifying predicate convictions under both federal and state law.[52]

Overall, the ACCA aimed at deterring career criminals who continued to offend and "who had proven resistant to all previous efforts to curb their repeat offending."[53] Further, according to a report from the Senate Judiciary Committee, the ACCA was only to apply to "the hard core of career criminals" by emphasizing that the ACCA "focus[ed] on the . . . very worst offenders with the worst records."[54] Based on this legislative history, it appears that the Court was correct in concluding that congressional intent for the ACCA was to provide federal law enforcement with another tool to combat recidivism in career criminals who were the most likely to use a gun in a deliberate, violent manner.[55]

B. "Recklessness" and Mens Rea Under the ACCA

Throughout the history of the law, criminal convictions have required that the defendant had the requisite mental culpability, or mens rea, to have committed a criminal offense.[56] From a broad standpoint, mens rea simply refers to the concept that a defendant is guilty if he or she has a "guilty mind," notwithstanding whether or not the defendant had a specific mental state (e.g., intentional or reckless).[57] Presently, most jurisdictions view mens rea narrowly and focus on what mental state is designated within the statute that forms the basis of the defendant's criminal charge.[58]

A significant development in defining mens rea was the drafting of the American Law Institute's Model Penal Code, which was to serve as a practical guide to criminal law.[59] For this guide, the drafters focused first on culpability before later turning to defining the different criminal offenses.[60] The Model Penal Code

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[52] T.J. Matthes, *The Armed Career Criminal Act: A Severe Implication Without Explanation*, 59 ST. LOUIS U. L.J. 591, 595 (2015).

[53] Krystle Lamprecht, *Formal, Categorical, but Incomplete: The Need for a New Standard in Evaluating Prior Convictions Under the Armed Career Criminal Act*, 98 J. CRIM. L. & CRIMINOLOGY 1407, 1411 (2008).

[54] S. REP. NO. 97-585, at 62–63 (1982).

[55] *See* Begay v. United States, 553 U.S. 137, 144–45 (2008).

[56] *Aetus non facit renum, nisi mens sit rea*, Black's Law Dictionary (4th ed. 1968) ("An act does not make [the doer of it] guilty, unless the mind be guilty; that is, unless the intent be criminal.").

[57] JOSHUA DRESSLER & STEPHEN P. GARVEY, CRIMINAL LAW CASES AND MATERIALS 158 (8th ed. 2019).

[58] *Id.*

[59] Ronald L. Gainer, *The Culpability Provisions of the Model Penal Code*, 19 RUTGERS L.J. 575, 579 (1988).

[60] *Id.*

recognizes four levels of mens rea: (1) purposely or intentionally, (2) knowingly, (3) recklessly, and (4) negligently.[61] Under this hierarchy, culpability decreases based upon the defendant's mens rea.[62] Furthermore, each culpability provision is distinct from the next.[63]

The Commentaries on the Model Penal Code illustrate that "knowingly" requires the jury to consider "the actual state of mind of the actor."[64] This differs from "recklessly," where the jury considers the "standard of conduct that a law-abiding person in the actor's situation would observe."[65] For example, an act committed "knowingly" requires a defendant to either be aware of the nature of his or her conduct or to be practically certain of the result,[66] whereas a defendant acting "recklessly" is one who "consciously disregards a substantial or unjustifiable risk that either a material element exists or will result from his conduct."[67] This distinction is best illustrated by understanding that "reckless conduct [is] . . . at most 'careless,'" as opposed to "knowing conduct . . . being 'willful.'"[68]

Although the distinction between "knowingly" and "recklessly" can appear murky,[69] the actual difference is of great significance in the context of the ACCA because the Court has defined a "violent felony" to only include "purposeful" conduct.[70] Furthermore, the ACCA's legislative history illustrates that it was meant to punish and deter criminals likely to use a firearm in a violent manner.[71] When considering the history of the Model Penal Code's culpability definitions, it is easier to reconcile the Court's decision in *Begay* because it makes sense that a violent criminal who acts purposefully to deliberately commit crimes is the type of individual Congress was trying to bar from possessing a firearm, as opposed to the criminal who acts carelessly.[72]

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[61] MODEL PENAL CODE § 2.02(2)(a)–(d) (AM. LAW. INST. 1985).

[62] Paul H. Robinson & Jane A. Grall, *Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond*, 35 STAN. L. REV. 681, 694–95 (1983) (discussing the various distinctions between the various levels of culpability).

[63] Gainer, *supra* note 59, at 580.

[64] MODEL PENAL CODE § 2.02 cmt. 2.

[65] *Id.* § 2.02 cmt. 3.

[66] *Id.* § 2.02(2)(b)(i)–(ii).

[67] *Id.* § 2.02(2)(c).

[68] Robinson & Grall, *supra* note 62, at 695 ("An offender whose conduct falls within [knowingly] is often condemned for 'intentional' conduct; one [who is reckless] is scolded for 'taking risks.'").

[69] *See id.*

[70] Begay v. United States, 553 U.S. 137, 144–47 (2008).

[71] *See* Taylor v. United States, 495 U.S. 575, 587–88 (1990).

[72] *See Begay*, 553 U.S. at 146 ("In this respect—namely, a prior crime's relevance to the possibility of future danger with a gun—crimes involving intentional or purposeful conduct (as in burglary and arson) are different from DUI, a strict-liability crime. In both instances, the

Because jurisprudence within the United States has consistently maintained that a culpable state of mind is necessary to sustain a conviction for almost all criminal statutes,[73] it follows that determining predicate "violent felonies" may depend on the mens rea necessary to sustain a conviction. This has proven difficult under the ACCA because not all states define mens rea terms in the same way.[74] By way of example, the Oregon criminal code defines "knowingly" in such a way that it does not require knowledge of the result, which differs from the Model Penal Code's definition of "knowingly."[75] Additionally, state definitions that diverge from federal definitions are further exacerbated under the ACCA because of the application of the modified categorical and categorical approaches. Simply put, courts rely upon these analytical approaches when determining if a defendant's prior convictions qualify as "violent felonies" by comparing the state offense to the generic definition of the federal offense.[76]

C. Determining Predicate Offenses: The Categorical and Modified Categorical Approaches

The requirement of three predicate offenses has been litigated in multiple contexts and has led to confusion within the federal judiciary.[77] These multiple proceedings are unsurprising because the possible predicate offenses encompass both federal and state criminal statutes.[78] Therefore, the Court has established a multi-step "categorical approach" where the sentencing court only looks to the statutory definition of the prior convictions but cannot analyze the facts underlying those previous convictions.[79] The categorical approach is applicable in both immigration proceedings and criminal sentencing enhancements under the ACCA at the federal level.[80]

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offender's prior crimes reveal a degree of callousness toward risk, but in the former instance they also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger. *We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist.*" (emphasis added)); *see also* Robinson & Grall, *supra* note 62, at 695.

[73] Francis Bowes Sayre, *Mens Rea*, 45 HARV. L. REV. 974, 974 (1932).

[74] *Id.*

[75] United States v. Crews, 621 F.3d 849, 855 (9th Cir. 2010).

[76] Mathis v. United States, 136 S. Ct. 2243, 2248 (2016); Descamps v. United States, 570 U.S. 254, 257 (2013); Taylor v. United States, 495 U.S. 575, 600 (1990).

[77] Much of the confusion stems from determining whether to apply the categorical approach or the modified categorical approach. *See* Michael McGivney, *A Means to an Element: The Supreme Court's Modified Categorical Approach After* Mathis v. United States, 107 J. CRIM. L. & CRIMINOLOGY 421, 429 (2017).

[78] 18 U.S.C. § 924(e)(2)(A) (2012).

[79] *Descamps*, 570 U.S. at 261 (citing *Taylor*, 495 U.S. at 600).

[80] Moncrieffe v. Holder, 569 U.S. 184, 189 (2013) (citing to both immigration and criminal

Essentially, the categorical approach is a three-step process that allows a court to determine whether a defendant's prior convictions at the state and federal level qualify under the ACCA.[81] At the first step, the sentencing court examines the prior conviction to determine if it is overbroad, which requires a comparison of the elements of the state offense against the elements of the federal offense.[82] Under the ACCA, a state crime is overbroad "if its elements are broader than those of a listed generic offense."[83] If the sentencing court determines that the state statute criminalizes conduct outside the elements of the federal offense, it then turns to step two and determines if the statute is "divisible."[84] A statute is divisible if it contains alternative versions of the crime.[85] The sentencing court must look to state law when determining whether a statute is divisible.[86]

If the court concludes that the statute at issue is both overbroad and divisible, the court then turns to the modified categorical approach.[87] The modified categorical approach allows a sentencing court to view a limited range of documents to help determine which portion of the divisible statute formed the basis of the defendant's conviction.[88] If unable to determine what portion of the divisible statute formed the basis of the defendant's conviction, then the presumption is that the defendant is guilty of nothing more than the least of the acts criminalized.[89] Therefore, "a conviction under an indivisible, overbroad statute can never serve as a predicate offense."[90]

Simply put, the categorical approach is the analytical framework under which sentencing courts determine whether a defendant's prior convictions qualify as

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sentencing cases while discussing how to apply the categorical approach); Jennifer Lee Koh, *The Whole Better Than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 268–69 (2012).

[81] *Mathis*, 136 S. Ct. at 2248; *Descamps*, 570 U.S. at 257; *Taylor*, 495 U.S. at 600.

[82] Lopez-Valencia v. Lynch, 798 F.3d 863, 867 (9th Cir. 2015).

[83] *Mathis*, 136 S. Ct. at 2251.

[84] *Id.* at 2268 (citing *Descamps,* 570 U.S. at 257).

[85] *Descamps*, 570 U.S. at 262.

[86] *Mathis*, 136 S. Ct. at 2256. By way of example, in the Ninth Circuit, the key inquiry in determining a statute's divisibility is whether a jury would have to be unanimous in finding separate elements. Ramirez v. Lynch, 810 F.3d 1127, 1130–31 (9th Cir. 2016).

[87] *Descamps*, 570 U.S. at 277–78.

[88] *Id.* The modified categorical approach also applies to defendants whose convictions stemmed from guilty pleas. *See* Shepard v. United States, 544 U.S. 13, 26 (2005) (holding that the documents that are reviewable regarding guilty pleas, i.e., the *Shepard* documents, are limited to the "terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information").

[89] Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013).

[90] *See* Lopez-Valencia v. Lynch, 798 F.3d 863, 868 (9th Cir. 2015) (emphasis omitted).

predicate offenses under the ACCA.[91] However, the process is not without its critics, many of whom point to its inconsistent application throughout the country.[92] This has led to some head-scratching results, including times where two courts have analyzed the same statute completely differently.

For example, federal judges in the District of Oregon disagreed about whether Or. Rev. Stat. § 164.415, Oregon's Robbery II offense, was divisible.[93] In *Ankeny*, Chief Judge Mosman found that the statute was divisible because in *State v. White*,[94] a conviction for Oregon Robbery II required the "proof of different facts" for each element.[95] Dissimilarly, Judge Hernandez in *Wicklund* found that the statute was not divisible without any analysis simply because "neither party contend[ed] that Robbery II [was] divisible."[96] Justice Alito, an ardent critic of the categorical approach,[97] would express no shock at this seemingly unexpected outcome as it supports his belief that the categorical approach is "an unworkable and impracticable way of determining whether previous convictions [are] indeed 'violent felonies.'"[98]

Recently, the Ninth Circuit described the categorical approach as "counterintuitive" because of the emphasis on not looking to "the underlying facts of the defendant's actual conviction."[99] However, proponents of the rule of lenity may find solace in the fact that the categorical approach requires the sentencing court to assume that the defendant only qualifies for the least of the acts criminalized in the state statute.[100]

Essentially, although the categorical approach has its fair share of critics,[101]

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[91] *Mathis*, 136 S. Ct. at 2247–49.

[92] *E.g.*, Koh, *supra* note 80, at 278 ("[I]n the recidivist sentencing and immigration contexts . . . . the doctrine suffers from incoherence and confusion . . . as the courts struggle to apply the categorical approach.").

[93] *Compare* United States v. Ankeny, No. 3:04-cr-00005-MO-1, 2017 WL 722580, at *4 (D. Or. Feb. 23, 2017) (determining that ORS § 164.415 is divisible), *with* United States v. Wicklund, No. 3:15-cr-0015-HZ, 2016 WL 6806341, at *4 n.4 (D. Or. Nov. 14, 2016) (failing to address if ORS § 164.415 was divisible because neither party argued that it was).

[94] State v. White, 211 P.3d 248 (Or. 2009) (en banc).

[95] *Ankeny*, 2017 WL 722580, at *4–*5 (quoting *White*, 211 P.3d at 254).

[96] *Wicklund*, 2016 WL 6806341, at *4 n.4.

[97] Evan Tsen Lee, Mathis v. U.S. *and the Future of the Categorical Approach*, 101 MINN. L. REV. HEADNOTES 263, 264 (2016).

[98] *See* McGivney, *supra* note 77, at 438 (citing *Mathis*, 136 S. Ct. at 2265–70 (Alito, J., dissenting)).

[99] United States v. Walton, 881 F.3d 768, 771 (9th Cir. 2018) ("Counterintuitive though it may seem, to determine whether a defendant's conviction under a state criminal statute qualifies as a violent felony . . . we do not look to the underlying facts of the defendant's actual conviction.").

[100] Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013).

[101] Koh, *supra* note 80, at 278; *cf.* Kelsey McCowan Heilman, *Why Vague Sentencing*

proponents of this analytical framework favor an analysis that prevents the government from introducing incriminating facts into the record.[102] Still, regardless of what facts are allowed into the record, the interpretation of state statutes and the required mens rea necessary for a prior conviction to qualify as a "violent felony" under the ACCA has caused confusion among the circuits. This confusion is not surprising considering the previous discussion about the difficulty of applying the categorical approach and determining a defendant's mens rea.

II. DEVELOPMENT OF THE ACCA THROUGH JUDICIAL INTERPRETATION

A. Johnson v. United States *Forever Alters the ACCA*

As mentioned previously, the text of the ACCA contains three clauses: (1) the force clause;[103] (2) the enumerated offenses clause;[104] and (3) the residual clause.[105] Prior to the *Johnson* decision in 2015, the residual clause was viewed as a "catchall clause" where, if a violent felony did not fit into either the force clause or the enumerated offenses clause, then the predicate offense could fit into this final clause.[106] However, the Court struck down the residual clause as "unconstitutionally vague."[107] Furthermore, the decision in *Johnson* means that a sentence imposed pursuant to the residual clause is subject to collateral attack under 28 U.S.C. § 2255.[108]

Johnson concerned petitioner Samuel Johnson, a defendant with an extensive criminal record.[109] In 2010, Johnson was under FBI surveillance because of his membership in a white supremacist organization that was suspected of planning terrorist attacks.[110] While talking with undercover agents, Johnson bragged about

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Guidelines Violate the Due Process Clause, 95 OR. L. REV. 53, 59 (2016) ("Because defendants in federal courts bring with them prior convictions under the criminal statutes of more than fifty states and territories, this interpretive task [takes] on seemingly infinite variations.").

[102] Lee, *supra* note 97, at 263 (implying that a statute's structure, when analyzed under the categorical approach, is favorable to defendants).

[103] 18 U.S.C. § 924(e)(2)(B)(i) (2012).

[104] *Id.* § 924(e)(2)(B)(ii).

[105] The enumerated offenses clause and the residual clause are found within the same subsection. *Id.* However, the residual clause no longer applies as it was held to be "unconstitutionally vague." *See* Johnson v. United States, 135 S. Ct. 2551, 2557 (2015).

[106] *See* United States v. Jennings, 515 F.3d 980, 990 (9th Cir. 2008) (referencing the residual clause as the "catchall clause").

[107] *Johnson*, 135 S. Ct. at 2557.

[108] *Id.* at 2555–57; *see also* Welch v. United States, 136 S. Ct. 1257, 1267 (2016) (holding that the rule announced in *Johnson* applies retroactively).

[109] *Johnson*, 135 S. Ct. at 2556.

[110] *Id.*

manufacturing explosives and said that he planned on attacking "the Mexican consulate in Minnesota, progressive bookstores, and liberals," while simultaneously showing the undercover agents a stockpile of weapons and ammunition.[111] Johnson ultimately pled guilty to violating 18 U.S.C. § 922(g), and the government subsequently argued for a sentence enhancement under the ACCA.[112] Of the three predicate offenses the government relied on, one was a conviction for unlawful possession of a short-barreled shotgun, which the government believed to qualify as a "violent felony" under the residual clause.[113] Without this conviction, he would not have qualified as an armed career criminal.

The question before the Court was whether the residual clause violated the Constitutional prohibition on vague criminal statutes.[114] Justice Scalia held that it violated the Due Process Clause of the Fifth Amendment on two grounds that in combination made the residual clause void for vagueness.[115] First, Justice Scalia found that the residual clause forced judges to speculate about what conduct gave rise to a conviction.[116] In Justice Scalia's words, a judge had to "picture the kind of conduct that the crime involves in 'the ordinary case'" and not "real-world facts or statutory elements," which violated the categorical approach's requirement that a court may only "assess[] 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.'"[117] Second, Justice Scalia was concerned that "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony."[118] Simply put, the residual clause was held unconstitutional because "it fail[ed] to give ordinary people fair notice of the conduct it punish[ed], [and is] so standardless that it invit[ed] arbitrary enforcement."[119]

Furthermore, in holding that the residual clause was unconstitutional, Justice Scalia specifically overruled *James v. United States*[120] and *Sykes v. United States*,[121] two cases that had rejected any contention that the residual clause was

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[111] *Id.* (internal quotation marks omitted).

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *Id.* at 2557.

[116] *Id.*

[117] *Id.* (quoting James v. United States, 550 U.S. 192, 208 (2007); and then Begay v. United States, 553 U.S. 137, 141 (2008)).

[118] *Id.* at 2558.

[119] *Id.* at 2556 (citing Kolender v. Lawson, 461 U.S. 352, 357–58 (1983)).

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

[121] Sykes v. United States, 56 U.S. 1 (2011).

unconstitutional.[122] Importantly, the *Johnson* opinion did not specifically discuss overruling *Begay* and instead quoted it in describing how the Court applies the categorical approach.[123]

Moreover, the Court held that the *Johnson* decision applied retroactively in *Welch v. United States*.[124] Normally, "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced."[125] However, two exceptions to the rule apply: (1) "new *substantive* rules generally apply retroactively," and (2) "new watershed rules of criminal procedure."[126] In *Welch*, neither party argued that the latter exception applied, so the Court considered whether *Johnson* concerned a substantive rule.[127] The Court held that the *Johnson* decision "changed the substantive reach of the [ACCA]" because, after *Johnson*, individuals could no longer be sentenced under the ACCA if one of their three violent felony convictions fell under the residual clause.[128] Furthermore, since the *Johnson* decision applies retroactively, there has been a constant flow of litigation challenging sentence enhancements under the ACCA.[129]

Recently, then-Attorney General Jeff Sessions argued that the ACCA was broken and had been rendered useless because the *Johnson* decision had removed the residual clause, which he argued was a powerful tool to combat crime.[130] Although there are no exact statistics on how often the residual clause was used, proponents of the unconstitutional clause viewed it as a catchall provision that expanded the definition of violent felony.[131] In 2018, based on the *Johnson* decision, Senators Orrin Hatch and Tom Cotton introduced a bill that would have replaced the violent felony definition with a "serious felony" category that would constitute any crime punishable by ten or more years of imprisonment.[132]

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[122] *Sykes*, 56 U.S. at 16; *James*, 550 U.S. at 210 n.6 ("[This Court is] not persuaded by [the dissent's] suggestion . . . that the residual provision is unconstitutionally vague.").

[123] *Johnson*, 135 S. Ct. at 2557 (quoting *Begay*, 553 U.S. 137, 141 (2008)).

[124] Welch v. United States, 136 S. Ct. 1257, 1268 (2016).

[125] *Id.* at 1264 (quoting Teague v. Lane, 489 U.S. 288, 310 (1989)).

[126] *Id.* (internal quotation marks omitted).

[127] *Id.* (quoting Schriro v. Summerlin, 542 U.S. 348, 351 (2004)).

[128] *Id.* at 1265.

[129] *See id.* at 1262 (noting that Welch was "one of the many offenders sentenced under the [ACCA] before *Johnson*" who can nevertheless challenge their sentencing enhancements).

[130] *See* Jeff Sessions, *Attorney General Sessions Delivers Remarks Calling for a Legislative Fix to the Armed Career Criminal Act*, U.S. DEP'T JUST. (Aug. 1, 2018), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-calling-legislative-fix-armed-career-criminal.

[131] Thomas H. Gabay, Note, *Using* Johnson v. United States *to Reframe Retroactivity for Second or Successive Collateral Challenges*, 84 FORDHAM L. REV. 1611, 1614 (2016).

[132] Press Release, Tom Cotton: Ark. Senator, Cotton, Hatch Introduce the Restoring the Armed Career Criminal Act (Aug. 1, 2018), https://www.cotton.senate.gov/?p=press_release&id=991.

Nevertheless, until Congress alters the ACCA, it currently reads as follows:

> [A] person who violates section 922(g) . . . and has three previous convictions by any court referred to in . . . section 922(g)(1) . . . for a violent felony or a serious drug offense, or both . . . shall be . . . imprisoned not less than fifteen years, and . . . the court shall not suspend the sentence of, or grant a probationary sentence to, such person . . .[133]

B. The Significance of Begay v. United States

Begay v. United States[134] is significant because, while the Court was analyzing an offense under the residual clause, it was still tasked with determining what constituted a "violent felony" as defined by the ACCA and looked towards the force and enumerated offenses clauses.[135] In 2004, Larry Begay was arrested by New Mexico police officers who were responding to a report that Begay was threatening his sister and aunt with a rifle.[136] After admitting to being a felon, Begay pleaded guilty to violating 18 U.S.C. § 922(g)(1) as a felon in unlawful possession of a firearm.[137] At sentencing, the government argued for an enhancement under the ACCA based upon Begay's numerous felony DUI convictions in the state of New Mexico.[138] The Court noted that violation of New Mexico's DUI statute automatically became a felony if the defendant had three earlier convictions.[139]

After holding that the New Mexico statute was not covered by either the force or enumerated offenses clause, the Court turned to the residual clause.[140] In conducting this analysis, the Court determined that the examples in the enumerated clause—"burglary, arson, extortion, or crimes involving the use of explosives—illustrate[d] the kinds of crimes that fall within the statute's scope."[141] Simply put, the Court focused in on whether New Mexico's DUI statute was similar to the examples found within the enumerated clause.[142]

It based its conclusion on the legislative history of the ACCA. The *Begay* Court pointed out that prior to the statute's current language, the sentence enhancement originally only applied to "offenders with 'three previous convictions for robbery or

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[133] 18 U.S.C. § 924(e)(1) (2012).

[134] Begay v. United States, 553 U.S. 137 (2008).

[135] *Id.* at 139.

[136] *Id.* at 140.

[137] *Id.*

[138] *Id.*

[139] *Id.* at 141 ("New Mexico's DUI statute makes it a crime (and a felony after three earlier convictions) to 'drive a vehicle within [the] state' if the driver 'is under the influence of intoxicating liquor' . . . ." (quoting N.M. STAT. ANN. §§ 66-8-102 (A), (C), (G) (West 2019)).

[140] *Id.* at 142.

[141] *Id.*

[142] *Id.* at 143.

burglary.'"[143] The subsequent amendment proposed by Congress broadened the statute, but the legislatures still rejected a proposal that would have included "*every* offense that involved a substantial risk of the use of 'physical force against the person or property of another.'"[144] Instead, the Court focused on the language in the House report indicating that the ACCA was only supposed to encompass "*similar* crimes [as those found in the enumerated offenses clause] as predicate offenses."[145]

Based on this congressional intent, the *Begay* Court held that the covered crimes involved conduct that was "purposeful, violent, and aggressive."[146] The Court further opined that the ACCA aimed to keep a violent criminal from possessing a gun.[147] As the Court put it:

> We have no reason to believe that Congress intended to bring within the statute's scope these kinds of crimes [reckless and negligent], far removed as they are from the deliberate kind of behavior associated with violent criminal use of firearms. The statute's use of examples . . . indicate the contrary.[148]

This explanation from the Court appears to support some very important goals of the ACCA. First, the ACCA is specifically concerned with providing federal prosecutors with an instrument to combat career criminals.[149] Second, the term "career criminals" refers to individuals who have a criminal past that indicates that they are "the kind of person who might deliberately point [a] gun and pull the trigger."[150] Finally, when considering the Court's language in *Begay* in combination with how the categorical approach operates, it seems unlikely that Congress would have wanted to punish a greater variety of individuals under the ACCA, instead of specifically reserving it for those individuals whose presence in society created a danger for the general public.[151]

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[143] *Id.* (quoting Taylor v. United States, 495 U.S. 575, 581 (1990)).

[144] *Id.* at 144 (quoting *Taylor*, 495 U.S. at 583).

[145] *Id.* (quoting H.R. Rep. No. 99-849, at 5 (1986)).

[146] *Id.* at 144–45 (internal quotation marks omitted).

[147] *Id.* at 146.

[148] *Id.* at 146–47.

[149] Lamprecht, *supra* note 53, at 1411 ("The purpose of [the] ACCA was to provide enhanced penalties for recidivism, with habitual ('career') criminals who had proven resistant to all previous efforts to curb their repeat offending the intended targets.").

[150] *Begay*, 553 U.S. at 146.

[151] *See* BUREAU OF ALCOHOL, TOBACCO & FIREARMS, PROTECTING AMERICA: THE EFFECTIVENESS OF THE FEDERAL ARMED CAREER CRIMINAL STATUTE 3 (1992) ("[L]ocal law enforcement officials have suspected that, if the small number of chronic offenders were removed from contact with society, the crime rate would fall dramatically. Several studies . . . tend to corroborate these officers' assumptions.").

III. RECKLESSNESS OFFENSES HAVE NO PLACE UNDER THE ACCA

To reiterate, the Court has viewed violent felonies as convictions that were "purposeful, violent, and aggressive."[152] Specifically focusing on "purposeful," this language led to multiple circuits holding that "violent felonies" only constituted acts that were committed with, at minimum, a mental culpability of intentional or knowingly.[153] This seems to comport with legislative intent considering that the ACCA was specifically drafted to punish "the very worst offenders with the worst records."[154] Nevertheless, one recent decision by the Supreme Court has impacted the categorical approach analysis in multiple circuits to now allow for "reckless" offenses to constitute predicate offenses.[155]

A. Voisine v. United States

The specific case that has led to confusion amongst the different courts is *Voisine v. United States*.[156] Although this decision did not concern a sentence enhancement under the ACCA, it has nevertheless influenced the categorical approach analysis for the ACCA in several circuits.

Voisine concerned two defendants who had both pleaded guilty to violating Section 207 of the Maine Criminal Code, Maine's misdemeanor domestic assault statute.[157] Subsequent investigations into both convictions revealed that each defendant illegally possessed firearms and ammunition.[158] Based upon this information, the government charged both individuals under 18 U.S.C.

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[152] *Begay*, 553 U.S. at 144–45 (determining that predicate offenses had to be "*purposeful*, violent, and aggressive" to constitute a "violent felony" under the ACCA (emphasis added) (internal quotation marks omitted)).

[153] *See* United States v. Holloway, 630 F.3d 252, 261 (1st Cir. 2011) ("Reckless battery does not typically involve purposeful conduct and thus is not similar in kind to the offenses enumerated within [18 U.S.C.] § 924(e)(2)(B)(ii)."); United States v. Gray, 535 F.3d 128, 132 (2d Cir. 2008) ("Despite coming close to crossing the threshold into purposeful conduct, the criminal acts defined by the reckless endangerment statute are not intentional, a distinction stressed by the Supreme Court in *Begay*."); United States v. McFalls, 592 F.3d 707, 716 (6th Cir. 2010) ("[A] crime requiring only recklessness does not qualify." (quoting United States v. Portela, 469 F.3d 496, 499 (6th Cir. 2006))); United States v. Smith, 544 F.3d 781, 786 (7th Cir. 2008) ("[T]hose crimes with a *mens rea* of negligence or recklessness do not trigger the enhanced penalties mandated by the ACCA."); United States v. Coronado, 603 F.3d 706, 710 (9th Cir. 2010) ("[C]rimes with a mens rea of gross negligence or recklessness do not satisfy *Begay*'s requirement of 'purposeful' conduct.").

[154] S. REP. NO. 97-585, at 62–63 (1982).

[155] *See* United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016) (holding that convictions with a *mens rea* of "recklessness" now qualify as "violent felon[ies]" under the ACCA).

[156] Voisine v. United States, 136 S. Ct. 2272 (2016).

[157] *Id.* at 2277.

[158] *Id.*

§ 922(g)(9), which prohibits anyone "who has been convicted in any court of a misdemeanor crime of domestic violence" from possessing a firearm.[159] Of particular importance, 18 U.S.C. § 921(a)(33)(A) defines misdemeanor domestic assault and follows the language of the force clause defining a "violent felony" under the ACCA.[160]

The Court held that the prohibition on possession of firearms by those convicted of misdemeanor crimes of domestic violence established by 18 U.S.C. § 922(g)(9) extended to those convicted of "reckless" conduct in addition to those convicted of intentional or knowing acts.[161] The Court noted that its previous decision in *Leocal v. Ashcroft*[162] had interpreted the "use of force" clause within 18 U.S.C. § 16[163] to exclude "merely accidental" conduct, but specifically reserved ruling on whether § 16 reached reckless conduct.[164] Simply put, the *Voisine* court chose to follow the example set by *Leocal* and explicitly narrowed its holding to not include § 16, while also declining to discuss any impact the Court's holding would have on the ACCA.[165]

In *Voisine*, like *Begay*, the Court's analysis started with the text and legislative history of the statute at issue to decide congressional intent in denying individuals firearm possession if they had been convicted of a "misdemeanor crime of domestic violence."[166] Examining the text first, the Court focused upon the word "use" because both parties in the case considered it the relevant portion of the statute.[167]

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[159] 18 U.S.C. § 922(g)(9) (2012).

[160] The definition of "misdemeanor crime of domestic violence" is:

> *[H]as, an element, the use or attempted use of physical force, or the threatened use of a deadly weapon,* committed by a current or former spouse, parent, or guardian of the victim, by a person with whom the victim shares a child in common, by a person who is cohabiting with or has cohabited with the victim as a spouse, parent, or guardian, or by a person similarly situated to a spouse, parent, or guardian of the victim.

18 U.S.C. § 921(a)(33)(A)(ii) (2012) (emphasis added).

[161] *Voisine*, 136 S.Ct. at 2276.

[162] Leocal v. Ashcroft, 543 U.S. 1 (2004).

[163] Other than the inclusion of "uses of force against the property of another," the definition of "crime of violence" set out in § 16(a) closely mirrors that of the ACCA force clause:

> The term "crime of violence" means-
> (a) an offense that has 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.

18 U.S.C. § 16 (2012) (emphasis added).

[164] *Voisine*, 136 S. Ct. at 2279–80; *see also Leocal*, 543 U.S. at 13.

[165] *See Voisine*, 136 S. Ct. at 2280 n.4.

[166] *Id.* at 2278.

[167] *Id.*

The Court pointed out that both the dictionary and common definitions of the word "use" imply that an individual is in the "act of employing."[168] Further, the Court did not believe "the word 'use' . . . [demanded] that the person applying force have the purpose or practical certainty that it will cause harm, as compared with the understanding that it is substantially likely to do so."[169]

If the Court had stopped the analysis here, then it would have been difficult to reconcile the similar language in the ACCA and the misdemeanor crime of domestic violence statute without concluding that "reckless" offenses apply to both equally.[170] Instead, the Court continued its discussion by examining the history of 18 U.S.C. § 922(g)(9).[171] At the time that statute was enacted, a majority of states only required a "reckless" mens rea for misdemeanor domestic violence offenses.[172] The Court found it inconceivable that Congress would not have realized that it would be punishing some offenders who were committing domestic assaults recklessly (but not knowingly).[173]

Consequently, the Court held that the statutory definition of "misdemeanor crime of violence" includes convictions for reckless behavior.[174] However, in a footnote, the Court also reserved ruling on whether the crime of violence definition within 18 U.S.C. § 16, which closely tracked the language in both 18 U.S.C. § 921(a)(33)(A)(ii) and the ACCA,[175] also included "reckless" conduct.[176] As the Court put it, different statutes that are worded similarly may still require different mental states based on "divergent readings in light of differences in their contexts and purposes."[177] Nevertheless, in circuits where reckless offenses had been categorically denied as predicate offenses under the ACCA, federal prosecutors now

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[168] *Id.* at 2278–79.

[169] *Id.* at 2279 ("Or, otherwise said, that word is indifferent as to whether the actor has the mental state of intention, knowledge, or recklessness with respect to the harmful consequences of his volitional conduct.").

[170] It was on these grounds that Justice Kavanaugh, then Judge Kavanaugh, authored an opinion for the Court of Appeals for the District of Columbia, extending *Voisine*'s reasoning to the ACCA. United States v. Haight, 892 F.3d 1271, 1281 (D.C. Cir. 2018) ("As long as a defendant's use of force is not accidental or involuntary, it is 'naturally described as an active employment of force,' regardless of whether it is reckless, knowing, or intentional." (quoting *Voisine*, 136 S. Ct. at 2279)).

[171] *Voisine*, 136 S. Ct. at 2280.

[172] *See id.* ("Then, as now, a significant majority of jurisdictions—34 States plus the District of Columbia—defined such misdemeanor offenses to include the reckless infliction of bodily harm.").

[173] *Id.*

[174] *Id.*

[175] *See supra* notes 135–40 and accompanying text.

[176] *Voisine*, 136 S. Ct. at 2280 n.4.

[177] *Id.*

had a tool to argue that they were encompassed under the force clause.

B. The Improper Extension of Voisine *to the ACCA*

Multiple appellate courts in different circuits have concluded that *Voisine*'s holding means that "violent felonies" include reckless predicate offenses,[178] whereas other circuits have reached the opposite conclusion.[179] When examining circuit decisions where *Voisine*'s reasoning was extended to the ACCA, a common thread among these decisions is a focus on the identical language shared between the felon in possession statute and the misdemeanor domestic violence statute rather than a focus on the congressional intent behind the ACCA.

As mentioned previously, the Eighth Circuit held that "reckless" offenses counted as predicate offenses under the ACCA in *United States v. Fogg*.[180] The *Fogg* court accurately stated that the force clause under the ACCA and the statute at issue in *Voisine* contained similarly worded language.[181] Without diving deeply into whether these statutes had divergent purposes, the *Fogg* court held that "[r]eckless conduct thus constitutes a 'use' of force under the ACCA because the force clauses in [the misdemeanor crime of violence statute] and the ACCA both define qualifying predicate offenses as those involving the 'use . . . of physical force' against another."[182] Crucially, the *Fogg* court never considered whether the two force clauses should be read differently "in light of differences in their contexts and purposes."[183]

Likewise, the Court of Appeals for the District of Columbia concluded that "reckless" convictions now constituted violent felonies because of *Voisine*.[184] In *United States v. Haight*, Marlon Haight was originally convicted on several drug and gun related offenses stemming from an investigation into whether his home served as an illicit substance processing and distribution center.[185] At sentencing, the government argued that Haight qualified for a mandatory minimum under the ACCA based on three prior convictions for violent felonies and serious drug offenses:[186] "(1) distribution of cocaine in violation of D.C. law; (2) first-degree

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[178] United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016); United States v. Hammons, 862 F.3d 1052, 1056 (10th Cir. 2017); United States v. Pam, 867 F.3d 1191, 1207–08 (10th Cir. 2017); United States v. Haight, 892 F.3d 1271, 1281–82 (D.C. Cir. 2018).

[179] United States v. Windley, 864 F.3d 36, 39 (1st Cir. 2017) (adopting *Bennett*'s reasoning); United States v. Middleton, 883 F.3d 485, 500 (4th Cir. 2018) (Floyd, C.J., concurring) (Judge Harris joined Parts II.A. and II.B, which discussed *Voisine*'s impact on the ACCA).

[180] *Fogg*, 836 F.3d at 956.

[181] *Id.*

[182] *Id.* (comparing 18 U.S.C. § 923(e)(2)(B)(i) with 18 U.S.C § 921(a)(33)(A)(ii)).

[183] Voisine v. United States, 136 S. Ct. 2272, 2280 n.4 (2016).

[184] United States v. Haight, 892 F.3d 1271, 1281 (D.C. Cir. 2018).

[185] *Id.* at 1274–75.

[186] *Id.* at 1275.

assault under Maryland law; and (3) assault with a dangerous weapon under D.C. law."[187] Regarding those three offenses, the district court agreed with Haight that the assault with a dangerous weapon conviction was not a predicate offense under the ACCA.[188]

On appeal, Haight challenged his sentence whereas the government appealed the district court's decision not to enhance Haight's sentence under the ACCA.[189] The court of appeals disagreed with the district court and found that the offense at issue qualified as a violent felony.[190]

Haight had defended the district court's decision on two grounds. First, he argued that D.C.'s assault with a dangerous weapon offense was committable with "indirect force," but the court of appeals found this unpersuasive in the face of such binding precedent.[191] Haight's second argument is the subject of this Article since he argued that the D.C. assault with a dangerous weapon offense could not qualify as a violent felony because it could be committed recklessly.[192] The court of appeals disposed of this second argument by relying on *Voisine*.[193] The *Haight* court specifically focused on the fact that "[t]he statutory provision at issue in *Voisine* contains language nearly identical to [the] ACCA's violent felony provision."[194] Because of the similarity in language, the *Haight* court concluded "that the use of violent force includes the reckless use of such force."[195] However, even with the statutory discussion, the court of appeals was silent on whether the two statutes may require differing minimum culpable mental states because of the "divergent purposes" of the two statutes.[196]

Similarly, in *United States v. Pam* and *United States v. Hammons*, the Tenth Circuit also held that predicate offenses with a *mens rea* of reckless could constitute

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[187] *Id.* at 1278.

[188] *Id.* at 1278–79. The D.C. offense of assault with a dangerous weapon consisted of four elements:

> (1) an attempt, with force or violence, to injure another, or a menacing threat, which may or may not be accompanied by a specific intent to injure; (2) the apparent present ability to injure the victim; (3) a general intent to commit the acts which constitute the assault; and (4) the use of a dangerous weapon in committing the assault.

Id. at 1279 (quoting Spencer v. United States, 991 A.2d 1185, 1192 (D.C. 2010)).

[189] *Id.*

[190] *Id.* at 1279–80.

[191] *Id.* at 1280 ("We do not perceive any such distinction between direct and indirect force in the language of the statute or in the relevant precedents.").

[192] *Id.*

[193] *Id.*

[194] *Id.*

[195] *Id.* at 1281.

[196] *See* Voisine v. United States, 136 S. Ct. 2272, 2280 n.4 (2016).

"violent felonies."[197] *Hammons* was the first time the Tenth Circuit was faced with a question of whether a reckless offense now qualified under the ACCA after *Voisine*.[198] The specific offense at issue was Oklahoma's drive-by shooting statute, which requires "the *intentional* discharge of any kind of firearm . . . in *conscious disregard* for the safety of any other person or persons."[199] These two unique elements of the Oklahoma statute proved persuasive in the *Hammons* court's decision. Like *Haight*, the Tenth Circuit relied upon *Voisine*, but used it in a way to disregard the reckless portion of the Oklahoma statute.[200] Specifically, it pointed out that "Oklahoma's [statute] requires the deliberate use of physical force—the facilitation of the intentional discharge of a weapon."[201] Therefore, regardless of the reckless portion of the statute referring to the result, there was still an intentionality requirement in the discharge of a weapon under Oklahoma law. However, once again, the *Hammons* court did not discuss how the possible differences between the *Voisine* misdemeanor domestic assault statute and the ACCA would impact its analysis.

At first glance, the *Hammons* decision seems to be in accordance with the argument posited by this Article. Oklahoma has interpreted its drive-by shooting statute to include an element where a prosecutor must prove that the offender had "the specific intent to discharge a weapon."[202] Such an interpretation appears to conform with the belief that the ACCA involves offenses "that show an increased likelihood that the offender is the kind of person *who might deliberately point the gun and pull the trigger*."[203]

However, the Court has also specified that predicate offenses should not include ones that merely "reveal a degree of callousness toward risk."[204] In the case of Oklahoma's drive-by statute, a conviction is sustainable against an individual who operates the vehicle but is not the person to discharge the weapon.[205] Therefore, a hypothetical defendant could be charged for simply operating the vehicle where *another* individual is the one who ultimately fires a weapon.[206] In such a scenario, that defendant is simply acting recklessly by operating the vehicle, but he or she is not necessarily the type of person the ACCA was directed at, specifically, "the kind

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[197] United States v. Pam, 867 F.3d 1191, 1208 (10th Cir. 2017); United States v. Hammons, 862 F.3d 1052, 1056 (10th Cir. 2017).

[198] *Hammons*, 862 F.3d at 1055.

[199] OKLA. STAT. TIT. 21, § 652(B) (1992) (emphasis added).

[200] *Hammons*, 862 F.3d at 1056.

[201] *Id.*

[202] Burleson v. Saffle, 46 P.3d 150, 153 (Okla. Crim. App. 2002).

[203] *Begay*, 553 U.S. 137, 146 (2008) (emphasis added).

[204] *Id.*

[205] *Hammons*, 862 F.3d at 1055 (citing OKLA. STAT. TIT. 21, § 652(B)).

[206] *See Burleson*, 46 P.3d at 152.

of person wo might deliberately point [a] gun and pull the trigger."[207] Simply put, by extending *Voisine* to the ACCA, the *Hammons* court committed error by broadening the type of crimes that would constitute predicate offenses.[208] This makes sense when considering the purpose of the misdemeanor crime of domestic violence statute, but is improper under the ACCA because it is intended only for a narrow subset of offenders.

Turning to the Tenth Circuit's second decision on the subject, *Pam*, the court specifically examined whether the defendant's two predicate offenses of shooting at or from a motor vehicle under New Mexico law qualified him for a sentence enhancement.[209] Similar to the statute at issue in *Hammons*, the New Mexico statute required that the defendant "*willfully* discharg[e] a firearm . . . from a motor vehicle with *reckless disregard for the person of another*."[210] After recognizing that it had applied *Voisine's* reasoning to the ACCA, the court held that although the New Mexico statute contained a recklessness element, the fact that the charge required a willful use of a firearm was enough to ensure its counting as a predicate offense.[211] Nevertheless, like the previous cases in this discussion, the *Pam* court failed to discuss the differences in policy between the two statutes and instead elected to extend *Voisine*'s reasoning simply because the statutes were worded similarly.[212]

This lack of consideration for congressional intent is disheartening when one considers that *Voisine* was only dealing with misdemeanors whereas the ACCA concerns felony convictions.[213] Further, an analysis examining the divergent purposes between the different statutes is permitted under *Voisine*.[214] Nevertheless, the Tenth Circuit has pointed out an interesting wrinkle in the drive-by shooting statutes—each statute required an intentional act coupled with a reckless disregard for the result.[215] Because a violent felony requires "purposeful" conduct and the ACCA was targeted at individuals likely to consciously pull a trigger,[216] it would

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[207] *Begay*, 553 U.S. at 146.

[208] *Hammons*, 862 F.3d at 1056 ("[I]t makes no difference whether the person applying the force had the specific intention of causing harm or instead merely acted recklessly." (citing Voisine v. United States, 136 S. Ct. 2272, 2279 (2016))).

[209] United States v. Pam, 867 F.3d 1191, 1202 (10th Cir. 2017).

[210] N.M. STAT. ANN. § 30-3-8(B) (1978) (emphasis added).

[211] *Pam*, 867 F.3d at 1208 ("[Oklahoma's drive-by shooting statute] requires 'proof that the person acted intentionally in the sense that he was aware of what he was doing,' . . . as well as knowledge that his conduct created a substantial foreseeable risk and that he was wholly indifferent to the welfare and safety of others." (quoting State v. Sheets, 610 P.2d 760, 770 (N.M. Ct. App. 1980))).

[212] *Id.*

[213] *Compare* 18 U.S.C. § 924(e)(1), *with* 18 U.S.C. § 922(g) (2012).

[214] *See* Voisine v. United States, 136 S. Ct. 2272, 2280 n.4 (2016).

[215] *See supra* notes 169–179 and accompanying text.

[216] Begay v. United States, 553 U.S. 137, 145–46 (2008).

appear possible that even with a discussion of the congressional intent behind the ACCA, the Tenth Circuit could have still concluded that these particular statutes still qualified as predicate offenses. Yet, without this policy discussion, the Tenth Circuit has possibly allowed district courts to go too far and include offenses that only require a mens rea of recklessness for both the act and the result. Such a result would not comport with the ACCA's purpose of targeting offenders who may consciously choose to hurt others.[217]

C. Policy Considerations Lead to the Proper Conclusion that Reckless Offenses Should Not Be Encompassed Under the ACCA

Although the *Voisine* court conceded that statutes with similar wording could be read differently, it is off-putting to see that the common theme running through the prior cases discussed fails to consider these policy implications.[218] This difference is even more stark when looking at cases reaching the opposite conclusion.

As discussed previously,[219] the First Circuit held in *Bennett v. United States*[220] that *Voisine* did not alter its precedent that "recklessness" offenses could not serve as predicate offenses under the ACCA.[221] The *Bennett* court went through a proper analysis in which it discussed the textual similarities between *Voisine's* statute and the ACCA,[222] the origin of the "purposeful" language,[223] and the legislative history of the ACCA focusing on career offenders.[224] The *Bennett* court also continuously cited and referenced the Court's language in *Voisine* that allowed it to read two similarly worded statutes differently because of divergent purposes.[225]

Although the *Bennett* court recognized that *Voisine* certainly "call[ed] into question" the First Circuit's precedent of disallowing reckless offenses under the ACCA, it still held that reckless offenses were not predicate offenses.[226] In an interesting twist, it relied on the rule of lenity in coming to that decision.[227] Essentially, it concluded that the "rule of lenity does serve the additional and

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[217] Levine, *supra* note 39, at 547.

[218] *See supra* notes 150–184 and accompanying text.

[219] *See supra* notes 9–18 and accompanying text.

[220] Bennett v. United States, 868 F.3d 1, 4 (1st Cir. 2017), *withdrawn*, 870 F.3d 34 (1st Cir. 2017).

[221] *Id.* at 23.

[222] *Id.* at 20.

[223] *Id.* at 21.

[224] *Id.*

[225] *Id.* at 20.

[226] *Id.* at 23.

[227] *See* Price, *supra* note 24, at 885 ("[T]he 'rule of lenity'—the common law doctrine, also known as 'strict construction' . . . directs courts to construe statutory ambiguities in favor of criminal defendants.").

important purpose of ensuring 'the proper balance between Congress, prosecutors, and courts.'"[228] This implication of the rule of lenity was further motivated by the understanding that the ACCA is "a sentencing enhancement of great consequence."[229]

The First Circuit extended its holding in *United States v. Windley*.[230] The statute in *Windley* was more akin to the statutes found in *Hammons* and *Pam* because the statute at issue, assault and battery with a dangerous weapon under Massachusetts law, "require[d] that the wanton or reckless act be committed *intentionally*."[231] After surveying the state law to determine how Massachusetts convicted individuals of assault and battery with a dangerous weapon, a necessary step under the categorical approach, the First Circuit was not convinced that the statute constituted a predicate violent felony.[232] A survey of the Massachusetts case law revealed that a conviction could result even where the defendant did not intend to cause injury.[233] For example, reckless driving leading to insignificant injury could be charged as assault and battery with a deadly weapon.[234] This sort of analysis was non-existent in *Haight*, *Pam*, *Fogg*, and *Hammons*, but if it had been included, these decisions may have come to the same conclusion as the *Windley* court in holding that reckless offenses are not predicate offenses under the ACCA.

The most recent circuit to continue holding that reckless offenses have no place under the ACCA is the Fourth Circuit in *United States v. Middleton*.[235] Defendant Jarnaro Carlos Middleton had his sentence enhanced under the ACCA, but challenged the district court's determination that his South Carolina involuntary manslaughter conviction qualified as a violent felony.[236] The majority opinion never discussed *Voisine* and instead focused on South Carolina's treatment of involuntary manslaughter within its jurisdiction.[237] The *Middleton* court relied heavily upon *State v. Hambright*,[238] which upheld an involuntary manslaughter conviction against an individual who illegally sold alcohol to minors and subsequently crashed their vehicle while driving impaired.[239] The *Middleton* court held that South Carolina's

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[228] *Bennett*, 868 F.3d at 23 (quoting United States v. Bowen, 127 F.3d 9, 13 (1st Cir. 1997)).

[229] *Id.*

[230] United States v. Windley, 864 F.3d 36, 39 (1st Cir. 2017) (per curiam).

[231] *Id.* at 38 (emphasis added).

[232] *Id.* at 39.

[233] Commonwealth v. Welansky, 55 N.E.2d 902, 910–12 (Mass. 1944).

[234] *See* Commonwealth v. Green, No. 02-P-678, 2003 WL 22399532 at *1, *3–*4 (Mass. App. Ct. Oct. 21, 2003).

[235] United States v. Middleton, 883 F.3d 485, 487 (4th Cir. 2018).

[236] *Id.*

[237] *Id.*

[238] State v. Hambright, 426 S.E.2d 806, 807 (S.C. Ct. App. 1992).

[239] *Middleton*, 883 F.3d at 489.

involuntary manslaughter statute could not reach the ACCA's force clause because a conviction was possible "through a non-violent sale."[240]

However, a concurring opinion extensively discussed *Voisine*.[241] Furthermore, this discussion was able to convince a majority of the three-judge panel that heard the case.[242] Here, the concurrence first focused on the word "use" that is present in both the statute in *Voisine* and the ACCA.[243] The concurrence found that the force clause in the ACCA required a higher degree of mens rea than recklessness because the ACCA statute was targeted at armed career criminals.[244] Relying upon the language in *Voisine* that instructed courts to consider the divergent purposes of differing statutes, the concurrence pointed out that "the ACCA's purpose in targeting the truly purposeful and aggressive criminals warrants a narrower reading of the word 'use' [in comparison to the statute at issue in *Voisine*]."[245] The concurrence was also critical of other circuits that applied *Voisine* to the ACCA force clause. It simply stated, "[w]hile some of our sister circuits have applied *Voisine* to the ACCA force clause, they have done so without seriously considering or even discussing the divergent contexts and purpose of the ACCA and the [misdemeanor crime of domestic violence] statute."[246]

Based on the conclusion that reckless offenses should not constitute predicate offenses under the ACCA's force clause, the concurrence then noted that South Carolina's involuntary manslaughter statute criminalizes reckless conduct.[247] Therefore, because reckless offenses fail to satisfy the mens rea requirement of the ACCA, the concurrence would categorically bar South Carolina's statute from ever serving as a predicate offense.[248]

D. The Rule of Lenity Supports the Unconditional Rejection of Reckless Offenses Under the ACCA

Beyond the support found in the policy considerations of the ACCA, the rule of lenity further supports the proposition that reckless offenses should not count as predicate violent felonies. Although not directly implicated by the text of the ACCA, the method for determining violent felonies under the categorical and modified

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[240] *Id.* at 492–93.

[241] *Id.* at 497–500 (Floyd, C.J., concurring).

[242] *See id.* at 500. Judge Harris joined Parts II.A. and II.B., which discussed *Voisine's* impact on the ACCA.

[243] *Id.* at 497–98.

[244] *Id.* at 498.

[245] *Id.* at 499.

[246] *Id.* at 499–500 (citing United States v. Pam, 867 F.3d 1191, 1207–08 (10th Cir. 2017) and United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016)).

[247] *Id.* at 500.

[248] *Id.*

categorical approaches have the rule of lenity running through them.[249]

The rule of lenity is a common law doctrine, sometimes referenced as "strict construction," that implores courts to construe statutes with ambiguities in favor of the criminal defendant.[250] Within American jurisprudence, the rule has been used since at least 1820.[251] However, in recent years, critics and proponents alike have pointed out that the rule has lost its muster within the courts.[252]

Nevertheless, the rule of lenity is present in relation to the ACCA, especially during the application of the categorical approach. As discussed previously,[253] the categorical approach is a counterintuitive analytical method that forces a court to ignore the facts of a case and instead imagine that the defendant only committed the least criminal act possible under the state statute.[254] Therefore, the categorical approach, when applied properly, implies that statutory ambiguities should be construed in favor of the defendant.[255]

Any argument against sentence enhancements as a violation of the Double Jeopardy Clause is precluded by the Court in *Witte v. United States*.[256] However, that does not take away from the fact that a sentence enhancement under the ACCA can lead to a minimum 50% increase in prison time.[257] Furthermore, the Court has made it abundantly clear that because a predicate offense can only rest on the least of the acts criminalized, the focus is on the "minimum conduct criminalized by the state statute."[258]

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[249] *See* Moncrieffe v. Holder, 569 U.S. 184, 190–91 (2013) (holding that the assumption is that the defendant qualifies for the least of the acts criminalized under the state statute).

[250] *See* United States v. Bass, 404 U.S. 336, 347–48 (1971).

[251] *See* United States v. Wiltberger, 18 U.S. (1 Wheat.) 76, 95 (1820) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself.").

[252] *See* Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 396–425 (1994); Price, *supra* note 24, at 885–86.

[253] *See supra* notes 51–69 and accompanying text.

[254] *See Moncrieffe*, 569 U.S. at 190–91.

[255] *See* United States v. Rose, 896 F.3d 104, 109–10 (1st Cir. 2018) (concluding that the rule of lenity led to the conclusion that the statute at issue "was not a violent felony under ACCA's force clause").

[256] Witte v. United States, 515 U.S. 389, 400 (1995) ("In repeatedly upholding such recidivism statutes, we have rejected double jeopardy challenges because the enhanced punishment imposed for the later offense 'is not to be viewed as either a new jeopardy or additional penalty for the earlier crimes,' but instead as 'a stiffened penalty for the latest crime, which is considered to be an aggravated offense because [sic] a repetitive one.'" (quoting Gryger v. Burke, 334 U.S. 728, 732 (1948))).

[257] *Compare* Bennett v. United States, 868 F.3d 1, 23 (1st Cir. 2017), *withdrawn*, 870 F.3d 34 (1st Cir. 2017) (declining to enhance a sentence under the ACCA), *with* United States v. Fogg, 836 F.3d 951, 956 (8th Cir. 2016) (enhancing the defendant's sentence under the ACCA).

[258] *Moncrieffe*, 569 U.S. at 191. However, this "is not an invitation to apply 'legal imagination' to the state offense; there must be '*a realistic probability, not a theoretical possibility*,

In turn, and in the interest of justice, it is imperative that statutory ambiguities are construed in favor of the defendant. Additionally, recklessness only requires proof that a defendant disregard the risk of his conduct[259] and fails to meet the Court's determination that violent felonies are "*purposeful*, violent, and aggressive."[260] Therefore, applying the rule of lenity is implicit throughout the categorical approaches. Thus, the only logical conclusion is that reckless offenses should not constitute violent felonies under the ACCA because purposeful conduct should require an awareness that a defendant is practically certain his or her conduct will cause the intended result.

CONCLUSION

As this Article has illustrated, the ACCA predicate offense analysis has resulted in contrasting outcomes in various circuit courts, which is unsurprising when considering the "'apples to oranges' comparison" that is comparing state offenses with federal offenses.[261] More importantly, a sentence enhancement from ten years maximum to fifteen years minimum is an extraordinary punishment that should only be reserved for the most violent of offenders. The congressional intent behind the ACCA supports the proposition that predicate offenses should only consist of convictions that illustrate a defendant's ability to utilize a firearm in a violent manner. In turn, reckless convictions where a defendant has a conscious disregard for the result should categorically be denied as predicate offenses under the ACCA.

Courts that have determined otherwise have done so erroneously by failing to consider the policy considerations at play with the ACCA and misdemeanor domestic violence statute, an analysis called for by the language from *Voisine*. Additionally, courts that have scrutinized the divergent purposes of the two statutes have correctly determined that reckless statutes still lack the degree of mens rea necessary to establish a violent felony.

Moving forward, if the Supreme Court ever takes up this issue, it should recognize the congressional implications at play in the ACCA and categorically deny reckless offenses under the ACCA's force clause, regardless of its holding in *Voisine*. To determine otherwise would be contrary to the congressional intent when the ACCA was implemented.

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that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" *Id.* (emphasis added) (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).

[259] *See* MODEL PENAL CODE § 2.02(2)(c) (AM. LAW INST. 1985).

[260] Begay v. United States, 553 U.S. 137, 144–45 (2008) (emphasis added) (internal quotation marks omitted).

[261] United States v. Ankeny, No. 3:04–cr–00005–MO–1, 2017 WL 722580, at *4 (D. Or. Feb. 23, 2017).