Federal Sentencing Reform: Will Changing the Sentencing Discretion Regarding the Armed Career Criminal Act Violate Due Process?

"Justice Alito reasonably asks why, under the doctrine of 'constitutional avoidance,' the Court does not choose, instead, to interpret the residual clause as requiring evaluation of a defendant's actual prior conviction conduct, as opposed to overruling four settled precedents."[1]

I. INTRODUCTION

Since the implementation of the Armed Career Criminal Act of 1984 (ACCA), the U.S. Supreme Court has grappled with defining certain aspects of it.[2] The ACCA calls for a fifteen-year mandatory minimum prison sentence for offenders who illegally possess a firearm and have three prior convictions for violent felonies and/or serious drug offenses.[3] The ACCA enumerates a few specific violent felonies; however, the most problematic provision—known as the "residual clause"—provides a framework that additionally encapsulates the definition of a violent felony.[4] The residual clause provides that a violent felony may "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."[5]

Since 2007, the Supreme Court has decided four different ACCA cases, but the characterization of a violent felony within the residual clause became more obscure with each opinion.[6] For instance, the Court held that attempted

1. Rory Little, *Opinion Analysis: The Court Strikes Down the ACCA's Residual Clause As Vague. But Is the Real Problem the "Categorical" Approach?*, SCOTUSBLOG (June 29, 2015), http://www.scotusblog.com/2015/06/opinion-analysis-the-court-strikes-down-the-accas-residual-clause-as-vague-but-is-the-real-problem-the-categorical-approach [http://perma.cc/4BZ7-N5SG] (explaining problems surrounding using categorical approach for sentencing).

2. *See* Johnson v. United States, 135 S. Ct. 2551, 2556 (2015) (describing Supreme Court's struggle defining ACCA).

3. 18 U.S.C. § 924(e)(1) (2012) (declaring minimum fifteen-year sentence for those violating felon possession statute); *see also* 18 U.S.C. § 922(g) (2012) (establishing felon possessing firearm illegal). This statute specifically targets career offenders who committed prior violent felonies and continue to pose a threat to society, and therefore, deserve a prison sentence without the possibility of a suspended or probationary sentence. *See* § 924(e)(1).

4. *See Johnson*, 135 S. Ct. at 2556 (emphasizing attempts to define residual clause within ACCA); *see also* 18 U.S.C. § 924(e)(2)(B)(ii) (noting "burglary, arson, or extortion" and crimes involving explosives constitute violent felonies).

5. 18 U.S.C. § 924(e)(2)(B)(ii); *see also* Jennifer Chow, Comment, *The Sobering Truth: The Seventh Circuit Categorizes Drunk Driving As a Violent Felony*, 2 SEVENTH CIR. REV. 170, 171 (2006) (providing historical foundation of injury causing serious harm from intentional violent acts).

6. *See Johnson*, 135 S. Ct. at 2556 (explaining various case holdings concerning residual clause); *see*,

burglary and fleeing from a police officer while in a vehicle are within the parameters of the residual clause, but driving under the influence is not.[7] To further complicate interpreting the residual clause, the Court applied different methods of reasoning in deciding which felonies are considered "violent" under the clause.[8] The Supreme Court in *James v. United States*[9] determined whether the attempted burglary conviction at issue was a violent felony by applying the categorical approach to attempted crimes—instead of completed crimes—within a residual clause analysis.[10] On the other hand, the Supreme Court in *Begay v. United States*[11] determined that "purposeful" crimes conducted in a violent manner should be evaluated by considering different levels of risk within the residual clause.[12]

The Supreme Court confronted the confusion surrounding the residual clause's vagueness head on in *Johnson v. United States*.[13] Here, the Supreme

e.g., Sykes v. United States, 564 U.S. 1, 16 (2011) (holding categorical approach of residual clause covers vehicular flight from law enforcement), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015); Chambers v. United States, 555 U.S. 122, 123 (2009) (concluding failure to report penal confinement not covered in residual clause); Begay v. United States, 553 U.S. 137, 139 (2008) (holding driving under influence not analyzed under residual clause); James v. United States, 550 U.S. 192, 195 (2007) (concluding residual clause incorporates attempted burglary), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).

7. *See Sykes*, 564 U.S. at 16 (holding fleeing in motor vehicle constitutes violent felony under ACCA); *Begay*, 553 U.S. at 139 (explaining driving under influence of alcohol not violent felony under ACCA); *James*, 550 U.S. at 195 (concluding attempted burglary constitutes violent felony under ACCA).

8. *See* Leah M. Litman, *Residual Impact: Resentencing Implications of* Johnson*'s Potential Ruling on ACCA's Constitutionality*, 115 COLUM. L. REV. SIDEBAR 55, 58 (2015) (considering "purposeful, violent, and aggressive" acts to constitute "violent" felonies under clause).

9. 550 U.S. 192 (2007), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).

10. *See id.* at 202-04 (analyzing attempted burglary under categorical approach); *see also* Taylor v. United States, 495 U.S. 575, 602 (1990) (defining categorical approach). The categorical approach evaluates crimes by the individual elements of the committed offense. *See Taylor*, 495 U.S. at 602. This approach analyzes hypothetical acts instead of considering the specific conduct of the actual offender. *See id.* at 600. *But see* Descamps v. United States, 133 S. Ct. 2276, 2281-82 (2013) (deciding when modified categorical approach applies to offenses); Dan Kesselbrenner et al., Descamps v. United States *and the Modified Categorical Approach*, NAT'L IMMIGR. PROJECT 1 (July 17, 2013), https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/crim/2013_17Jul_descamps.pdf [http://perma.cc/D5L9-WCUZ] (recognizing modified categorical approach allows judges to analyze specific conduct and records). Sentencing judges may use the modified approach when a specific statute lists multiple offenses, and it is necessary for the judge to determine which offense fits within the ordinary case. *See Descamps*, 133 S. Ct. at 2281-82; *see also* Kesselbrenner et al., *supra*, at 1. The Court in *Descamps v. United States* grappled with the modified categorical approach that allows judges to consult additional documents about individual offenders, and whether judges should use this approach to assess appropriate sentencing punishments. *See* 133 S. Ct. at 2281-82. The Court ultimately held that the modified categorical approach should not be used "when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id.* at 2282. Moreover, the Court reasoned that the modified approach had been previously utilized as only a "tool" to help identify specific elements within divisible statutes that list multiple elements and, therefore, the approach would continue to be used in such a way. *See id.* at 2284-85; *see also* Mathis v. United States, 136 S. Ct. 2243, 2253 (2016) (asserting strictly limited use of modified approach).

11. 553 U.S. 137 (2008).

12. *See id.* at 143 (opining crimes considered under residual clause should be limited by risk); *see also* Litman, *supra* note 8, at 58 (explaining levels of risk used to decide which crimes fall under residual clause).

13. *See* 135 S. Ct. 2551, 2555 (2015) (positing issue of "prohibition of vague criminal laws").

Court held that the ACCA's residual clause was unconstitutionally vague because it did not provide a clear and uniform analysis for deciding the level of risk a certain crime would create.[14] By invalidating the residual clause, the Court maintained that the categorical approach—as it applied to "residual-clause cases" and other enumerated crimes—would remain a legitimate method of analyzing convictions.[15] In light of the changing circumstances, Justice Alito argues that the categorical approach does not need to be used to analyze residual clause cases.[16] In the aftermath of *Johnson*, now may be the perfect opportunity to question whether a modified categorical approach would better help judges analyze various sentencing options.[17] Moreover, Congress should establish a sentencing reform to allow sentencing judges more discretion in deciding the most beneficial outcome for both the offender and society.[18] Congress enacted the Sentencing Reform Act of 1984 (SRA) without violating an offender's due process rights; this Note argues that sentencing should be reformed yet again, allowing sentencing judges to rely on each offender's ability to be rehabilitated.[19]

To better understand the implications of courts using a modified categorical approach with greater judicial discretion, this Note examines the history of the vast authority sentencing judges have held in imposing punishment.[20] Prior to the ACCA and SRA, state and federal trial judges, as well as the Parole Commission, had the authority to decide what was best for offenders.[21] Society questioned this approach, and as a result, the SRA came to fruition.[22] The sentencing reform led to the establishment of the ACCA, and courts later began

14. *See id.* at 2557 (explaining vagueness invites arbitrary enforcement). The Court reasoned that a judicial assessment of a hypothetical criminal scenario was too difficult to analyze because the dissection did not rely on "real-world facts." *See id.* at 2558 In the majority opinion, Justice Scalia grappled with how a person would even begin to decide what was considered the "ordinary case" of a crime, and how a judicial official would assess whether that ordinary crime was a violent felony. *See id.*

15. *See id.* at 2562 (upholding categorical approach regarding hypothetical ordinary crime).

16. *See id.* at 2578 (Alito, J., dissenting) (discussing unmanageability of categorical approach to analyze violent felonies).

17. *See* Descamps v. United States, 133 S. Ct. 2276, 2283-84 (2013) (discussing modified categorical approach with divisible statutes).

18. *See* Hon. Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 186, 198 (1993) (explaining historical background of sentencing judges' vast discretion and urging Congress continue recent active role).

19. *See* Mistretta v. United States, 488 U.S. 361, 412 (1989) (holding SRA constitutional); Bradford Mank, *Do the United States Sentencing Guidelines Deprive Defendants of Due Process?*, 37 DRAKE L. REV. 377, 384 (1987) (proffering sentencing guidelines violate due process). The Supreme Court declared the concept of due process to be "fluid" and capable of adapting to the social circumstances of the time. *See* Jerold H. Israel, *Free-Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS U. L.J. 303, 362 (2001) (explaining adaptations of due process to changing circumstances).

20. *See infra* Part II.A (providing overview of sentencing prior to sentencing reform).

21. *See id.*

22. *See infra* Part II.B.1.

using the categorical approach to analyze crimes within the residual clause.[23] The history section details the various Supreme Court cases relying on the categorical approach within the residual clause.[24] The analysis focuses on the flaws of the categorical approach, as well as its failure to assist judges in deciding whether an individual meets all the requirements for the specific conviction, which ultimately leads to imposing a heavier sentence.[25]

With the recent change in the ACCA's sentencing structure, the analysis argues that in the future, it would be most beneficial for the ACCA to be applied with a modified categorical approach.[26] Convictions under the ACCA carry heavy prison sentences and therefore, this Note asserts that courts should delve deeper into each individual case, rather than judge the conviction within an idealized hypothetical by simply applying the ACCA's elements.[27] This Note further asserts that Congress should consider establishing a sentencing framework that focuses on cognitive behavior therapies to reduce recidivism rates around the country.[28]

II. HISTORY

A. The Relationship Between Congress and Judicial Sentencing

The U.S. Constitution expressly grants Congress the authority to "punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations."[29] The Constitution explicitly empowers the legislature to establish criminal punishments; the judiciary, on the other hand, relies on implied discretion to analyze statutes and assign appropriate punishments on a case-by-case basis.[30] Historically, Congress rarely infringed upon the judiciary's discretion in deciding federal punishments.[31] The rise of the rehabilitative theory of punishment reinforced the broad discretion granted to trial judges because the intention focused on restoring incarcerated individuals to law-abiding citizens who would contribute to society.[32] Trial judges

23. *See infra* Part II.C.

24. *See id.*

25. *See infra* Part II.D.

26. *See infra* Part III.A (describing benefits of modified approach and need for sentencing reform).

27. *See infra* Part III.B.

28. *See id.*

29. U.S. CONST. art. I, § 8, cl. 10 (inferring clause does not grant judiciary sentencing power).

30. *See Ex parte* United States, 242 U.S. 27, 41-42 (1916) (explaining judges implement sentences, but Congress limits judiciary power). Congress originally enacted sentencing statutes to punish felons but as society developed, the goal shifted to reforming criminals. *See id.* at 38.

31. *See* Hatch, *supra* note 18, at 186 (explaining judges' wide timeframe to decide appropriate sentencing). Congress established the United States Parole Commission in 1910 and, as a result, the judiciary acquired greater discretion. *See id.* Instead of automatically sentencing a federal defendant to prison, judges gained the authority to sentence defendants to different probation programs. *See id.*

32. *See* Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 893-94 (1990) (describing judiciary's liberal discretion deciding individual

consulted parole boards, considered the best possible rehabilitation programs, and analyzed factors, including "a defendant's troubled childhood, emotional instability, arrest record, acquitted charges, education, substance abuse, and family responsibilities."[33] These individual characteristics allowed trial judges the broad discretion to decide which sentence best rehabilitated the offender's underlying behavioral issues.[34]

B. Shifting Powers of Judicial Sentencing

1. Growing Criticism Regarding Broad Judicial Discretion

The broad authority trial judges exercised in sentencing came to a head when Americans grew critical of these judges' unbridled discretion in their sentencing decisions—decisions often viewed as resulting in inconsistent and discriminatory punishments.[35] To help placate the growing unease amongst American citizens, Congress drafted the SRA and established the United States Sentencing Commission (USSC) to act as an independent judicial agency working toward coordinating punishments using sentencing guidelines.[36]

factors affecting sentences); *see also* Williams v. New York, 337 U.S. 241, 247-48 (1949) (explaining "legal category" of crime no longer calls for identical sentencing). Writing for the majority, Justice Black recognized that "[r]etribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence." *Williams*, 337 U.S. at 248.

33. Jennifer Borges, *The Bureau of Prisons' New Policy: A Misguided Attempt to Further Restrict a Federal Judge's Sentencing Discretion and to Get Tough on White-Collar Crime*, 31 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 141, 144 (2005) (discussing judge's discretion to sentence offender based upon individual's conduct). During this era of indeterminate sentencing, trial judges retained broad discretion to focus the rehabilitative framework on the individual's personal characteristics rather than the circumstances of the crime committed. *See id.* The focus of indeterminate sentencing was the rehabilitation of individual offenders; at the time, sentencing officials believed that analyzing and reforming underlying characteristics was more important than the facts surrounding the commission of the crime. *See id.* Although the goal of indeterminate sentencing was to benefit society, this sentencing structure was flawed because it resulted in "unjustified sentencing disparity." *See id.* Because no two offenders were the same, sentencing judges needed to administer individual punishments instead of relying on a consistent sentencing guideline. *See id.*

34. *See id.* (explaining offenders' individual characteristics judges consider when sentencing). *But see* Charles E. Wyzanski, Jr., *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1292 (1952) (explaining punishment should be consistent by crime type and not offender-specific).

35. *See* Nagel, *supra* note 32, at 886-87 (describing growing criticism in 1960 spurred legislative enactment of SRA in 1984); Matthew C. Lamb, Note, *A Return to Rehabilitation: Mandatory Minimum Sentencing in an Era of Mass Incarceration*, 41 J. LEGIS. 126, 136-37 (2015) (explaining racial bias resulted in higher incarceration rates for minorities). *But see* Erik Luna, *Mandatory Minimum Sentencing Provisions Under Federal Law*, CATO INST. (May 27, 2010), http://www.cato.org/publications/congressional-testimony/mandatory-minimum-sentencing-provisions-under-federal-law [http://perma.cc/K2UT-GT6N] (explaining determinate sentencing did not alleviate sentencing disparities).

36. *See* Pub. L. No. 98-473, 98 Stat. 2017 (codified as amended at 28 U.S.C. § 991) (establishing USSC); *see also* Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended) (enumerating text of SRA); Nagel, *supra* note 32, at 886 (describing restriction of judicial discretion through structure of sentencing guidelines); Julia L. Black, Note, *The Constitutionality of Federal Sentences Imposed Under the Sentencing Reform Act of 1984 After* Mistretta v. United States, 75 IOWA L. REV. 767, 772-73 (1990) (referencing SRA's changes to judicial sentencing). The SRA established the USSC's authority to "promulgate and distribute . . . guidelines . . . for

These guidelines, commonly known as the Federal Sentencing Guidelines (Guidelines), utilize a "mathematical methodology" that automatically enforces a mandatory minimum sentencing punishment that, for the first time, forces trial judges to punish offenders with mandatory jail time rather than allowing discretionary sentencing to achieve rehabilitation.[37]

2. Harsher Sentencing Under the Armed Career Criminal Act

In addition to establishing the SRA, Congress enacted the ACCA in 1984; the ACCA adopted the policy underlying determinate sentencing, punishing offenders who repeatedly deviated from the law.[38] The ACCA calls for a fifteen-year mandatory minimum prison sentence for offenders with three prior convictions for violent felonies and/or serious drug offenses, which has drastically changed the prison population in the United States.[39] Once an offender is sentenced under the ACCA, the individual must remain in prison for the fifteen-year mandatory minimum sentence—implementing the original notion of drastically punishing those considered habitual offenders.[40]

use of a sentencing court in determining the sentence to be imposed in a criminal case." 28 U.S.C. § 994(a)(1) (2012).

37. *See* Lamb, *supra* note 35, at 138-39 (explaining judge's point system moves sentence depending on circumstantial adjustments). Depending on the severity of the crime, the SRA imposed different levels of punishment. *See id*. at 137. The establishment of factors a sentencing judge could consider in determining a valid prison sentence constituted the major discretional difference under the SRA. *See* 18 U.S.C. § 3582 (2012) (noting "court . . . shall consider the factors . . . to the extent that they are applicable"). Moreover, sentencing judges could consult the USSC, but they had to realize that "imprisonment is not an appropriate means of promoting correction and rehabilitation." *See id.* § 3582(a). *But see* Francis T. Cullen & Paul Gendreau, *The Effectiveness of Correctional Rehabilitation: Reconsidering the "Nothing Works" Debate*, *in* 4 THE AM. PRISON: ISSUE IN RES. & POL'Y 23, 27 (Lynne Goodstein & Doris Layton MacKenzie eds., 1989) (explaining rehabilitation wrongly targeted for purported ineffectiveness). The American public was disheartened with the rehabilitative sentencing structure because of the rise in recidivism. *See id*. Broader societal circumstances may have contributed to years of increased offending, with events such as the civil rights movement and the Vietnam War reverberating throughout the nation. *See id*.

38. *See* 18 U.S.C. 924(e)(1) (2012) (providing fifteen-year mandatory minimum for career offenders with three predicate violent felony or drug convictions); T.J. Matthes, Comment, *The Armed Career Criminal Act: A Severe Implication Without Explanation*, 59 ST. LOUIS L.J. 591, 592-93 (2015) (discussing how federal enactment of ACCA helps incarcerate repeat criminals). Because of the policy shift in sentencing, the prison population within the United States drastically increased: the number of inmates was over eight times higher in 2013 than in 1980. NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 1 (2014) (providing prison statistics).

39. 18 U.S.C. § 924(e)(1) (setting forth mandatory minimum sentence); *see also* JAMES, *supra* note 38, at 1 (highlighting increased incarceration rates). The mandatory minimum prison sentence pertains to offenders with previous convictions "punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1) (2012).

40. *See* H.R. REP. NO. 98-1073, at 7 (1984) (explaining career offenders, regardless of sentence range, not eligible for parole once designated habitual offender); *see also* Jill C. Rafaloff, Note, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?*, 56 FORDHAM L. REV. 1085, 1091-92 (1988) (asserting Congress anticipated punishing habitual offenders would reduce crime rates).

C. Varying Residual Clause Usages

Sentencing under the ACCA is clearly serious, and as such, it is important to understand which types of crimes are relevant to the enhanced sentencing requirements.[41] The residual clause creates problems for career offenders because the language is arguably ambiguous, which is unacceptable for such an intense sentencing structure.[42] The residual clause's broad language led the Supreme Court to announce varying verdicts regarding whether a certain crime qualifies as a violent felony under the residual clause.[43] In *James*, the Court struggled to decide whether the lower courts correctly considered a conviction for attempted armed robbery a violent felony.[44] The Court held that attempted crimes are eligible for enhanced punishment under the ACCA's residual clause, and a categorical approach to sentencing is the correct method of determining eligibility.[45]

The categorical approach the Court used in *James* was established in *Taylor v. United States*,[46] a case analyzing what circumstances amounted to a burglary offense.[47] The Court in *Taylor* considered burglary to be among the crimes enumerated in the residual clause because of the underlying logic that threatened force or use of force was a risk inherent of burglary.[48] After concluding that burglary should receive the enhanced sentence, the Court opined that the language of § 924(e) should be read only to consider whether the defendant's prior conviction fits within one of the established crimes,

41. *See* 18 U.S.C. § 924(e)(2) (describing elements of "serious drug offense" and "violent felony").

42. *See id.* § 924 (e)(2)(B)(ii) (demonstrating statutory ambiguity); *see also* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015) (holding increased sentence under residual clause unconstitutional). Specifically, the residual clause defines a violent felony as any crime that "*otherwise involves conduct that presents a serious potential risk of physical injury to another*." § 924 (e)(2)(B)(ii) (emphasis added).

43. *See Johnson*, 135 S. Ct. at 2556; *supra* note 7 and accompanying text (discussing various Court holdings).

44. *See* James v. United States, 550 U.S. 192, 195 (2007) (enumerating issue before Court), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015). It was important for the Supreme Court to hear *James* because the offender would either be sentenced under the ACCA and receive a sentence of life imprisonment, or the Court would not deem the offense a violent felony and the ACCA would not apply. *See id.* at 196-97. The Court looked to the plain language of the ACCA's residual clause, and concluded that it incorporated any "conduct that presents a serious potential risk of physical injury to another." *Id.* at 198. The Court reasoned that the most important thing was not the "completion" of the crime, but that the initial undertaking of committing a burglary, arson, extortion, or crime using explosives is extremely dangerous and carries the risk of grievous bodily injury. *See id.* at 199. Additionally, the Court concluded there was no evidence that Congress intended the residual provision to apply only to completed offenses. *Id.* at 200.

45. *See id*. at 198-200 (applying categorical approach in concluding nothing in ACCA precludes applying clause to attempted crimes).

46. *See* 495 U.S. 575, 601 (1990) (determining appropriateness of categorical approach used by circuit courts in residual clause analyses).

47. *See id.* at 580 (questioning whether Congress intended burglary to encompass convicting state's definition or some model definition).

48. *See id*. at 589 (explaining categorical approach deciphers among common characteristics of inherently dangerous crimes); *see also* Johnson v. United States, 559 U.S. 133, 140 (2010) (defining violent force in ACCA context).

without looking at the underlying facts surrounding the actual crime.[49]

Congress's amendments to the ACCA in 1986, which expanded the scope of predicate offenses, created problems in analyzing attempted crimes under the residual clause.[50] In *James*, the justices broadly construed the residual clause to integrate attempted offenses, and applied the categorical approach taken from *Taylor* to decide an adequate punishment.[51] When integrating the categorical approach with the residual clause, the Court looked at the "ordinary case" of a given crime, and the degree to which the offense was considered a "serious potential risk of injury to another."[52] If a crime posed a sufficient potential risk of injury, it satisfied the residual clause, and could subject the offender to an enhanced sentence.[53] The *James* court interpreted the language of the burglary statute—taken with the language of the ACCA's residual clause—to determine that attempted burglary constitutes a violent felony.[54]

In *Begay*, the Court held that driving under the influence did not pose a serious potential risk of physical injury to others because the offense was not considered "purposeful, violent, [or] aggressive."[55] The Court distinguished

49. *See Taylor*, 495 U.S. at 600 (scrutinizing statutory language and conforming categorical approach to framework). The Court gave great deference to Congress's use of the categorical approach in drafting the ACCA's sentencing enhancement. *See id.* at 601. The categorical approach resonates with the Court's conclusion to analyze only the "conviction and the statutory definition of the prior offense." *See id.* at 602.

50. *See id*. at 584 (discussing Senate's goal to expand predicate offenses); *see also* James v. United States, 550 U.S. 192, 201 (2007) (discussing broad interpretation of residual clause encompasses attempted offenses), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015). The Court construed the residual clause so broadly that it could not be argued that Congress intended the language to reject attempted offenses. *See id.*; *see also* Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402(b), 100 Stat. 3207, 3207-40 (codified at 18 U.S.C. § 924(e)(2)(B)(ii)) (setting forth text adopted for purposes of residual clause).

51. *See James*, 550 U.S. at 202 (explaining categorical approach analyzes conviction and hypothetical ordinary case of crime committed). Implementing the categorical framework, the Court considered "the elements of the offense" and whether they justified assimilation into the residual clause, rather than considering the offender's individual characteristics. *Id.*

52. *Id.* at 208-09 (stressing importance of actual elements underlying offense over considering hypothetical scenarios).

53. *See id.* (establishing test for applicability of residual clause). By analyzing an ordinary scenario surrounding a specific type of crime, the Court established a consistent sentencing structure that focused on a singular crime instead of relying on inconsistent, individual characteristics of the offenders. *See id.*

54. *See James*, 550 U.S. at 207-08 (analyzing risk level of attempted offense). The Court reasoned that even where an offense is attempted but not completed, the potential risk of seriously injuring another and the intentional conduct of the crime amount to a violent felony. *See id*. at 208-09.

55. *See* Begay v. United States, 553 U.S. 137, 144-45 (2008) (internal quotations omitted) (considering purposeful conduct unique element of ACCA). The Court held that driving under the influence did not satisfy clause (i) of the ACCA because the language of the state statute does not include any "element [of] . . . threatened use of physical force against the person of another." *Id.* at 141 (citing 18 U.S.C. § 924(e)(2)(B)(i) (2012)). Most importantly, the Court looked to the language of the residual clause to decipher whether Congress intended it to encompass any crime presenting a serious risk of injury to another individual. *See id.* at 142. The Court specifically examined § 924(e)(2)(B)(ii)'s examples to conclude that Congress intended the statute to pertain to violent crimes similar to those listed, not all categories of violent crimes. *See id*. at 142-43. In addition to limiting the residual clause to crimes similar to those enumerated within the statute, the Court concluded it should also be limited to those that have a degree of risk comparable to such enumerated offenses. *See id.* at 143.

driving under the influence from the enumerated crimes within the ACCA because the offender did not need to have criminal intent to act violently or aggressively, which would result in harm to another individual.[56] The Court differentiated driving under the influence from acts encompassed in the ACCA by emphasizing the type of offender the ACCA and the residual clause intend to punish—individuals committing purposeful and violent crimes that endanger others.[57]

The Supreme Court later settled a conflict among lower courts as to whether "failure to report for imprisonment" was subject to the ACCA's violent felony clause.[58] In *Chambers v. United States*,[59] the Supreme Court distinguished between the offense of failing to report to a penal institution and attempting to escape from such an institution.[60] Although the Illinois state statute incorporated the different intentions of escape and failing to report into a single statutory scheme, the Court reasoned that failure to report is an inaction, and poses no threat of physical harm to others.[61] Moreover, the Court analyzed the state statute by applying the ACCA's description of a violent felony to the offense, and concluded that not only does the offense not involve the use of threatened physical force but, most importantly, it does not fit within the residual clause's requirement that the offense pose a "serious potential risk of physical injury to another."[62] The Court in *Chambers* considered failure to

56. *See id.* at 144-45 (noting purposeful and violent conduct constitute pertinent traits of career offenders).

57. *See id.* at 146 (focusing on higher level of danger associated with offenses committed by violent career offenders).

58. Chambers v. United States, 555 U.S. 122, 125 (2009) (explaining circuit split interpreting failure to report under ACCA). *Compare* United States v. Winn, 364 F.3d 7, 12 (1st Cir. 2004) (explaining categorical interpretation of felony escape creates serious potential risk under residual clause), *abrogated by* Chambers v. United States, 555 U.S. 122 (2009), *with* United States v. Piccolo, 441 F.3d 1084, 1090 (9th Cir. 2006) (declining to consider failure to report example of violent crime under residual clause), *and* United States v. Thomas, 333 F.3d 280, 282 (D.C. Cir. 2003) (refusing to consider all escapes violent). Once again, the Supreme Court upheld the use of the categorical approach in assessing offenses under the ACCA by applying a "generic *set* of acts" to determine whether the offense is a violent felony warranting enhanced punishment. *Chambers*, 555 U.S. at 125 (emphasis original); *see also* Shepard v. United States, 544 U.S. 13, 16-17 (2005) (explaining rare cases in which nongeneric approach should apply); Taylor v. United States, 495 U.S. 575, 602 (1990) (discussing categorical approach and generic approach used to analyze offenses).

59. 555 U.S. 122 (2009).

60. *See id.* at 126-27 (considering state statutory language categorizing escape and failure to report different felonies).

61. *See* 720 ILL. COMP. STAT., § 5/31–6(a) (2012); *Chambers*, 555 U.S. at 128 (explaining failure to report "amounts to a form of inaction"). The Court focused its analysis on the passivity of failing to report in contrast to the violent and aggressive nature of actively trying to escape from prison. *See Chambers*, 555 U.S. at 127-28. Considering the ACCA seeks to punish violent and aggressive career criminals, it does not seem as though failing to report would warrant any extra punishment. *See id*.

62. *Id.* at 128 (internal quotations omitted) (comparing failure to report to language from ACCA); *see also* 18 U.S.C. § 924(e)(2)(B) (2012) (providing statutory requirements for ACCA offenses). According to Justice Scalia, the most significant similarity between an offense and the requirements of the ACCA is that the offense must pose a sufficiently serious potential risk of causing physical harm to another individual. *See* Begay v. United States, 553 U.S. 137, 151 (2008) (Scalia, J., concurring). Thus, the residual clause is the most

report an inaction—something very different than the purposeful and violent conduct that the ACCA punishes.[63] Because the enhanced punishment under the ACCA is so severe, the Court is diligent to only penalize particularly violent offenders, which avoids severely punishing an offender who may not be in the same category as a career criminal.[64]

The Supreme Court considered the final residual clause ambiguity in *Sykes v. United States*,[65] which involved a motor vehicle fleeing from a law-enforcement officer.[66] In analyzing the offense, the Court once again applied the categorical approach to determine whether the language of the residual clause covered the elements of the offense.[67] The Supreme Court deemed using a motor vehicle to flee from a law enforcement officer presented a serious potential risk of physical injury to another due to the complete disregard for the safety of individuals in the general vicinity.[68] Although the ACCA does not contain language requiring "purposeful, violent, and aggressive conduct,"[69] the Court in *Sykes* concluded that offenses posing serious risk of physical injury to others would automatically have the "purposeful" requirement incorporated into the offense.[70] Thus, relying on the degree of risk presented, the Court concluded the ACCA's residual clause applied to the use of a motor vehicle to

important factor to consider when the Court decides which offenses will be subject to the enhanced punishment structure of the ACCA. *See id.*

63. *See Chambers*, 555 U.S. at 128 (explaining ACCA focuses punishment toward actions resulting in serious physical harm to others). Although failing to act is still an undertaking, the Court reasoned that this type of action does not have the inherent risk of causing severe physical injury to other individuals. *See id*. Because a failure to act lacks the risk of physical harm, such omissions are not included in the ACCA. *See id*. The Court differentiated failure to report from the purposeful acts of burglary, arson, and the use of explosives, which have the capacity to injure other individuals seriously. *See id*.

64. *See* Chambers v. United States, 555 U.S. 122, 128 (2009) (analyzing that "something" beyond inaction must pose serious risk to warrant ACCA sentencing); *see also Begay*, 553 U.S. at 146 (explaining ACCA's commitment to punishing "particular type of offender"). The ACCA is a narrowly-tailored statute that seeks to limit the danger serious offenders present to their communities. *See Begay*, 553 U.S. at 146.

65. 564 U.S. 1 (2011), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).

66. *See id.* at 4 (discussing state statutory language and identification of violent felony offenses).

67. *See id.* at 7 (explaining assessment of generic offense instead of particular characteristics and behavior of offender); *see also* James v. United States, 550 U.S. 192, 196-97 (2007) (describing categorical approach), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015).

68. *See* Sykes at 8-9 (discussing possibility law enforcement will use necessary and sometimes dangerous force to apprehend offender. The Court concluded that the violence posed by fleeing in a motor vehicle included a risk of harming others similar to the risk involved in arson, an offense enumerated under the ACCA. *Id*. at 9; *see also* 18 U.S.C. § 924(e)(2)(B)(ii) (2012) (including arson in list of crimes posing serious risk of physical injury to another).

69. Begay v. United States, 553 U.S. 137, 144-45 (2008) (internal quotations omitted) (explaining difference between ACCA-like offenses and strict liability).

70. *See* Sykes v. United States, 564 U.S. 1, 13 (2011) (analogizing level of risk in vehicle fleeing to residual clause offenses), *overruled by* Johnson v. United States, 135 S. Ct. 2551 (2015). The Court reasoned the felony of fleeing from law enforcement in a motor vehicle was serious enough to warrant the enhanced punishment under the ACCA's residual clause because of the threat of causing grievous injury to other individuals. *See id*.

flee from law enforcement.[71]

D. The Supreme Court Ruled That the ACCA's Residual Clause Is Unconstitutionally Vague

The Supreme Court declared the residual clause unconstitutionally vague because of the lack of consistency in sentencing.[72] In *Johnson*, the Court acknowledged the inconsistencies surrounding the residual clause, and sought to decide the best course of action to protect individual liberty and provide the public with notice of offenses that would be subject to an enhanced sentence under the ACCA.[73] The residual clause's reprimand of offenses that "otherwise involve[] conduct that present[s] a serious potential risk of physical injury to another," places many career offenders' crimes in limbo between judicial discretion and mandatory enhanced sentences.[74]

In *Johnson*, the Supreme Court began its assessment of the residual clause by upholding the use of the categorical approach in analyzing whether offenses meet the requirements for enhanced sentencing.[75] The Court declared the

71. *See id*. at 16 (holding "vehicle flight is a violent felony for purposes of ACCA"). The Court relied on the residual clause to evaluate the degree of risk posed by vehicle flight, resulting in the offense's classification as a violent felony. *See id*. at 17-18 (Thomas, J., concurring).

72. *See* Johnson v. United States, 135 S. Ct. 2551, 2557, 2563 (2015) (holding residual clause unconstitutionally vague because of various inquiries leading to arbitrary sentencing). *Johnson* included an interesting procedural history: the original offense involved the unlawful possession of a short-barreled shotgun but, by the time the Supreme Court heard the case, the prominent issue was whether the residual clause was constitutional. *See id.* at 2556. The initial issue was whether possession of a short-barreled shotgun was considered a violent felony under the language of the ACCA's residual clause, warranting an enhanced sentence. *Id*. The Supreme Court requested that the parties present arguments scrutinizing the "compatibility of the residual clause with the Constitution's prohibition of vague criminal laws." *Id*. The Fifth Amendment of the U.S. Constitution states: "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

73. *See Johnson*, 135 S. Ct. at 2556-57 (explaining lack of standards leads to "arbitrary enforcement" of similar crimes). Due process rights are extremely important when dealing with the ACCA because of the enhanced mandatory minimum sentence; therefore, the Court sought to analyze whether the statutory language of the residual clause violated due process. *See id*. Due to the lack of consistency between state criminal codes and the ACCA's language, courts at all levels struggled to apply the statute consistently, which ultimately led to a wide array of disconnect and a lack of notice to offenders. *See* Nicole D. Porter, *Ruling Against "Three Strikes" Sentencing Law Opens Door to Reform*, TRUTHOUT (June 30, 2015), http://www.truth-out.org/news/item/31642-supreme-court-rules-against-three-strikes-federal-sentencing-law-provision-opens-door-for-further-reform [http://perma.cc/BQM6-4SGH]. The ambiguity as to which crimes were considered violent felonies left too much discretion in the hands of state officials and sentencing judges. *See id*. Because of the extreme length of these sentences, the Court found too much ambiguity surrounded what constituted a violent felony to validate the residual clause. *See Johnson*, 135 S. Ct. at 2558.

74. 18 U.S.C. § 924(e)(2)(B)(ii) (2012); *see also supra* Part II.C (demonstrating sentencing irregularity for crimes posing substantial risk of harm to others).

75. *See Johnson*, 135 S. Ct. at 2557 (discussing how categorical approach assesses language defining crime in ordinary sense); *see also* Taylor v. United States, 495 U.S. 575, 602 (1990) (illustrating application of categorical approach to elements of offense); Michael O'Hear, *Supreme Court Reaffirms "Categorical Approach" in Applying Armed Career Criminal Act*, LIFE SENTENCES BLOG (June 21, 2013), http://www.lifesentencesblog.com/?p=6536#sthash.4p3fxX1A.dpuf [http://perma.cc/NF2E-PUPX] (discussing Court's affirmation of categorical approach to sentence under ACCA). The Supreme Court considered the problems of

residual clause unconstitutionally vague for two reasons: first, "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime;" and second, it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony."[76] In the first prong, the Court relied on various scenarios dealing with a burglary; specifically, the Court postulated that the "ordinary case" of a burglary may involve an incredibly diverse set of circumstances, which may lead to denying individuals fair notice and arbitrary enforcement.[77] Secondly, the Court was skeptical about sentencing judges utilizing the degree of risk framework to decide whether their own fabricated ideal of a crime warranted an enhanced sentence.[78]

These ambiguities led to such diverse outcomes that the Supreme Court acknowledged its lack of consistency in applying the residual clause.[79] The resources and characteristics sentencing judges considered while imposing their sentences created much of the disagreement among the courts.[80] In response, Justice Scalia, writing for the majority, brought the residual clause's ambiguities to a head when he and the other concurring justices held the clause unconstitutional.[81] The resulting outcome created an entirely new framework for analyzing how offenses are defined as violent felonies under the ACCA.[82]

applying the categorical approach to an ordinary criminal, including the vast circumstances that could be used to commit the offense. *See Johnson*, 135 S. Ct. at 2557-58. Furthermore, determining which ordinary act of the offense courts should consider the ideal for comparison left sentencing judges with too much uncertainty regarding the degree of risk that satisfied the residual clause's requirement for a violent felony. *See id*. at 2558.

76. *Johnson*, 135 S. Ct. at 2557-58 (discussing uncertainties judges encounter sentencing various offenses).

77. *See* Johnson v. United States, 135 S. Ct. 2551, 2557-58 (2015) (illustrating different burglary scenarios). Because no two offenses are factually identical, the circumstances surrounding each offense can vary greatly. *See id.* The Court was previously conflicted about sentencing judges' method of deciding the ordinary case of a crime. *See id*. at 2558. Specifically, the Court disapproved of sentencing judges imposing inconsistent and unpredictable sentences for similar offenses. *See id*.

78. *See id.* (articulating uncertainty in level of risk required for crime to constitute violent felony). The Court held that sentencing judges had no clear framework for determining the necessary level of risk to satisfy the ACCA's violent felony definition. *See id*.; *see also* Begay v. United States, 553 U.S. 137, 142-43 (2008) (explaining varying offenses and levels of risk).

79. *See Johnson*, 135 S. Ct. at 2559-60 (admitting continuous lower court splits applying clause); *see also* Kedar S. Bhatia and Shamoil T. Shipchandler, *Three Strikes Is Out*, MONDAQ (July 17, 2015), http://www.mondaq.com/unitedstates/x/413314/Crime/Three+Strikes+Is+Out [https://perma.cc/56ZX-3WWW] (questioning whether fault for ambiguity lies with Court or Congress).

80. *See Johnson*, 135 S. Ct. at 2560 (discussing courts' inconsistent analyses pertaining to factors considered in evaluating degree of risk levels).

81. *See id*. at 2563 (overturning previous cases).

82. *See* Johnson v. United States, 135 S. Ct. 2551, 2563 (2015) (departing from previous decisions to establish predictable framework for future); *see also* Steve Sady, Johnson*: Remembrance of Illegal Sentences Past*, NINTH CIRCUIT BLOG (July 1, 2015), http://circuit9.blogspot.com/2015/07/johnson-remembrance-of-illegal.html [http://perma.cc/D7RP-XVVF] (discussing Justice Scalia's majority opinion holding residual clause unconstitutional). After dissenting in *James* and *Sykes*, Justice Scalia in *Johnson* expressed his discontent regarding the "wide-ranging inquiry" sentencing judges undertook to decide on the ordinary case of an offense, which Scalia asserted violated an offender's right to due process. *See Johnson*, 135 S. Ct. at 2557; Sady, *supra* (discussing length of sentence because of vast circumstantial inquiry). Together the residual clause

E. New Ways to Assess Violent Felonies Under the ACCA

Since the implementation of mandatory minimum sentencing under the SRA, the number of offenders committed to prison has drastically increased.[83] Instead of focusing on the ability of individual offenders to be rehabilitated, courts sentenced offenders to ACCA punishments so long as the relevant offense posed a significant risk of physical injury to another.[84] The Court has been reluctant to accept rehabilitative options for career offenders despite critiques regarding the ACCA's harsh sentences and drastic population increases in the American prison system.[85] Many of these critiques come from

and the categorical approach created problems within the enhanced sentencing framework of the ACCA because prior convictions were not subject to a time limit within which the offender had committed the crime. *See* Sady, *supra*. The residual clause's catch-all language, combined with the lack of specific characteristics of the offense, led sentencing judges to subject offenders to the mandatory fifteen-year minimum sentence even if their prior offenses occurred twenty years ago. *See id*.; *see also* Sentencing Reform and Corrections Act of 2015, S. 2123, 114th Cong. (2015). Looking specifically at the proposed Sentencing Reform and Corrections Act, the legislature intended to reduce mandatory minimum sentencing. *See* S. 2123 § 105; *see also* Carrie Johnson, *Here's One Thing Washington Agreed On This Week: Sentencing Reform*, NPR (Oct. 3, 2015), http://www.npr.org/sections/itsallpolitics/2015/10/03/445309516/heres-1-thing-washington-agreed-on-this-week-sentencing-reform (summarizing legislative actions addressing need for sentencing reform); *Sentencing Reform and Corrections Act of 2015 (S. 2123)*, FAMM, http://famm.org/sentencing-reform-and-corrections-act-of-2015 (last visited Feb. 3, 2017) [http://perma.cc/T999-Z6GR] (providing analysis of Sentencing Reform and Corrections Act's proposed amendments).

83. *See* Kristen Ashe, Note, *The District Court Tried to Make Me Go to Rehab, the Eleventh Circuit Said "NO, NO, NO": The Divide over Rehabilitation's Role in Criminal Sentencing and the Need for Reform Following* United States v. Vandergrift, 60 VILL. L. REV. 283, 283-84 (2015) (demonstrating overpopulation within American prison system). "The United States holds five percent of the world's population, yet it incarcerates twenty-five percent of the world's prisoners." *Id.* at 283; *see also Criminal Justice Fact Sheet*, NAACP, http://www.naacp.org/pages/criminal-justice-fact-sheet (last visited Feb. 3, 2017) [http://perma.cc/HPU5-Z7QK] (explaining significant prison population increase from 1980 to 2008). Despite the limitations on sentencing judges' discretion, various discrepancies resulted from judges punishing large numbers of career offenders pursuant to the ACCA's automatic minimum fifteen-year prison sentence. *See* Karina Kendrick, *The Tipping Point: Prison Overcrowding Nationally, in West Virginia, and Recommendations for Reform*, 113 W. VA. L. REV. 585, 586 (2011) (analyzing need for sentencing reform because of problematic prison overcrowding). The overcrowding problem is so prevalent in American society that Congress delegated the task of analyzing mandatory and minimum prison sentences to the USSC to ascertain whether a more effective method of sentencing existed. *See id.*

84. *See* Sady, *supra* note 82 (discussing offenders receiving harsh sentences in connection with crimes committed many years ago). Instead of relying on the individual characteristics of offenders to decide if an enhanced punishment would be most beneficial in changing their criminal ways, courts sentenced offenders to long prison sentences in the hope that incarceration would prevent further offenses. *See id*.; *see also supra* note 40 and accompanying text (explaining ACCA's intention to reduce crime). Fifteen-year minimum mandatory sentences were not reasonable punishments for offenders who were not within the targeted career criminal group but who were roped into the categoriztation because of the ACCA's strict sentencing guidelines. *See* Sady, *supra* note 82 (arguing "unconscionable" sentence given to defendant offense-free for twenty years); *see also* Ashe, *supra* note 83, at 283 (discussing prison overpopulation in United States).

85. *See* Ashe, *supra* note 83, at 285-86 (discussing Supreme Court's refusal to allow sentencing judges to consider rehabilitation instead of imprisonment). The Supreme Court relied on precedent and the SRA's plain language to conclude that the SRA precluded sentencing judges from considering rehabilitative programs. *Id*. at 293. Although the SRA was thought to be a positive change to the old sentencing structure, history demonstrated that the system was ineffective. *See* Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1315 (2005). One scholar went so

federal sentencing judges who were not consulted in the original planning stages of the SRA.[86]

The expansive authority once granted to sentencing judges is abhorrent to American society.[87] In the face of such conflict within the sentencing structure and overall penal institution, sentencing guidelines should rely on the scientific data that provides evidence of the ways rehabilitative services can contribute to lower recidivism rates.[88] Congress's primary focus in enacting the ACCA was to punish career criminals who would not benefit from rehabilitative programs.[89] Furthermore, Congress established the ACCA to punish only a small number of offenders as opposed to the large number presently incarcerated; to combat this oversight, a modified categorical approach helped sentencing judges determine whether a specific offender was beyond the scope of rehabilitation measures.[90] The state of the current prison system makes clear that the ACCA's initial punishment structure failed to make a significant difference, and now is the time to reconsider rehabilitation systems that specifically target the cognitive behaviors that led career offenders to commit multiple violent felonies.[91]

far as to say that prosecutors were provided with immense authority to shape a sentence even though sentencing judges—the more experienced officials—were criticized for exercising such authority in the past. *See id.*; *see also infra* note 87 and accompanying text (discussing criticisms of sentencing judges' vast discretion). Sentencing judges have not spoken positively about the ACCA nor the USSC's decision to implement changes to the sentencing structure. *See* Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 281-82 (1993) (noting criticism of judges' harshness and lack of individual analyses of offenders).

86. *See* Stith & Koh, *supra* note 85, at 289-90 (discussing criticisms and possibility for Congress to implement sentencing reform).

87. *See id.* at 228-29 (exposing harsh critiques of Judge Marvin Frankel and what he deemed "unchecked and sweeping" power). Sentencing judges' authority was based upon explicit guidelines, not the historic discretion such judges had experienced in the past. *See id.*; *see also* Attorney General Eric Holder, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013) (transcript available at http://www.justice.gov/opa/speech/attorney-general-eric-holder-delivers-remarks-annual-meeting-american-bar-associations [http://perma.cc/6S87-RLEJ]) [hereinafter Holder's Remarks] (explaining sentencing purpose to "punish, deter, and rehabilitate" offenders).

88. *See Recidivism*, NAT'L INST. JUSTICE (last updated June 17, 2014), http://www.nij.gov/topics/corrections/recidivism/pages/welcome.aspx [http://perma.cc/3HNY-NPDC] (stating prison programs and services transform offenders' mindsets, offenders transform into "ex-offender").

89. *See* Krystle Lamprecht, Comment, *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, 1414 (2008) (discussing original intent of Congress in enacting ACCA based on legislators' own justifications for bill).

90. *See id.*; *see also* 18 U.S.C. § 924(e) (2012) (expressing requirements needed for ACCA punishment); Jondavid S. DeLong, *What Constitutes "Violent Felony" for Purpose of Sentence Enhancement Under Armed Career Criminal Act (18 U.S.C.A. §924(e)(1))*, 119 A.L.R. Fed. 319, § 4.6 (1994) (explaining modified categorical approach applied to ACCA offenses).

91. *See* Cullen & Gendreau, *supra* note 37, at 33 (displaying table depicting proposed successful rehabilitation programs for offenders); *see also* HARVEY MILKMAN & KENNETH WANBERG, U.S. DEP'T OF JUST., NAT'L INST. OF CORRS., NIC# 021657, COGNITIVE-BEHAVIORAL TREATMENT: A REVIEW AND DISCUSSION FOR CORRECTIONS PROFESSIONALS 5 (2007) (discussing specific target areas of cognitive behavioral therapy (CBT)); Nana A. Landenberger & Mark W. Lipsey, *The Positive Effects of Cognitive-*

III. ANALYSIS

A. Historic Sentencing Reforms Did Not Violate Due Process

The Constitution explicitly provides Congress the authority to punish any wrongs or offenses committed against established laws.[92] It was not until *Ex parte United States*[93] that the Supreme Court recognized the judiciary's authority to impose sentences against individuals who violated criminal laws.[94] This authority broadened over time when sentencing judges began to consider rehabilitation as a way for offenders to re-enter society in a reasonable, productive manner.[95] Sentencing judges had to work within the confines of the statutory timeframes established by Congress, but the discretion to decide the appropriate sentence for each offender was left to the judge's knowledge and experience.[96]

Sentencing judges' broad authority came under attack in the 1980s because gross inconsistencies resulted from each judge providing his or her own discretion when sentencing individual offenders.[97] Hostility toward the sentencing system grew so strong that Congress established a new sentencing

Behavioral Programs for Offenders: A Meta-Analysis of Factors Associated with Effective Treatment, 1 J. EXP. CRIMINOLOGY 451, 451-52 (2005) (considering CBT effective method for reducing recidivism); Patrick Clark, *Preventing Future Crime with Cognitive Behavioral Therapy*, NAT'L INST. JUSTICE (last updated May 29, 2010), http://www.nij.gov/journals/265/pages/therapy.aspx [http://perma.cc/RXT6-8CW3] (explaining CBT works positively for violent offenders). If sentencing judges had the authority to look deeper than the criminal statutory language and consider specific aspects of the offender's actions when committing the crime, they might be able to reduce recidivism rates by targeting actual career offenders who are most in need of changing underlying cognitive behaviors. *See* Clark, *supra*. In fact, cognitive behavior studies indicate that these rehabilitative measures work best on the most serious offenders. *See id*.; *see also* JEFFREY A. CULLY & ANDRA L. TETEN, DEP'T OF VETERAN AFFAIRS, A THERAPIST'S GUIDE TO BRIEF COGNITIVE BEHAVIORAL THERAPY 6 (2008) (explaining underpinnings of CBT); Chris Hansen, *Cognitive-Behavioral Interventions: Where They Come From and What They Do*, 72-SEP FED. PROB. 43, 45-46 (2008) (discussing how therapy affects offenders' recidivism rates).

92. *See* U.S. CONST. art. I, § 8, cl. 10 (giving Congress power to punish and decide punishments).

93. 242 U.S. 27 (1916).

94. *See id.* at 41-42 (recognizing the judiciary exercised "reasonable . . . discretion" to impose sentences based on circumstances of offense); *see also* Hatch, *supra* note 18, at 186 (discussing judges' vast discretion regarding sentencing decisions). Moreover, sentencing judges were considered to have near absolute discretion when deciding upon a sentence for a given crime. *See* Hatch, *supra* note 18, at 186. Judges had to work within a confined sentencing framework for each given offense, but judges effectively maintained "near absolute discretion . . . to determine the duration of a sentence" within the framework's range. *Id.*

95. *See* Nagel, *supra* note 32, at 893-94 (explaining emergence of rehabilitation framework by National Congress of Prisons); *see also* Williams v. New York, 337 U.S. 241, 247-48 (1949) (analyzing punishment tailored to individual offender and not crime).

96. *See* Hatch, *supra* note 18, at 186 (explaining timeframes and ability to choose sentence anywhere within timeframe); Lamb, *supra* note 35, at 134-35 (noting mandatory minimum sentences "were . . . very uncommon exception[s] to sentencing methods that" hampered judge's discretion).

97. *See* Borges, *supra* note 33, at 145-46 (describing reasoning for criticism regarding broad judicial discretion). The continuously increasing crime rates led critics to infer that the rehabilitation framework was unsuccessful in assisting individual offenders to reform their criminal behaviors. *See id*. at 145.

framework in the 1980s.[98] Courts did not consider the new structure a violation of an offender's due process rights because the need for reform was essential and constitutionally permissible.[99] According to the Fifth Amendment's Due Process Clause, any individual who commits a crime must be provided notice of the type of punishment said offense entails; failure to provide such notice deprives the individual of his or her fundamental right.[100] With three major sentencing reforms throughout American history—and the current uncertainty surrounding the sentencing of career offenders—now is the time for Congress to consider reforming the sentencing structure to focus on rehabilitating offenders.[101]

B. Refocusing Sentencing Structure to Rehabilitation Methods

Since the SRA became effective, the United States's prison population has grown exponentially as a result of the focus on punishing offenders with harsher sentences.[102] Despite the SRA's primary aim to reduce recidivism, the significant increase in the prison population suggests these reforms have been unsuccessful.[103] The Supreme Court began the sentencing reform process

98. *See id*. at 146 (describing sentencing reform). Congress promulgated the SRA in 1984 and later established the Guidelines in 1987, which changed the focus of sentencing from rehabilitation and reform to harsh punishments to deter future crimes. *See id.* at 146-48. Additionally, the new sentencing structure split authority between many public offices to prevent judges from exercising too much sentencing discretion. *See* Bowman, *supra* note 85, at 1319. Congress's intent to deter future crimes initiated judicial imposition of mandatory minimum sentences to ensure that offenders were adequately punished for the crime committed. *See* Lamb, *supra* note 35, at 134-36 (describing rise of mandatory minimum sentencing originally used to combat narcotics abuse and later expanded).

99. *See* Mistretta v. United States, 488 U.S. 361, 412 (1989) (holding SRA constitutional); Mank, *supra* note 19, at 386-87 (noting varying opinions between circuit courts). At the inception of the SRA, circuit courts were split as to whether the reform violated an offender's due process rights, but as a majority of courts noted, the Constitution explicitly provided authority to establish "mandatory or fixed sentences." *See* Mank, *supra* note 19, at 386. Throughout the United States's history, there have been three major sentencing reforms that have been held constitutional. *See id*. at 388. From colonial times to the mid-nineteenth century, there were "fixed sentences" where rehabilitating an offender was neither an option nor a priority. *See id*. Then, from the late 1890s until the 1960s, sentencing moved toward providing judges expansive discretion and allowing them to consider offenders for rehabilitation programs. *See id*. Finally, from the 1970s to present, sentencing judges have experienced limited discretion. *See id*.

100. *See* U.S. CONST. amend. V (providing due process rights for alleged criminals); Johnson v. United States, 135 S. Ct. 2551, 2556-57 (2015) (discussing explicit language needed for sentencing statutes).

101. *See* Stith & Koh, *supra* note 85, at 289-90 (discussing "window of opportunity to replace" strict sentencing with "constructive" reform); Ashe, *supra* note 83, at 285 (discussing Guidelines in need of reform); *see also infra* note 112 and accompanying text (arguing for sentencing reform).

102. *See* Ashe, *supra* note 83, at 284-85 (arguing prison overcrowding directly results from problematic sentencing structure). Although the American sentencing structure focuses on reducing recidivism, research suggests that "[w]ithin three years of release, about two-thirds (67.8 percent) of released prisoners were rearrested. Within five years of release, about three-quarters (76.6 percent) of released prisoners were rearrested." *Recidivism*, *supra* note 88.

103. *See* Ashe, *supra* note 83, at 284-85 (arguing criminal sentencing directly responsible for mass incarceration). The SRA explicitly forbade sentencing judges from considering rehabilitation as a useful approach within the prison system. *See* 18 U.S.C. § 3582(a) (2012) (requiring fifteen-year mandatory

when it declared the residual clause of the ACCA unconstitutionally vague.[104] In voiding the clause, the Court noted the lack of uniformity among sentencing judges in defining the single hypothetical crime that could encompass all levels of risk that amount to a violent felony.[105]

The Court's specific wording in *Johnson* leads one to believe that not only is the residual clause unconstitutional, but there may be serious suspicions about upholding the categorical analytical approach in the future.[106] Moreover, it may be time for the Supreme Court to reanalyze the modified categorical approach as being the most beneficial method of helping sentencing judges determine punishments that are appropriate for each offender.[107]

C. Developing Cognitive Behavior Therapy for Career Offenders in Connection with a Modified Categorical Approach

The ACCA's primary goal is to reduce the rate of recidivism by preventing violent criminals from returning to society; the best way to ensure this result is for Congress to adopt a CBT that targets these individuals' criminal behaviors.[108] A sentencing judge, applying a modified categorical approach,

minimum sentence).

104. *See Johnson*, 135 S. Ct. at 2556-57 (citing Fifth Amendment in emphasizing importance of sentencing statutes ensuring constitutional rights). The Court declared that the "indeterminacy of the [residual clause's] wide-ranging inquiry" denied offenders their due process rights and continued the practice of "arbitrary enforcement." *See id*. at 2557.

105. *See id.* at 2557-58 (concluding residual clause unconstitutional for two reasons). The "ordinary case" sentencing judges strive to develop for each offense was too difficult to apply to individual scenarios where "real-world facts" contributed to establishing unique circumstances for each offense. *See id.* at 2557. Because there is an indefinite number of scenarios for each offense, the Court concluded that the "ordinary case" in *James* "illustrates how speculative (and how detached from statutory elements) this enterprise can become." *Id.* at 2558. Furthermore, the Court focused its analysis on sentencing judges' practice of paying more attention to defining an ordinary case than considering each offender and how best to determine an appropriate sentence. *See id.*

106. *See* Johnson v. United States, 135 S. Ct. 2551, 2557-58 (2015) (opining ordinary case left too much speculation in sentencing).

107. *See* Kesselbrenner et al., *supra* note 10, at 1-2 (acknowledging circuit courts adopt broader application of modified categorical approach than Supreme Court). Because of the varying circumstances and statutory definitions, a modified categorical approach would allow sentencing judges to use more pertinent information to craft a more reformative and rehabilitative sentence. *See id.* Although the Court in *Descamps* provided a working analysis for employing the modified approach, this framework is likely irrelevant due to the Court's recognition that the ordinary case in a particular offense is ineffective in deciding sentences. *See* Descamps v. United States, 133 S. Ct. 2276, 2281-82 (2013) (describing how modified categorical approach applies in very limited circumstances). *But see Johnson*, 135 S. Ct. at 2257-58 (asserting overly speculative nature of formulating ordinary cases). Because courts only applied the modified approach when offenses or conduct were broader than the federal statute, there is a strong argument that the Supreme Court should consider more resources when analyzing an offender's conduct because relying on the "ordinary case" is no longer considered a viable method of analyzing a sentence. *See Johnson*, 135 S. Ct. at 2257.

108. *See* Holder's Remarks, *supra* note 87 (discussing necessity of reforming current sentencing structure). Former Attorney General Holder pronounced the need for "fundamentally rethinking the notion of mandatory minimum sentences" due to the limited discretion awarded to sentencing judges under the current system. *Id.*; *see also* Lamb, *supra* note 35, at 146 (discussing Attorney General Holder's position); *supra* note

should have access to court documents that detail the offense and, if the court finds the career offender has a propensity to commit violent felonies, then judges should recommend CBT in connection with a prison sentence.[109] Research demonstrates that CBT effectively reduces recidivism rates in serious adult offenders, and Congress should be mindful of such research when establishing sentencing reform in the future.[110] Researchers observed that the most successful results of CBT are among high-risk offenders who are part of extensive programs geared towards monitoring behavioral tendencies of serious offenders.[111]

Following tradition, Congress should establish a new sentencing framework that applies a modified categorical approach to the conduct of individual offenders to allow sentencing judges the opportunity to consider each offender in his or her individual capacity.[112] Not only would the modified approach treat offenders as human beings, but it would allow sentencing judges to understand the totality of the circumstances and decide the best form of punishment to benefit each offender.[113] The harsh punishments within the United States's

91 and accompanying text (discussing CBT and its positive effects).

109. *See* Lamb, *supra* note 35, at 147 (asserting impossibility of maintaining "tough-on-crime" approach considering current sentencing problems). "In 2013 Republicans and Democrats joined forces and introduced the Justice Safety Valve Act [JSVA] and the Smarter Sentencing Act [SSA]. Both Acts seek to expand safety valves and increase judicial discretion in sentencing." *Id.* Further, the JSVA grants sentencing judges the ability to stray from the Guidelines when they believe the punishment does not warrant a mandatory minimum sentence. *See id.* at 147-48. This judicial flexibility is patently applicable to the ACCA because many ACCA offenders are spending many, many years in prison for so-called violent felonies. *See* Holder's Remarks, *supra* note 87 (discussing inadequacy of criminal justice system and vicious cycle it creates for offenders). Because society believes career offenders pose a greater risk; it naturally follows that the most effective sentencing structure would be one that helps repeat offenders reform their underlying criminal behaviors and reduce recidivism. *See* Cully & Teten, *supra* note 91, at 6 (explaining function of CBT). According to scientific research, "CBT builds a set of skills that enables an individual to be aware of thoughts and emotions; identify how situations, thoughts, and behaviors influence emotions; and improve feelings by changing dysfunctional thoughts and behaviors." *Id.* (emphasis omitted).

110. *See* Clark, *supra* note 91 (discussing findings of CBT with adult offenders). Specifically, research has shown that offenders are able to "improve their social skills, means-ends problem solving, critical reasoning, moral reasoning, cognitive style, self-control, impulse management and self-efficacy." *Id.* Facts and research support the finding that therapy and rehabilitation are far more effective in reducing recidivism compared to a structure focused on harsh punishments. *See id.* Therefore, to help guide sentencing decisions and rehabilitate the most serious offenders, sentencing judges should be able to recommend CBT so that the ultimate goal of reducing recidivism rates can actually be achieved. *See id.*; *see also* Hansen, *supra* note 91, at 45-46 (explaining CBT allows offenders to reform behaviors to fit societal expectations when reentry permitted).

111. *See* Landenberger & Lipsey, *supra* note 91, at 452-53 (providing research conclusions).

112. *See Descamps*, 133 S. Ct. at 2283-85 (providing contextual basis for implementing modified categorical approach). Until the *Johnson* decision, courts employed the categorical approach to provide an understanding of the level of risk involved in the ordinary case; the modified approach, however, should prevail in the future because it makes sentencing judges consider the elements of the specific conduct committed, without having to determine what constitutes an ideal ordinary offense. *See Johnson*, 135 S. Ct. at 2557-58 (considering ordinary case too speculative); *see also Descamps*, 133 S. Ct. at 2283-84 (stating modified approach allows more focus into individual offense compared to categorical approach).

113. *See* Descamps v. United States, 133 S. Ct. 2276, 2283-84 (2013) (encouraging sentencing judges to

sentencing structure have been ineffective, and now is the time for sentencing to refocus on rehabilitative frameworks that lead to fewer offenders serving unnecessarily long prison sentences.[114] Ideally, with close monitoring systems and a resourceful CBT plan, recidivism rates will decrease, ultimately resulting in far fewer individuals facing and serving enhanced ACCA sentences.[115]

IV. CONCLUSION

Has the American criminal sentencing structure finally reached the disastrous point where both parties in Congress will work together to ensure a more efficient and successful method of analyzing offenders? Researchers and scholars agree that determinate sentencing has failed, and it is time for a reform that is directed toward helping offenders instead of punishing them for wrongs committed. Although the ACCA was established within the SRA to combat the recidivism rates of the most serious offenders, the legislature needs to admit defeat and pursue sentencing reforms seriously. The Sentencing Reform and Corrections Act is a step in the right direction because it will enable sentencing judges to minimize the effects of mandatory minimum sentencing, which have directly resulted in mass incarceration in the American penal institution. More needs to be done for offenders sentenced under the ACCA and other high-risk offenders because these individuals are the ones who are negatively impacting society and the overall prison population.

American society will never be completely rid of criminal offenses, but directly targeting these destructive behaviors in career criminals may have a positive impact on helping reduce recidivism rates in the future. Research has proven that CBT can be effective in high-risk offenders, and now is the time for the legislature to reform the sentencing structure once again. CBT is supported by intensive research favoring the replacement of the present system with one that reduces mandatory minimum sentencing and seeks to help career offenders instead of banishing them into prisons throughout the country.

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consider prior convictions and other court resources). By allowing sentencing judges to analyze an offender's prior convictions, judges will likely recognize patterns of behaviors and implement punishments that they deem benefit the offender and his or her ability to contribute to society upon release. *See* Williams v. New York, 337 U.S. 241, 247 (1949) (explaining "punishment should fit the offender and not merely the crime"); *see also* Wyzanski, *supra* note 34, at 1292 (discussing treating similar offenders equally).

114. *See* Lamb, *supra* note 35, at 141 (discussing ineffectiveness of SRA and minimum sentencing). "Due to the rigid nature of mandatory minimums and the elimination of judicial discretion in sentencing, the Sentencing Reform Act has exacerbated the very problems it aimed to address." *Id.*; *see also* Holder's Remarks, *supra* note 87 (concluding current sentencing framework incapable of resolving problems of mass incarceration); *supra* notes 38-40 and accompanying text (comparing Congress's anticipation of ACCA and reality resulting in mass incarceration).

115. *See* Landenberger & Lipsey, *supra* note 91, at 424, 433 (providing research programs and results supporting CBT in rehabilitative context).