March 16, 2009

The Armed Career Criminal Act--Proposing a New Test to Resolve Difficulties in Applying the Act's Ambiguous Residual Clause

Thomas O. Powell, University of California - Los Angeles

Available at: https://works.bepress.com/thomas_powell/1/
“Imprecision and indeterminancy are particularly inappropriate in the application of a criminal statute. Years of prison hinge on the scope of the [Armed Career Criminal Act’s] residual provision yet its boundaries are ill defined.”

The Armed Career Criminal Act—Proposing a New Test to Resolve Difficulties in Applying the Act’s Ambiguous Residual Clause

Thomas O. Powell

Introduction

With the passage of the Comprehensive Crime Control Act of 1984, the United States Congress enacted the most extensive changes ever made to the federal criminal justice system at one time. Included in those changes was the Armed Career Criminal Act of 1984, amended into its current form by the Career Criminals Act of 1986.

Initially, the Armed Career Criminal Act (“ACCA”) had a very narrow scope. If the prosecution could prove beyond a reasonable doubt that the defendant was guilty of using a firearm during the commission of a burglary or robbery, and the defendant had been previously convicted of at least three burglaries or robberies, then the defendant faced a mandatory minimum sentence of fifteen years without parole.

The 1986 amendments to the ACCA significantly increased the number and types of crimes to which the Act applies. A defendant now faces the same mandatory minimum sentence if he is found guilty of being a felon in possession of a firearm in violation of 18 U.S.C. §922(g).

---

1 James v. United States, 127 S.Ct. 1586, 1597-98 (2007) (Justice Scalia dissenting)
4 Taylor v. United States, 495 U.S. 575, 582 (1990) (providing a brief history of the evolution of the Armed Career Criminal Act into its current form)
5 I will refer to the Armed Career Criminal Act as both the “ACCA” and “the Act” interchangeably throughout the rest of the comment.
6 The Armed Career Criminal Act Amendments: Hearing Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary, 99th Cong. 1 (1986) (opening statement of Senator Arlen Specter, Chairman, Senate Comm. on the Judiciary) (claiming that the inclusion of only burglary and robbery as predicate offenses under the ACCA was too narrow, and that the ACCA should be expanded to include more crimes as predicate offenses).
8 18 U.S.C. § 922(g)—It shall be unlawful for any person--
   (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;
   (2) who is a fugitive from justice;
   (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
   (4) who has been adjudicated as a mental defective or who has been committed to a mental institution;
   (5) who, being an alien--
      (A) is illegally or unlawfully in the United States; or
      (B) except as provided in subsection (y)(2), has been admitted to the United States under a nonimmigrant visa (as that term is defined in section 101(a)(26) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(26)));
   (6) who has been discharged from the Armed Forces under dishonorable conditions;
   (7) who, having been a citizen of the United States, has renounced his citizenship;
and has at least three prior convictions for any combination of serious drug offenses or violent felonies.\(^9\) 18 U.S.C. §924(e)(2)(A)\(^10\) unambiguously defines what constitutes a serious drug offense under the ACCA.\(^11\) However, the Act’s definition of violent felonies is ambiguous. According to the ACCA:

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

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another\(^12\)

The italicized portion is commonly referred to as the residual clause.\(^13\) The imprecise meaning of the residual clause, combined with the presence of four enumerated crimes in the same section, makes determining whether or not a particular crime falls within the residual clause difficult at best.

To date the Supreme Court has set forth no unambiguous test for determining whether any given crime falls within the residual clause.\(^14\) Two approaches used by the Supreme Court

---

\(^{9}\) 18 U.S.C. § 924(e)

\(^{10}\) From here on I will omit “18 U.S.C.” from citations to the ACCA, using instead only the short citation form of § 924(e)(0)(0).

\(^{11}\) 18 U.S.C. § 924(e)(2)—As used in this subsection—

A. the term “serious drug offense” means—

i. an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

ii. an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law

\(^{12}\) 18 U.S.C. § 924(e)(2)(B) (emphasis added)

\(^{13}\) Most Courts, including the Supreme Court, consistently refer to the second portion of 18 U.S.C. § 924(e)(2)(B) as the “residual” clause, as I will throughout this paper. Taylor, 495 U.S. 575. Note, however, that other courts occasionally refer to this clause as the “otherwise” clause. See United States v. Williams, no. 07-2679, 2008 WL 3266912, at *2 (8th Cir. 2008).

\(^{14}\) The rule of lenity says that ambiguous criminal statutes should be given the narrowest reading to which they are susceptible. According to Black’s Law Dictionary, the rule of lenity is “[t]he judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the
in recent cases make up the sum total of current precedent available to lower courts for
determining whether or not a crime falls within the residual clause. Unfortunately, neither of
these tests provides a clear method for determining whether unenumerated crimes fall within the
residual clause.

First, in James v. United States the Supreme Court determined that attempted burglary
falls within the residual clause because the risk of physical injury to another associated with
attempted burglary is similar to the risk of physical injury to another associated with the
enumerated crime of burglary. Thus, the test the Court suggests in James is that the
unenumerated crime be compared to its closest analogue among the enumerated crimes. If the
risk associated with the unenumerated crime is comparable with the risk associated with its
closest analogue among the enumerated crimes, then the unenumerated crime falls within the
residual clause.

But what if the crime has no close analogue among the enumerated crimes? The James
test makes sense for determining whether or not attempted burglary falls within the residual
clause because it is easily compared to burglary. But what about other crimes, like driving under
the influence (DUI), reckless endangerment, or escape? Because it is not immediately clear
which of the enumerated crimes these facially dissimilar crimes should be compared to, different
courts might compare the unenumerated crimes to different enumerated crimes, and therefore
come up with incongruous results.

Second, in Begay v. United States the Supreme Court held that felony DUI was not a
violent felony under the ACCA’s residual clause. The Court determined that the residual
clause does not cover all crimes that “present[] a serious risk of physical injury to another,” but
only crimes that both present a similar serious risk and are similar in kind to the enumerated
crimes.

With respect to whether a crime is similar in degree of risk posed to the enumerated
crimes, the Court simply accepted the lower courts’ determination that DUI involves conduct
that presents a serious potential risk of physical injury to another. The Court offered no
guidance to lower courts regarding how they should determine whether other unenumerated
crimes are similar in degree of risk posed to the enumerated crimes.

With respect to whether an unenumerated crime is similar in kind to the enumerated
crimes, the Court determined that the enumerated “crimes all typically involve purposeful,
“violent,” and “aggressive” conduct.” Therefore, in order for an unenumerated crime to be
similar in kind to the enumerated crimes, it must also involve purposeful, violent, and aggressive
conduct. The Begay Court determined that the felony DUI under consideration did not fall

15 James, 127 S.Ct. at 1597-98. Both the majority and dissenting opinions in this case are discussed in greater detail
in Part II.
16 Id. at 1594
17 Id.
18 Begay v. United States, 128 S.Ct. 1581, 1588 (2008). Both the majority and concurring opinions in this case are
discussed in greater detail in Part II.
19 Id. at 1585
20 Id. at 1584
21 Id. at 1586
22 United States v. Herrick, 545 F.3d 53, 58-59 (1st Cir. 2008)
within the residual clause because it did not involve the purposeful, violent, and aggressive conduct characteristic of the enumerated crimes.\footnote{Begay, 128 S.Ct. at 1588}

While the \textit{Begay} test can be more easily applied to a broader range of crimes than the test suggested in \textit{James}, the court failed to define “purposeful,” “violent,” and “aggressive” conduct, leaving this test very ambiguous. Additionally, the similarities between the enumerated crimes listed by the Court cannot realistically be considered an exhaustive list,\footnote{For instance, the enumerated crimes might just as accurately be said to involve intimidating, fear creating conduct aimed at achieving material gain. While these might not be the most accurate descriptors of the enumerated crimes, it could be argued that they are at least as applicable as the similarities that the Court focuses on, and different people would likely come up with different ways in which the enumerated crimes seem related.} thus leaving open the possibility of lower courts finding other similarities between the enumerated crimes and using those similarities to determine whether or not unenumerated crimes fall within the residual clause.\footnote{United States v. Charles, 566 F.Supp.2d 1229, 1233-34 (D. Kan. 2008) (finding that the Court in \textit{Begay} only focused on the kind of conduct typically involved in the enumerated crimes—namely purposeful, violent and aggressive conduct—but did not say that the similar typical conduct was the only relevant comparison to make for determining “kind”)}

Furthermore, the Court did not offer any insight into how courts should determine whether a felony is similar in degree of risk posed to the enumerated crimes. Should the \textit{James} test of comparing the risk associated with the unenumerated crime to its closest analogue among the enumerated crimes be used? The \textit{Begay} Court did not say that it should or should not be. If the Court did intend the \textit{James} test to be used, it is unclear why \textit{James} is not mentioned at all in that respect in the \textit{Begay} opinion. If the Court did not intend the \textit{James} test to be the first element of the \textit{Begay} test, then lower courts appear to have nothing other than their own discretion to rely on in determining whether the risk associated with an unenumerated crime is similar to the risk associated with the enumerated crimes.

The Court had an opportunity to address some of these questions when it granted certiorari in \textit{Chambers v. United States}.\footnote{Chambers v. United States, 129 S.Ct. 687, 689 (2009)} In \textit{Chambers} the Court resolved a Circuit split by determining that failure to report is not a violent felony under the ACCA’s residual clause.\footnote{Id. at 693} The Court reasoned that “the crime amounts to a form of inaction, a far cry from the purposeful, violent, and aggressive conduct potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion.”\footnote{Id. at 692 (internal quotations omitted)} However, the Court said nothing else with respect to the \textit{Begay} test. Instead, the \textit{Chambers} Court relied heavily on a United States Sentencing Commission report that indicated that, over a two year period, there were no instances of violence in arrests of criminals who were guilty of failure to report.\footnote{Id.}

Thus, \textit{Chambers} offers no guidance with respect to how the tests from \textit{James} and \textit{Begay} should be applied. At most, \textit{Chambers} indicates that if there is statistical evidence that violence is generally not associated with a particular type of crime, and the crime meets the similar in kind element of the \textit{Begay} test, the Court is willing to determine that such a crime is not a violent felony under the ACCA’s residual clause.

Further complicating attempts to fit crimes into the Act’s residual clause is the Supreme Court’s determination in the 1990 decision \textit{Taylor v. United States} that the \textit{categorical approach}
must be used to determine whether or not a crime is a predicate offense under the Act.\textsuperscript{30}

Generally speaking, the categorical approach requires courts to look only at the elements of the crime the defendant was convicted of, as opposed to the factual situation that lead to the defendant’s conviction, in order to determine whether or not the crime is a predicate violent felony.\textsuperscript{31} Thus, any test for determining whether or not a crime falls within the residual clause must be effective when only considering the elements of the crime the defendant was convicted of, instead of the specific acts of the defendant that led to his conviction.\textsuperscript{32}

In light of the ambiguity associated with determining whether a defendant’s prior offense is a predicate offense under the residual clause, I propose the following test. Under my proposed test, the following elements must be satisfied for a crime to fall within the residual clause:

1. The crime must be generally accepted as a crime against property\textsuperscript{33}
2. The crime must not have been committed recklessly or negligently; and
3. The crime must have made physical confrontation with someone other than a police officer reasonably foreseeable.

As I will make clear below, this test should replace the more ambiguous examinations used by the Supreme Court in \textit{James} and \textit{Begay} because it will give lower courts a uniform system that will yield predictable results by eliminating the need for case by case comparisons of unenumerated crimes to enumerated crimes. Additionally, my test will limit the unenumerated crimes that fall within the residual clause to more closely reflect the types of crimes Congress intended the residual clause to include,\textsuperscript{34} as opposed to the broad inclusion of unenumerated crimes that occurs using the Court’s current framework.\textsuperscript{35}

While the elements of this test are not wholly novel, they do depart from the current framework provided by \textit{James} and \textit{Begay} in important ways. No court has considered all of these elements together when considering whether a crime should fall within the residual clause.\textsuperscript{36}

\begin{enumerate}
\item Taylor v. United States, 495 U.S. 575, 600-601 (1990). The categorical approach is discussed in greater detail in Part I.
\item Id. at 600
\item \textit{See} Shepard v. United States, 125 S.Ct. 1254, 1257 (2005) (holding that while courts are not allowed to look at police reports or complaint applications when attempting to determine whether a prior conviction counts as a violent felony under the residual clause, under the \textit{modified} categorical approach, courts may look to “the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented”)
\item Black’s Law Dictionary (8th ed. 2004) defines crimes against property as “A category of criminal offenses in which the perpetrator seeks to derive an unlawful benefit from—or do damage to—another's property without the use or threat of force.”
\item As I will explain in greater detail later, the House Report from the Committee on the Judiciary expressly states that the residual clause is supposed to include only “violent felonies involving physical force against \textit{property}. H.R.Rep. No. 99-849, at 3 (1986).
\item In the brief time since the Court decided \textit{Begay}, courts have used the \textit{Begay} test to find that crimes ranging from indecent contact with a child (United States v. Davis, 583 F.Supp.2d 1015 (N.D. Iowa, 2008)), to stalking (United States v. Mohr, No. 08-6007, 2009 WL 26766 (5th Cir. 2009)), to failure to stop for a police officer (United States v. West, No. 06-4284, 2008 WL 5158599 (10th Cir. 2008)), are all predicate violent felonies.
\item \textit{See} United States v. Johnson, 286 Fed. Appx. 155, 157-58 (5th Cir. 2008) (holding that the Arkansas crime of terrorist threatening was not an predicate felony under the ACCA based only on the determination that terroristic threatening is not a crime against property, and according to \textit{Johnson}, only crimes against property can be predicate violent felonies under the residual clause after \textit{Begay}); United States v. Grey, 535 F. 3d 128, 132 (2d Cir. 2008) (determining that reckless endangerment cannot be a predicate violent felony under the ACCA’s residual clause because the commission of reckless endangerment does not involve purposeful or deliberate conduct); United States v. Henry, 556 F.Supp.2d 133, 140-41 (D. Conn. 2008) (reasoning that the risk of serious potential physical harm to
With that end in mind, Part I of this comment explores the legislative history of the ACCA that is relevant to interpretation of the residual clause. Part II provides a brief explanation of the categorical approach. The categorical approach is the method courts must use when examining a previously committed crime to determine whether or not it is a predicate violent felony under the ACCA. It is necessary to understand the confines of the categorical approach before examining the existing tests and my proposed test. Part III examines the vague methods currently used by courts to determine whether or not a crime falls within the residual clause. It is important to see how the weaknesses of these tests in order to understand how my proposed test will be an improvement.

Part IV of this comment examines each of the elements in my proposed test. Part V of this comment applies my test to several fact scenarios. This section illustrates why my test is effective and what types of crimes will fall in or out of the residual clause when my test is used.

I. **Brief Background of the ACCA**

The Armed Career Criminal Act was initially passed in response to the problem posed by criminals colloquially referred to as career criminals, who statistics indicate are guilty of committing some seventy percent of all robberies and burglaries. Generally speaking, “A career criminal is incorrigible, un-deterrable, recidivating, [and] unresponsive to the ‘specific deterrence of having been previously convicted....’”

When first passed as part of the Comprehensive Crime Control Act of 1984, the Armed Career Criminal Act only applied its fifteen year mandatory minimum sentence to criminals who had been previously convicted of at least three robberies and burglaries, and who in the current case were convicted of committing yet another burglary or robbery, this time while using a firearm. Robbery and burglary are fairly easy crimes to recognize, and they are similarly defined in all places. Therefore, there was little difficulty in determining which crimes the 1984 ACCA applied to.

In 1986, the ACCA received a facelift that created the problems courts face today when trying to determine whether certain crimes qualify as predicate violent felonies. The first change was the inclusion in the definition of violent felony of any crime that “has as an element the use, attempted use, or threatened use of physical force against the person of another.” The second change was the removal of robbery and the addition of arson, extortion, and any crime

---

37 Armed Career Criminal Act: Hearing Before the S. Comm. on the Judiciary, 98th Cong. (1983) (“Studies reveal that six percent of criminals arrested commit as much as 70% of the serious crime in this country.”). See also United States v. Hawkins, 811 F.2s 210, 216 (3rd Cir. 1987) (“Congress enacted the Armed Career Criminal provision for the purpose of incapacitating particular repeat offenders, who it found were responsible for a large proportion of crimes involving theft and violence.”)

38 United States v. Belton, 890 F.2d 9, 10 (7th Cir. 1989)


41 Taylor, 495 U.S. at 582. The 1986 amendments to the ACCA also added serious drug offences as violent felonies. However, application of that part of the statute is comparatively uncontroversial. Herein our focus is solely on the language introduced in the 1986 amendments with respect to “violent felonies.”

42 18 U.S.C. § 924(c)(2)(B)(i)
that involves the use of explosives.\textsuperscript{43} Continuing to include robbery as an enumerated crime was unnecessary after the first change because all robberies fall within that language.\textsuperscript{44} The third change was the inclusion of the residual clause after the enumerated offenses.\textsuperscript{45}

While it is the residual clause that we are primarily concerned with here, the other two changes are important because the Supreme Court has looked to them in trying to determine what exactly the residual clause is meant to cover.\textsuperscript{46}

The legislative history indicates that the purpose of the 1986 amendments to the ACCA was to broaden the predicate offenses beyond burglary and robbery.\textsuperscript{47} According to the report from the House Judiciary Committee on the 1986 Amendments, there were three categories of offenses that were meant to qualify as predicate crimes. First were serious drug offenses, which are covered by a portion of the Act separate from the violent felonies provision at issue here.\textsuperscript{48} Second were violent felonies where the criminal used, attempted to use, or threatened to use violence against a person.\textsuperscript{49} Third were “violent felonies involving physical force against property.”\textsuperscript{50}

The first two areas where the 1986 amendments extended what counted as a predicate felony under the ACCA are clear: the first involves serious drug offenses, a standard which is well defined, and the second involves violent felonies against persons, which is also well defined.\textsuperscript{51} However, the third category is not as clear. The legislative history says expressly that the third category is meant to include violent crimes against property. However, the enumerated crimes together with the residual clause do not make that clear, leading courts to include many crimes as predicate violent felonies under the residual clause that clearly are not crimes involving the use of force against property.\textsuperscript{52}

II. The Categorical Approach

The categorical approach was established in \textit{Taylor v. United States}. Taylor claimed that his second degree burglary conviction for burglarizing an empty building was not a violent felony under the ACCA because it did not involve “‘conduct that present[ed] a serious risk of potential injury to another.’”\textsuperscript{53} Under Missouri law, a burglary that presented that kind of danger would lead to a conviction for first degree burglary.\textsuperscript{54}

\begin{flushright}
\textsuperscript{43} 18 U.S.C. § 924(e)(2)(B)(ii)
\textsuperscript{44} H.R.Rep. No. 99-849, at 3 (1986)
\textsuperscript{45} Id.
\textsuperscript{46} See \textit{Begay}, 128 S.Ct. at 1584-85, and \textit{James} 127 S.Ct. at 1594
\textsuperscript{48} Id. (agreeing with the Subcommittee on Crime that serious drug offenses—meaning drug offenses “for which a maximum term of imprisonment of 10 years or more is prescribed for manufacturing, distributing or possessing with intent to manufacture or distribute controlled substances”—should qualify as a predicate crime under the ACCA)
\textsuperscript{49} Id. The Committee report italicizes the word \textit{person} in talking about violent felonies involving the use, threatened use, or attempted use of violence against a person, thus making it clear that predicate violent felonies under the similarly worded clause in the amendment to the statute should only apply to crimes of violence against people.
\textsuperscript{50} Id. The Committee was very explicit about making violent felonies against property count as predicate offenses.
\textsuperscript{51} 18 U.S.C. §924(e)(2)
\textsuperscript{52} Id. It is worth noting that the version of the amendments that the House Judiciary Committee approved did not include any enumerated offenses. Thus, the residual clause stood on its own, indicating that some legislators believed that the residual clause provided enough guidance for courts to know that violent felonies against property that risked physical injury to other persons should be counted as predicate offenses.
\textsuperscript{53} Taylor, 495 U.S. at 579 (quoting 18 U.S.C. § 924(e)(2)(B)(ii))
\textsuperscript{54} United States v. Taylor, 864 F. 2d 625, 626 (8th Cir. 1989)
\end{flushright}
The Supreme Court was not swayed by Taylor’s arguments. First, the Court determined that Congress must have intended to use burglary in its generic sense, the basic elements of which are “unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime.” Second, in order to determine whether or not a defendant’s prior conviction was for a crime meeting the standards of this generic definition of burglary, the court determined “that § 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offense[], and not to the particular facts underlying [that] conviction.”

Thus, if the statute Taylor was convicted under defines second degree burglary in a manner corresponding to the generic definition of burglary, then Taylor’s burglary conviction qualifies as a predicate violent felony under the ACCA.

In limited situations, courts can use a “modified” categorical approach. The modified categorical approach allows courts to look beyond just the statutory elements to the “charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.” The modified categorical approach can only be used “when a statute ‘is ambiguous, or broad enough to encompass both violent and nonviolent crimes.’”

It is important to understand the categorical approach because some of the problems courts face when determining whether a crime qualifies as a violent felony under the residual clause seem to be easy to resolve if courts could simply look at the facts and determine whether the defendants actually engaged in any violent or risky activity. However, for the time being courts can only look at the statute of conviction, so any test for determining whether a crime falls within the residual clause must work without looking at the facts. Whether Congress actually intended the categorical approach to be applied to the ACCA, and whether the approach should continue to be used, is a topic for another day.

III. **James, Begay and Chambers**

In the past two years the Supreme Court has granted certiorari in three cases where it was unclear whether a particular crime should be a predicate violent felony under the ACCA’s residual clause. In *James* and *Begay*, the Supreme Court promulgated tests for determining whether unenumerated crimes fall within the residual clause, but the success of those tests has been limited. In *Chambers* the Court mentioned part of the *Begay* test, but then decided the case on other grounds. Thus, lower courts are still left with ambiguous rules for determining what crimes fall within the residual clause.

A. **James: Attempted Burglary**

---

55 Id. at 599; Id. at 598 (“Congress presumably realized
56 Id. at 600-601 (justifying the use of the categorical approach on the language and legislative history of § 924(e), as well as the “practical difficulties and potential unfairness of a factual approach.”)
57 Id. at 602
58 United States v. Piccolo, 441 F.3d 1084, FN4 (9th Cir. 2006)
59 Shepard v. United States, 544 U.S. 13, 16
61 Chambers, 129 S.Ct. at 694-695 (Alito concurring) (claiming that the root of the problem with the ACCA’s residual clause is that the categorical approach makes proper application of the clause unclear)
In *James*, the Supreme Court determined that attempted burglary is a violent felony under the ACCA. According to Justice Alito’s majority opinion, the key question in this case is “whether overt conduct directed toward unlawfully entering or remaining in a dwelling, with the intent to commit a felony therein, is ‘conduct that presents a serious potential risk of physical injury to another.’”

In order to answer this question, the Court determined that the potential predicate crime should be compared to its closest analogue among the offences enumerated in the same clause of the ACCA: burglary, arson, extortion, or a crime involving the use of explosives. If the risk posed by the unenumerated crime is comparable to the risk posed by its closest analog among the enumerated crimes, then the unenumerated crime falls within the residual clause.

With respect to attempted burglary, the Court determined that, so long as the state statute covering attempted burglary—or the interpretation of that statute by the state courts—required an overt act toward entry of a structure, the risk posed by the attempted burglary was comparable enough to the risk posed by burglary for the attempted burglary conviction to be counted as a predicate violent felony under the residual clause.

However, as Justice Scalia pointed out in his dissent, the *James* test for determining whether a crime falls within the residual clause put forth by the majority is not easily applicable in many instances. The majority’s test is effective only where the offence in question has a close or clear analogue among the enumerated offenses. But what are lower courts supposed to do when the crime before them has no clear analogue among the enumerated crimes?

Under the *James* test lower courts have to make two difficult determinations. First, a court has to determine which enumerated crime the unenumerated crime is most similar to. Because there are only a few enumerated crimes and they have many similarities themselves, this determination will be clear only where the unenumerated crime is an attempt version of an enumerated crime. Second, a court has to determine if the unenumerated crime presents the same risk as the enumerated crime to which it is the most similar. Thus, even after making a decision about what enumerated crime the unenumerated crime is most similar to, the court must then go on and assess whether the unenumerated crime presents at least the same risk as the enumerated crime. Clearly, both parts of this test require the court to make ad hoc determinations that become more difficult and less accurate the more different the unenumerated crime is than the enumerated crimes.

As if predicting *Begay*, Justice Scalia specifically pointed to driving under the influence as a potential predicate offense that has no clear analogue among the enumerated crimes, and that is no more readily comparable to one of the enumerated crimes then another. As Justice Scalia
predicted, the *James* test proved inadequate in determining whether DUI counted as a predicate violent felony, and the Court created another test.\(^{70}\)

**B. *Begay*: Driving Under the Influence**

In *Begay* the Supreme Court determined that driving under the influence is not a violent felony under the residual clause of the ACCA.\(^{71}\) However, the Court did not try to use the method it set forth in *James* only one year earlier. Instead, the Court came up with a new approach for determining whether or not an offence falls within the ACCA’s residual clause. While the *Begay* framework is more easily applied to a wide variety of potential predicate violent felonies than the *James* test, the *Begay* test is extremely vague, and the Court provided little guidance with respect to how it should be applied.

According to the majority in *Begay*, DUI is “simply too unlike the provision’s listed examples for us to believe that Congress intended the provision to cover it.”\(^{72}\) The Court determined that the presence of the enumerated crimes means that Congress intended the residual clause to cover only similar crimes, as opposed to every crime presenting a serious risk of physical injury to another person.\(^{73}\) The Court reasoned that the enumerated crimes should be read “as limiting the crimes that [the residual clause] covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.”\(^{74}\) Thus, *Begay* suggests a two part test.

First, the potential predicate felony must be similar to the enumerated crimes in degree of risk posed.\(^{75}\) The Court avoids any discussion of this element with respect to the DUI at issue in *Begay* by accepting the lower courts’ determination “that DUI involves conduct that ‘presents a serious potential risk of physical injury to another.’”\(^{76}\) By accepting the lower court’s determination on this issue, the Supreme Court offers no guidance to lower courts, which must make completely discretionary determinations about comparative degrees of risk, which the Court admits is “unclear.”\(^{77}\)

It is possible that the Court assumed that the test from *James* could be used here. However, if the Court intended the *James* test to be used as the first element of the *Begay* test, it is likely that the Court would have carried out the *James* test by comparing the risk associated with the felony DUI at issue with the its closest analogue among the enumerated crimes. Because the Court did not mention the *James* test, let alone apply it, it is unlikely that the Court intended the *James* test to be used as the first element of the *Begay* test.

Second, the potential predicate felony must be similar in kind to the enumerated crimes.\(^ {78}\) The Court determined that the enumerated crimes all involve purposeful, violent, and aggressive
For an unenumerated felony to be similar in kind to the enumerated felonies, it must have these same characteristics. The Court held that DUI does not fall within the residual clause because it does not need to be purposeful or deliberate.

Despite offering more guidance for the second element than the first element, the Court still did not provide details as to how lower courts should apply this second element. For instance, the Court did not say what constitutes aggressive or violent conduct, leaving it to lower courts to determine that standard for themselves. “Adjectives like ‘purposeful’ and ‘aggressive’ denote qualities that are ineluctably manifested in degree and appear in different combinations; they are, therefore, imprecise aids.” Furthermore, the court did not clarify what it meant by purposeful conduct, but instead merely determined that DUI is a strict liability crime, and is therefore not purposeful in the same way that the enumerated crimes are.

Three Justices dissented in Begay, arguing that nothing in the ACCA requires that crimes be similar to the enumerated crimes to fall within the residual clause. Additionally, the dissenters believed that the majority misapplied its own test. The dissenting Justices argued that under the majority’s interpretation of the statute DUI should fall in the residual clause because DUI does involve purposeful, violent and aggressive conduct.

As the dissenting opinion indicates—and as Justice Scalia expressly points out in his concurring opinion—the rule created by the Court in Begay is susceptible to varying interpretations and application. Instead of clarifying a standard for determining whether a crime falls within the residual clause, the Supreme Court’s holdings in James and Begay appear to leave lower courts with two methods for determining whether a crime falls within the residual clause. First, if the crime is attempted burglary, attempted extortion, or attempted arson, the James framework can still be used. Second, if the crime is not attempted burglary, attempted extortion, or attempted arson, the Begay framework must be used.

---

79 Id. at 1586
80 Id.
81 Id. at 1587 (“W[e hold only that, for the purposes of the particular statutory provision before us, a prior record of DUI, a strict liability crime, differs from a prior record of violent and aggressive crimes committed intentionally, such as arson, burglary, extortion, or crimes involving the use of explosives.” Id. at 1588.)
82 Charles, 566 F.Supp2d at 1235
83 Id. at 1588
84 Id.
85 Id. at 1594
86 Id. at 1594-95 (Alito, J., dissenting) (“I have no doubt that the overwhelming majority of DUI defendants purposefully drank before getting behind the wheel and were purposefully operating their vehicles at the time of apprehension….Driving can certainly involve aggressive conduct…..”)
87 Id. at 1589 (Scalia, J., concurring) (“There are still many crimes that are not analogous to the enumerated crimes (so that their status cannot be resolved by James) but do involve ‘purposeful,’ ‘violent,’ and ‘aggressive’ conduct (so that their status cannot be resolved by today’s due ex machina). Presumably some third (and perhaps fourth and fifth) gimmick will be devised to resolve those cases as they arise, leaving out brethren on the district courts of appeals much room for enjoyable speculation.)
88 Id. (Scalia, J., concurring) (“[T]he concomitant of the sad fact that the theory of James has very limited application is the happy fact that its stare decisis effect is very limited as well. It must be followed, I presume, for unenumerated crimes that are analogous for enumerated crimes (e.g., attempted arson.”). It is questionable whether or not the Court will accept inclusion of a crime as a predicate based solely on the James test in the future. Thus, at best, the James framework applies only to a very limited subset of crimes, and at the worst, it no longer provides any framework that lower courts can use that the Supreme Court will accept.
89 Id. at 1585
C. Chambers and the Aftermath of James and Begay

The court granted certiorari in Chambers to resolve a Circuit split regarding whether failure to report for imprisonment is a violent felony under the ACCA’s residual clause. The Court resolved the disagreement in the lower courts by determining that failure to report is not a violent felony under the residual clause. However, the Court did not clarify the approach lower courts should use to determining whether a crime is a predicate violent felony under the residual clause, and the Chambers opinion itself illustrates the vagaries currently associated with making such a determination.

The Chambers Court did not rest its holding on the test it propounded in Begay less than a year earlier. With respect to the first element of the Begay test, there is no mention of comparing the degree of risk posed by failure to report to the degree of risk posed by the enumerated crimes. Instead, all the Court looked at with respect to the degree of risk posed by failure to report was a United States Sentencing Commission report. Based on that report, the Court determined that there was no evidence that someone who failed to report was “significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a serious potential risk of physical injury.”

While it is not entirely clear, one might argue that the Court was willing to replace the difficult comparison of the degree of risk posed by failure to report to the degree of risk posed by the enumerated crimes with statistical evidence that failure to report involves a very minimal degree of risk. However, the Court did not indicate that that was its intention, and there is no precedent for using statistics to determine the degree of risk posed by an unenumerated or enumerated crime in either James or Begay.

As for the second element of the Begay test, the Court says only that failure to report “amounts to a form of inaction, a far cry from the purposeful, violent, and aggressive conduct potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion.” While this is the test the Begay Court said to use to determine whether an unenumerated crime is similar in kind to the enumerated crimes, the Chambers Court provides no analysis for its conclusion that failure to report is not purposeful, violent, or aggressive. The Court also does not appear to rely on its determination that failure to report satisfied the second element of the Begay test in reaching its holding, choosing instead to rely on the statistics from the Sentencing Commission report.

It seems that if the Court had wanted to simply adhere to the standard it set in Begay, it only needed to make a determination about whether the degree of risk posed by failure to report was similar to the degree of risk posed by the enumerated crimes. If the Court had done that analysis and provided more concrete analysis with respect to the second element of the Begay test, it could have based its holding on that alone, and in the process clarified how the Begay test is properly applied.

It is not clear why the Court relied so heavily on statistical data regarding failure to report from one Sentencing Commission report instead of relying on the Begay test. One possible answer is that the Court was persuaded by the statistical evidence that the commission of failure

---

90 Chambers, 129 S.Ct. at 690
91 Id. at 693
92 Id. at 692-693
93 Id. at 692 (internal quotations omitted)
94 Id. at 693 (internal quotations omitted; emphasis added)
to report does not generally involve violence, and determined that that was enough to rest its holding on. However, that begs the question as to why the Court did not use statistical evidence in James or Begay. While there might not be great statistical evidence with respect to attempted burglary, there is a lot of data available regarding DUls that the Court did not discuss.

Because the Chambers Court appears to have used half of the Begay test together with statistical evidence about the amount of violence associated with the commission of the crime to reach its holding, the current standard that lower courts should apply is even less clear than it was after Begay. The second element of the Begay test still appears necessary because the Chambers Court included it, but what about the first element? The Chambers Court did not expressly discredit the first element of the Begay test, much as the Begay Court did not expressly discredit the James test. Therefore, it would appear that a lower court would not be out of line if it were to apply just the James test (for the attempt versions of the enumerated crimes), the Begay test, or the second element of the Begay test in conjunction with statistical evidence indicating that the crime at issue generally is or is not carried out with violence.

IV. Proposed Test

In light of the uncertainty regarding how lower courts are supposed to determine whether an unenumerated crime falls within the ACCA’s residual clause, I propose a new test. Under my test, the following elements must be proved in order for a crime to fall within the ACCA’s residual clause:

(1) The crime must be generally accepted as a crime against property
(2) The crime must not have been committed recklessly or negligently; and
(3) The crime must have made physical confrontation with someone other than a police officer reasonably foreseeable

Taking into account applicable statutory interpretation, the legislative history, and current Supreme Court precedent, these elements allow for the residual clause to be narrowly applied to only certain crimes that Congress intended the ACCA to cover, and eliminate the need for difficult comparisons regarding similarities in risk between unrelated crimes.

A. Crime Against Property

95 Id.
96 Black’s Law Dictionary (8th ed. 2004) defines crimes against property as “A category of criminal offenses in which the perpetrator seeks to derive an unlawful benefit from—or do damage to—another’s property without the use or threat of force.”
97 The use of legislative history in statutory interpretation is a somewhat contentious issue. Today a majority of the Court supports the use of legislative history as an aid when interpreting facially ambiguous statutes or statutes that on their face appear to lead to an absurd result. Some Justices currently on the Court go even further, believing that legislative history is appropriately used as an aid in interpretation even when the statute at issue is not facially ambiguous. For instance, Justices Stevens and Breyer think that all available information, including the legislative history, should be considered when interpreting any statute. Other Justices, namely Justice Scalia, believe that legislative history should never be used because sub-committee and committee reports do not necessarily represent the view of the entire Congress. E.g., Bart M. Davis et al., Use of legislative History: Willow Witching for Legislative Intent, 43 IDAHO L. REV. 585, 589-91 (2007). Because a majority of the Justices currently on the Supreme Court support the use of legislative history when interpreting ambiguous statutes, it is appropriate to look at the legislative history when examining the ACCA’s inherently ambiguous residual clause.
Looking at the legislative history of the 1986 amendments to the ACCA, and interpreting the ACCA so as to give meaning to every clause and word,\(^\text{98}\) it is clear that only crimes against property should be included as predicate offenses under the residual clause.

When Congress amended the ACCA, it determined that violent felonies against both persons and property should count as predicate offenses.\(^\text{99}\) Violent felonies against persons were meant to be included as predicate offenses under the language codified at § 924(e)(2)(B)(i), which includes crimes punishable by more than a year imprisonment that have “as an element the use, attempted use, or threatened use of physical force against another.”\(^\text{100}\) Violent felonies against property were meant to be included as predicate offenses under the language codified at § 924(e)(2)(B)(ii), which includes crimes punishable by more than a year imprisonment that are either “burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”\(^\text{101}\)

At the time that the House Committee on the Judiciary submitted its report on the 1986 ACCA amendments, there were no enumerated crimes in the proposed statutory language.\(^\text{102}\) In its report, the Committee said that crimes such as burglary, arson, extortion, and the use of explosives were indicative of the types of crimes Congress thought the residual clause should cover.\(^\text{103}\) It is likely that those very crimes listed by the Committee in its report were included in front of the residual clause in the same section in the final version of the amendment in order to insure that those particular crimes would be covered, as well as to give guidance regarding what crimes the residual clause was intended to cover.

With such clear evidence available that the purpose of the enumerated crimes and the subsequent residual clause was to make violent felonies involving the use of physical force against property predicate offenses, the Court’s broader interpretation of the residual clause to include crimes that are not crimes against property—like escape\(^\text{104}\) and failure to stop for a police officer\(^\text{105}\)—appears to be a misapplication.

Further evidence that the residual clause should be interpreted to only apply to crimes against property come from interpreting the plain language of the statute so as to give meaning to every clause.\(^\text{106}\) If interpreted to include crimes against persons, the residual clause would make the preceding clause superfluous because “conduct that presents a serious potential risk of physical injury to another”\(^\text{107}\) clearly includes any crimes that “has as an element the use, attempted use, or threatened use of physical force against the person of another.”\(^\text{108}\)

Another possible reading of the ACCA views the physical force language as adding greater clarity to the residual clause. However, the physical force language is included before

\(^{98}\) Inhabitants of Montclair Tp. v. Ramsdell, 2 S.Ct. 391, 395 (1883) (“It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.”)


\(^{100}\) 18 U.S.C. § 924(e)(2)(B)(i); and 18 U.S.C. §924(e)(2)(B)


\(^{103}\) Id. at 3

\(^{104}\) United States v. Mathias, 482 F.3d 743, 744 (4th Cir. 2007)

\(^{105}\) West, 2008 WL 5158599 at *5

\(^{106}\) Ramsdell, 2 S.Ct. at 395 (see footnote 98 supra)

\(^{107}\) 18 U.S.C. § 924 (e)(2)(B)(ii)

\(^{108}\) 18 U.S.C. § 924(e)(2)(B)(i); Begay, 128 S.Ct. at 1581 (determining that Congress could not have meant the residual clause to be all inclusive because if the residual clause was all inclusive there would have been no reason to include § 924(e)(2)(B)(i)).
the residual clause in a separate subsection of the Act. Additionally, it is not immediately clear that the enumerated crimes that accompany the residual clause meet the physical force requirements of the preceding clause.

Because the legislative history indicates that Congress only intended the residual clause to apply to property crimes, and because interpreting the statute in a way that gives meaning to each word and clause requires that the residual clause not be all encompassing, it is reasonable to require courts to first determine whether a potential predicate offense is a crime against property. If it is not a crime against property, the inquiry should be over, and that crime will not count as a predicate violent felony under the residual clause.

B. More than Reckless

The language of the ACCA, the legislative materials, and the Supreme Court opinions on the subject all support a requirement that for a crime to fall within the ACCA’s residual clause the crime must have involved conduct that was more purposeful or intentional than reckless or negligent conduct.

The legislative history indicates that Congress intended that the residual clause would cover “crimes against property such as burglary, arson, extortion, use of explosives and similar crimes.” Because Congress only intended the residual clause to include crimes that are similar to the enumerated crimes, it is reasonable to use similar attributes of the enumerated crimes to help determine the bounds of the residual clause.

The Supreme Court reached the conclusion that the residual clause only includes crimes similar to the enumerated crimes in Begay. The Begay Court went on to determine that one of the things that all of the enumerated crimes have in common is that they involve purposeful conduct. It was based on this determination that the Begay Court held that the DUI at issue was not a predicate violent felony under the residual clause. “[U]nlike the example crimes, the conduct for which the drunk driver is convicted (driving under the influence) need not be purposeful or deliberate.”

While the Court determined that DUI is not necessarily purposeful and deliberate, and is therefore different than the enumerated crimes in at least one important respect, the Court did not indicate whether the unenumerated crime must have a mens rea of purpose. In fact, the Court offered little guidance to lower courts for determining whether a different unenumerated crime was purposeful or deliberate in the same way that the enumerated crimes are.

Since Begay, lower courts have used different methods to determine whether or not the crime before them was purposeful or deliberate. In one case, the Fourth Circuit determined that the proper test for purposeful and deliberate conduct was looking at the statute of conviction and

---

110 Begay, 128 S.Ct. at 1584-85
111 Id.
112 Id. at 1586 (“The listed crimes all typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct.”)
113 Id. at 1587
114 Id.
115 Id. at 1586
116 Id. at 1588 (“[W]e hold only that, for the purposes of the particular statutory provision before us, a prior record of DUI, a strict liability crime, differs from a prior record of violent and aggressive crimes committed intentionally such as arson, burglary, extortion, or crimes involving the use of explosives.”)
determining if the defendant necessarily acted willfully or knowingly.\textsuperscript{117} Using that test, the Fourth Circuit held that “a South Carolina failure to stop for a blue light violation” is not a violent felony under the residual clause because it is clear from the elements of the crime that “the State does not have to prove that the defendant acted with criminal intent.”\textsuperscript{118}

In another case, the Tenth Circuit determined that a conviction in Utah for failing to stop at an officer’s command is a violent felony under the ACCA’s residual clause because the “crime of evading or eluding police in a vehicle generally involves a deliberate choice by the driver to disobey the police officer’s signal.”\textsuperscript{119} Thus, for the Tenth Circuit, it is enough that in most instances the crime at hand is committed deliberately,\textsuperscript{120} whereas for the Fourth Circuit the elements of the crimes must prove that it was committed willfully or knowingly.\textsuperscript{121}

I believe that the Fourth Circuit’s interpretation of the requirement that a predicate violent felony must involve purposeful conduct is closer to what Congress intended when drafting the ACCA and what the \textit{Begay} Court thought was proper in interpreting it.

Congress intended the residual clause to be limited by the enumerated crimes, and all of the enumerated crimes require purposeful or intentional conduct.\textsuperscript{122} For instance, according to the Court in \textit{Taylor}, “the generic, contemporary meaning of burglary contains at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with \textit{intent} to commit a crime.”\textsuperscript{123} The \textit{Begay} Court pointed out that the Model Penal Code’s definitions of arson and extortion both require purposeful conduct.\textsuperscript{124} The Court has also indicated that the use of explosives requires purposeful conduct, because the inclusion of the word “use” in the statute “suggests a higher degree of intent than negligent or merely accidental conduct.”\textsuperscript{125}

Therefore, I believe that the right test requires lower courts to look at the elements of the offense using the categorical approach to determine whether the offense was committed purposefully or intentionally. If the elements of the crime indicate that the defendant could have been convicted without having carried out an intentional act—in other words, if the defendant could have been convicted based on actions that were no more than negligent or reckless—than the crime is not similar to the enumerated crimes in this regard and cannot be used a predicate felony under the ACCA’s residual clause.

\textbf{C. Physical Confrontation}

For a crime to fall within the residual clause it must involve “conduct that presents a serious potential risk of physical injury to another.”\textsuperscript{126} However, neither Congress nor the Supreme Court has ever determined exactly what “conduct that presents a serious potential risk of physical injury to another” is. The legislative history of the ACCA indicates only that

\begin{footnotesize}
\begin{itemize}
\item[\textsuperscript{117}] United States v. Roseboro, No. 07-4348, 2009 WL 19136 at *7 (4th Cir. 2009) (“...the elements as set forth by the South Carolina Supreme Court simply do not require that the defendant act either willfully or knowingly.”)
\item[\textsuperscript{118}] Id. at *6
\item[\textsuperscript{119}] \textit{West}, 2008 WL 5158599 at *5, *8 (italics added, internal quotation marks omitted)
\item[\textsuperscript{120}] Id.
\item[\textsuperscript{121}] \textit{Roseboro}, 2009 WL 19136 at *7
\item[\textsuperscript{122}] \textit{Begay}, 128 S.Ct. at 1586.
\item[\textsuperscript{123}] \textit{Taylor}, 110 S.Ct. at 2158 (italics added)
\item[\textsuperscript{124}] \textit{Begay}, 128 S.Ct. at 1586; Model Penal Code § 220.1(1) (Am. Law Inst. 1985) (“A person is guilty of arson…if he starts a fire or causes an explosion with the \textit{purpose} of...”); Id. at § 223.4 (a person is guilty of extortion only if he obtains property by threatening another person with various harms)
\item[\textsuperscript{125}] Leocal v. Ashcroft, 125 S.Ct. 377, 378 (2004)
\item[\textsuperscript{126}] 18 U.S.C. § 924(e)(2)(B)(ii)
\end{itemize}
\end{footnotesize}
burglary, arson, extortion, and the use of explosives are all crimes that involve conduct that seriously risks injuring other persons.\textsuperscript{127}  

Maybe Congress included the enumerated crimes to be examples of the type of risk of physical injury that must be created by an unenumerated crime in order for an unenumerated crime to fall within the residual clause. This is the conclusion reached by the Court in \textit{Begay}.\textsuperscript{128}  However, the \textit{Begay} Court offered no insight with respect to how courts should determine when an unenumerated crime presents a risk of harm to another person similar to the risk presented by the enumerated crimes.\textsuperscript{129}  

Comparing the risk of physical injury to another associated with an unenumerated crime to the risk associated with the enumerated crimes is not as easy as one might think. As the \textit{Begay} Court noted in commenting on the risk comparison test it propounded in \textit{James}, “the examples are…far from clear in respect to the degree of risk each poses….”\textsuperscript{130}  If it is unclear what degree of risk the enumerated crimes actually pose, it is equally unclear what degree of risk unenumerated crimes pose. And the problem does not end there, because after determining the degree of risk of physical injury posed by the enumerated crimes and an unenumerated crime, courts have to determine whether those risks are similar.

It is because of the inherent difficulty in determining and then comparing the degree of risk posed by the enumerated crimes and unenumerated crimes that I propose that the standard be set at reasonably foreseeable conduct. Congress and the Court would likely agree that the enumerated crimes all involve conduct that creates a reasonably foreseeable risk of physical confrontation with another person.

For instance, the risk of physical injury to another from burglary “arises…not from the completion of the break-in, but rather from the possibility that some innocent party may appear on the scene while the break-in is occurring.”\textsuperscript{131}  Arson and the use of explosives involve this same risk because a person starting a fire or setting off explosives might be discovered at the scene by an innocent party in the same way that a burglar might be.\textsuperscript{132}  

Extortion can also be viewed as involving the same risk of physical confrontation with another as the enumerated crimes. For the purposes of the ACCA, extortion has been defined as “the obtaining of something of value from another, with his consent, induced by the wrongful use or threatened use of force against the…property of another.”\textsuperscript{133}  If a criminal is using force against someone else’s property he risks being discovered by an innocent party in the same way that someone breaking into another person’s house to commit burglary risks an encounter with an innocent party.

\begin{itemize}
  \item \textsuperscript{127}H.R.Rep. No. 99-849, at 3 (1986)
  \item \textsuperscript{128}\textit{Begay}, 128 S.Ct. at 1585 (“…we should read the examples as limiting the crimes that [the residual clause] covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.” (emphasis added))
  \item \textsuperscript{129}Id. at 1584 (…we assume that the lower courts were right in concluding that DUI involves conduct that ‘presents a serious potential risk of physical injury to another.’ § 924(e)(2)(B)(ii).”)
  \item \textsuperscript{130}Id. at 1585
  \item \textsuperscript{131}United States v. Payne, 966 F.2d 4, 8 (9th Cir. 1992). The Supreme Court adopted Ninth Circuits language regarding the where the risk to another from burglary comes from in \textit{James}. James, 127 S.Ct. at 1595.
  \item \textsuperscript{132}It is true that the more serious risks of physical injury to other persons from arson and the use of explosives come from the fire or the explosion and resulting damage. However, that is not pertinent here because there is no similar risk from burglary or extortion, and it is what the enumerated crimes have in common that is important in determining what should fall within the residual clause.
  \item \textsuperscript{133}\textit{James}, 127 S.Ct. at 1606 (Scalia, J., dissenting)
\end{itemize}
Therefore, looking at whether an unenumerated crime creates a reasonably foreseeable risk of physical confrontation with another person is in keeping with interpreting the residual clause based on the characteristics shared by all of the enumerated crimes.

It is important to note that every crime significantly risks physical confrontation with the police, and in that way risks physical confrontation with another person. However, Congress could not have intended conduct “that presents a serious potential risk of physical injury to another” to include every crime that presents a serious potential risk of injury to a police officer. If that were the case, than a reasonable argument could be made that every crime (or at least most crimes) would be included under the residual clause because the police try to arrest all criminals, and in every arrest there is a potential risk of physical injury to the police officer. The degree of risk likely depends on the context and the criminal, things that courts generally cannot look at using the categorical approach.

If the residual clause included all crimes that present a serious risk of physical injury to the police, than preceding clause in the ACCA would be superfluous. A violent felony that "has as an element the use, attempted use, or threatened use of physical force against the person of another"\textsuperscript{134} would clearly include some crimes where there was a serious potential risk of physical injury to a police officer.

Because it is clear that the residual clause cannot have been meant to include all crimes that risk serious potential injury to police officers, it is appropriate to limit my test to only crimes that create a reasonably foreseeable risk of physical confrontation with another person other than a police officer.

\textbf{D. Pros and Cons of My Proposed Test}

There are two primary benefits of my proposed test compared to the existing framework. First, my proposed test is closer to being in line with what the legislative history indicates the residual clause was meant to include. The Court has thus far ignored that fact that the legislative history of the ACCA states explicitly that the residual clause was meant to cover only “violent felonies involving physical force against property.”\textsuperscript{135} Thus, my test brings the residual clause back in line with Congress’ original intent.

An additional benefit of bringing the residual clause in line with legislative intent is that it comports with the rule of lenity. According to Black’s Law Dictionary, the rule of lenity holds “that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.”\textsuperscript{136} “The rule of lenity…demands that we give [the ACCA] the more narrow reading of which it is susceptible.”\textsuperscript{137} My proposed test narrows the application of the residual clause not only by limiting it to including only crimes against property, but also by eliminating crimes that might have been committed negligently or recklessly, as well as crimes that did not create a reasonably foreseeable risk of physical confrontation with another person other than a police officer.

The test created by the \textit{Begay} Court was applicable to a much broader range of crimes than my propped test. Some might argue that the residual clause should be interpreted more

\textsuperscript{134} 18 U.S.C. § 924(e)(2)(B)(i)
\textsuperscript{136} Black’s Law Dictionary (8th ed. 2004) defines the rule of lenity as “The judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment.”
\textsuperscript{137} James, 127 S.Ct. at 1603 (Justice Scalia dissenting)
broadly because otherwise some violent felonies will not count as predicate offenses. However, if Congress wanted every violent felony to fall within some provision of the ACCA, it would have simply said that all violent felonies are predicate offenses instead of limiting the types of crimes that qualify as predicate violent felonies to those that fall into either the violent felonies against people category or the violent felonies against property category.

Second, my proposed test provides more clarity than the existing framework. The current framework has lead to inconsistent results and uniform application has proven difficult at best. It is unacceptable for someone to receive fifteen years without parole based on a prior conviction when a criminal in another state was convicted of the same crime under a virtually identical statute but the courts in his state determined that it was not a predicate violent felony.\(^{138}\)

Someone might argue that my test fails to take into account other similarities between the enumerated violent felonies that might be used to further limit the crimes that fall within the residual clause.\(^{139}\) For instance, my proposed test does not include aggressive and violent conduct, two factors that the Begay Court determines the enumerated crimes have in common and that an unenumerated crime must also have in order for it to fall under the residual clause.\(^{140}\)

My test does not include the aggressive and violent conduct factors from Begay because those factors difficult to define and even more difficult to apply,\(^{141}\) and one of the main purposes of my test is to eliminate ambiguities found in the current test. Many other similarities that can be drawn between the enumerated crimes would also fail because of the ambiguity that would be involved in trying to determine if an unenumerated crime shared that trait.

While the elements in my test will not make the determination of whether a given unenumerated crime falls within the residual clause obvious in every situation, as the following section will illustrate, their application is much clearer than the Begay factors or the limited James test.

V. Testing my Proposed Test

In the following test suite\(^{142}\) I demonstrate the strengths and weaknesses of my proposed test when it is applied to a variety of crimes. The test cases include crimes that cannot easily be placed within the James and Begay frameworks, as well as crimes that do fall within those frameworks, to indicate where my test would give the same or different results. As a starting point, I apply my proposed test to Begay and James.

A. Begay and DUI

In Begay, the Court considered whether the defendant’s prior convictions for DUI under New Mexico’s DUI statute were violent felonies for the purpose of the ACCA.\(^{143}\) New Mexico’s

\(^{138}\) This was exactly the situation that led the Court to grant certiorari in Chambers. However, Chambers only determined that one crime was not a violent felony, and even then only after many people had been sentenced based on the courts that heard their cases determining that that crime was a violent felony. Such incongruous results, resolved only years later by the Supreme Court, are what should not be allowed to continue.

\(^{139}\) Charles, 566 F.Supp.2d at 1233-34 (noting that the Begay Court listed purposeful, violent and aggressive conduct as all characterizing the enumerated violent felonies, but nowhere did the Begay Court say that there were no other similarities between the enumerated crimes that would be pertinent in comparing them to an unenumerated crime)

\(^{140}\) Begay, 128 S.Ct. at 1586

\(^{141}\) Charles, 566 F.Supp.2d at 1235


\(^{143}\) Begay, 128 S.Ct. at 1584
DUI statute makes it a crime “for a person who is under the influence of intoxicating liquor” or “any drug to a degree that renders the person incapable of safely driving a vehicle to drive a vehicle within [New Mexico].”  

As noted above, the Begay Court determined that DUI in New Mexico was too different from the enumerated crimes in the ACCA for the DUI to be properly considered a violent felony under the residual clause. Whereas the enumerated crimes “all typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct,” the New Mexico DUI statute does not require that the drunk driver to have been acting purposefully or deliberately to secure a conviction. 

Applying my proposed test to the facts of Begay yields the same result—felony DUI under New Mexico’s statute does not count as a predicate violent felony under the ACCA—but the reason that result correct is much more straightforward. Under New Mexico’s DUI statute—or any DUI statute for that matter—DUI is not a crime against property. As opposed to being generally accepted as a crime against property, DUI is generally accepted as a traffic or motor vehicle offense. Therefore, under my proposed test, the inquiry would end right there and the defendant’s prior DUls could not be used as predicate offenses for ACCA purposes. 

The Begay ruling did not make things this clear for lower courts. After Begay, a lower court trying to determine whether a felony DUI conviction counts as a predicate violent felony has to compare whether the statute of conviction indicated that the felony DUI conviction in that case was similar in kind, as well as degree of risk posed, to the enumerated crimes. Some lower courts might be willing to accept that all DUIs involve a degree of risk similar to the enumerated crimes because the Begay Court was willing to accept without discussion a lower court’s conclusion that DUI “presents a serious potential risk of physical injury to another.” 

However, other lower courts might not be so willing to accept that the risks associated with DUI are similar to the risks posed by burglary, arson, extortion, and the use of explosives, and might determine that a DUI at issue is not a violent felony for that reason. On the other hand, some

---

144 N.M. STAT. ANN. §§ 66-8-102(A) & (B) (2008)
145 Begay, 128 S.Ct. at 1584
146 Id. at 1586
147 Id. at 1587
148 If DUI was generally accepted as a crime against property, the next step in my proposed test would be to determine whether conviction under the statute at issue required that the defendant acted more than negligently or recklessly. The Begay Court characterized the general crime of DUI as a strict liability crime, meaning that a defendant could have been convicted for mere negligent or reckless conduct. Because of the possibility that the defendant’s conviction under the DUI statute at issue in Begay might have been for only negligent or reckless conduct, the DUI fails to qualify as a predicate violent felony under the second element of my proposed test. As Justice Alito points out in his dissent, some states do require a finding of purposeful conduct for a conviction of DUI. In one of those states, a court applying my proposed test would determine that the second element was satisfied.

If DUI was generally considered a crime against property, and the statute of conviction required a finding that defendant acted more than negligently or recklessly, the last element of my test would require a court to determine whether the DUI made physical confrontation with someone other than a police officer reasonably foreseeable. This element would require the court to engage in some limited discretionary analysis. For instance, a court would need to consider whether the risk of crashing into another vehicle counted as a reasonably foreseeable risk of physical confrontation with another person. As applied to a DUI, therefore, this element of my proposed test has weaknesses similar to those associated with the current Begay framework. However, it is not important that the third element of my test is not readily applicable under these circumstances because the first element guarantees that a court will never have to determine whether the crime of DUI makes physical confrontation with someone other than the police reasonably foreseeable.

lower courts might not agree with the Begay Court that DUI does not involve purposeful conduct, which was the main reason why the Begay Court held that the felony DUI at issue was not a violent felony. Those lower courts might determine that a conviction under the DUI statute they are considering does count as a violent felony under the ACCA.

B. James and Attempted Burglary

In James the Court determined that attempted burglary counts as a predicate violent felony under the ACCA’s residual clause. My proposed test reaches the same conclusion, but in a different and clearer way.

The James Court determined that James’ conviction for attempted burglary under Florida state law posed a risk comparable to the risk associated with the enumerated crime burglary. Because of the similarity in degree of risk posed, the Court held that attempted burglary qualifies as a predicate violent felony.

The obvious similarities between burglary and attempted burglary make it possible to compare the risks associated with each with relative ease and at least some degree of accuracy. However, first courts must engage in the inherently imprecise task of determining how much risk is associated with burglary, as well as how much risk is associated with attempted burglary considering the specific language of the attempted burglary statute the defendant was convicted under. While not an impossible task, it is nonetheless difficult and imprecise.

Using my proposed test it is easy to determine that a conviction under the attempted burglary statute at issue in James—or any similar attempted burglary statute—would count as a predicate violent felony. First, because burglary is generally accepted as a crime against property attempted burglary must be generally accepted as a crime against property. It would make no sense to think of an attempt crime as not falling into the same general category as the completed crime.

Second, a conviction for attempted burglary under a statute similar to Florida’s attempted burglary statute, as interpreted by the Florida Supreme Court, requires a finding that the defendant acted more than negligently or recklessly. In Florida, attempt requires “an act toward the commission” of the offense. With respect to attempted burglary, the Florida Supreme Court has interpreted that requirement to be “an overt act directed toward entry of a structure.” Because a conviction for attempted burglary requires an overt act, someone cannot be convicted of attempted burglary without taking action that was more than negligent or reckless. Therefore, the second element of my test is met.

The third element of my test is satisfied because attempted burglary under the Florida statute makes physical confrontation with someone other than a police officer reasonably foreseeable.

---

150 Id. at 1587
151 Id. at 1594-1596 (Alito, J., dissenting). The dissenting opinion by Justice Alito, joined Justices Souter and Thomas, provides ample reasoning and examples for lower courts to use if they believed that the DUI they were considering was a violent felony and wanted to reach that holding while complying with the majority decision in Begay. Because this dissenting opinion makes such analysis readily available, it makes it even more likely that lower courts will be willing to come out the opposite way of the Begay majority when considering felony DUIs not arising under the New Mexico statute directly under consideration in Begay
152 James, 127 S.Ct. at 1590
153 Id. at 1595
154 Id.
155 FLA. STAT. § 777.04(1) (2008)
156 James, 127 S.Ct. at 1596
By taking an overt act toward the commission of the burglary, the criminal makes it reasonably foreseeable that someone will come upon him in his attempt and a physical confrontation will ensue.\footnote{According to the James Court, the risk associated with burglary arises “from the possibility that an innocent person might appear while the crime is in progress.” James, 127 S.Ct. at 1594-95. The risk associated with attempted burglary is the same. “Interrupting an intruder at the doorstep while the would-be burglar is attempting a break-in creates a risk of violent confrontation comparable to that posed by finding him inside the structure itself.” Id. at 1595. Attempted burglary would not qualify as a predicate violent felony under my test in states that allow for convictions of attempted burglary when the criminal did no more than copy a key, or some other preparatory act far removed from going onto another’s property and entering the premises. United States v. Strahl, 958 F. 2d 980, 986 (10th Cir. 1992); see also United States v. Matinez, 954 F.2d 1050, 1054 (5th Cir. 1992). A conviction under such a statute does not indicate that it was reasonably foreseeable that physical confrontation with an innocent bystander would ensue. In this situation, a court would have to apply the modified categorical approach to determine if there was in fact an overt act that made physical confrontation reasonably foreseeable. In that way only could a conviction for attempted burglary under such a statute be properly found to be a predicate violent felony.}

\section*{C. Chambers and Escape}

The Supreme Court granted certiorari in 	extit{Chambers} in order to settle a disagreement between lower courts regarding whether failure to report is a violent felony under the ACCA.\footnote{Chambers 129 S.Ct. at 689} The Court concluded that failure to report is not a predicate violent felony under the residual clause.\footnote{Id. at *6}

While the Court’s holding in 	extit{Chambers} clarifies whether failure to report is a violent felony, the way in which the Court reached that conclusion will not help lower courts better understand how to determine whether other crimes fall within the residual clause. In reaching its holding, the 	extit{Chambers} Court relied in part on its determination that failure to report “amounts to a form of inaction, a far cry from the purposeful, violent, and aggressive conduct potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion.”\footnote{Id. at *4 (internal quotations omitted)}

While a reasonable person might agree that not showing up somewhere is not violent or aggressive in the same way that the enumerated crimes are, it is not entirely clear what the court means when it says that failure to report is not purposeful conduct. The Court does not look at the statute of conviction to determine whether or not defendant must have acted purposefully or could have been convicted having negligently or recklessly failed to report. In other words, was the failure to report intentional, or did it simply slip the defendant’s mind? Thus, while the Court gives lip service to the test it created in \textit{Begay}, it once again failed to clarify how the test should be applied to any potential predicate violent felony. Had the Court applied my proposed test in \textit{Chambers}, the holding would have been the same, but the reason for reaching that conclusion would have been much clearer. Failure to report is not a violent felony under my proposed test because it fails to satisfy the first element by not being a crime against property.

The first element of my test would also eliminate the more serious and potentially dangerous crime of escape from inclusion in the residual clause of the ACCA. While some might argue that is not a desirable result because escape is a dangerous felony, I disagree.
Escape is a dangerous felony and it does involve “conduct that presents a serious potential risk of physical injury to another.”161 That much must be admitted.

However, I do not think that is problematic. If the escapee were to use, attempt to use, or threaten to use violence against someone in the course of his escape, it is likely that the prosecutor would press for conviction for that violent crime in addition to seeking conviction for the escape. That violent felony against another person would then count as a predicate offense under § 924(e)(2)(B)(i); the clause preceding the residual clause in the ACCA.162 It is that clause which, as noted above, is meant to cover crimes involving the use of force against persons, not the residual clause.

D. Assorted Crimes

Because of the limiting nature of my proposed test, there are several other crimes that lower courts have placed within the ACCA’s residual clause that would not count as predicate violent felonies if my test was applied. For most of these crimes, it is that fact that they are not generally accepted as crimes against property that moves them outside of the boundaries of the residual clause under my proposed test.

For instance, crimes involving the failure to stop for a police officer, which courts have generally determined to be violent felonies under the residual clause, will no longer qualify using my proposed test because they are not generally accepted as crimes against property.163 However, that does not mean that criminals who commit such crimes will be able to avoid the fifteen year mandatory minimum required by the ACCA. As noted with respect to escape, it will be up to prosecutors to seek convictions for specific crimes of violence against persons or property if they want a particular defendant to have a conviction that qualifies as a predicate violent felony.

Another category of crimes that will no longer qualify as predicate felonies under the residual clause using my proposed test are sex crimes.164 Where a sex crime has as an element the use, attempted use, or threatened use of physical force against another person, the offense will still qualify as a predicate violent felony under the ACCA, just not under the residual clause.165 However, where a sex crime does not have as an element the use, attempted use, or threatened use of physical force against another, but the offender used force against another in the commission of the crime, it will be up to prosecutors to seek convictions for crimes that include as an element the violent acts so that the criminal has a conviction for a predicate violent felony even though the sex crime itself does not count.

162 18 U.S.C. § 924(e)(2)(B)(i) (A crime constitutes a violent felony for purposes of the ACCA if it “has as an element the use, attempted use, or threatened use of physical force against the person of another.”)
163 See Roseboro, 2009 WL 19136 at *8 (finding that, where it is clear from the modified categorical approach that the defendant acted willfully or knowingly, a South Carolina conviction for failure to stop for a blue light is a violent felony under the ACCA’s residual clause); West, 2008 WL 5158599 at *15 (holding that a conviction under Utah’s failure-to-stop for a police officer statute meets the Begay criteria and is therefore a predicate violent felony under the ACCA’s residual clause); United States v. Spells, 537 F.3d 743, 752 (7th Cir. 2008) (holding that a conviction under Indiana law for fleeing an officer in a vehicle is a violent felony under the ACCA’s residual clause); Powell v. United States, 430 F.3d 490, 492 (1st Cir. 2005) (pre-Begay holding that a conviction under the Maine statute for eluding a police officer counts as a predicate violent under the ACCA’s residual clause)
164 See Davis, 583 F.Supp.2d at 1019 (holding that the Iowa crime of indecent contact with a child is a violent felony under the residual clause based on the Begay standard)
165 Under 18 U.S.C. § 924(e)(2)(B)(i), a crime constitutes a violent felony for purposes of the ACCA if it “has as an element the use, attempted use, or threatened use of physical force against the person of another.”
An example of a sex crime that was held to be a violent felony under the residual clause after *Begay* that would not qualify as a violent felony under any other clause of the ACCA or the residual clause using my proposed test can be found in *United States v. Davis*.\(^{166}\) In *Davis* the court held that the defendant’s prior conviction under the Iowa Code of indecent contact with a child constituted a violent felony.\(^{167}\)

Working with the test from *Begay*, the *Davis* court determined that the risk of physical injury to another from indecent contact was similar to the risk of physical injury posed by burglary, arson, extortion or crimes involving the use of explosives.\(^{168}\) However, the court’s discussion of the risk posed by indecent contact focused on the likely psychological harms suffered by a minor engaged in sexual contact with an adult (regardless of whether it was consensual).\(^{169}\) The harms associated with the enumerated crimes, on the other hand, are really the risk of physical injury to innocent bystanders. While there is undoubtedly a risk of psychological harm to victims of the enumerated crimes as well, no cases indicate that it is the risk of that type of harm to another person that is pertinent with respect to the residual clause.

With respect to the second part of the *Begay* test, the *Davis* court determined that indecent contact does involve the purposeful, violent, and aggressive conduct that the *Begay* Court found to be present in the enumerated crimes.\(^{170}\) While it is easy to see how indecent touching must be purposeful, it is not as clear that it is violent and aggressive, at least not in every case. A person can be convicted of indecent contact in Iowa for mutually voluntary conduct, and unless all sexual conduct is inherently aggressive and violent, it seems illegitimate to say that just because it is between a minor and an adult that voluntary sexual conduct is aggressive and violent. For example, an eighteen year old male could be convicted in Iowa for indecent contact for engaging in consensual sexual conduct with a seventeen year old female only a couple of months younger than him. Nothing about such an act seems aggressive or violent.

While the *Davis* court used the *Begay* test to determine that indecent contact with a minor is a violent felony, that determination is not particularly clear, and other courts applying the *Begay* test to similar statutes could easily come to the opposite conclusion. If my proposed test replaced the current framework a conviction for a sex crime under a statute like the one in *Davis* would be easily ruled out as a predicate violent felony. First, the crime in *Davis* would be ruled out by my proposed test based on the first element because indecent contact is not generally accepted as a crime against property. Second, as the court in *Davis* pointed out, the statute Davis was convicted under did not have an element requiring the use, attempted use, or threatened use or physical force against another, so the conviction would not count as a predicate violent felony based on any other part of the ACCA.\(^{171}\)

Other crimes will fail to qualify as predicate violent felonies under my proposed test because a defendant can be convicted of the crimes even if he acted only negligently or recklessly. While the *Begay* decision led some courts to start holding that such crimes did not qualify as predicate violent felonies anymore,\(^{172}\) my proposed test sets a clearer standard by

\(^{166}\) *Davis*, 583 F.Supp.2d. at 1020
\(^{167}\) Id. at 1016
\(^{168}\) Id. at 1019
\(^{169}\) Id. at 1019-20
\(^{170}\) Id. at 1020
\(^{171}\) Id. at 1019
\(^{172}\) See *United States v. Gray*, 535 F.3d 128, 129 (2nd Cir. 2008) (holding that reckless endangerment is not a predicate violent felony under the residual clause because it does not involve purposeful conduct, as required by
eliminating as predicate violent felonies any crimes that a defendant can be convicted of when he
engaged in conduct that was only negligent or reckless.

For instance, in *United States v. Grey* the Second Circuit held that a conviction for
reckless endangerment was not a violent felony after *Begay*.\(^{173}\) The Second Circuit pointed out
the focus of the *Begay* Court on intentional or purposeful conduct being a prerequisite for a
crime to fall within the residual clause.\(^{174}\) Therefore, because the defendant’s conviction for
reckless endangerment under New York Penal Law was not a conviction for intentional conduct,
the reckless endangerment conviction could not be counted as a predicate violent felony under
the residual clause.\(^{175}\)

The Second Circuit was able to follow the reasoning in *Begay* to reach the conclusion
that reckless endangerment is not a violent felony, but it would be clearer that that was the
correct holding using my proposed test. Assuming that the conviction for reckless endangerment
was generally accepted as a crime against property in order to get past the first element of my
test, the second element would clearly not be satisfied because a conviction for reckless
endangerment requires that the criminal’s conduct was merely reckless. Clearly a conviction
requiring reckless conduct is not a conviction for a crime involving conduct that is more than
negligent or reckless, and the second element of my test is not satisfied.

While my proposed test eliminates some crimes from the residual clause, using my test
will make other crimes more clearly identifiable as predicate violent felonies. One crime that has
been the source of some confusion that would clearly qualify as a predicate violent felony under
my proposed test is auto theft.

In *United States v. Williams* the Eighth Circuit held that auto theft by coercion under
Missouri law is a violent felony under the ACCA after *Begay*, but auto theft by deception and
auto theft without consent are not.\(^{176}\) The court determined that auto theft by coercion is a
violent felony because “its inherent threat of violence and close similarity in kind to extortion
satisfies the two-part *Begay* test.”\(^{177}\) Auto theft by deception, on the other hand, was found to be
too unlike any of the enumerated crimes to qualify as a predicate violent felony.\(^{178}\) Auto theft
without consent was held not to be a predicate violent felony because its closest analogue among
the enumerated crimes is burglary, and, according the Eighth Circuit, there are many crimes
involving stealing a car that are more violent and more analogous to burglary than auto theft
without consent, so the latter cannot qualify as a predicate violent felony.\(^{179}\)

The application of the *Begay* test by the *Williams* court is unclear, as is the outcome.
First, there are shades of the *James* test in *Williams* when the court attempts to determine which
of the enumerated crimes are more analogous to the different auto theft crimes it is
considering.\(^{180}\) Whether that test is proper here is dubious at best, and the fact that it leads the

\(^{173}\) *Grey*, 535 F.3d at 129
\(^{174}\) Id. at 131-132
\(^{175}\) Id. at 132
\(^{176}\) *Williams*, 2008 WL 3266912 at *6
\(^{177}\) Id. at *4
\(^{178}\) Id.
\(^{179}\) Id.
\(^{180}\) Id.
court to conclude that two similar forms of auto theft are similar to two different enumerated crimes indicates the inaccuracy of the test and the propensity for incongruous results.

Second, for auto theft by deception and auto theft by coercion, the Williams court does not even discuss whether they involve purposeful, violent or aggressive conduct.\(^{181}\) The court is willing to base its conclusion solely on the relationship or lack of relationship of those crimes with their closest analogue among the enumerated crimes.\(^{182}\) For auto theft without consent the court looked at the Begay test, but determined that the risk of confrontation from auto theft without consent is far less than the risk of confrontation associated with burglary and auto thefts involving force.\(^{183}\) Based on that reasoning the court determined that auto theft without consent is not a violent felony under the ACCA.\(^{184}\)

Under the facts in Williams, my proposed test would provide clearer analysis and a more congruous outcome. Auto theft is generally accepted as a crime against property, so all three variations of auto theft under consideration in Williams meet the first element of my test. The second element of my test is satisfied based on the plane language of the statute where all three crimes are found. The Missouri law at issue requires that the prosecution prove that the defendant acted “with the purpose of depriving the owner” of his property.\(^{185}\) Thus, a defendant cannot be convicted of any of the three auto theft crimes at issue here if he only acted negligently or recklessly. The third element of my crime is also easily satisfied by all three crimes. When you steal someone’s car, you have to go through the act of taking the vehicle. During that process there is always the chance that an innocent bystander, whether the vehicle’s owner or someone else, will discover what you are doing and a confrontation will ensue. Therefore, it is reasonably foreseeable that a physical confrontation with someone other than the police will take place anytime someone steals a vehicle.

**Conclusion**

Statutes that provide long mandatory minimum sentences should never be applied in vague and inconsistent ways. The current methods available to courts for determining whether a crime falls within the ACCA’s residual clause are inadequate. James, at best, can be interpreted to apply only to convictions for attempt versions of the enumerated crimes. Begay, on the other hand, is too broad and vague to be consistently applied.

As my test suite illustrates, the test I have suggested will limit the reach of the residual while setting an easy standard for lower courts to follow. Additionally, it will do so without changing the outcome of the important Supreme Court cases in this area: the attempted burglary in James is still a predicate violent felony under my proposed test, whereas the DUI in Begay and the failure to report in Chambers do not qualify. Furthermore, after applying my test to those crimes it is clearer why one crime qualifies and the others do not.

In addition to being easier to apply, my proposed test interprets the residual clause more closely to what the ACCA’s legislative history indicates Congress intended. Violent felonies against persons are covered by the preceding clause, and using my proposed test the residual clause will cover only certain types of violent crimes against property.

\(^{181}\) Id.
\(^{182}\) Id.
\(^{183}\) Id. at *5
\(^{184}\) Id.
\(^{185}\) Id. at *3 (emphasis added)