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Three Strikes and You're Out … Maybe: "Violent Felonies" and the Armed Career Criminal Act in *United States v. Vann*

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THREE STRIKES AND YOU'RE OUT . . . MAYBE: "VIOLENT FELONIES" AND THE ARMED CAREER CRIMINAL ACT IN *UNITED STATES v. VANN*

Abstract: On October 11, 2011, in *United States v. Vann*, the U.S. Court of Appeals for the Fourth Circuit, sitting en banc, held that Torrell Vann's three prior indecent liberties convictions were not violent felonies under the federal Armed Career Criminal Act (ACCA). In so doing, the per curiam majority attempted to interpret the vague residual clause of the ACCA and concluded that taking improper liberties or committing lewd acts on the body of a child were not the type of convictions worthy of the fifteen-year mandatory minimum prison sentence mandated by the ACCA. This Comment argues that the time has come for Congress to amend the ACCA or for the U.S. Supreme Court to declare it void for vagueness, because an individual's liberty cannot rest upon ad hoc judicial conjectures.

Introduction

On January 20, 2008, police officers found Torrell Vann in possession of a pistol and arrested him for violations of 18 U.S.C. §§ 922(g)(1) and 924.[1] Pursuant to § 924(e)(1), if an accused person has three or more "violent felony" convictions as defined by the Armed Career Criminal Act (ACCA), he or she is subject to an enhanced sentence with a mandatory minimum of fifteen years in prison and the possibility of a life sentence.[2] Thus, in 2011, in *United States v. Vann*, the U.S. Court of Appeals for the Fourth Circuit was called upon to analyze whether Torrell Vann's three prior indecent liberties convictions were "violent felony" convictions under the ACCA.[3] In a per curiam decision, the Fourth Circuit concluded they were not.[4] But despite the Fourth Circuit's decision to issue a per curiam opinion in

[1] *See* United States v. Vann, 660 F.3d 771, 772 (4th Cir. 2011) (en banc) (per curiam). 18 U.S.C. prohibits felons from shipping, transporting, possessing, or receiving any firearm or ammunition in or affecting interstate or foreign commerce. 18 U.S.C. § 922(g)(1) (2006). Additionally, 18 U.S.C. § 924(e)(1)–(2) comprises the Armed Career Criminal Act. Armed Career Criminal Act, *Id.* § 924(e)(1)–(2).

[2] *See* 18 U.S.C. § 924(e)(1); David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 Conn. L. Rev. 209, 215 (2010).

[3] *Vann*, 660 F.3d at 772–74.

[4] *Id.* at 773–74.

Vann, six judges filed opinions addressing how to interpret the ACCA.[5] The conflicted conclusions of the members of the panel stemmed from the broad language of the ACCA and the inability of the U.S. Supreme Court to craft consistent precedent from which lower federal courts may analyze whether a crime is a violent felony.[6]

Part I of this Comment explains Vann's journey through the legal system, the history of the ACCA, and how the Supreme Court analyzes ACCA cases.[7] Part II examines the conflicting opinions of the judges on the *Vann* panel as well as the concern voiced by the judges that Congress passed an overly broad statute.[8] Finally, Part III argues that the Supreme Court must declare the ACCA an unconstitutionally vague statute or Congress must amend the ACCA and specifically enumerate which felonies are violent.[9] It further argues that, while waiting for congressional or Supreme Court action, lower federal courts should follow the interpretation adopted in one of the concurrences in *Vann* and focus on congressional intent.[10]

I. Vann's Journey Through the Federal Court System and the History of the Armed Career Criminal Act

A. *Vann's Arrest and Appeal Process*

On January 20, 2008, police officers arrested Torrell Vann after finding him in possession of a Bersa .380 pistol and ammunition.[11] Subsequently, police charged Vann with being a felon in possession of a firearm, a violation of 18 U.S.C. § 922(g)(1).[12] Additionally, Vann's indictment alleged that he had three prior "violent felony" convictions pursuant to 18 U.S.C. § 924(e)(2)(B).[13] Vann's presentence report showed that he had three previous convictions for violations of

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[5] *See Vann*, 660 F.3d at 771; *infra* notes 48–71 and accompanying text (discussing the different opinions of the judges of the *Vann* court).

[6] *See* Sykes v. United States, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting) (arguing that ACCA case law amounts to little more than ad hoc judicial decision making).

[7] *See infra* notes 11–47 and accompanying text.

[8] *See infra* notes 48–71 and accompanying text.

[9] *See infra* notes 72–93 and accompanying text.

[10] *See infra* notes 72–93 and accompanying text.

[11] *Vann*, 660 F.3d at 809 (Niemeyer, J., concurring in part and dissenting in part).

[12] *See id.*

[13] *Id.* at 772 (majority opinion). Under § 924 (e)(2)(B), a violent felony is punishable by at least one year of imprisonment and "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C.§ 924(e)(2)(B) (2006).

North Carolina's indecent liberties statute.[14] The indecent liberties statute punishes individuals who are at least sixteen years old and at least five years older than the child in question when those individuals take immoral liberties with a child or willfully commit lewd acts with the body of a child.[15] Vann pled guilty to the charges.[16]

Although a violation of 18 U.S.C. § 922(g)(1) typically carries a maximum sentence of ten years, because the district court considered Vann's indecent liberties convictions to be violent felonies, he was classified as a career criminal under the ACCA and given a mandatory fifteen-year sentence.[17] The district court did not accept Vann's argument that his previous indecent liberties convictions were not violent felonies.[18] On appeal, a panel of the Fourth Circuit affirmed the lower court's ruling.[19] The court then granted Vann's petition for a rehearing en banc, thereby vacating the panel's opinion.[20]

B. The Armed Career Criminal Act

The key to applying the ACCA is understanding what offenses fall within the scope of the statute's reach.[21] In 1984, Congress enacted the first version of the ACCA to protect society from violent habitual criminals.[22] The Act's purpose was to aid law enforcement efforts against criminals who commit a large number of the nation's crimes.[23] Congress wanted to ensure that only felonies that indicated a criminal is particularly dangerous when in possession of a firearm fell under

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[14] *Vann*, 660 F.3d at 772; *see* N.C. GEN. STAT. § 14-202.1 (2011).

[15] N.C. GEN. STAT. § 14-202.1. The North Carolina statute punishes anyone who:

> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or (2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

Id.

[16] *Vann*, 660 F.3d at 772.

[17] *See id.* at 773.

[18] *See id.* at 810 (Niemeyer, J., concurring in part and dissenting in part).

[19] *Id.* at 773 (majority opinion).

[20] *See id.* at 773, 776–77.

[21] *See* Holman, *supra* note 2, at 209.

[22] *See* Taylor v. United States, 495 U.S. 575, 581 (1990); Brett T. Runyan, Comment, *ACCA Residual Clause: Strike Four? The Court's Missed Opportunity to Create a Workable Residual Clause Violent Felony Test*, 51 WASHBURN L.J. 447, 450 (2012).

[23] *See Taylor*, 495 U.S. at 581; Runyan, *supra* note 22, at 450.

the scope of the ACCA.[24] Consequently, under the ACCA, 18 U.S.C. § 924(e)(1)–(2), criminals who violate 18 U.S.C. § 922(g)[25] and have been convicted of three "violent felonies" or serious drug offenses[26] are subject to a mandatory minimum sentence of fifteen years' imprisonment.[27] Specifically, 18 U.S.C. § 924(e)(1) states that three prior violent felony convictions requires the mandatory minimum fifteen-year prison sentence and § 924(e)(2) defines the term violent felony.[28] In defining the term violent felony, Congress enumerated four violent felonies and then included a residual provision that includes all felonies that "otherwise involve[] conduct that presents a serious potential risk of physical injury to another."[29]

The ACCA's "residual provision" has led to significant confusion among federal courts, including the *Vann* court sitting en banc.[30] In assessing whether previous felonies fall within the residual provision, courts use two approaches engrained in Supreme Court precedent:

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[24] *See Taylor*, 495 U.S. at 581–90 (examining the legislative history of the ACCA); Runyan, *supra* note 22, at 451; Hayley A. Montgomery, Comment, *Remedying the Armed Career Criminal Act's Ailing Residual Provision*, 33 SEATTLE U. L. REV. 715, 717 (2010).

[25] *See* 18 U.S.C. § 922(g) (2006) (forbidding individuals who have been convicted of crimes punishable by at least one year in prison from possessing any firearm or ammunition).

[26] *Id.* § 924(e)(2)(A)(i)–(ii). Serious drug offenses are another type of conviction that Congress chose to include within the scope of the ACCA. *See id.* Serious drug offenses can be combined with violent felonies to equal the required three violent felony convictions to trigger the ACCA. *Id.*

[27] *Id.* § 924(e)(1).

[28] *Id.* § 924(e)(1)–(2).

[29] *Id.* § 924(e)(2)(B)(ii). 18 U.S.C. § 924(e)(2)(B)(i) provides an alternative type of violent felony covering offenses that involve "the use, attempted use, or threatened use of physical force against the person of another." *Id.* § 924(e)(2)(B)(i). Congress originally included only two predicate felonies, robbery and burglary, which automatically qualified as violent when it first enacted the ACCA. Runyan, *supra* note 22, at 450. Subsequently, Congress amended § 924(e) with the goal of expanding the predicate felonies. *See id.* at 451. The legislature proposed amendments in two bills, both of which would have mandated that any felony with an element of violence or attempted violence against a person be deemed a "violent felony." *See id.* All members of Congress focused on one key issue: ensuring that the predicate felonies swept under the ACCA sentence enhancement would not be too expansive while simultaneously ensuring that the sentence enhancement provision would not be under-inclusive. *See id.* Ultimately, Congress reached a compromise whereby certain felonies were enumerated as violent and others could qualify as violent based on whether the crime presented a "serious potential risk of physical injury" to another person. *See Taylor*, 495 U.S. at 586–87 (describing the history of the ACCA). The current enumerated felonies are burglary, arson, extortion, and felonies involving use of explosives. 18 U.S.C. § 924(e)(2)(B).

[30] *See Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting); *Vann*, 660 F.3d at 787 (Agee, J., concurring) (referring to the ACCA residual provision as "a black hole of confusion and uncertainty [that] stymies our best efforts").

the "categorical approach" and the "modified categorical approach."[31] To determine whether federal or state statutory offenses qualify under the ACCA as violent felonies, courts usually use the categorical approach.[32] Under this approach, courts look solely at the fact of conviction and the elements of the offense, without regard to the offense as committed.[33]

But when a statute includes multiple categories of conduct, some of which are potentially ACCA violent felonies, courts apply the modified categorical approach.[34] Under this approach, when considering a statute that describes multiple criminal acts, courts essentially split the statute and look at each particular type of conduct separately.[35] Alt-

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[31] *Vann*, 660 F.3d at 778 (King, J., concurring). There is no requirement that a court choose one approach over the other; decisions are made based upon the structure of the specific state or federal statute. *See* Ted Koehler, Note, *Assessing Divisibility in the Armed Career Criminal Act*, 110 MICH. L. REV. 1521, 1523–24 (2012).

[32] *See* United States v. Rivers, 595 F.3d 558, 563 (4th Cir. 2010) (explaining that the categorical approach is preferred to the more searching analysis required under the modified categorical approach); *Taylor*, 495 U.S. at 602. In 1990, in *Taylor v. United States*, the Supreme Court first articulated the categorical approach and held that the residual provision usually requires only an examination of the fact of a defendant's conviction and the elements of the offense in the abstract. *See id.*; R. Daniel O'Connor, Note, *Defining the Strike Zone—An Analysis of the Classification of Prior Convictions Under the Federal "Three Strikes and You're Out" Scheme*, 36 B.C. L. REV. 847, 851 (1995). In other words, a prior conviction must be a violent felony as a matter of law; it does not have to be committed in a violent manner in a specific case. *See* Holman, *supra* note 2, at 213. For instance, the crime of tampering with a witness in Connecticut simply requires the inducement of a witness to withhold testimony or not show up for a legal proceeding. CONN. GEN. STAT. § 53A-151 (2007). Although no violent act is required, a person could kill a witness in order to prevent the witness's testimony. *See* Holman, *supra* note 2, at 213. This violence does not make the crime categorically violent because proof of violence to secure a conviction is not required. *See id.* Therefore, conviction under Connecticut's witness tampering statute would fall outside the ACCA residual provision under the categorical approach. *See id.*

[33] *See Taylor*, 495 U.S. at 602.

[34] *See* Koehler, *supra* note 31, at 1523. For example, the *Vann* majority viewed the indecent liberties statute as including multiple categories of conduct—and therefore requiring the modified categorical approach—because it concluded that subsections (a)(1) and (a)(2) regulate sufficiently distinct behaviors. *See Vann*, 660 F.3d at 799 (Keenan, J., concurring). Subsection (a)(1) proscribes "immoral, improper, or indecent liberties with any child." N.C. GEN. STAT. § 14-202.1(a)(1) (2011). Subsection (a)(2), however, proscribes "lewd or lascivious acts upon or with the body of any child." *Id.* § 14-202.1(a)(2).

[35] *See Vann*, 660 F.3d at 778 (King, J., concurring). For instance, in 2010, in *Johnson v. United States*, the Supreme Court evaluated a Florida battery statute that penalized "1. [a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other; or 2. [i]ntentionally caus[ing] bodily harm to another person." 130 S. Ct. 1265, 1266 (2010); *see* FLA. STAT. § 784.03(1)(a) (2007). Because the Florida statute was stated in the disjunctive, the Court in *Johnson* concluded that it contained "three separate offenses . . . (1) intentionally causing bodily harm; (2) intentionally striking a victim; or (3) actually and intentionally touching a victim." *See Vann*, 660 F.3d at 812–13 (discussing the holding

hough a court still must avoid looking at the offense as committed,[36] if only one of the types of behavior described in the statute constitutes a violent felony as defined, the defendant is subject to an enhanced sentence.[37] Consequently, the modified categorical approach, as distinguished from the categorical approach, is applied when a statute proscribes multiple distinct behaviors, any one of which would satisfy the definition of a violent felony.[38] For example, if a state statute criminalizes burglary of a building and burglary of a motor vehicle, the modified categorical approach authorizes courts to divide the prohibited conduct into two categories: burglary of a building (a violent felony) and burglary of a vehicle (not a violent felony).[39] Then, the courts may consult various "*Shepard*-approved documents"—such as charging documents, plea agreements, transcripts of plea colloquies, judicial findings of fact and conclusions of law, jury instructions, and verdict forms—to determine the category of behavior into which the defendant's conduct falls.[40] If the information contained within these documents shows that the defendant committed burglary of a building, the court is required to apply the ACCA sentence enhancement.[41] Therefore, the modified categorical approach essentially enables a court to categorize the behavior underlying a defendant's conviction as either violent or nonviolent.[42]

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in *Johnson* (citing *Johnson*, 130 S. Ct. at 1269)). Similarly, in 2009, in *Chambers v. United States*, the Supreme Court used the modified categorical approach because the Illinois statute at issue penalized several different types of behavior including:

> (1) escape from a penal institution, (2) escape from the custody of an employee of a penal institution, (3) failing to report to a penal institution, (4) failing to report for periodic imprisonment, (5) failing to return from furlough, (6) failing to return from work and day release, and (7) failing to abide by the terms of home confinement.

Chambers v. United States, 555 U.S. 122, 126 (2009) (citing 720 ILL. COMP. STAT. 5/31-6(a) (2010)).

[36] *See Vann*, 660 F.3d at 778–79 (King, J., concurring). Therefore, any time a court reaches the conclusion that a previous offense constitutes an ACCA violent felony, that conclusion must derive from the elements of the conduct regulated. *See id.*

[37] *See id.* at 778.

[38] *See id.*

[39] *See id.* In *Vann*, Judge Robert King used this example to illustrate how the modified categorical approach operates. *See* MASS. GEN. LAWS ch. 266, § 16 (2010); *Vann*, 660 F.3d at 778.

[40] *Vann*, 660 F.3d at 778; *see also* Shepard v. United States, 544 U.S. 13, 16 (2005) (establishing the "*Shepard*-approved" criteria).

[41] *See Vann*, 660 F.3d at 778.

[42] *See id.*

The Supreme Court has not provided a bright-line rule to determine whether an offense is swept under the breadth of the residual provision.[43] In 2007, in *James v. United States*, the Supreme Court created a "closest analog" test and held that attempted burglary poses the same level of risk as the completed offense of burglary; thus, the Court concluded that attempted burglary falls within the residual provision.[44] In 2008, in *Begay v. United States*, however, the Court disregarded the closest analog test and determined that, along with a serious potential for physical injury, violent felonies must be purposeful, violent, and aggressive.[45] The following year, in 2009, in *Chambers v. United States*, the Court did not focus on the precedential value of either *James* or *Begay* and instead heavily relied on statistical data to determine whether felony offenses are violent.[46] Commenting on these decisions in his dissent in *Sykes v. United States* in 2011, Justice Antonin Scalia argued that the ACCA is an unconstitutionally vague statute and federal judges are incapable of yielding consistent precedent.[47]

II. Vann's Rehearing En Banc and the Court's Conflicting Opinions on How to Apply the Residual Provision to Indecent Liberties

In *Vann*, the Fourth Circuit sitting en banc vacated and remanded the panel's decision and held that Torrell Vann's indecent liberties

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[43] *See Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting); *Chambers*, 555 U.S. at 131 (Alito, J., concurring).

[44] *See Sykes*, 131 S. Ct. at 2287 (Scalia, J., dissenting); James v. United States, 550 U.S. 192, 211–12 (2007). Justice Antonin Scalia's dissenting opinion in *Sykes v. United States* in 2011 refers to the *James* holding as the closest analog test. *See id.*

[45] *See* Begay v. United States, 553 U.S. 137, 144–45 (2008). Because the Court considered felony driving under the influence (DUI) convictions to be closer to a strict liability crime and not purposeful, violent, and aggressive, this felony fell outside the residual clause. *See id.* at 148.

[46] *See Chambers*, 555 U.S. at 129.The Court in *Chambers* reviewed a study prepared by the U.S. Sentencing Commission that showed that the crime of failure to report carries a very low probability of violence. *Id.* at 130.

[47] *See Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting) (citing *James*, *Begay*, and *Chambers* as prime examples). Generally, to declare a statute void for vagueness, a court must find that the penal statute fails to define a given offense with sufficient definiteness such that "ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *See* Kolender v. Lawson, 461 U.S. 352, 357 (1983) (citing Supreme Court cases reaching back to 1926). In *Sykes*, Justice Scalia focused on the requirement that Congress establish minimal guidelines to govern enforcement and concluded that, based on the ambiguous language of the ACCA and the inability of the Supreme Court to craft consistent precedent, the time has come to declare the ACCA void for vagueness. *See Sykes*, 131 S. Ct. at 2287 (Scalia, J., dissenting).

convictions were not violent felonies and consequently fell outside the scope of the residual provision.[48] Using the modified categorical approach, the per curiam majority determined that even if subsection (a)(2) of the North Carolina indecent liberties statute qualified as a violent felony, it was impossible to determine whether Vann had violated it.[49] Nonetheless, the judges did not reach a consensus regarding how the court should analyze Vann's prior felonies.[50] The judges filed six separate opinions, including one dissent, which argued that indecent liberties was a violent felony and subject to the ACCA sentence enhancement.[51] More importantly, each judge struggled to apply the residual provision.[52]

Overall, the five judges who authored concurring opinions argued that violent felonies include an element of actual physical contact whereas indecent liberties offenses do not.[53] Judge Robert King articulated that neither physical contact nor physical proximity is necessary to violate the indecent liberties statute; therefore, the risks of violence associated with the enumerated felonies in the residual clause, such as burglary or arson, do not exist with indecent liberties.[54] Because indecent liberties pose primarily a psychological threat,

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[48] *See* United States v. Vann, 660 F.3d 771, 776 (4th Cir. 2011) (en banc) (per curiam).

[49] *See id.* at 773–74. Because none of the charging documents for each of Vann's three prior indecent liberties convictions specified to which subsection Vann pled guilty, the court could not determine the particular subsection under which Vann's conduct fell. *See id.* at 775.

[50] *See, e.g.*, *id.* at 777 (King, J., concurring) (noting that there are multiple ways of analyzing Vann's prior felonies). One of the key differences in the approaches of the concurring judges derived from a difference of opinion regarding whether to use the categorical approach or the modified categorical approach. *See id.* (arguing for using the categorical approach); *id.* at 788 (Davis, J., concurring) (arguing for using the categorical approach); *id.* at 798 (Keenan, J., concurring) (arguing for using the modified categorical approach); *id.* at 802 (Wilkinson, J., concurring) (arguing for using the modified categorical approach). A discussion of which approach should be used in a given case is outside the scope of this Comment. *See* Koehler, *supra* note 31, at 1536–51 (providing further reading on this issue).

[51] *Vann*, 660 F.3d at 771 (indicating the filed opinions); *id.* at 807 (Niemeyer, J., concurring in part and dissenting in part).

[52] *See id.* at 787 (Agee, J., concurring); *id.* at 802 (Wilkinson, J., concurring). Judge Steven Agee filed a concurrence in which he argued that Congress has created a poorly drafted statute and placed the federal courts in a tough position. *See id.* at 787–88 (Agee, J., concurring). Further, Judge J. Harvie Wilkinson's concurrence recognized the extreme difficulty federal courts are experiencing in applying the residual clause and posited that it may be the result of Congress's propensity for vague statutes. *See id.* at 801 (Wilkinson, J., concurring).

[53] *See, e.g.*, *id.* at 781 (King, J., concurring); *id.* at 804 (Wilkinson, J., concurring).

[54] *See, e.g.*, *id.* at 781 (King, J., concurring). Judge King compared indecent liberties to the U.S. Supreme Court's interpretation of vehicular flight in *Sykes v. United States* in 2011. *See id.* In *Sykes*, the Court held that because of the defendant's determination to elude

Judge J. Harvie Wilkinson concluded it is outside the scope of the ACCA.[55] Similarly, the other concurring judges distinguished this case from the Supreme Court's 2009 decision in *Chambers v. United States* to downplay the argument that statistical evidence of injury rates for sexual assault victims is sufficient to prove an offense qualifies as a violent felony.[56] In his concurrence, Judge King cited the Supreme Court majority's acknowledgement in 2011 in *Sykes v. United States* that statistical evidence is "not dispositive" and could merely serve as an aid in drawing a "commonsense conclusion" about the character of a particular offense.[57]

Judge Wilkinson's concurrence sought to maintain a strict focus on congressional intent because of the lack of clarity in the language in the residual provision.[58] Using the modified categorical approach, Judge Wilkinson concluded that because the risk of injury associated with indecent liberties is psychological in nature, Congress did not intend to punish this type of conduct.[59] Furthermore, the available *Shepard*-approved documents—a 1991 indictment and a 1998 information (a charging document similar to an indictment filed directly with the court)—simply recited the language of the indecent liberties statute.[60] Accordingly, he concluded that the psychological risks asso-

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capture through vehicular flight, there is an inherent lack of concern for the safety of others and a likelihood that a confrontation between the suspect and police will end in violence. *See* Sykes v. United States, 131 S. Ct. 2267, 2273 (2011).

[55] *See Vann*, 660 F.3d at 804 (Wilkinson, J., concurring). Judge Wilkinson conceded that indecent liberties are morally repugnant offenses but argued that "vile conduct is not necessarily violent conduct." *See id.*

[56] *See, e.g.*, *id.* at 785 (King, J., concurring). Specifically, Judge King argued that the dissent's use of statistics to show that sexual assault victims are often injured physically was flawed because the studies cited included rape and other types of conduct which pose little similarity to indecent liberties. *See id.* Additionally, in *Chambers*, the Supreme Court looked to statistical evidence in determining whether an Illinois offense of failure to report was a violent felony under the residual provision of the ACCA. *See* 555 U.S. 122, 129, 130 (2009). Because a U.S. Sentencing Commission report showed zero instances of violence in failure-to-report cases, the Court used this information to anchor its decision that failure to report is not a violent felony. *See id.*

[57] *See Vann*, 660 F.3d at 785 (King, J., concurring). Judge Paul Niemeyer's dissent presented a statistical analysis documenting the injury rate for sexual assault victims. *See id.* at 823 (Niemeyer, J., concurring in part and dissenting in part).

[58] *See id.* at 801 (Wilkinson, J., concurring).

[59] *See id.* at 804.

[60] *See id.* at 805. Judge Wilkinson argued that merely reciting the statutory language in the indecent liberties statute failed to describe the nature of Vann's behavior that underlies the statutory language. *See id.* Judge Wilkinson posited that although he suspected Vann committed violations that would qualify as violent felonies under the ACCA, suspicions are insufficient. *See id.*

ciated with indecent liberties offenses, although heinous, fall outside the scope of the ACCA because offensive conduct is not necessarily violent.[61]

Despite their disagreement on other matters, all of the concurring judges agreed the ACCA is vaguely worded.[62] Judge Steven Agee criticized Congress for drafting a poorly written statute and opined that ACCA cases will simply be resolved by ad hoc judicial conjectures incapable of yielding an intelligible principle.[63] In similar fashion, Judge King added a footnote at the end of his concurrence to conclude that the disagreement among his fellow judges evidenced a good faith attempt to apply a poorly written congressional statute.[64] Finally, Judge Wilkinson argued that the judicial difficulty in applying and interpreting the ACCA is due in part to Congress's propensity to draft vague statutes.[65]

In contrast to the arguments of the concurring judges, Judge Paul Niemeyer, joined by Judge Dennis Shedd, dissented and argued that a serious potential risk of actual physical contact is an element of indecent liberties.[66] Judge Niemeyer asserted that subsection (a)(2) requires that a sexual act be committed "upon or with the body" of a minor child.[67] Because this element is often satisfied through intimate physical contact, Judge Niemeyer posited that there is a potential risk of physical harm.[68] Further, the dissenting judges argued that the substantial age difference between victim and offender was a controlling factor.[69] According to Judge Niemeyer, because the age gap between offender and victim is substantial, a power disparity exists and poses a risk that offenders will employ coercive conduct leading to physical violence.[70] Finally, unlike the concurring judges, Judge Niemeyer ar-

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[61] *See id.* at 804.

[62] *See, e.g.*, *id.* at 787 (Agee, J., concurring); *id.* at 797 (Davis, J., concurring) (explaining that the ACCA may ultimately be a vague statute); *id.* at 801–02 (Wilkinson, J., concurring).

[63] *See Vann*, 660 F.3d at 787–88 (Agee, J., concurring). According to Judge Agee, although the judges no doubt struggle to interpret the language within the residual provision, the real consequences are felt by the parties who have an incredible stake in judicial interpretation. *See id.*

[64] *See id.* at 787 n.9.

[65] *See id.* at 801.

[66] *See id.* at 771, 822 (Niemeyer, J., concurring in part and dissenting in part).

[67] *Id.* at 822; *see* N.C. GEN. STAT. § 14-202.1(a)(2) (2011).

[68] *Vann*, 660 F.3d at 822 (Niemeyer, J., concurring in part and dissenting in part).

[69] *See id.*

[70] *See id.*

gued that statistical evidence helped prove that indecent liberties is a violent felony.[71]

III. A Proposal for Action by Congress, the Supreme Court, and Lower Courts

The difficulty the *Vann* panel experienced in applying the vague language of the ACCA residual clause—and the high stakes resulting from the possibility of a fifteen-year mandatory minimum prison sentence—demand a bright-line rule for lower courts to follow when scrutinizing the ACCA.[72] Under the ACCA, an offense carrying a maximum penalty of less than ten years in prison can ultimately result in a life sentence.[73] Thus, how the ACCA is interpreted in a given case carries very real consequences for defendants whose liberty is at stake.[74] The clearest and most effective long-term solution is for Congress to amend the ACCA.[75] Because Congress has failed to act thus far, however, the U.S. Supreme Court should declare the statute unconstitutionally vague, thereby forcing Congress's hand.[76] In the meantime,

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[71] *See id.* at 823. The statistical evidence he cited demonstrated that the high incidence of physical injuries inherent in sexual assaults were greater than risks associated with ACCA-enumerated offenses such as burglary or extortion. *See id.*

[72] *See* United States v. Vann, 660 F.3d 771, 787 (4th Cir. 2011) (en banc) (per curiam) (Agee, J., concurring); Runyan, *supra* note 22, at 466. In his concurring opinion in *Vann*, Judge Steven Agee specifically called out to Congress to rescue the federal courts from the broad, ambiguous language of the residual clause. *See Vann*, 660 F.3d at 787 (Agee, J., concurring).

[73] *See* Sykes v. United States, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting).

[74] *See id.*

[75] *See id.*; Chambers v. United States, 555 U.S. 122, 134 (2009) (Alito, J., concurring).

[76] *See Chambers*, 555 U.S. at 134 (Alito, J., concurring). Although another possible solution would be for the Supreme Court to issue a ruling on what the statute means, such a decision would likely represent "another in a series" of ad hoc judicial interpretations. *See id.* Additionally, as Justice Samuel Alito argued in his concurrence in *Chambers v. United States* in 2009, the ACCA residual provision is nearly impossible to apply consistently. *See id.* at 133. If the Supreme Court were finally to declare the ACCA unconstitutionally vague, it would present Congress with the opportunity to establish a bright-line rule. *See id.* at 134. This would ensure that nonviolent offenders are not subject to fifteen-year mandatory minimum sentences. *See Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting). Equally important, Congress could easily formulate a specific list of expressly defined crimes just as it did when it originally enacted the ACCA in 1984. *See Chambers*, 555 U.S. at 134. Even more importantly, because the Supreme Court has admittedly been incapable of yielding consistent applications of the ACCA, it seems inevitable that each new application of the residual provision will lead the Court further away from the statutory text. *See id.* at 131. For example, in *Chambers*, the Court's decision turned on little more than analysis of a statistical report prepared by the U.S. Sentencing Commission. *See id.* at 134. Even if Congress does not rewrite the statute and the ACCA is abolished, courts could simply sentence criminals in accordance with the sentencing guidelines. *See* Montgomery, *supra* note 24, at 738.

while waiting for Congress or the Supreme Court to act, lower federal courts should follow Judge J. Harvie Wilkinson's concurrence in *Vann* because it strictly adhered to congressional intent.[77]

The optimal long-term answer to the ACCA dilemma is for Congress to amend the ACCA.[78] Federal judges have repeatedly written opinions criticizing the vague, overly broad language of the residual clause.[79] As a result of this broad language, application of the statute is not uniform.[80] Amending the ACCA could be as simple as enumerating which crimes are violent felonies and subject to the ACCA sentence enhancement.[81] But Congress does not appear willing to amend the ACCA despite numerous pleas from the Supreme Court itself.[82] Consequently, the second best option is for the Supreme Court to

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Further, judges are nonetheless permitted to sentence above the sentencing guidelines if a particular individual is so dangerous that a more severe penalty is necessary. *See id.*; *see also* U.S. Sentencing Guidelines § 5K2.2 (2011) (permitting courts to sentence above the guideline range for offenses resulting in significant injury); *id.* § 5K2.3 (permitting courts to sentence above the guideline range if a victim suffers extreme psychological injury). Although this is not what Congress intended when it drafted the ACCA to address concerns about the recidivism rate of dangerous criminals, abandoning the ACCA would at least avoid the inconsistencies plaguing the lower federal courts and allow for fairness in sentencing. *See Taylor*, 495 U.S. at 581–90 (examining the legislative history of the ACCA); Montgomery, *supra* note 24, at 738.

[77] *See Vann*, 660 F.3d at 802 (Wilkinson, J., concurring). Even though Judge Wilkinson attempted to follow strictly the intent of Congress, the text of the ACCA remains vaguely worded and therefore following Judge Wilkinson's opinion in the future is not an optimal solution. *See Chambers*, 555 U.S. at 132 (Alito, J., concurring) (arguing that the federal courts are incapable of yielding workable ACCA precedent).

[78] *See Chambers*, 555 U.S. at 134 (Alito, J., concurring); Jeffrey C. Bright, *Violent Felonies Under the Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun Without a Permit Should Be Considered a Violent Felony*, 48 Duq. L. Rev. 601, 633 (2010); Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Law Enforcement*, 92 B.U. L. Rev. 171, 218 (2012).

[79] *See, e.g.*, *Sykes*, 131 S. Ct. at 2284, 2287 (Scalia, J., dissenting) (concluding that the time has come to call the ACCA what it truly is: "a drafting failure"); James v. United States, 550 U.S. 192, 230 (2007) (Scalia, J., dissenting) (arguing that the drafting of the ACCA was "shoddy"); *Vann*, 660 F.3d at 787 (Agee, J., concurring) (arguing that federal judges have entered a "judicial morass that defies systemic solution"); *id.* at 797 (Davis, J., concurring) (conceding that Justice Antonin Scalia may be correct and the residual clause of the ACCA may be unconstitutionally vague).

[80] *See Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting); *Chambers*, 555 U.S. at 132 (Alito, J., concurring).

[81] *See Chambers*, 555 U.S. at 134 (Alito, J., concurring); Montgomery, *supra* note 24, at 737.

[82] Runyan, *supra* note 22, at 463. Additionally, it is possible that Congress is hesitant to act because, by electing not to include certain offensive felonies, it may create the perception that Congress is soft on crime. *See id.* at 451.

strike down the ACCA as unconstitutionally vague and force Congress to act.[83]

The Supreme Court should declare the ACCA unconstitutionally vague because the statute is conducive to arbitrary enforcement.[84] Justice Antonin Scalia's powerful dissent in *Sykes v. United States* in 2011 characterized residual clause cases as a never-ending ad hoc application of the ACCA to state offenses.[85] Not only does the phrase "or otherwise involves conduct that presents a serious potential risk of physical injury to another" fail to identify clearly which offenses fall within the residual provision, but also the Supreme Court itself has failed to generate consistent precedent from the residual provision's text.[86] Accordingly, the Court's next residual clause decision should void the ACCA for vagueness.[87]

Although the ACCA should be either voided for vagueness or amended by Congress, Judge Wilkinson's concurrence in *Vann* represented a valiant attempt to adhere to congressional intent where the text could not provide resolution.[88] Congress simply did not intend to punish vile conduct like indecent liberties with a child; it sought to

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[83] *See Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting) ("We should admit that ACCA's residual provision is a drafting failure and declare it void for vagueness."); *Chambers*, 555 U.S. at 134 (Alito, J., concurring) ("At this point, the only tenable, long-term solution is for Congress to formulate a specific list of expressly defined crimes that are deemed to be worthy of ACCA's sentencing enhancement."); Runyan, *supra* note 22, at 463 (arguing that the Supreme Court has failed to provide a workable standard to help guide the lower federal courts).

[84] *See Sykes*, 131 S. Ct. at 2287 (Scalia, J., dissenting); April K. Whitescarver, Chambers v. United States: *Filling in the Gaps When Interpreting the Armed Career Criminal Act.*, 13 JONES L. REV. 89, 95 (2009) (discussing Justice Scalia's argument in his 2007 dissent in *James v. United States* that there is no concrete guidance for lower federal judges to apply the residual provision with consistency). In his dissenting opinion in *James*, Justice Scalia asserted that "Congress has simply abdicated its responsibility when it passes a criminal statute insusceptible of an interpretation that enables principled, predictable application; and this Court has abdicated its responsibility when it allows that." 550 U.S. 192, 230 (2007) (Scalia, J., dissenting).

[85] *See Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting). Justice Elena Kagan echoed similar sentiments in her dissenting opinion in *Sykes* in which she argued that "[t]he best that can be said for the Court's approach is that it is very narrow—indeed, that it decides almost no case other than this one." *See id.* at 2295 (Kagan, J., dissenting).

[86] 18 U.S.C. § 924(e)(2)(B)(ii) (2006); *see Sykes*, 131 S. Ct. at 2287 (Scalia, J., dissenting).

[87] *See Sykes*, 131 S. Ct. at 2284; *see also supra* note 76 (providing additional support for this argument).

[88] *See Vann*, 660 F.3d at 801 (Wilkinson, J., concurring). Judge Wilkinson observed the difficulties courts are experiencing in applying the residual clause of the ACCA and argued that when judicial inquiries become overly complex, the most simplistic solution is to look to congressional intent. *See id.*

punish violent conduct.[89] Furthermore, assuming (as the *Vann* per curiam majority did) that the modified categorical approach applies, the *Shepard*-approved documents in this case provided no basis on which to classify indecent liberties as a violent felony because they did not specify what conduct Vann pled guilty to.[90] The only documents available (a 1991 indictment and a 1998 information) simply restated the language of the indecent liberties statute.[91] Although this would seem to exclude some violent offenders, it prevents arbitrary punishment and permits adequate punishment via state statutes and the federal sentencing guidelines.[92] Consequently, until Congress or the Supreme Court provide a better solution, other courts should apply Judge Wilkinson's concurrence and focus strictly on punishing criminals who are truly violent and more dangerous when in possession of a handgun rather than harshly punishing criminals simply because their conduct may be heinous.[93]

Conclusion

The conflicting opinions of the Fourth Circuit sitting en banc in *Vann* illuminated the problems presented by the ambiguous, broad language in the ACCA's residual clause. The Fourth Circuit is not alone in its struggle to interpret what constitutes a violent felony under this clause. Many federal courts have struggled to analyze ACCA residual clause cases, including the Supreme Court, which has provided inconsistent precedent when applying the ACCA. This poses a significant problem because the stakes for defendants in ACCA cases are immense: offenses that only carry ten-year maximum sentences have the potential to carry fifteen-year minimum sentences with the possibility of life imprisonment. These fifteen-year mandatory minimum sentences cannot rest on an ambiguous statute incapable of yielding an intelligible principle by which federal judges can readily discern which offenses are violent. There are only two sufficient courses of action to ensure that extended prison sentences are not imposed on those who Congress did not intend to punish: congressional amendment of the ACCA or a Supreme Court decision striking the ACCA down as an unconstitutionally vague statute. In the meantime, because Judge Wilkinson's concur-

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[89] *See id.* at 804.
[90] *See id.* at 805.
[91] *See id.*
[92] *See id.* at 804; Montgomery, *supra* note 24, at 738.
[93] *See Vann*, 660 F.3d at 804 (Wilkinson, J., concurring).

rence in *Vann* closely adhered to congressional intent, lower federal courts should follow his lead until Congress or the Supreme Court takes substantive action.

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