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Comment

CORRECTING CORRECTIONS: DISCREPANCIES IN DEFINING STATE MANSLAUGHTER AS A “CRIME OF VIOLENCE” FOR FEDERAL SENTENCING PURPOSES

MEAGHAN GEATENS*

“Welcome to the counter-intuitive world of sentencing”¹

I. THE INITIAL CHARGES: AN INTRODUCTION TO PREDICATE VIOLENT CRIME CLASSIFICATION

Initially, George Gordon was charged with statutory rape.² Gordon, who was an adult at the time of his conviction, had engaged in sexual intercourse with a child younger than 17-years-old.³ But on October 8, 2004, Gordon pled guilty to one count of endangering the welfare of a child in the first degree under Missouri law, instead of the rape that he had initially been charged with.⁴ The new charge for endangering the welfare of a child originated from the same set of facts that could have

* J.D. Candidate, 2020, Villanova University Charles Widger School of Law; B.A., 2017, Drexel University. This Comment is dedicated to my parents, Fran and Marianne Geatens, my siblings, Jenny, Brian, and Katie, as well as my late grandmother Bertha Spahn and our Kona. I am incredibly grateful for your support and love every single day, and thank you endlessly for all you do for me. I would also like to thank the members of the *Villanova Law Review* for their assistance in helping me make this Comment all that it has become.

1. Douglas J. Bench, Jr., *What Constitutes A Violent Felony After Begay?*, 67 J. MO. B. 208 (2011) (explaining difficulties in determining what qualifies as a violent crime in federal court for the purposes of federal sentencing). In addition, Bench notes that the applications of the categorical and modified categorical approaches in classifying predicate crimes as crimes of violence can result in decisions that may appear “absurd” when considering the underlying facts of particular predicate crimes. *See id.* at 214.

2. *See* Brief for the United States as Amicus Curiae, at *i, *United States v. Gordon*, 557 F.3d 623 (8th Cir. 2009) (noting that Gordon was originally charged with statutory rape, but the charge was later amended to endangering the welfare of a child).

3. *See id.* at *6 (stating the facts that Gordon “knowingly acted in a manner that created a substantial risk to the body and health of B.S. . . . a child less than 17 years old, by engaging in sexual intercourse with B.S.”) (internal quotations omitted).

4. *See* *United States v. Gordon*, 557 F.3d 623, 625 (8th Cir. 2009) (explaining that Gordon alleged in his plea and acknowledged that he “knowingly act[ed] in a manner that created a substantial risk to the body and health . . . of a child of less than seventeen years old”) (internal quotations omitted).

convicted him of statutory rape—his sexual relationship with a minor.⁵ Ultimately, in pleading guilty to child endangerment, Gordon pled to “knowingly . . . act[ing] so as to create a substantial risk to the life, body, or health of a child under seventeen.”⁶

Gordon was charged with another crime in 2006.⁷ When Gordon was sentenced in connection with his 2006 conviction, the court held that his previous conviction for endangering the welfare of a child (while originally charged as rape) was not a “crime of violence” for the purposes of applying a sentencing enhancement.⁸ Intuitively, it may come as a surprise that raping a minor was not considered a crime of violence in assessing a defendant’s predicate violent crimes and criminal history.⁹

The shocking concept that raping a minor is *not* a crime of violence is not the only important part of Gordon’s story.¹⁰ The classification of his prior crime had a significant impact on the sentence imposed in Gordon’s subsequent legal proceedings; if his previous conviction was a crime of violence, Gordon would be subject to a fifteen-year mandatory minimum

5. See Brief for the United States as Amicus Curiae at *i, *United States v. Gordon*, 557 F.3d 623 (8th Cir. 2009) (noting that the same factual circumstances that initially constituted the statutory rape charge also gave rise to a charge for endangering the welfare of a child).

6. See *Gordon*, 557 F.3d at 626 (giving statutory definition of Gordon’s conviction).

7. See *id.* at 624 (noting facts of Gordon’s current charge).

8. See *id.* at 627–28 (holding that conviction under MO. REV. STAT. 568.045(1) did not constitute a crime of violence because, in comparing the Missouri statute to burglary, arson, or other offenses under the Armed Criminal Career Act, Gordon’s prior conviction did not suggest the same level of “violent or aggressive conduct”); see also *id.* at 625 n.3 (citing *United States v. Williams*, 537 F.2d 969, 972 n.1 (8th Cir. 2008)) (noting that while statutory rape does constitute a violent felony and sexual intercourse with a child would also constitute a violent crime, circuit precedent requires that the sentencing court “should consider how the law defines the crime, not how a crime might be committed on a particular occasion”). In further explaining its decision, the court noted that the analysis of the predicate crime needs to be confined to the statute itself, instead of the factual circumstances of the crime. See *id.*

9. See Bench, *supra* note 1, at 208 (observing that a fact pattern that constituted rape did not amount to classification as a crime of violence in *Gordon*, and noting the strange discrepancies in outcome where classifications of crimes of violence are considered). Bench also notes that while this crime, which was the equivalent of statutory rape, did not qualify as a crime of violence for the purposes of federal sentencing in conjunction with the Armed Career Criminal Act, other seemingly less “violent” crimes, such as possession of a sawed-off shotgun or refusing to pull over for the police, *did* qualify as a crime of violence for the purposes of sentencing guidelines. See *id.* Bench emphasizes that these classifications seem “counter-intuitive.” See *id.*

10. See *Gordon*, 557 F.3d at 623 (analyzing whether the endangering the welfare of a child charge was a predicate violent felony as a first step in determining whether the Armed Career Criminal Act’s sentencing enhancement for three prior violent felonies would apply). For a full discussion of the Armed Career Criminal Act (ACCA) and the sentencing enhancement, see *infra* notes 42–50 and accompanying text.

under the Armed Career Criminal Act.¹¹ On the other hand, if, as the court ultimately decided, his predicate crime was *not* a crime of violence, the mandatory minimum would be taken off the table.¹²

With the term—crime of violence—playing a large role in federal sentencing proceedings, scholars have largely debated its definition over the years.¹³ Certain Federal Sentencing Guidelines and their accompanying federal statutory schemes mandate that if a defendant has previously committed one or several other crime(s) of violence, the individual will automatically face a significant mandatory minimum for the sentence at hand.¹⁴ In some cases, these mandatory minimums have the consequence

11. See Brief for the United States as Amicus Curiae at *8, *United States v. Gordon*, 557 F.3d 623 (8th Cir. 2009) (explaining that in his present criminal status, Gordon had been convicted of being a felon in possession of a firearm, and this hearing was centered on deciding whether the endangering of the welfare of a child conviction qualified as a crime of violence for sentencing purposes). Under the ACCA, if a person has committed three previous violent felonies, they are subject to a fifteen-year mandatory minimum under federal sentencing guidelines. See *id.* at *6. For a full discussion of the ACCA and the sentencing enhancement imposed under the act in connection with prior violent felony convictions, see *infra* notes 42–50 and accompanying text.

12. See *Gordon*, 557 F.3d at 623 (holding that because “Gordon’s 2004 Missouri conviction for endangering the welfare of a child in the first degree is not an ACCA predicate offense,” Gordon’s sentence did not qualify for the Armed Career Criminal Act fifteen-year enhancement). Because the district court in *Gordon* held that his child endangerment charge *did* qualify as a predicate violent crime, the Eighth Circuit vacated and remanded Gordon’s case for a new sentencing hearing. See *id.*

13. See, e.g., Jason A. Stegner, *Circuit Court Division and the Supreme Court’s Begay Decision: Is Eluding Police in a Vehicle a Violent Felony or Crime of Violence?*, 10 APPALACHIAN J.L. 183, 184 (2011) (calling for clarity across jurisdictions classifying the crime of eluding police in a vehicle as a crime of violence under the ACCA); see Bench, *supra* note 1, at 208 (seeking clarity on what constitutes a violent felony after *United States v. Begay*); Megan A. Embrey, *A Circuit Split Survey on Violent Felonies and Crimes of Violence: Where Does the Tenth Circuit Stand?*, 88 DENV. U. L. REV. 469, 479–80 (2011) (observing splits on whether fleeing a police officer can be classified as a crime of violence).

14. See James G. Levine, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 539 (2009) (discussing the ACCA and the potential for fifteen-year mandatory minimums under the statute). Levine particularly discusses mandatory minimums with respect to felons carrying firearms under 18 U.S.C. 922(g). Levine calls for amendments to the statute and proposes a number of changes in the timeline of predicate offenses that qualify as violent felonies. See Levine, *supra*, at 551. He further provides an assertion that particular crimes that are not always classified as violent felonies should be included as “crimes of violence” for sentencing purposes. See Levine, *supra*, at 558. Another critic’s analysis also notes the importance of the definition of “crime of violence” for the purposes of the ACCA and Career Offender Provisions of the United States Sentencing Guidelines. See Daniel O’Connor, *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, 847 (1995) (commenting on the Violent Crime Control and Law Enforcement Act’s three-strikes scheme, which requires mandatory life sentences for defendants convicted of three violent felonies). Additionally, a separate critic notes that in the United States, on the overall scale, “considerable weight” is given to predicate crime convictions in sen-

of sentencing defendants to at least fifteen years of incarceration.¹⁵ Under other circumstances, for those who have committed three prior crimes of violence, defendants may be sentenced to life in prison.¹⁶

In addition to differing statutory schemes, there are different types of analyses that courts use to determine whether a predicate offense constitutes a crime of violence: the categorical and the modified categorical approaches.¹⁷ For example, in *United States v. Leaverton*,¹⁸ the Tenth Circuit held that a defendant's Oklahoma manslaughter conviction did not constitute a crime of violence after utilizing the modified categorical approach.¹⁹ Concluding otherwise and using the categorical approach, the Fourth Circuit in *United States v. Smith*²⁰ held that a voluntary manslaughter conviction under North Carolina law does qualify as a crime of violence.²¹ These cases are representative of the divisiveness that surrounds defining what constitutes a crime of violence.²²

With a substantial amount of mandatory incarceration time weighing in the balance, lives lie in the hands of the sentencing judge and whether previous crimes committed qualify as crimes of violence.²³ For this rea-

tencing hearings, and the "breadth of offenses in relation to which legislative enhancements apply is very wide; the enhancements are large in objective terms." See Mirko Bagaric, *The Punishment Should Fit the Crime-Not the Prior Convictions of the Person That Committed the Crime: An Argument for Less Impact Being Accorded to Previous Convictions in Sentencing*, 51 SAN DIEGO L. REV. 343, 347, 354, 366 (2014) (arguing that in many cases, prior convictions are a driving force and primary consideration in imposing a sentence for the crime at hand).

15. See 18 U.S.C. § 924(e)(1) (mandating that if a defendant who has previously committed a "crime of violence" commits his current crime with a firearm, he will be automatically subjected to a fifteen-year mandatory minimum for sentencing).

16. See 18 U.S.C. § 3559(c) (2018) (directing that conviction of three violent crimes subjects a defendant in his next crime to a mandatory life sentence).

17. See *Descamps v. United States*, 570 U.S. 254, 257 (explaining that, depending on which circumstances apply, courts can use the categorical approach or the modified categorical approach to classify predicate violent felonies).

18. 895 F.3d 1251 (10th Cir. 2018).

19. See *id.* at 1255–58 (applying modified categorical approach and divisibility analysis and finding that Oklahoma Manslaughter I conviction does not qualify as predicate violent felony).

20. 882 F.3d 460 (4th Cir. 2018).

21. See *id.* at 463–64 (applying categorical approach and holding that North Carolina voluntary manslaughter conviction does qualify as predicate violent felony).

22. See Bench, *supra* note 1, at 214 (noting that the term "violent" is much more nuanced when used in terms of federal sentencing).

23. See U.S. Sentencing Commission, *Mandatory Minimum Penalties for Firearms Offenses in the Federal Criminal Justice System* 9 (2018), <https://www.ussc.gov/research/research-reports/mandatory-minimum-penalties-firearms-offenses-federal-system> [<https://perma.cc/VW69-Y6Z6>] (articulating the mandatory minimums associated with firearms offenses, including the Armed Career Criminal Act, which imposes a fifteen-year mandatory minimum for defendants who have been convicted of three prior violent felonies or drug offenses); Congressional Research Service, *Three Strike Mandatory Sentencing (18 U.S.C. 3559(c)): An Overview* (2010),

son, how a crime of violence is defined for the purposes of sentencing statutes must be taken seriously, be applied uniformly, and not be arbitrarily based on the outcome of a divisibility analysis.²⁴ A more uniform application of what constitutes a crime of violence will ensure both consistent sentences and justice, nationwide and within individual circuits.²⁵

This Comment explores the recent decisions that discussed manslaughter convictions under several state statutes as crimes of violence for the purposes of federal sentencing under the Armed Career Criminal Act and the Violent Crime Control and Law Enforcement Act's three-strikes provision.²⁶ In response, this Comment calls for a parallel outcome with respect to the classification of manslaughter as a crime of violence across federal jurisdictions.²⁷ What qualifies as a crime of violence should be defined in a parallel manner across all jurisdictions—justice cannot be fairly administered where a regime allows state-specific statutory analyses to impose a mandatory fifteen-year or life sentence for a crime in one federal court, while the same crime is punished less severely in another federal court merely because of varying definitions.²⁸ Part II of this Comment synthesizes the background of the relevant statutes and statutory analyses in play when discussing the definition of a crime of violence for the purposes of federal sentencing.²⁹ In addition, Part II summarizes the

<https://www.everycrsreport.com/reports/R41461.html> [Permalink unavailable] (explaining the mandatory minimum of life imprisonment for defendants who have been convicted of three violent felonies and examining the constitutionality of the three-strikes provision).

24. See Stegner, *supra* note 13, at 184 (acknowledging circuit splits with respect to violent crime classification, and calling for jurisdictional parallelism with respect to classifying a particular crime as a crime of violence). See generally Bench, *supra* note 1, at 214 (noting inherent confusion in defining violent crimes).

25. See Stegner, *supra* note 13, at 184 (noting circuit splits and calling for jurisdictional parallelism with respect to classifying the crime of eluding police in a vehicle as a crime of violence); Embrey, *supra* note 13, at 470 (seeking clarity on the Tenth Circuit's stance on whether certain crimes constitute crimes of violence).

26. See *United States v. Leaverton*, 895 F.3d 1251, 1255, 1257 (10th Cir. 2018) (conducting “modified categorical approach” with respect to an Oklahoma statute's divisibility, and finding that manslaughter under the Oklahoma statute did not qualify as a “crime of violence” for the purposes of federal sentencing enhancement). *But see United States v. Smith*, 882 F.3d 460, 464 (4th Cir. 2018) (holding that manslaughter as defined by a North Carolina state statute did qualify as a crime of violence for the purposes of federal sentencing).

27. For a suggestion on how to ensure more parallel outcomes in determining what classifies as a crime of violence and how to better promote justice amongst sentences, see *infra* notes 121–40.

28. See Bench, *supra* note 1, at 208 (seeking clarity on what constitutes a violent felony for the purposes of sentencing); Jondavid S. DeLong, *What Constitutes “Violent Felony” for Purpose of Sentence Enhancement under Armed Career Criminal Act* (18 U.S.C.A. § 924(e)(1)), 119 A.L.R. FED. 319, §§ 9-46 (1994) (noting cases of decision in determining what crimes are violent crimes, and observing differences on the same kinds of crimes classification as violent or nonviolent predicate offenses).

29. For a full discussion of the Armed Career Criminal Act and the Three-Strikes provision of the Violent Crime Control and Law Enforcement Act, see *infra*

Tenth and Fourth Circuits' approaches to determining whether particular state manslaughter convictions qualify as crimes of violence in *United States v. Leaverton*³⁰ and *United States v. Smith*³¹, respectively.³² Part III provides a critical analysis of the Tenth Circuit's reasoning in *Leaverton* and the Fourth Circuit's reasoning in *Smith*, and shines a light on how the categorical approach, modified categorical approach, and divisibility analysis fail in yielding uniform results across jurisdictions for crimes that are almost statutorily identical.³³ Finally, Part IV discusses the impact of the failure to produce consistent decisions regarding manslaughter as a crime of violence, and crimes of violence overall.³⁴

II. THE PRE-SENTENCE INVESTIGATION REPORT: BACKGROUND ON RELEVANT STATUTES AND CASE LAW

Analyzing whether a particular predicate crime constitutes a crime of violence for the purposes of sentencing in federal court requires piecing together several moving parts.³⁵ The first step in the process is to look at the relevant statutory schemes that implicate sentencing enhancements when crimes of violence have been previously committed.³⁶ Secondly, courts consider the particular approaches to categorizing those prior crimes as a crime of violence or "violent felony" to decipher whether a sentencing enhancement is appropriate.³⁷ After deciding which approach

notes 39–55 and accompanying text. For a full description the approaches adopted by the courts in analyzing predicate crimes, namely the categorical and modified categorical approaches, see *infra* notes 56–78 and accompanying text.

30. 895 F.3d 1251 (10th Cir. 2018) (holding that Oklahoma manslaughter conviction did not constitute a crime of violence under the federal sentencing Guidelines). For a full discussion of *Leaverton*, see *infra* notes 83–92 and accompanying text.

31. 882 F.3d 460 (4th Cir. 2018) (noting that North Carolina manslaughter conviction did qualify as a crime of violence for the purposes of federal sentencing). For a full discussion of the facts and reasoning applied by the court in *Smith*, see *infra* notes 93–105 and accompanying text.

32. For the background, facts, and court reasoning applied in *Leaverton* and *Smith*, two recent Circuit Court cases analyzing state manslaughter convictions as "crimes of violence," see *infra* notes 79–105 and accompanying text.

33. For a critical analysis of the differing outcomes in *Leaverton* and *Smith*, see *infra* notes 109–20 and accompanying text.

34. For a discussion on the impact that differing definitions of manslaughter as a crime of violence will have on federal sentencing, see *infra* notes 141–44 and accompanying text.

35. See Mary Frances Richardson, *Why the Categorical Approach Should Not Be Used When Determining Whether An Offense is a Crime of Violence Under the Residual Clause of 18 U.S.C. § 924(C)*, 67 AM. U. L. REV. 1989, 2000–01 (2018) (giving a background of the use of the categorical approach and how it fits in with analyzing prior predicate offenses with respect to sentencing enhancement).

36. For a background on the statutes that implicate sentencing enhancements for previously committed violent crimes, see *infra* notes 39–55 and accompanying text.

37. For a discussion of the statutes and sentencing guidelines that impose sentencing enhancement for previously committed crimes of violence, see *infra* notes

to categorization is appropriate, courts analyze predicate crimes to determine whether they are violent, and then impose a sentence accordingly.³⁸

A. *Background on Relevant Statutes That Impose Sentence Enhancements for Previous Crimes of Violence*

Several statutes give rise for the need for an express definition of a crime of violence or violent felony for the purposes of applying a sentencing enhancement.³⁹ While the statutes discussed in this Comment differ slightly, they each call for sentencing enhancements when a defendant who has previously been convicted of crimes of violence is later sentenced for a subsequent crime.⁴⁰ In addition, they each employ the same approaches in defining whether a predicate crime qualifies as a crime of violence.⁴¹ The two statutes this Comment explores are the Armed Criminal Career Act and the Violent Crime Control Act.

The Armed Criminal Career Act (ACCA) calls for a sentencing enhancement regarding previous “violent crimes” under 18 U.S.C. § 924(e).⁴² This statute applies when a defendant who has previously been convicted of three or more felonies that “qualify” as a “violent felony” or “serious drug offense” is found possessing a firearm.⁴³ As noted in

39–55 and accompanying text. For a description of the two kinds of approaches adopted by courts in analyzing predicate crimes, see *infra* notes 56–78 and accompanying text.

38. See Bench, *supra* note 1, at 209 (noting that courts use categorical or modified categorical approach to classify whether crimes are violent).

39. See William R. Maynard, “Statutory” Enhancement by Judicial Notice of Danger: Who Needs Legislators or Jurors?, CHAMPION, January/February 2007, at 43 (noting that previous convictions for “crimes of violence” or “violent felonies” can amount to sentencing enhancements under the Armed Career Criminal Act (ACCA), The Violent Crime Control Act (VCCA)’s three-strikes provision, and the Immigration and Nationality Act (INA)). For the purposes of this Comment, the relevant statutory schemes are the ACCA and the VCCA; however, as Maynard notes, the INA “increases the maximum sentence for illegal reentry after deportation from two to [twenty] years based on a prior conviction for an aggravated felony” or “crime of violence.” See *id.* at 43.

40. See O’Connor, *supra* note 14, at 864–65 (noting that the ACCA calls for sentence enhancements for offenders who have committed previous violent crimes).

41. See *id.* (noting that ACCA and the three-strikes provision of the VCCA function similarly in defining crimes of violence). O’Connor notes that “[t]he structure and language used by the three-strikes provision bear a significant resemblance to both the ACCA’s ‘violent felony’ and the Career Offender provision’s ‘crime of violence’ definitions Although the three-strikes law lists qualifying enumerated violent felonies with more detail than the ACCA and Career Offender provision, all three statutes use almost identical language to define qualifying nonenumerated crimes.” See *id.*

42. See 18 U.S.C. § 924(e) (2006) (providing that “a person who violates section 922(g) of this title and has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both, . . . shall be fined under this title and imprisoned not less than fifteen years”).

43. See U.S. Sentencing Commission, *supra* note 23 (explaining a number of enhancements for sentencing with respect to firearms, and reporting data analysis

Mathis v. United States,⁴⁴ in determining whether a predicate crime will qualify for the enhancement, the “ACCA defines the term ‘violent felony’ to include any felony, whether state or federal, that “is burglary, arson, or extortion.”⁴⁵ The accompanying career offender guidelines in the United States Sentencing Guidelines, section 4B1.2(a), further sets out what constitutes a crime of violence for sentencing in conjunction with the statute.⁴⁶

on trends with respect to mandatory minimums and prevalence of particular firearms offenses). This publication gives the structural breakdown of 18 U.S.C. § 924 and how the parts of the statute function together. *See id.* at 8–10. It particularly notes that 18 U.S.C. § 924(e) serves as the sentencing enhancement section for crimes committed under 18 U.S.C. § 922(g), which makes it a crime for a defendant who has committed three or more violent felonies or serious drug offenses to possess a firearm. *See id.* at 9–10. The text also provides an explanation on the appropriate corresponding United States Sentencing Guideline, USSG §4B1.4 (Armed Career Criminal), and provides a thorough explanation of what the guidelines instruct the sentencing court to consider and apply during the course of sentencing. *See id.* at 11.

44. 136 S. Ct. 2243 (2016).

45. *Id.* at 2248 (citation omitted) (noting the ACCA’s definition of “violent felony”). In *Mathis*, the Court considered whether *Mathis*’ five prior state convictions in Iowa for burglary qualified as predicate violent crimes in his current sentencing, given that the convicting Iowa statute provides “alternative means of fulfilling a single locational element.” *See id.* at 2250. The Court in *Mathis* also explained that in listing the particular crimes of burglary, arson, and extortion, the legislation was specifically referring to their generic versions, and “not to all variants of the offenses.” *Id.* at 2248. Finally, the Court also emphasized that a “prior conviction does not qualify as the generic form of a predicate violent felony offense listed in the ACCA if an element of the crime of conviction is broader than an element of the generic offense.” *See id.*

46. *See* U.S.S.G. 4B1.2 (providing guidelines on what constitutes a crime of violence for the purposes of the ACCA). The Guidelines dictate:

(a) The term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—

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

(2) is murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, extortion, or the use or unlawful possession of a firearm described in 26 U.S.C. § 5845(a) or explosive material as defined in 18 U.S.C. § 841(c).

(b) The term “controlled substance offense” means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term “two prior felony convictions” means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the pro-

Crimes of burglary, arson, and extortion are not the only crimes that qualify as violent crimes under the ACCA.⁴⁷ When considering predicate crimes for ACCA sentencing, a court can also consider whether a crime fits as a crime of violence under the ACCA's "force clause."⁴⁸ In conducting a force clause analysis, judges look to see if the predicate crime has an element that includes "the use, attempted, or threatened use of physical force against a person."⁴⁹ If the crime involves an element of force, then those predicate crimes may also qualify as a crime of violence in the current sentencing matter.⁵⁰

The Violent Crime Control and Law Enforcement Act of 1994 (VCCA) functions similarly in mandating a sentence enhancement based on prior convictions for violent felonies.⁵¹ Well-known for its "three

visions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Id. While this amended guideline is still in application, it is important to note that in *United States v. Johnson*, the Supreme Court held that the former "residual clause" which was included in the guidelines of the Armed Criminal Career Act was unconstitutional. *See United States v. Johnson*, 135 S. Ct. 2551 (2015) (holding the ACCA's residual clause unconstitutional). The residual clause of the act stated that any felony that "involves conduct that presents a serious potential risk of physical injury to another" qualifies as a predicate violent felony for the purposes of sentencing under the Armed Career Criminal Act. *See id.* at 2555 (quoting 18 U.S.C. § 924(e)(2)). The Court held the clause unconstitutional because it violated the guarantee of due process provided by the Constitution. *See id.* at 2563.

47. *See* 18 U.S.C. § 924(e)(2)(B) (2006) (articulating that crimes other than those enumerated can be held as crimes of violence under the ACCA's force clause).

48. *See* 18 U.S.C. § 924(e)(2)(B)(i) (2006) (noting that if a predicate crime "has as an element the use, attempted use, or threatened use of physical force against the person of another," the prior conviction can be classified as a violent felony); U.S. Sentencing Commission, *The Categorical Approach: A Step-by-step Analysis*, https://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2016/slideshow_categorical-approach.pdf [<https://perma.cc/F33Z-5U98>] (discussing how to apply the categorical approach and the elements of statutory language of the ACCA).

49. 18 U.S.C. § 924(e)(2)(B) (2006).

50. *See id.* (directing that crimes that include force elements be considered crimes of violence under the force clause); DeLong, *supra* note 28, at §§ 9–21 (providing examples in which courts have held crimes with the use of force as crimes of violence under the ACCA for their force element: assault and battery, assault with a deadly weapon, aggravated assault, attempted burglary, carrying concealed weapon, criminal conspiracy, extortion, intimidating a witness, manslaughter, rape or sexual battery, robbery, and storebreaking. *See* DeLong, *supra* note 28, at §§ 10–21. As an introductory note, DeLong notes that these crimes have been held to be predicate crimes of violence because such offenses had an element including the use, attempted use, or threatened use of physical force against the person of another. *See* DeLong, *supra* note 28, at §§ 9–10.

51. *See* O'Connor, *supra* note 14, at 863–65 (emphasizing that the analysis of determining whether a predicate crime qualifies as a violent crime under the ACCA or the VCCA's three-strikes provision is largely the same, as they each use the formal categorical approach adopted in *Taylor*). O'Connor also notes that

strikes” provision, the statute provides for a sentencing enhancement of mandatory life imprisonment if a person has been convicted of three violent felonies.⁵² The statute gives a comprehensive list of what federal crimes constitute a serious violent felony, such as murder, manslaughter other than involuntary manslaughter, various forms of assault, and a multitude of others that qualify as violence or acts that threaten violence if committed at the federal level.⁵³ If the crime has been committed at the state level, however, it does not necessarily match the elements of a federally-enumerated offense.⁵⁴ Thus, sentencing courts need to analyze the convicting state’s statute to determine whether the state-level predicate crime qualifies as a crime of violence in a federal sentencing matter.⁵⁵

“[t]he language and definitional structure related to classifying prior convictions for sentence enhancement in the ACCA, Career Offender provision and the three-strikes law are almost identical.” *See id.* at 851.

52. *See* Congressional Research Service, *Three Strike Mandatory Sentencing (18 U.S.C. 3559(c): An Overview*, EVERYCRSREPORT.COM, at 1–4 (2010), <https://www.everycrsreport.com/reports/R41461.html> [<https://perma.cc/R6LH-227E>] (providing a summary of the federal three-strikes provision and qualifying predicate offenses, and discussing the constitutionality of the three-strikes provision). The three-strikes provision will apply if the defendant in a case has two prior convictions for violent felonies, and the felony in the current hearing is also classified as violent. *See id.* at 1; *see also* Nkechi Taifa, “Three-Strikes-and-You’re-Out”-Mandatory Life Imprisonment for Third Time Felons, 20 U. DAYTON L. REV. 717, 717–18 (explaining the legislative history behind the VCCA). Taifa argues that three-strikes provisions are “constitutionally suspect,” and “constitute bad public policy,” because they can sometimes impose life imprisonment for fairly minor crimes. *See* Taifa, *supra*, at 717.

53. *See* 18 U.S.C. § 3559(F) (2006) (listing all of the enumerated offenses that qualify as serious violent felonies). The list includes the following crimes:

a Federal or State offense, by whatever designation and wherever committed, consisting of murder (as described in section 1111); manslaughter other than involuntary manslaughter (as described in section 1112); assault with intent to commit murder (as described in section 113(a)); assault with intent to commit rape; aggravated sexual abuse and sexual abuse (as described in sections 2241 and 2242); abusive sexual contact (as described in sections 2244 (a)(1) and (a)(2)); kidnapping; aircraft piracy (as described in section 46502 of Title 49); robbery (as described in section 2111, 2113, or 2118); carjacking (as described in section 2119); extortion; arson; firearms use; firearms possession (as described in section 924(c)); or attempt, conspiracy, or solicitation to commit any of the above offenses; and any other offense punishable by a maximum term of imprisonment of 10 years or more that has as an element the use, attempted use, or threatened use of physical force against the person of another or that, by its nature, involves a substantial risk that physical force against the person of another may be used in the course of committing the offense.

Id.

54. For a full discussion of the importance of elements matching in state and federal offenses for the classification of violent crimes, see *infra* notes 56–78 and accompanying text.

55. For a full discussion of the approaches used by federal courts in sentencing hearings to determine if a predicate crime qualifies as a crime of violence (both the categorical approach under *Taylor* and the modified categorical approach), see *infra* notes 56–78 and accompanying text.

B. *Background on Prior State Offenses and Predicate Crime Classification: Approaches Adopted by Courts in Categorizing Previous Crimes as “Violent”*

Historically, the question of whether a particular crime committed at the state level qualifies as a predicate crime or crime of violence requires a complex analysis.⁵⁶ State statutes differ across the nation for similar crimes, and also vary in required elements to convict defendants of similar crimes.⁵⁷ Most importantly, state crimes are not enumerated in the federal statutes that impose sentencing enhancements.⁵⁸ Thus, deciding whether a particular state statute’s elements align with federal elements for predicate crime classification largely requires sentencing judges to carefully compare state and federal laws and the elements required for conviction under each.⁵⁹

In classifying predicate crimes, courts can use either the categorical approach or the modified categorical approach to determine if a previous state-level felony conviction is a violent felony.⁶⁰ In most cases, the judge

56. See DeLong, *supra* note 28, at 319 (providing examples of the various types of predicate offenses that have qualified as violent crimes under the ACCA, including: assaults, manslaughter, sex crimes, and other offenses involved serious potential risk of physical injury to another). See generally Stegner, *supra* note 13, at 187–90.

57. See Rebecca Sharpless, *Finally, A True Elements Test: Mathis v. United States and the Categorical Approach*, 82 BROOK. L. REV. 1275, 1280 (2017) (noting that even when states give a crime the same label, “the elements of the offenses” may be different).

58. See Sharpless, *supra* note 57, at 1280 (“[I]t is impractical for federal sentencing enhancement and federal deportation laws to cross-reference specific state criminal laws.”).

59. See *Taylor v. United States*, 495 U.S. 575, 602 (1990) (holding that federal sentencing courts must consider the elements of a state statute in comparison to a federal statute when classifying predicate crimes as crimes of violence); U.S. Sentencing Commission, *supra* note 48 (emphasizing that courts must consider the elements of a predicate conviction in classifying it as a crime of violence, as opposed to the facts of a case).

60. See *Descamps v. United States*, 570 U.S. 254, 260–64 (2013) (noting the differences in applying the modified categorical approach and categorical approach in classifying predicate crimes as violent crimes). In *Descamps*, the defendant faced sentencing for his present conviction under the ACCA for being a convicted felon in possession of a firearm. See *id.* at 259. The Court was tasked with considering whether Descamps’s prior conviction for burglary under California law (a statute that contains a “single, indivisible set of elements”) qualified as an Armed Criminal Career Act predicate violent felony. See *id.* at 258. The Court then clarified that when a state statute has an “indivisible set of elements,” the modified categorical approach does *not* apply and the courts should use the traditional categorical approach as detailed in *Taylor v. United States*. See *id.*; Sharpless, *supra* note 57, at 1284 (discussing when it is proper to apply the modified categorical approach versus the *Taylor* approach); see also 27 NO. 17 CRIM. PRAC. REP. 2 (reiterating that “Courts may not apply the modified categorical approach to determine whether a prior conviction was for a violent felony under the Armed Career Criminal Act (ACCA) when the crime of which the defendant was convicted contains a single, indivisible set of elements”). As one scholar explains, the modified categorical approach is different from the original approach introduced in

adopts the traditional categorical approach as introduced by the Supreme Court in *Taylor v. United States*.⁶¹ In *Taylor*, the Court considered whether the defendant's previous conviction for second-degree burglary under a Missouri statute classified as a prior violent felony when sentencing him for illegal possession of a firearm under 18 U.S.C. § 922(g)(1).⁶² If the second-degree burglary classified as a predicate crime, the defendant would receive a sentencing enhancement providing him with a minimum of fifteen years of incarceration.⁶³

In analyzing whether the defendant's prior Missouri second-degree burglary conviction classified as a crime of violence, the Court reasoned that examining only the particular facts of the prior conviction (rather than analyzing the statute under which the defendant was convicted) would create a faulty analysis.⁶⁴ Thus, the Court upheld an approach that

Taylor because it allows "looking beyond the statute to the record of conviction," and in *Descamps*, the Court directly addressed under what "circumstances" a sentencing court could employ the modified categorical approach. *See Sharpless, supra* note 57, at 1283–85.

61. 495 U.S. 575, 602 (1990) (holding that § 924(e)(2)(B)(ii) . . . generally requires the trial court to look only to the fact of the conviction and the statutory definition of the prior offense"). The Court in *Taylor* considered whether the defendant's prior second-degree burglary charge under a Missouri statute classified as a violent crime in conjunction with 18 U.S.C. § 924(e), for the purposes of applying the fifteen-year sentencing enhancement. *See id.* at 580. After concluding that the categorical approach was the proper way to classify the predicate offense, the Court remanded the case for further proceedings in order to let the lower courts determine whether the conviction sufficed. *See id.* at 602.

62. *See id.* at 578–79 (noting that the issue in the case was whether a Missouri second-degree burglary charge qualified as a predicate crime of violence). Importantly, the Court also noted that the defendant had a total of four prior convictions: in addition to the Missouri second-degree burglary charge, Taylor had a previous second-degree burglary charge under Missouri law, and other convictions for robbery and assault. *See id.* at 578. Because the defendant "conceded" that his robbery and assault convictions qualified as predicate crimes for the purposes of his current sentencing, he challenged his second-degree burglary convictions as predicate crimes by asserting that those two convictions did not pose "serious potential risk of physical injur[ies] to another," and thus did not qualify as predicate violent felonies. *See id.* at 579.

63. *See id.* at 578 (explaining that "[u]nder 18 U.S.C. § 922(g)(1), it is unlawful for a person who has been convicted previously for a felony to possess a firearm. A defendant convicted for a violation of § 922(g)(1) is subject to the sentence-enhancement provision at issue, § 924(e): '(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court . . . for a violent felony or a serious drug offense, or both . . . such person shall be fined not more than \$25,000 and imprisoned not less than fifteen years.'"). The Court explained that as part of the defendant's guilty plea, he agreed to be sentenced at the district court to the fifteen years provided under the statute, but his plea was "conditioned on the right to appeal this issue." *See id.* at 579.

64. *See id.* at 600–02 (providing three reasons that analyzing the specific facts of a conviction would create a flawed analysis in labeling predicate convictions as violent felonies). The Court gave three reasons: (1) the language of section 924(e) supports the proposition of not considering the facts of a defendant's case; (2) the legislative history of the enhancement suggests that "Congress generally

supported looking solely at the convicting statute in classifying a defendant's prior crime as violent.⁶⁵

Following *Taylor's* rule, after analyzing the relevant state conviction statute, the sentencing court in a particular matter must then compare the conviction elements of the state crime to the elements of the generic crime as defined federally.⁶⁶ As critics have noted, the categorical approach is rooted in considering elements, and comparing the "elements of the prior offense with elements required by the enhancement law."⁶⁷ If the elements match closely in the eyes of the court, or the state statute is

took a categorical approach to predicate offenses"; and (3) taking factual considerations could create "practical difficulties and potential unfairness," such as presenting witnesses from the old crimes at the sentencing phase, or difficulties where there was no record from a plea indicating the underlying facts of the conviction. *See id.*

65. *See id.* (supporting an approach that solely looks at the convicting statute in classifying a predicate crime for the three reasons). For a list of the three reasons the *Taylor* court referenced in upholding this approach, see *supra* note 64 and accompanying text. One scholar has described the categorical approach as a "fundamental tool" in classifying prior convictions as violent. *See* Richardson, *supra* note 35, at 2000–01 (explaining that the categorical approach is a process with four steps, and explaining those steps). As Richardson notes, the four-step process works in the following manner:

First, a court identifies the definition at issue, such as violent felony in the ACCA or crime of violence in § 16. Second, a court determines the statute of the conviction, and, if the statute is divisible into separate crimes, will use the modified categorical approach to identify which crime is currently at issue. Third, a court identifies the elements of the statute of the conviction. Fourth and last, a court is the elements of the statute of conviction to the definition at issue.

See id. at 2001–02. Richardson also provides a thorough background of the "genesis" of the categorical approach and its evolution, providing additional explanation of the Court's decision in *Taylor*. *See id.* at 2003–04. *See generally* Ted Koehler, *Assessing Divisibility in the Armed Career Criminal Act*, 110 MICH. L. REV. 1521, 1523–24 (2012) (discussing methods in assessing whether a statute is divisible with respect to analysis under the categorical or modified categorical approach).

66. *See Taylor*, 495 U.S. at 602 (holding that comparison of the elements of a state conviction to the elements of a federal conviction is necessary). The Court specifically held that an offense constitutes "burglary" for purposes of a § 924(e) sentence enhancement if either its statutory definition substantially corresponds to "generic" burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary in order to convict the defendant. *See id.* The court in *United States v. Leaverton* also gave a helpful description of the comparison of crimes committed at the state level to the federal definitions, noting that to determine whether a state crime meets the generic definition, "we look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition." *United States v. Leaverton*, 895 F.3d 1251, 1256 (10th Cir. 2018) (citing *Moncrieffe v. Holder*, 569 U.S. 184 (2013) (internal quotations omitted)); *see also* U.S. Sentencing Commission, *supra* note 48 (explaining how to apply the categorical approach, and emphasizing that "only the elements of the conviction can be considered," not the facts of a case or the name of the convicting statute).

67. *See* Maynard, *supra* note 39, at 46 (explaining how the categorical approach introduced in *Taylor* functions and noting importance of comparison of statutory elements in applying categorical approach); *see also* Richardson, *supra*

narrower than the generic crime as elementally described under federal law, then the prior conviction can be classified as a predicate violent felony for the purposes of sentencing in the present matter.⁶⁸

Nevertheless, if the state statute is broader than the generic federal crime, the analysis is not quite as simple.⁶⁹ In considering this difficulty, but not applied directly in *Taylor*, the Court in *Taylor* set the stage for a “modified categorical approach.”⁷⁰ Under the modified categorical approach, a sentencing court can look past the sole statutory definition of the predicate conviction, and consider items such as charging papers and jury instructions to determine the particular elements of the defendant’s predicate offense.⁷¹ Following a determination of the specific elements a defendant is convicted of, the court can then decide whether those elements specific to the particular defendant amount to a predicate violent felony for the purposes of applying the sentencing enhancement.⁷² After

note 35, at 2001–02 (explaining four steps necessary in applying categorical approach).

68. *See Taylor*, 495 U.S. at 599 (holding that “[i]f the state statute is narrower than the generic view . . . there is no problem, because the conviction necessarily implies that the defendant has been found guilty of all the elements of generic burglary”).

69. *See id.* at 600 (questioning whether when defendant has been convicted under statute of “nongeneric” burglary, sentencing enhancement for prior *generic* burglary applies). In conducting its analysis, the *Taylor* Court noted that answering this question required deciding whether statutory definitions were all that can be considered in such cases, or “whether the court may consider other evidence.” *See id.* (explaining how under formal categorical approach, courts of appeals have looked only to statutory definition of prior offenses).

70. *See id.* at 602 (holding that “[the] categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary”). The example the Court provided in making this determination involved a state’s burglary statute that required entry of either an automobile or a building; in such a case, the Court noted, the sentencing court could consult an indictment or jury instructions in order to assess what part of the statute the defendant was convicted under. *See id.* (explaining when government could use this type of conviction for enhancement).

71. *See id.* (observing when modified categorical approach may be appropriate); *see also* O’Connor, *supra* note 14, at 862–63 (summarizing *Taylor* and discussing Court’s adoption of categorical approach and introduction of modified categorical approach). The Court in *Taylor* noted that:

This categorical approach, however, may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary. For example, in a State whose burglary statutes include entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.

See Taylor, 495 U.S. at 602 (explaining when courts can look beyond mere statutory language for sentencing enhancements).

72. *See Taylor*, 495 U.S. at 602 (holding that nongeneric form of burglary under state law, in this case, would qualify as predicate offense for purposes of

Taylor established the modified categorical approach, courts could apply it in situations where the defendant's conviction itself did not provide clarity on the specific elements the court had convicted the defendant under.⁷³ The modified categorical approach is *only* appropriate when the state statute is considered "divisible," or gives a number of separate elements that defendants may have met in their individual convictions.⁷⁴

More recently, in *Shepard v. United States*,⁷⁵ the Court revisited the modified categorical approach and discussed what particular documents a sentencing court could consider in assessing a prior violent felony conviction under the caveat presented in *Taylor*.⁷⁶ In *Shepard*, the Supreme Court held that when using the modified categorical approach, sentencing courts may only consider the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the

sentencing if, instead of elements itself, accompanying papers like jury instructions or charging papers showed that defendant had committed elements of generic burglary).

73. *See* *Descamps v. United States*, 570 U.S. 254, 261–62 (2013) (noting that courts can use modified categorical approach in situations where statute lists several potential offense elements and it is unclear which particular subsection defendant has been convicted under).

74. *See* *United States v. Leaverton*, 895 F.3d 1251, 1254 (10th Cir. 2018) (noting that "[t]he modified categorical approach applies only when a statute sets out alternative *elements*, rather than alternative means"); *see also* *United States v. Tittles*, 852 F.3d 1257, 1266 (10th Cir. 2017) (explaining that divisible statute is one that "sets out one or more elements of the offense in the alternative" and that courts considering a prior conviction under a divisible statute apply the "modified categorical approach . . . to identify the elements of the crime of conviction"). In *Tittles*, the defendant pled guilty as a felon in possession of a firearm but argued as to whether his previous conviction for "feloniously pointing a firearm" under Oklahoma law qualified as a predicate felony under the Armed Career Criminal Act. *See id.* at 1262 (explaining background facts and defendant's previous conviction). Ultimately, after deciding that the statute the defendant was convicted under was divisible because it set out alternative elements, the court applied the modified categorical approach to analyze the Oklahoma statute. *See id.* at 1277–82 (explaining why courts use modified categorical approach). In applying the modified categorical approach, the Tenth Circuit ultimately concluded that the element that the defendant had pleaded guilty to was pointing a firearm at a woman with the "purpose of threatening her," which qualified as a predicate violent felony for the purposes of his present sentencing under the Armed Career Criminal Act. *See id.* at 1282 (finding defendant was convicted of violent felony after applying modified categorical approach).

75. 544 U.S. 13 (2005).

76. *See id.* at 26 (concluding that charging documents and written plea agreements are documents that can be considered under modified categorical approach in determining what elements of particular statute defendant was convicted under). In *Shepard*, the defendant was indicted under 18 U.S.C. § 992(g) for being a felon in possession of a firearm; the Court considered whether the defendant's conviction under one of Massachusetts' burglary statutes qualified as a "predicate ACCA offense." *See id.* at 16 (describing relevant facts). In holding that charging documents and written plea agreements *could* be considered in determining the elements of a particular statute a defendant is convicted under, while police reports could *not* be considered in assessing the prior crime, the Court remanded the case for resentencing. *See id.* at 26 (remanding case for further proceedings).

trial judge to which the defendant assented.”⁷⁷ Therefore, when applying the modified categorical approach and determining what documents are admissible in conducting the approach, courts consider whether a document qualifies as a “Shepard” document.⁷⁸

C. *Background on Recent Circuit Court Cases Defining State Manslaughter Convictions as Crimes of Violence or Violent Felonies*

One particular offense that has recently garnered review by several courts of appeals has been the state-level offense of manslaughter.⁷⁹ In two recent cases, the Tenth Circuit Court of Appeals and the Fourth Circuit Court of Appeals came to different conclusions on whether particular state convictions for manslaughter classified as crimes of violence or vio-

77. *See id.* at 26 (holding that admissible documents under modified categorical approach are limited to “charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information”). In its reasoning, the Court in *Shepard* explained that allowing any additional documents would be inconsistent with precedent introduced in *Taylor*. *See id.* at 23 (noting importance of adhering to precedent case law); *see also* Richardson, *supra* note 35, at 2000–09 (explaining the ruling in *Shepard*, and noting that the plurality opinion stated that “evidence judges may look to under *Taylor* should not be extended to include anything beyond what the categorical approach allows”); Sharpless, *supra* note 57, at 1282–83 (noting *Shepard* was “major development regarding the categorical approach”).

78. *See* United States v. Leaverton, 895 F.3d 1251, 1252–55 (10th Cir. 2018) (noting that docket sheets are not “*Shepard* documents”); *see also* United States v. Abeyta, 877 F.3d 935, 943 (10th Cir. 2017) (stating that “*Shepard* documents are limited to conclusive records made or used in adjudicating guilt”). In *Abeyta*, the defendant was found guilty of being a felon in possession of a firearm under 18 U.S.C. § 922(g)(1); the court, in considering his enhancement sentence (which was not for three prior violent felonies, but did consider his prior crimes for the purposes of his criminal history score) analyzed whether the defendant’s prior crime for “damaging, defacing, or destruction of private property under Denver Revised Municipal Code” could factor into his criminal history score as a state-level offense. *See id.* at 938–39 (providing background information on defendant’s prior convictions). Ultimately, the court held that it could not use the modified categorical approach in the defendant’s case, and the defendant’s ordinance violation did not factor into his criminal history score. *See id.* at 942 (explaining modified categorical approach could not be used in this case).

79. *See* Leaverton, 895 F.3d at 1251–58 (holding Oklahoma manslaughter conviction did not qualify as crime of violence for purposes of sentencing, because Oklahoma statute was too generic in comparison to federal statute); *see also* United States v. Smith, 882 F.3d 460 (4th Cir. 2018) (holding that North Carolina voluntary manslaughter conviction did constitute crime of violence under Armed Career Criminal Act, specifically under force clause of act, as North Carolina’s statute has force element); United States v. Chauncey, 420 F.3d 864 (8th Cir. 2005) (holding that involuntary manslaughter also qualifies as crime of violence under ACCA). While not discussed at length in this Comment due to the differences of the state-level charge (between voluntary and involuntary manslaughter), *Chauncey* stands for the proposition that, as a matter of law, even involuntary manslaughter can qualify as a crime of violence, as it poses a significant risk of physical injury to another. *See id.* at 878 (citing United States v. Newton, 259 F.3d 964 (8th Cir. 2001)).

lent felonies for sentencing in later cases committed by the same defendant.⁸⁰ In *Leaverton*, the Tenth Circuit found that a conviction for Oklahoma manslaughter did not constitute a crime of violence.⁸¹ Conversely, in *Smith*, the Fourth Circuit held that a North Carolina voluntary manslaughter conviction did qualify as a crime of violence.⁸²

1. United States v. Leaverton

In *United States v. Leaverton*,⁸³ the Tenth Circuit considered whether a defendant's conviction for first-degree manslaughter under an Oklahoma statute qualified as a crime of violence for the purposes of the three-strikes provision provided in 18 U.S.C. § 3559(c).⁸⁴ After finding the Oklahoma statute divisible, the court in *Leaverton* applied the modified categorical approach to determine if a subsection of the first-degree manslaughter statute qualified as a violent felony.⁸⁵ An analysis indicated that the defendant was likely convicted under Oklahoma Statute Title 21 Section 711(2), and that the wording of that particular subsection arose to qualification of

80. See *Leaverton*, 895 F.3d at 1251 (holding Oklahoma manslaughter in first degree to *not* be crime of violence); see also *Smith*, 882 F.3d at 460 (holding North Carolina voluntary manslaughter conviction as crime of violence for purposes of classifying predicate violent offenses).

81. See *Leaverton*, 895 F.3d at 1251 (holding Oklahoma manslaughter in first degree to *not* be crime of violence).

82. See *Smith*, 882 F.3d at 460 (holding North Carolina voluntary manslaughter as crime of violence).

83. 895 F.3d 1251 (10th Cir. 2018).

84. See *Leaverton*, 895 F.3d at 1254 (considering whether 18 U.S.C. § 3559(c) sentencing enhancement for three prior violent felonies should apply in sentencing for Leaverton's conviction of three counts of bank robbery). The defendant contended that his conviction for Oklahoma manslaughter did not qualify as a violent felony under the VCCA. See *id.* at 1253, 1256 (noting the defendant's timely appeal after the district court sentenced him to life imprisonment and discussing the defendant's argument that his prior conviction was not the equivalent of federal manslaughter). According to the court, "[t]he sole point of contention was whether Leaverton's prior conviction for Oklahoma Manslaughter I qualified as a serious violent felony." See *id.* at 1253 (citing OKLA. STAT. TIT. 21, § 711).

85. See *id.* at 1255 (applying modified categorical approach to classify Leaverton's conviction). As the court in *Leaverton* explained, the Oklahoma statute had three subsections for a manslaughter conviction:

Homicide is manslaughter in the first degree in the following cases: 1. When perpetrated without a design to effect death by a person while engaged in the commission of a misdemeanor.; 2. When perpetrated without a design to effect death, and in a heat of passion, but in a cruel and unusual manner, or by means of a dangerous weapon; unless it is committed under such circumstances as constitute excusable or justifiable homicide.; 3. When perpetrated unnecessarily either while resisting an attempt by the person killed to commit a crime, or after such attempt shall have failed.

See *id.* at 1254 (citing OKLA. STAT. TIT. 21, § 711). The government argued that the court convicted the defendant under subsection 2 of the Oklahoma statute, relying largely on the state court's docket sheet as evidence. See *id.* at 1254–55.

a serious violent felony and was equitable to voluntary manslaughter.⁸⁶ However, the court did not complete the predicate crime analysis by simply designating that a manslaughter in the first degree conviction could be deemed a serious violent felony.⁸⁷ The opinion noted that, “[W]e do not simply apply an enhancement to any crime designated by a state as ‘manslaughter.’”⁸⁸ Next, the court applied the “general approach, in designating predicate offenses, of using uniform categorical definitions” to compare the state crime against the generic crime definitions provided in the federal statute.⁸⁹

As noted in *Taylor*, the state offense must be a “categorical match with a generic federal offense,” meaning that the facts underlying the state offense would also secure a conviction at the federal level for manslaughter.⁹⁰ After comparing the statutes, the court held that the statutory definitions did not match because the Oklahoma manslaughter statute stated that the heat of passion conviction requirement would be “so great as to destroy the intent to kill,” thus eliminating the element of intentional

86. *See id.* (concluding that wording of Oklahoma’s manslaughter statute constituted crime of violence). The district court in *Leaverton* held that subsection 2 of Oklahoma’s manslaughter statute was the subsection that the defendant was convicted under, given that the docket sheet reflected it. *See id.* at 1255 (citing OKLA. STAT. TIT. 21, § 711). While the court in *Leaverton* did compare subsection 2 to federal generic manslaughter, the court did not make its own review or its own determination if that was the subsection that Leaverton was actually convicted under. *See id.* at 1255–56 (skipping to comparison of conviction under § 711(2) with manslaughter under federal law, instead of determining the specific subsection Leaverton was convicted under). Instead, the *Leaverton* court noted that docket sheets are *not* one of the documents noted in *Shepard* permitted as evidence when determining which part of a divisible statute that a defendant was convicted under. *See id.* at 1255 (concluding docket sheets are not *Shepard* documents). The court also noted that even if documents could prove that the defendant was convicted under subsection 2 of the Oklahoma manslaughter statute the conviction still did not suffice as a violent crime for the sentencing enhancement after completing the comparison deemed necessary in *Taylor*. *See id.* 1255–57 (citing *Taylor v. United States*, 495 U.S. 575, 590 (1990)). For a full discussion of the necessary comparison of state and federal statutes as described in *Taylor*, see *supra* notes 60–78 and accompanying text.

87. *See id.* at 1256 (explaining that analysis under modified categorical approach does not end after classifying conviction under state statute as “serious violent felony”).

88. *See id.* (noting that analysis under modified categorical approach includes comparing state language that qualifies as a serious violent felony with its federal counterpart).

89. *See id.* (quoting *Taylor*, 495 U.S. at 590) (explaining that after applying modified categorical approach the court must compare state crime’s statute to generic federal statute).

90. *See id.* at 1256–57 (“Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved facts equating to the generic federal offense.” (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013))). For a full discussion of the decision in *Taylor* and what is required under the categorical approach and comparing a state level crime to that at the federal level, see *supra* note 48–59 and accompanying text.

killing required federally.⁹¹ The court therefore concluded that the defendant's Oklahoma manslaughter conviction did not equate to the federal definition of "generic manslaughter," and accordingly did not qualify as a crime of violence warranting a sentence enhancement.⁹²

2. United States v. Smith

In *United States v. Smith*,⁹³ the Fourth Circuit faced an issue similar to that presented in *Leaverton*: analyzing a state manslaughter conviction for the purposes of applying a federal violent felony sentencing enhancement.⁹⁴ In *Smith*, the court considered whether the defendant's prior voluntary manslaughter conviction under a North Carolina statute qualified as a violent felony for the purposes of the sentencing enhancement reflected in the ACCA.⁹⁵

91. *See id.* at 1257 (comparing Oklahoma's statute with federal statute for manslaughter). The *Leaverton* court noted that Oklahoma's manslaughter statute requirements are a minority viewpoint, and that most other states, in addition to the Model Penal Code, require that despite there being a heat of passion for voluntary manslaughter, there is still some intent to kill in addition to a circumstance that induced some kind of provocation. *See id.* (citing *Brown v. State*, 777 P.2d 1355, 1358 (Okla. Crim. App. 1989)).

92. *See id.* at 1257–58 (concluding Leaverton's offense does not equate to federal generic manslaughter). As the court explained in *Leaverton*, the Model Penal Code (MPC) gives the best generic definition of manslaughter. *See id.* at 1256–57 (citing *United States v. Peterson*, 629 F.3d 432, 436 (4th Cir. 2011)). In conducting its comparison of the MPC definition of manslaughter with the defendant's conviction under Oklahoma's manslaughter statute, the court noted that the MPC definition of manslaughter is "a homicide 'committed recklessly,' or a homicide that would be murder except that it was 'committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.'" *See id.* at 1257 (citing Model Penal Code § 210.3 (AM. LAW INST. 1962)). In comparing this definition to Oklahoma's manslaughter statute, the court noted that "[u]nlike generic manslaughter under a heat of passion theory, a conviction under § 711(2) requires that the defendant did not intend to kill." *Id.* (explaining differences between generic manslaughter and manslaughter under Oklahoma's statute). Because the Oklahoma statute was thus markedly different in providing that the defendant *did not* have the intention to kill, the court concluded that Oklahoma manslaughter was not equitable to generic manslaughter and thus did not qualify as manslaughter that would count as a crime of violence as defined under 18 U.S.C. 3559(c). *See id.* at 1258 (reversing and remanding district court's decision).

93. 882 F.3d 460 (4th Cir. 2018).

94. For a full discussion of the Tenth Circuit's decision in *Leaverton* (examining whether state manslaughter conviction qualified as predicate crime for purposes of three-strikes sentence enhancement under VCCA) and the reasoning applied by the court in deciding that the defendant's Oklahoma manslaughter conviction did not qualify as a predicate crime of violence, see *supra* notes 83–92 and accompanying text.

95. *See Smith*, 882 F.3d at 462 (noting that issue was predicate crime classification for Smith's North Carolina voluntary manslaughter conviction). In *Smith*, the defendant was at the time being sentenced in conjunction with conviction of one count of possession with intent to distribute cocaine hydrochloride and one count of possession of ammunition by a convicted felon. *See id.* at 462 (explaining facts of case). Smith's three prior violent felonies included two counts of felony robbery

In contrast to the analysis in *Leaverton*, the court in *Smith* did not need to utilize the modified categorical approach because the North Carolina statute did not require a divisibility analysis.⁹⁶ The divisibility analysis is only relevant when a statute lists a variety of “elements of the offense in the alternative.”⁹⁷ Thus, the court used only the categorical approach in reaching its conclusion.⁹⁸ The defendant in *Smith*, like the defendant in *Leaverton*, was convicted of the equivalent of voluntary manslaughter at the state level; however, the North Carolina statute was not a “divisible” statute and laid out all of the elements of the offense without leaving room for interpretation regarding what section the defendant was convicted under.⁹⁹ The most important element in *Smith*, and in North Carolina’s statute, was the intent element listed for voluntary manslaughter, because the intent element reflected the intuitive need to apply intentional force against another person.¹⁰⁰

In applying the standard categorical approach described in *Taylor*, the court in *Smith* compared the North Carolina voluntary manslaughter statute to the ACCA’s requirements.¹⁰¹ In its comparison, the Fourth Circuit noted that North Carolina’s voluntary manslaughter statute required the intent to kill.¹⁰² In comparing the North Carolina statutory language to

with a dangerous weapon, and the count of voluntary manslaughter analyzed in the opinion. *See id.* at 462 (stating that Smith argued that voluntary manslaughter did not qualify as violent felony). The district court applied the fifteen-year mandatory minimum sentencing enhancement under 18 U.S.C. § 924(e). *See id.* (noting district court did not agree with Smith’s interpretation of voluntary manslaughter statute). Counsel for the defendant appealed on the grounds that voluntary manslaughter under North Carolina law did not qualify as a violent felony under the ACCA “because it can be committed with a *mens rea* of mere negligence or recklessness.” *See id.* (asserting that the Court reviews this issue *de novo*).

96. *See id.* at 463 (noting that court applied the categorical approach).

97. *See* *Descamps v. United States*, 570 U.S. 254, 257 (explaining divisible statute and alternative elements).

98. *See Smith*, 882 F.3d at 463 (applying categorical approach to classify Smith’s voluntary manslaughter conviction). The *Smith* court did not mention the modified categorical approach, and solely proceeded with the categorical approach to consider whether conviction under the North Carolina voluntary manslaughter statute is “categorically violent.” *See id.* (“We therefore begin with the elements of the North Carolina crime of voluntary manslaughter before considering whether this crime is categorically violent.”).

99. *See id.* (emphasizing importance of looking to wording and elements of North Carolina voluntary manslaughter statute rather than defendant’s conduct). The court in *Smith* noted that “voluntary manslaughter in North Carolina is ‘the unlawful killing of a human being without malice, express or implied, and without premeditation and deliberation.’” *See id.* (citing *State v. McNeil*, 518 S.E.2d 486 (N.C. 1999)).

100. *See id.* at 463–64 (noting that element of intent in North Carolina voluntary manslaughter charging establishes intent required for ACCA’s force clause).

101. *See id.* at 463 (considering “the elements of the North Carolina crime of voluntary manslaughter before considering whether this crime is categorically violent”).

102. *See id.* (discussing intent required by North Carolina’s voluntary manslaughter conviction). For the language of the North Carolina voluntary man-

that of the ACCA and accompanying Federal Sentencing Guidelines that call for enhancement, the court concluded that the necessity of force required under the North Carolina statute qualified the conviction as a violent felony.¹⁰³ Specifically, the North Carolina manslaughter conviction qualified under the ACCA's use-of-force clause, because an intentional killing "plainly involves 'the use, attempted use, or threatened use of physical force against the person of another.'"¹⁰⁴ Thus, the court concluded that the defendant's conviction for voluntary manslaughter in North Carolina satisfied the criteria of a violent felony and upheld the sentence enhancement imposed by the district court.¹⁰⁵

slaughter statute, see *supra* note 99. In addition to its examination of the statutory language itself, the court in *Smith* explained that North Carolina Pattern Jury Instructions require "that the defendant killed the victim by an intentional and unlawful act," further substantiating that North Carolina voluntary manslaughter requires an intentional killing and that is what the jury is asked to find in assessing a defendant's guilt. See *Smith*, 882 F.3d at 464 (citing N.C. Crim. Jury Instr. 206.40). Finally, the court made the point that North Carolina's voluntary manslaughter statute essentially has the same requirements as an intentional, first-degree murder, with an exception that "the defendant's reason is temporarily suspended by legally adequate provocation" or temporary justification. See *id.* (citing *State v. Rainey*, 574 S.E.2d 25 (N.C. Ct. App. 2002)).

103. See *Smith*, 882 F.3d at 464 (observing that Supreme Court jurisprudence in *Leocal v. Ashcroft* "makes clear that the 'use' in the force clause of ACCA requires that the force involved in the qualifying offense be volitional" and because the North Carolina manslaughter statute requires an intentional killing, the crime then qualified as a violent felony under the use-of-force clause); see also *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (noting that the ACCA requires a higher threshold than negligence for crimes committed, and that intentional conduct does qualify under the ACCA).

104. See *Smith*, 882 F.3d at 464 (quoting ACCA's "use-of-force clause" in 18 U.S.C. § 924(e)(2)(B)).

105. See *id.* (upholding classification of manslaughter conviction as violent felony and thus upholding district court's sentence enhancement). In its analysis in *Smith*, the Fourth Circuit also cited the opinions of its sister courts in which they have upheld that voluntary manslaughter convictions under other state statutes qualify as violent felonies under the ACCA. See *id.* (noting that in similar circumstances other circuits have reached the same conclusion). The *Smith* court noted that the Sixth Circuit held that a conviction under Georgia's voluntary manslaughter statute qualified as a violent felony, and the Eighth Circuit held that conviction under Missouri's voluntary manslaughter statute qualified as a violent felony. See *id.* (citing *United States v. Jackson*, 655 Fed. App'x. 290 (6th Cir. 2016); then citing *United States v. Lambers*, 527 Fed. App'x. 586 (8th Cir. 2013)). The court also noted, in explaining its decision and relating to the decisions of its sister courts, that voluntary manslaughter can be classified as "a violent felony for purposes of ACCA if it proscribes conduct that would otherwise be murder except for circumstances that served as partial justification for the conduct." See *id.* (stating that "[a]ny other conclusion would strain North Carolina law beyond the breaking point").

III. THE SENTENCING HEARING: CRITICAL ANALYSIS AND HOW CURRENT JURISPRUDENCE NEEDS AN “ENHANCEMENT”

Recent case law defining separate states’ equivalent of voluntary manslaughter as a crime of violence leaves two questions unanswered: (1) why do essentially the same crimes differ with respect to classification as a crime of violence, and (2) how can we create a system that enforces more uniform classifications across jurisdictions in order to give similar offenders parallel classifications and sentences?¹⁰⁶ First, this section analyzes why *Leaverton* and *Smith* yielded different results in conducting their analyses of the manslaughter statutes in Oklahoma and North Carolina.¹⁰⁷ Second, this section provides suggestions on how to improve the states’ predicate crime analyses to afford better consistency in results across all jurisdictions—despite the fact that state statutes are not always parallel.¹⁰⁸

A. *The Predicate Crime: Inconsistent Application of Whether Manslaughter Is a Violent Felony for Federal Sentencing*

The circuit courts deciding *Leaverton* and *Smith* were essentially tasked with analyzing the same issue: did each defendant’s prior manslaughter conviction amount to a predicate violent crime in their current sentencing?¹⁰⁹ The difference in outcomes was not so much the defendant’s conduct in each case, but instead, the specific language of the state statute that each defendant was convicted under.¹¹⁰ Both defendants were

106. For a full discussion of the statutes that require enhanced sentences for criminals with predicate crimes of violence, see *supra* notes 39–55 and accompanying text. For a more specific discussion on the classification of two different states’ voluntary manslaughter classification, see *supra* notes 79–105 and accompanying text.

107. For a critical analysis of why the courts in *Leaverton* and *Smith* reached different results in analyzing their respective state statutes, see *infra* notes 109–120 and accompanying text.

108. For a critical analysis of the difficulties in uniformly classifying predicate crimes and suggestions of different ways to improve the jurisprudence regarding classifications of predicate crimes under the ACCA and the VCCA of 1994, see *infra* notes 109–40 and accompanying text.

109. For a discussion of the differing outcomes in *Leaverton* and *Smith*, and each court’s analysis of whether particular state convictions for voluntary manslaughter qualified as predicate crimes in the defendant’s subsequent sentencing for a separate crime, see *supra* notes 79–105 and accompanying text, explaining *Leaverton* and *Smith*.

110. Compare *United States v. Leaverton*, 895 F.3d 1251, 1257–58 (10th Cir. 2018) (noting that defendant was convicted under divisible state statute, and convicting elements that *Leaverton* was convicted under were too broad in comparison to the federal generic requirements (citing OKLA. STAT. TIT. 21, § 711)) with *United States v. Smith*, 882 F.3d 460, 464 (4th Cir. 2018) (noting that North Carolina’s manslaughter conviction requires an intentional killing, which implies force element). The main difference is that the Oklahoma statute was both divisible and too broad according to the court, and conversely, the North Carolina statute was very specific, and thus its narrow nature aided in meeting the federal guidelines for predicate crimes (despite the fact that the crime charged in each case was nearly identical under name). See *Leaverton*, 895 F.3d at 1257–58 (holding

charged and convicted of their state's equivalent of manslaughter; the difference was not necessarily the crime itself, but the way that their convicting statutes were worded.¹¹¹

In *Leaverton*, the divisibility of the statute and use of the modified categorical approach was good news for the defendant because the particular section of the statute was too broad in comparison to generic manslaughter under federal law.¹¹² Therefore, his manslaughter conviction *did not* qualify as a crime of violence.¹¹³ Consequently, the defendant could not face mandatory life imprisonment under the VCCA's three-strikes enhancement because the his criminal history did not include the required predicate crimes needed to trigger the enhancement.¹¹⁴

However, the defendant in *Smith* landed on the opposite side of the spectrum.¹¹⁵ Because North Carolina's voluntary manslaughter statute was clear, and corresponded with the intent element in the use-of-force clause of the ACCA, the defendant's manslaughter conviction *did* qualify as a violent felony.¹¹⁶ Thus, he was subjected to the fifteen-year mandatory minimum due to his conviction's classification as a violent crime.¹¹⁷

Oklahoma manslaughter conviction did not amount to violent predicate crime). *But see Smith*, 882 F.3d at 464 (holding North Carolina manslaughter conviction met federal guideline for violent predicate crime).

111. Compare OKLA. STAT. TIT. § 711 (Oklahoma's manslaughter statute analyzed in *Leaverton*) with N.C. CRIM. JURY INSTR. 206.40 (detailing elements for North Carolina voluntary manslaughter conviction). See also *Leaverton*, 895 F.3d at 1253 (noting defendant's prior Oklahoma manslaughter conviction); *Smith*, 882 F.3d at 464 (noting defendant's North Carolina voluntary manslaughter conviction). For a full discussion of why the particular wording or broadness of a statute matters in the classification of predicate crimes, see *supra* notes 56–78 and accompanying text.

112. See *Leaverton*, 895 F.3d at 1257–58 (“[W]e cannot say that a conviction under § 711(2) ‘necessarily involved facts equating to’ generic manslaughter.”).

113. See *id.* (holding that the Oklahoma manslaughter statute did not constitute generic manslaughter under VCCA).

114. See *id.* (stating that conviction under second prong of Oklahoma's first degree manslaughter statute did not “involve[] . . . facts equating to ‘generic manslaughter’” and thus did not qualify as manslaughter as defined in 18 U.S.C. 3559(c)(2)(F)(i)); see also OKLA. STAT. TIT. 21 § 711 (Oklahoma's first-degree manslaughter statute).

115. See *Smith*, 882 F.3d at 462 (holding that prior North Carolina voluntary manslaughter conviction did constitute violent felony, and thus sentencing enhancement under the ACCA applied).

116. See *id.* at 464 (“It is beyond dispute that the *intentional* use of force satisfies the *mens rea* requirement of ACCA's force clause. That is exactly what is required to support conviction for North Carolina voluntary manslaughter.”).

117. For a full discussion of the facts in *Smith* and explanation of why the *Smith* court held the defendant's voluntary manslaughter conviction under North Carolina law as a predicate violent felony for purposes of sentencing under the ACCA, see *supra* notes 93–105 and accompanying text. For a full discussion of why clear state statutes with an indivisible set of elements do not require analysis under the modified categorical approach, see *supra* note 45 and accompanying text, explaining the Supreme Court's ruling in *Mathis*. As one scholar notes, the “circum-

In juxtaposing these two cases and how each court determined the relevant predicate crime classification, the courts focused on how the particular state statute was worded, and how that statutory language measured up against its federal generic counterparts.¹¹⁸ It does not intuitively follow that just because someone is convicted of manslaughter in Oklahoma rather than under a more specifically-worded statute in North Carolina, that the manslaughter conviction for what may have been nearly identical conduct *does* qualify as a crime of violence in one instance and not another.¹¹⁹ This leaves one question: how do we fix it to avoid these disparate sentences?¹²⁰

B. *Remanding this Process for Resentencing to Achieve Correct Corrections
Method: Amending the Categorical and Modified Categorical
Approaches and Striving for Consistency Nationwide in
Classifying Predicate Crimes*

The current legal landscape of federal sentencing, enhancement, and crimes of violence has clearly created a problem.¹²¹ Jurisprudence in the area of deciding what does and does not constitute a crime of violence as a predicate crime has yielded inconsistent results for a variety of criminal acts.¹²² Thus, confusion exists on what actually constitutes a predicate violent felony, and inconsistent enhanced sentences are imposed for offenders who have committed nearly identical predicate crimes.¹²³ The only

stances” that require a sentencing judge to go beyond the convicting statute are when the statute a defendant is convicted under is “divisible.” See Sharpless, *supra* note 57, at 1284–85 (discussing categorical approach versus modified categorical approach).

118. For a discussion of how the state statute was analyzed in *Leaverton*, see *supra* notes 83–92 and accompanying text. Conversely, for an analysis of how the state statute was considered in *Smith*, see *supra* notes 93–105 and accompanying text.

119. For explanation of Oklahoma’s manslaughter statute, OKLA. STAT. TIT. 21 § 711, see *supra* notes 83–92 and accompanying text explaining its applicability in *Leaverton*. For an explanation of North Carolina’s voluntary manslaughter statute, see *supra* notes 93–105 and accompanying text explaining its function in *Smith*.

120. For a discussion of potential solutions to the issue of classification of predicate violent felonies in sentencing matters, see *infra* notes 121–40 and accompanying text.

121. For a discussion of the inconsistencies in results of two federal court cases addressing predicate crimes of state-level voluntary manslaughter, and the differing methods that the courts used in analyzing each of the statutes in play in their respective cases, see *supra* notes 79–105 and accompanying text discussing *Leaverton* and *Smith*.

122. Compare *Leaverton*, 895 F.3d at 1257–58 (holding that conviction under Oklahoma manslaughter statute did not qualify for federal sentencing enhancement), with *Smith*, 882 F.3d at 462 (holding that North Carolina manslaughter conviction qualified for federal sentencing enhancement). See, e.g., Richardson, *supra* note 35, at 2031 (noting that categorical approach provides “a threat uniformity”).

123. See Bench, *supra* note 1, at 208 (noting that Eighth Circuit jurisprudence after *Begay v. United States* has resulted in confusion over what constitutes a “violent

thing differentiating defendants' predicate crimes is the specific language of the statute the defendants were convicted under; different states have different statutes with different elements for what may truly does constitute the same crime—and some are clearer than others.¹²⁴

While some state statutes are clear and invoke clear application of the *Taylor* categorical approach, others require a court to divide up a state statute, and then compare particular conviction elements against the federal generic versions of the crime charged to determine if the state statute is broader or narrower than the federal statute.¹²⁵ If all states worded their criminal statutes the same way and all federal courts were interpreting the same statutory language, uniform application would be simple; however, because each state has different statutory schemes, the uniform application of federal sentencing guidelines becomes tricky and yields differing results for very similar crimes.¹²⁶

Critics have suggested a number of different ways that the crime-of-violence analysis could be improved to provide greater parallelism for sentencing results across jurisdictions.¹²⁷ Others have suggested scrapping

crime"); *see also* Embrey, *supra* note 13, at 470 (noting circuit splits regarding whether individual fleeing police officer constitutes violent crime for purposes of federal sentencing); Stegner, *supra* note 13, at 184 (noting differences in opinion as to whether fleeing police qualifies as predicate crime of violence).

124. *See* Bench, *supra* note 1, at 214 (explaining that "the use of categorical and modified categorical approaches to reviewing prior convictions can result in decisions that, at times, appear absurd depending upon the underlying facts of the prior convictions"). Bench noted that at other times, the cases applying these approaches reveal "a logical framework." *See id.* (noting that reviewing cases can reveal coherent background for applying *Begay*).

125. *See* Descamps v. United States, 570 U.S. 254, 263–64 (2013) (holding that *Taylor's* categorical approach is the base approach to take in analyzing statute for classification of predicate crime as violent felony, and modified categorical approach only applies when state statute lists several alternative elements, as opposed to "single, indivisible set of elements"); *see also* Shepard v. United States, 544 U.S. 13, 26 (2005) (noting that in case of alternative elements in individual statute, modified approach allows bringing in certain information from trial court documents); Sharpless, *supra* note 57, at 1284 (noting differences in situations where categorical approach and modified categorical approach apply); O'Connor, *supra* note 14, at 874 (noting that "[c]ourts interpreting the three-strikes law likely will apply the *Taylor* categorical approach as developed in the ACCA," but will look to the modified categorical approach in the case of "any ambiguities that exist with respect to what specific elements comprised the prior conviction").

126. For a discussion of the differing outcomes in two federal sentencings discussing whether particular state convictions for voluntary manslaughter qualified as predicate crimes in a subsequent sentencing, *see supra* notes 79–105 and accompanying text, explaining the facts and reasoning of *Leaverton* and *Smith*.

127. *See* O'Connor, *supra* note 14, at 883–85 (calling for post-conviction hearings for every crime to determine whether particular conviction qualified as crime of violence); *see also* Sharpless, *supra* note 57, at 1284 (noting that "an elements test ameliorates harsh sentencing"); Levine, *supra* note 14, at 566–67 (calling for remedies to "deficiencies" produced by predicate crime analysis and Armed Career Criminal Act). Levine's position is that the definition of "violent felony" should be amended to include concrete language, and additionally, Levine asserts that crimes more than fifteen years old, juvenile offenses, and prior convictions not

the categorical approach entirely, suggesting the need to totally revamp classification of predicate crimes under these statutes.¹²⁸ In adopting any of these methods, federal sentencing courts across the country might have more success in applying uniform sentences to defendants who have committed essentially the same crimes but were convicted under different state statutory schemes.¹²⁹

One suggested method of altering the current analysis of whether a particular predicate crime would qualify as a violent crime is for the legislators to impose a law asking federal and state sentencing courts to make a ruling after every felony conviction as to whether the conviction classifies as a violent felony.¹³⁰ This would take the onus off of the federal sentencing court in later felony convictions, as they would not need to apply the categorical or modified categorical approach at the time of sentencing; instead, there would be a hearing following every conviction to leave a clear record of the number of violent felonies a particular defendant has committed.¹³¹ However, courts and other scholars have noted that this

separated by an “intervening arrest” should not qualify as predicate offenses under the ACCA. *See* Levine, *supra* note 14, at 567 (noting that “[m]aking these amendments to the ACCA would not only advance the congressional purpose that motivated its enactment but also would help to promote justice”).

128. *See* Richardson, *supra* note 35, at 1994–95 (arguing that categorical approach should not apply to certain parts of § 924 because of particular fact-specific inquiries and equating this to the argument made in *Johnson v. United States*, which held residual clause of statute as unconstitutionally void for vagueness). Richardson specifically says that the categorical approach should not apply to § 924 and specifically produces inconsistencies in sentences. *See id.* at 2031 (concluding that courts should send facts to the jury to decide whether a certain offense is a crime of violence”). Conversely to the method supposed by O’Connor, which would be to hold post-conviction hearings on whether a particular conviction qualified as a crime of violence, Richardson notes that this method would be ineffective. *See id.* at 2033 (advocating for “avoid[ing] the inefficiency of mini-trials” with respect to § 924).

129. *See* Levine, *supra* note 14, at 567 (noting that reforming scope of qualifying predicate violent felonies under Armed Career Criminal Act in more concrete manner “would help to promote justice”).

130. *See* O’Connor, *supra* note 14, at 884–85 (suggesting that one method of amending current legal situation with regard to confusion on what truly constitutes crime of violence would be to hold post-conviction hearings in every case to determine whether crime was violent).

131. *See* O’Connor, *supra* note 14, at 884 (noting that process of classifying prior offenses for purposes of current sentencing “could be simplified if whenever a court convicted a defendant it produced a clear and concise record, taking into consideration that the conviction may have meaning beyond the instant proceedings”). O’Connor notes a specific process that courts should take in classifying crimes:

Congress should direct the sentencing court to make three factual findings related to the underlying conduct of the prior offense (the ‘violence attributes’). First, the sentencing court should determine whether the prior offense involved the use of a dangerous weapon or firearm. Second, the sentencing court should find whether the offense involved the threatened use of a firearm or dangerous weapon. Third, the sentencing

method has the potential to create extra court hearings following conviction.¹³²

Other critics have suggested other methods for amending current predicate crime jurisprudence, such as making statutory law more concrete on what predicate crimes include to avoid an overbreadth issue.¹³³ These methods suggest that actually specifying certain crimes as violent under statutory law will provide greater clarity in defining predicate offenses.¹³⁴ Regardless of how one reforms the approach to categorizing predicate violent felonies, it is evident that reform is needed.¹³⁵ Putting an emphasis on whether a state statute is broad in comparison to its federal counterparts provides an inconsistency in federal sentencing for offenders who truly have committed the same predicate crime.¹³⁶ This approach aids in creating an unjust penal system, in which citizens may receive lighter sentences than parallel offenders merely because their state law was broad—not because their actual conduct differed that greatly from offenders in other states.¹³⁷ Because of the injustice imposed by the current predicate crime analysis system, courts should adopt an approach

court should indicate whether the crime resulted in death or serious bodily harm.

See id. at 885. O'Connor argues that this process would establish a "direct benefit" in allowing sentencing courts to focus on "attributes of violence" rather than conducting the categorical analysis. *See id.* at 886 ("[A] direct benefit arises from providing easy access to a prior offense's underlying conduct, specifically, enabling a later sentencing court to determine the existence of any attributes of violence.").

132. *See* Richardson, *supra* note 35, at 2033 (noting that conducting post-conviction "mini-trials" in order to classify predicate crimes as a crime of violence would be inefficient). Richardson also emphasizes that the court in *Taylor* specifically guided against a fact specific analysis in order to avoid "practical inconvenience" in considering predicate crimes. *See id.* at 2004.

133. *See* Levine, *supra* note 14, at 567 (calling for more concrete statutory construction of what constitutes violent crime for purposes of ACCA and classifying predicate offenses).

134. *See* Levine, *supra* note 14, at 567 (arguing that under ACCA, burglary of structure other than dwelling, escape, and felony DUI should also be classified as violent predicate offenses under the statutory scheme itself). Levine also argues for timing amendments in categorizing predicate crimes, specifically that crimes committed more than fifteen years prior to the current offense not qualify as predicate offenses, in addition to juvenile crimes and crimes "not separated by an intervening arrest . . . [and] contained in the same charging instrument or resulted in sentences imposed on the same day should not qualify as separate predicate offenses". *See id.* at 540 (explaining three proposals for timing issues).

135. *See* Bench, *supra* note 1, at 214 (stating that even within same circuit, confusion exists regarding predicate violent crime analysis); *see also* O'Connor, *supra* note 14, at 884 (recommending reform for predicate crime sentencing when classifying violent crimes); Levine, *supra* note 14, at 567 (noting challenges in predicate crime classification and seeking consistency in labeling certain crimes as predicate violent crimes for purposes of federal sentencing).

136. *See* Bench, *supra* note 1, at 214 (noting that current approaches to classifying predicate crimes sometimes create results that appear to be counterintuitive).

137. *See* Levine, *supra* note 14, at 567 (arguing that reforming scope of qualifying predicate violent felonies under ACCA in more concrete manner "would help

where felonies are classified by the sentencing or trial court as violent immediately after conviction, specifically based on the underlying facts of the individual case.¹³⁸ Brief court hearings following conviction would be a small inconvenience when a mandatory minimum life sentence is at stake, and could simply be viewed as a short follow-up to trial proceedings.¹³⁹ Moreover, it would create a simpler process further down the line when new convictions are considered, and would eliminate the heavy reliance on statutory language in determining whether a crime is truly violent.¹⁴⁰

IV. HOW WE SHOULD USE THIS SENTENCE TO REHABILITATE: IMPACT OF INCONGRUOUS SENTENCING ON JUSTICE

Enhancing sentencing is certainly important for the most violent offenders who pose dangerous risks to society because protecting society and our communities is one of the main purposes of the penal system in the United States.¹⁴¹ It is in the interest of our communities to keep guns out of the hands of dangerous felons and to keep repeat violent offenders from having the chance to commit additional violent crimes; the ACCA and VCCA have important purposes in deterring behavior by imposing greater sentences.¹⁴² Nevertheless, if sentences are going to be enhanced under federal law in one jurisdiction, intuitively, those enhanced sentences should apply uniformly for offenders with the same conduct across all federal jurisdictions.¹⁴³ We, as citizens, should hold our judicial

to promote justice,” and suggesting that current jurisprudence in classifying predicate violent felonies is somewhat flawed).

138. See O'Connor, *supra* note 14, at 885 (describing approach where sentencing court could make findings with respect to convictions).

139. See O'Connor, *supra* note 14, at 886–87 (advocating that classification of felonies at post-conviction hearing would be beneficial). O'Connor asserts that while federal courts have rejected a fact specific approach in light of judicial economy, the judicial economy concern evaporates when the fact-finding court is tasked with making the inquiry. See *id.*

140. See O'Connor, *supra* note 14, at 887 (emphasizing that requiring courts to make findings following every individual conviction will help later courts in that sentencing court will “focus on increased punishment of truly violent criminals” instead of focusing on “whether the prior offense was actually violent”).

141. See Bagaric, *supra* note 14, at 348 (noting that one of main purposes of sentencing and sentencing law is “community protection”). In addition to noting community protection as one of the main purposes of sentencing, Bagaric explains that rehabilitation, deterrence, retribution, and denunciation are other main “objectives” of sentencing law. See *id.* (explaining typical “objectives” of sentencing law); see also Taifa, *supra* note 52, at 718 (noting that one of main claims of those enacting three-strikes legislation was “to protect society from the most dangerous felons”). Taifa, like Bagaric, also notes that policies like the three-strikes provision are also enacted to “deter people from committing crimes.” See Taifa, *supra* note 52, at 725 (explaining beliefs behind “crime control policies”).

142. For a full discussion of the mandatory minimums imposed for offenders who have previously committed crimes of violence or violent felonies under the ACCA or VCCA, see *supra* notes 39–55 and accompanying text.

143. For a discussion of inconsistent results reached in different circuits with respect to state manslaughter charges, see *supra* notes 79–105 and accompanying

system accountable and advocate to keep classifications of convictions uniform across the nation when potential mandatory life sentences are at risk. Protecting liberty is one of the key concepts that our Nation is founded upon and, if liberty is being improperly taken away, we need to do better.¹⁴⁴

text; for summaries of further scholarship discussing whether other crimes qualify as predicate crimes of violence for the purposes of federal sentencing, both broadly and in particular circuits, such as eluding police or fleeing, see *supra* notes 13–14 and accompanying text.

144. For a full discussion on how to keep the judicial system more accountable, see *supra* notes 121–140 and accompanying text.

