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THE FUTURE OF RESIDUAL CLAUSE INTERPRETATION: “SHANKING” THE COMMENTARY AND SIMPLIFYING SENTENCING ENHANCEMENT ANALYSIS AFTER UNITED STATES v. MOBLEY

NICOLAS A. NOVY*

“It will be found an unjust and unwise jealousy to deprive a man of his natural liberty upon the supposition he may abuse it.”

George Washington1

I. INTRODUCTION

In September 2009, Jermaine Mobley sought medical treatment for his back at a prison infirmary while serving his 151-month prison sentence for possession with intent to distribute.2 The physical therapist picked up his right shoe to examine the insole and found a homemade knife, or “shank,” concealed within.3 Subsequently, Mobley pled guilty to possession of a prohibited object in prison.4 The sentencing judge enhanced his sentence, and labeled Mobley a “Career Offender” by concluding that possession of a shank in prison amounted to a “crime of violence.”5 In United States v. Mobley,6 the Fourth Circuit agreed, and upheld the sentence.7

In the mid-1980s, Congress and the Federal Sentencing Commission began targeting career criminals due to evidence suggesting a small group

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2. See United States v. Mobley, 687 F.3d 625, 626 (4th Cir. 2012) (describing background of Mobley’s previous conviction for heroin possession with intent to distribute).

3. See id. (explaining Mobley’s attempt to hide shank underneath examination table after physical therapist discovered it). Shanks are customarily “made by inmates from bits and pieces of metal and sharpened against concrete.” See id. at n.1 (citation omitted).


5. See Mobley, 687 F.3d at 627 (summarizing sentencing judge’s determination that Mobley’s possession amounted to crime of violence). For an analysis of the statutory language, see infra notes 21–27 and accompanying text.

6. 687 F.3d 625, 626 (4th Cir. 2012).

7. Id. at 626 (issuing holding affirming sentence).
of repeat offenders were responsible for a large number of crimes.\textsuperscript{8} Congress enacted the Armed Career Criminal Act (ACCA) in 1986, which imposed minimum sentences on certain felons with multiple prior convictions for “violent felony[ies] or serious drug offense[s].”\textsuperscript{9} The Federal Sentencing Commission followed suit three years later by incorporating nearly identical language into section 4B1.1 of the U.S. Sentencing Guidelines (“Sentencing Guidelines” or “Guidelines”)—the “Career Offender” provision.\textsuperscript{10} Under section 4B1.1, an enhanced sentence is imposed on repeat offenders who have been convicted of three “crime[s] of violence or controlled substance offense[s].”\textsuperscript{11} A crime of violence is defined in pertinent part as, “any offense . . . [that] is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.”\textsuperscript{12} The last phrase—known as the “residual clause”—is also found in the ACCA definition of “Violent Felony,” was the focus of the \textit{Mobley} opinion and has been the subject of much debate.\textsuperscript{13}

This Note argues that the Fourth Circuit’s decision in \textit{Mobley} was inconsistent with prior Supreme Court decisions, was contrary to original legislative intent, and fails to achieve justice and fairness in sentencing.\textsuperscript{14} To realize a more universal residual clause framework, courts must focus on the primary intent behind the legislation: punish violent \textit{acts} that are similar in degree and risk to the enumerated offenses in the statute.\textsuperscript{15}

\begin{itemize}
  \item \textsuperscript{8} See Megan A. Embrey, Comment, \textit{A Circuit Split Survey on Violent Felonies and Crimes of Violence: Where Does the Tenth Circuit Stand?}, 88 \textit{DENV. U. L. REV.} 469, 469 (2011) (explaining purpose of sentencing enhancement for repeat offenders of serious crimes).
  \item \textsuperscript{9} 18 U.S.C. 924(e)(1); see, \textit{e.g.}, Begay v. United States, 553 U.S. 137, 139–48 (2008) (discussing ACCA and definition of “violent felony” thereunder).
  \item \textsuperscript{13} See id.; 18 U.S.C. 924(e)(2)(B)(ii) (providing relevant portion of ACCA definition of “Violent Felony”); see also Montgomery, supra note 10, at 718 (explaining that analysis for violent felonies under ACCA and crimes of violence under Sentencing Guidelines are essentially identical). For a discussion of the Supreme Court’s opinions analyzing the residual clause, see infra notes 39–69 and accompanying text.
  \item \textsuperscript{14} For a discussion of why the \textit{Mobley} court incorrectly interpreted the residual clause provision, see infra notes 113–41 and accompanying text.
  \item \textsuperscript{15} See Begay v. United States, 553 U.S. 137, 143 (2008) (asserting enumerated offenses, i.e., burglary, arson, etc., limit crimes that may fall within residual clause because they must be similar “in kind as well as in degree of risk posed to the examples themselves”); see also United States v. McGill, 618 F.3d 1273, 1277
\end{itemize}
Courts should be wary of enhancing an offender’s term based on mere possession because it is the second unlawful act—the use of a weapon—that creates a substantial risk to others.\(^\text{16}\) Equating the two assumes inevitability of the second unlawful act, the use of the weapon, which has not yet occurred.\(^\text{17}\)

Part II of this Note analyzes the statutory language and the purpose of both the ACCA and the Career Offender provision under the Sentencing Guidelines.\(^\text{18}\) Part III traces the Supreme Court opinions that examine the residual clause and create the somewhat ambiguous analysis that circuit courts have labored to apply.\(^\text{19}\) Part IV analyzes the impact of the Guideline’s commentary that directs courts to enhance sentencing based on certain possession offenses.\(^\text{20}\) Part V explains the facts, procedural background, and analysis of the Fourth Circuit’s decision in *Mobley*.\(^\text{21}\) Part VI critiques the holding and reasoning in the *Mobley* decision as inconsistent with Supreme Court precedent and contrary to congressional intent.\(^\text{22}\) Part VII considers the implications of the *Mobley* decision and offers two suitable alternative solutions that create a more manageable

\(^{11\text{th Cir. 2010}}\) (recognizing Congress included use of explosives as enumerated violent felony and, therefore, did not intend for mere possession of explosives to constitute violent felony). For a further discussion on interpreting the residual clause provision in conjunction with the enumerated offenses, see infra notes 118–21 and accompanying text, and for a further discussion of *Begay*, see infra notes 46–51 and accompanying text.

\(^{16}\) See Serafin v. United States, 562 F.3d 1105, 1115 (10th Cir. 2009) (holding possession of unregistered weapon did not constitute crime of violence). “[T]he use or risk of force is not implicated in [defendant’s] possession of the unregistered rifle, rather it is the risk he would commit another crime to obtain or retain possession.” Id. (explaining risk is recognized when weapon is used, not merely possessed). “For example, an individual possessing an unregistered sawed-off shotgun might use it against someone . . . . [b]ut at a minimum, this scenario would result in a charge of aggravated assault or something similar—and that resulting crime potentially qualifies as a ‘crime of violence’—not the possession itself.” See id. (emphasizing danger of weapon is inherent in its use).

\(^{17}\) See United States v. Bradford, 766 F. Supp. 2d 903, 909 (E.D. Wis. 2011) (holding possession of short-barreled shotgun was not violent felony under ACCA). The court explains that mere possession only has a “hypothetical connection to violence.” See id. (“[S]imple possession merely creates a potential for violence and aggression that is ordinarily realized only if possession ripens into use . . . .”).

\(^{18}\) For a discussion of the statutory language and the purpose behind the ACCA and 4B1.1 of the Sentencing Guidelines, see infra notes 24–32 and accompanying text.

\(^{19}\) For a discussion of the Supreme Court decisions that analyze the residual clause, see infra notes 36–78 and accompanying text.

\(^{20}\) For a discussion of the commentary and the impact that it has had on lower courts, see infra notes 83–95 and accompanying text.

\(^{21}\) For a discussion of the Fourth Circuit’s decision in *Mobley*, see infra notes 96–112 and accompanying text.

\(^{22}\) For a critique of the decision in *Mobley*, see infra notes 113–141 and accompanying text.
framework for courts to uniformly interpret residual clause offenses in the future.\textsuperscript{23}

II. THE BIRTH OF STATUTORY CONFUSION: THE SENTENCING COMMISSION'S FIRST ATTEMPT TO BROADEN OFFENSES THAT FALL WITHIN THE RESIDUAL CLAUSE

Section 4B1.1 of the Sentencing Guidelines provides a framework for increasing base offense levels for “Career Offenders” who have committed previous “crimes of violence” or “controlled substance offenses.”\textsuperscript{24} Congress initially intended that the Sentencing Commission use the pre-existing definition of a crime of violence when determining whether a defendant should be labeled a Career Offender under the Guidelines.\textsuperscript{25} This universal definition required the substantial risk of physical injury to arise during the commission of the offense.\textsuperscript{26} Nevertheless, a few years later the Sentencing Commission expanded the Guidelines’ definition of a Career Offender in section 4B1.2, despite judicial criticism that the new definition swept “too broadly.”\textsuperscript{27}

A defendant is labeled a Career Offender under section 4B1.1 if the defendant was at least eighteen years old at the time of the instant offense, the instant offense is a crime of violence or substance abuse offense, and the defendant has at least two prior convictions for crimes of violence or

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\textsuperscript{23} For a discussion of suitable solutions that would provide a workable framework for lower courts to analyze residual clause offenses in the future, see infra notes 142–72 and accompanying text.


\textsuperscript{25} See Amy Baron-Evans et al., Deconstructing the Career Offender Guideline, 2 Charlotte L. Rev. 39, 59 (2010) (stating that congressional intent was to have universal definition of “crime of violence,” however, Sentencing Commission did not comply and amended new definition anyway).

\textsuperscript{26} See 18 U.S.C. § 16(b) (2006) (defining universal crime of violence residual clause as “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense”); see also S. Rep. No. 98-225, at 304 (1983) (illustrating Congress’s intent that section 16 “define[] the term ‘crime of violence,’ used here and elsewhere in the bill”). The general definition of “crime of violence” found in section 16 and the ACCA’s definition in Section 994(h) were both enacted as part of the Comprehensive Control Act of 1984. See Baron-Evans et al., supra note 25, at 59 n.38 (explaining that both definitions stemmed from same act); see also Sale v. Haitian Ctrs. Council, 509 U.S. 155, 203 n.12 (1993) (“It is axiomatic that ‘identical words used in different parts of the same act are intended to have the same meaning.’” (quoting Atl. Cleaners & Dryers, Inc. v. United States, 286 U.S. 427, 433 (1932))).

\textsuperscript{27} See Baron-Evans et al., supra note 25, at 59 (illustrating Commission’s reluctance to state any reason for changing definition of crime of violence despite judicial animosity).
substance abuse offenses. In pertinent part, section 4B1.2 defines a “crime of violence” as an offense that “is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” The requirement that the substantial risk of physical injury must arise during the commission of the offense is conspicuously absent; thus the Sentencing Commission effectively expanded the scope of the residual clause beyond Congress’s intent.

The language in the ACCA that provides a similar sentencing enhancement for offenders with three prior convictions of a “violent felony” is virtually identical to the Sentencing Guidelines’ definition of a “crime of violence.” Therefore, courts have considered analyses under the ACCA.


[A]n 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.

Id. § 4B1.2(b) (emphasis added) (defining controlled substance offense). Possession of a controlled substance, alone, is not sufficient; intent to distribute, or some other form of intent to dispense the substance is also necessary. See id.


30. See Baron-Evans et al., supra note 25, at 59 (describing Commission’s acknowledgment that its new definition “reached offenses not traditionally considered crimes of violence”).

31. See Montgomery, supra note 10, at 718 (acknowledging Supreme Court decisions are wide-reaching because of virtually identical language in both statutes). Nevertheless, the ACCA mandates sentencing enhancement when the instant offense is unlawful possession of a firearm by a felon and the defendant has three prior convictions of “violent felonies.” See 18 U.S.C. § 924(e) (2006) (illustrating examples of sentencing enhancement). In contrast, the Sentencing Guidelines imposes sentencing enhancement when an offender has committed a “crime of violence” and has “at least two prior felony convictions of either a crimes of violence or controlled substance offense.” See U.S. Sentencing Guidelines Manual § 4B1.1 (2012) (describing requirements for “Career Offender” sentencing enhancement). This distinction, however, does not change the analysis of either residual clause and is therefore outside the scope of this Note. The ACCA defines a violent felony as follows:

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

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

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another . . .
residual clause and the Sentencing Guidelines residual clause to be interchangeable.\footnote{32}

III. THE SUPREME COURT’S ATTEMPT TO NARROW THE PLAYING FIELD: CONFUSING BUT IMPLICITLY SOUND

Despite the Sentencing Commission’s best efforts to sweep in unconventional crimes of violence to enhance sentencing more frequently, the “Supreme Court stepped in [and] narrowly interpret[ed] the statutory definitions of ‘crime of violence’ and ‘violent felon[ies]’” as amended by the Commission.\footnote{33} However, the Supreme Court’s interpretation of the residual clause has resulted in a circuit split and incompatible interpretations applied by various district courts.\footnote{34} When analyzing whether a certain offense falls within the residual clause and constitutes a crime of violence or a violent felony, courts consider: (1) what information is applicable, and (2) whether the crime falls within the residual clause.\footnote{35}

\footnote{18 U.S.C. § 924(e)(2)(B). The residual provision in the Sentencing Guidelines only differs slightly by using the phrase “burglary of a dwelling” whereas the ACCA refers to general “burglary.” Compare U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2012) (requiring “burglary of a dwelling”), with 18 U.S.C. § 924(e)(2)(B) (indicating standard “burglary” is sufficient to classify “violent felony”). For the purpose of this Note, however, the distinction is irrelevant.}

\footnote{32. See United States v. Brown, 514 F.3d 256, 268 (2d Cir. 2008) (explaining courts analyzing offenses under ACCA’s residual clause provision are guided by cases interpreting Section 4B1.2(a)’s residual clause and vice versa, due to nearly identical language in both clauses); see also United States v. Wise, 597 F.3d 1141, 1145 (10th Cir. 2010) (“The residual clause of the ACCA is worded almost identically to that of § 4B1.2(a), and we have held that in interpreting ‘crime of violence’ under § 4B1.2, we may look for guidance to cases construing the ACCA’s parallel provision.”), cert. denied, 131 S. Ct. 3020 (2011); United States v. Tyler, 580 F.3d 722, 724 n.3 (8th Cir. 2009) (“Although the Gordon court was analyzing whether an offense constituted a ‘violent felony’ under the Armed Career Criminal Act, we employ the same test to decide whether an offense constitutes a ‘crime of violence’ under the Sentencing Guidelines because the definitions of ‘violent felony’ and ‘crime of violence’ are virtually identical.” (citing United States v. Wilson, 562 F.3d 965, 967–68 (8th Cir. 2009))). Despite the language being virtually identical, some commentators have suggested that “the ACCA’s definition of ‘violent felony’ should be amended to be consistent with the Guidelines definition of ‘crime of violence’ in order to avoid any further inconsistencies or prejudice. See James G. Levine, Note, The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency, 46 HARV. J. ON LEGIS. 537, 567 (2009) (advocating for one completely uniform definition).}

\footnote{33. Baron-Evans et al., supra note 25, at 59 (explaining that Supreme Court attempted to help resolve issue by narrowly interpreting residual clause language in both ACCA and Sentencing Guidelines).}

\footnote{34. See Montgomery, supra note 10, at 719 (suggesting Supreme Court’s interpretation of residual clause is so irreconcilable that Congress should amend ACCA).}

The Categorical Approach: Established in Taylor and refined in James

In Taylor v. United States, the Supreme Court established that courts may only consider whether the “generic” offense constituted a crime of violence and are restrained from considering the facts in any particular case. When evaluating an offense as a potential crime of violence, courts must use a “categorical approach that relies only on the state statute’s elements and the fact that there was a conviction under that statute.” The court adopted the categorical approach because the “practical difficulties and potential unfairness of a factual approach [were] daunting.” Only in a narrow range of cases, where the state’s statute is broader than the definition of the generic offense, can the specific facts of the defendant’s offense be considered.

Taylor’s categorical approach was slightly modified in James v. United States. The Supreme Court found that attempted burglary constituted a violent felony under the residual clause despite lacking the statutory ele-


37. See id. at 602 (establishing courts must only consider elements of offense and not underlying facts of defendant’s specific crime).


39. Taylor, 495 U.S. at 601 (describing inherent difficulties in speculating whether defendant’s specific conduct constituted crime of violence); see also Isham M. Reavis, Comment, Driving Dangerously: Vehicle Flight and the Armed Career Criminal Act After Sykes v. United States, 87 Wash. L. Rev. 281, 330 (2012) (explaining “ACCA levies too harsh a penalty to be applied with anything less than the caution demanded by the categorical approach”). Namely, in some cases “only the Government’s actual proof at trial would indicate whether the defendant’s conduct constituted generic burglary.” Taylor, 495 U.S. at 601 (explaining possibility Government would have to present testimony of witnesses again before sentencing court). The court also noted that nothing in the statute indicates that Congress intended sentencing courts to engage in “elaborate fact finding” when considering the defendant’s prior offenses. See id. (stating lack of congressional history and plain meaning of statute supports categorical approach).

40. See Taylor, 495 U.S. at 602 (considering state statute allowing convictions of burglary for entry of automobile and entry of building). If a state statute includes breaking and entering of an automobile sufficient to support a burglary conviction, factual evidence of defendant’s crime can be introduced at sentencing to show whether the statutory requirements for generic burglary were met. See id. (explaining that convictions of burglary under certain state statutes may not rise to conviction of “generic” burglary). Thus, only when a state statute requires the same or narrower elements to support a conviction for burglary can the Government use that conviction to support a sentencing enhancement. See id. (describing situations where government can use conviction under state law to support sentencing enhancement under Career Offender provision of Sentencing Guidelines).

ments of a generic, completed burglary. Although attempted burglary is not a completed crime, a violent felony under the residual clause need only involve conduct that “presents at least as much risk as one of the enumerated offenses.” The court reasoned that attempted burglary, in the ordinary case, involves inevitable face-to-face confrontation that presents just as much, if not more, potential risk to others than a completed burglary. Although James narrowed the statutory element requirement expressed in Taylor, the Court also recognized the danger in a fact-specific analysis and concluded the “proper inquiry is whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another.”

B. Narrowing the Lens of the Residual Clause: The Court Rules on DUI Offenses

Larry Begay was convicted of three driving under the influence (“DUI”) felonies under New Mexico law, but the Supreme Court refused to categorize his offenses as violent crimes under the residual clause in Begay v. United States. The Court reasoned that the presence of the enumerated offenses (burglary, arson, etc.) indicated the statute was only intended to cover “similar crimes, rather than every crime that ‘presents a serious potential risk of physical injury to another.’” The enumerated examples limit the reach of the residual clause because the clause may only cover crimes that are “roughly similar, in kind as well as in degree of

42. See id. at 214 (holding Taylor’s categorical approach is still applicable). Although the Court undercuts Taylor’s precedent to some extent, the Court in James recognized they “avoided any inquiry into the underlying facts of James’ particular offense, and have looked solely to the elements of attempted burglary as defined by Florida law.” See id. (implementing Taylor’s categorical approach).

43. See id. at 210–11 (recognizing that although some attempted burglaries are non-violent, attempted burglaries in ordinary case and completed burglaries present equivalent risk to others); see also Holman, supra note 35, at 220 (“A hypothetically peaceful commission of the crime should not exclude it from the residual clause.”).

44. See James, 550 U.S. at 204 (concluding that risk posed by attempted burglary is comparable to risk posed by completed offense).

45. See id. at 208 (emphasis added) (reasoning Court’s approach simplifies residual clause analysis). But see Holman, supra note 35, at 220–21 (explaining that James approach supplies lower courts with insufficient guidance). Holman criticizes James because sentencing courts have “few tools” to consistently determine whether conduct, in the ordinary case, is sufficiently risky. See id. (lamenting that sentencing courts only have their “intuitive belief” and rough statist at their disposal).

46. 553 U.S. 137 (2008). New Mexico law makes DUI a felony after the fourth subsequent offense, and defendant Begay had been arrested for DUI twelve times. See id. at 140 (citing N.M. STAT. ANN. § 66-8-102G-J (West 2007) (noting Begay’s twelfth DUI marked his third violent crime according to sentencing court).

47. Id. at 142 (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2006)) (explaining enumerated offenses would be superfluous had Congress meant for clause to include all crimes that present serious potential risks of physical injury).
risk posed, to the examples themselves.” Specifically, the enumerated offenses all “typically involve purposeful, ‘violent,’ and ‘aggressive’ conduct.”

In Begay, the Court recognized that although a defendant who drives while intoxicated poses a significant potential risk of physical injury to others, the offense does not involve the purposeful, violent, and aggressive conduct that is characteristic of the examples enumerated in the statute.

48. Id. at 143 (explaining courts must give effect to every clause and word when interpreting statutes); see also Leocal v. Ashcroft, 543 U.S. 1, 12 (2004) (advocating that every word in statute must be given effect whenever possible); Duncan v. Walker, 533 U.S. 167, 174 (2001) (discussing clauses in statutes must be read together in order to be correctly interpreted). The court also noted the word “otherwise” did not expand the scope of the clause because “otherwise” means offenses may differ in the “way or manner” they produce certain risks. See Begay, 553 U.S. at 144 (quoting Webster’s Third New International Dictionary 1598 (1961)).

49. Begay, 553 U.S. at 144–45 (quoting United States v. Begay, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part) (citations omitted), reversed and remanded, 553 U.S. 137 (2008)); cf. Model Penal Code § 220.1(1) (1985) (describing “arson” as causing fire or explosion “with the purpose of . . . destroying or damaging any property”). The Court also recognizes this purposeful, violent, and aggressive conduct is the type of conduct that makes a perpetrator who later possesses a gun more likely to “use that gun deliberately to harm a victim.” See Begay, 553 U.S. at 145 (explaining such violent, aggressive, purposeful crimes are characteristic offenses of armed career criminal or career offender). But see Holman, supra note 35, at 229–31 (noting “likely shooter” analysis has no contextual roots in statute or legislative history). The “likely shooter” analysis stems from the ACCA’s requirement that the defendant be charged with the instant offense of felon-in-possession of a firearm after being previously convicted of three “violent felonies.” See id. at 229 (asserting analysis was created for sole purpose to avoid unjust results such as finding DUI offenses as violent felonies). The analysis also directly conflicts with the categorical approach announced in Taylor/James. See id. at 230 (explaining likely shooter analysis “casts a wider net” than categorical approach because in considering whether offender would likely commit deliberate, harmful, crime against another, courts are considering defendant’s previous conduct and not solely whether instant offense creates substantial risk of physical injury to another in ordinary case). For a discussion of the categorical approach, see supra notes 36–45 and accompanying text. Although Begay introduces the “likely shooter” analysis in a case interpreting the ACCA, because the offender was in possession of a gun, the analysis can still be helpful when determining whether a defendant committed a crime of violence under the Sentencing Guidelines because the analysis is predominantly based on targeting a certain “type” of violent career offender. See Cynthia R. Cook, Comment, The Armed Career Criminal Act Amendment: A Federal Sentence Enhancement Provision, 12 Geo. Mason U. L. Rev. 99, 114 (1989) (noting ACCA and USSG both target “the individual who has been deemed a threat to society”).

50. Begay, 553 U.S. at 145 (reasoning DUI felonies are more similar to strict liability crimes, rather than those offenses enumerated in statute that involve violent, aggressive, and purposeful behavior). Although a DUI offender may “drink on purpose . . . . [T]he conduct for which the drunk driver is convicted . . . need not be purposeful or deliberate.” Id. at 145; see also United States v. Begay, 470 F.3d 964, 980 (10th Cir. 2006) (explaining even though DUI offenses “undoubtedly entail[ ] risk of physical injury to others, drunk driving is a crime of negligence or recklessness, rather than violence or aggression”), rev’d and remanded, 553 U.S. 137 (2008). Although a DUI offense reveals “a degree of callousness toward risk,” it
The Court made clear that the offenses may only fall within the scope of the residual clause if the conduct is similar in nature and degree of risk posed to the enumerated offenses in the statute.  

C. Passive Crimes Fall Outside the Residual Clause

The Supreme Court reiterated its Begay analysis a year later in Chambers v. United States, and held that failing to report to a penal institution for weekend confinement did not constitute a violent felony under the residual clause of the ACCA. The Court properly recognized that failing to report is a form of inaction and “a far cry” from the conduct “potentially at issue when an offender uses explosives against property, commits arson, burges a dwelling or residence, or engages in certain forms of extortion.” Although the offender who fails to report is doing “something at the relevant time, there is no reason to believe that the something poses a serious potential risk of physical injury.” The Court supported its reasoning by introducing statistics that demonstrated that violence does not typically occur “during [the] commission of the offense itself.”

does not, unlike the enumerated offenses, indicate an increased likelihood that the offender is “the kind of person who might deliberately point the gun and pull the trigger.” Begay, 553 U.S. at 146 (categorizing type of person targeted by statute). The Court concluded that driving under the influence “is simply too unlike the provision’s listed examples for us to believe that Congress intended the provision to cover it.” See id. at 142 (implying Congress did not intend to cover offenses that were not actively deliberate).

1. See Embrey, supra note 8, at 480 (noting that “Begay test requires not only that the offense present a serious potential risk of physical injury to another, but it must also be ‘roughly similar, in kind as well as degree of risk posed’ to the enumerated offenses” (quoting Begay, 553 U.S. at 143–45)). The author states “[a] crime is ‘roughly similar’ to an enumerated offense if it ‘typically involve[s] purposeful, “violent,” and “aggressive” conduct.’” Id. (quoting Begay, 553 U.S. at 143–45) (alteration in original) (emphasis added).


3. See id. at 123–24 (recounting defendant’s sentence required him to report to prison for eleven weekends of incarceration, and he failed to report on four separate occasions).

4. Id. at 128 (comparing failing to report to penal institution with use of explosives, burglary, and arson). Without defining the terms “purposeful, violent, and aggressive,” the Court recognized that passive, non-active offenses are too disparate from the characteristics of the enumerated offenses exemplified in the statute. See id. (same).

5. Id. (implying courts cannot assume defendant would inevitably commit future crime during weekend he failed to report). Furthermore, the contrary assumption seems more likely because an individual “who fails to report would seem unlikely, not likely, to call attention to his whereabouts by simultaneously engaging in additional violent and unlawful conduct.” See id. (explaining rationale for holding).

6. See id. at 129 (citing U.S. Sentencing Comm’n, Report on Federal Escape Offenses in Fiscal Years 2006 and 2007 6 (2008)) (acknowledging that of 160 failure to report cases, “none at all involved violence” during commission of offense). The Court, for the first time, demonstrated an offense cannot be categorized as a crime of violence or a violent felony if physical injury results in only one
D. **Slight Retreat from Begay Causes Confusion for Lower Courts**

The Supreme Court’s most recent attempt to provide lower courts with a clear residual clause framework was predominantly unsuccessful in *Sykes v. United States*.57 The Court held that knowingly and intentionally fleeing law enforcement in a vehicle was a violent felony under the ACCA and required sentencing enhancement.58 When an offender intentionally defies law enforcement by fleeing in a vehicle, a “lack of concern for the safety of property and persons . . . [is] an inherent part of the offense.”59 This intentional disregard for the safety of others is fundamentally why vehicle flight presents a serious potential risk of physical injury to others.60

In coming to its conclusion, the Court analogized vehicle flight to the crime of burglary, noting that the danger in burglary is that it “can end in confrontation leading to violence.”61 Unlike burglary, however, vehicle flights occur in the presence and in defiance of police orders, causing a substantial risk of collisions and injuries to persons and property.62 In support of its conclusion, the Court introduced statistics to illustrate that vehicle flights result in physical injury to innocent third parties twenty percent more often than burglaries, and held that vehicle flight is signifi-

out of every thousand attempts. *See id.* at 130 (concluding that failure to report for penal confinement is not violent felony); *see also Runyon, supra note 38, at 458 (asserting Chambers “set the floor for the level of risk that is insufficient to qualify under the residual clause”).

57. 131 S. Ct. 2267 (2011). *See Runyon, supra note 38, at 465 (explaining Sykes missed an opportunity to provide lower courts with workable residual clause framework that could be consistently applied). Justice Scalia, in his dissent in *Sykes*, provided that “[i]nsanity, it has been said, is doing the same thing over and over again, but expecting different results. Four times is enough.” *Sykes*, 131 S. Ct. at 2284 (Scalia, J., dissenting) (explaining Court has failed, yet again, to provide sufficient guidance to interpret ambiguous residual clause).

58. *See Sykes*, 131 S. Ct. at 2270 (noting vehicular flight was defendant’s third violent felony and required sentencing enhancement).

59. *Id.* at 2273 (explaining defendant creates possibility that police will “exceed or almost match his speed or use force to bring him within their custody”). In the instant case, defendant “wove through traffic, drove on the wrong side of the road and through yards containing bystanders, passed through a fence, and struck the rear of a house. Then he fled on foot. He was found only with the aid of a police dog.” *Id.* at 2272.

60. *See id.* at 2273 (acknowledging dangers inherent in vehicle flight have “violent—even lethal—potential for [risk of physical injury to] others”).

61. *Id.* (explaining that burglary is enumerated statutory violent felony that presents similar risks to innocent third parties). The Court notes the danger in face-to-face confrontation is of a “greater degree” in vehicle flight because it is the “expected result . . . [and] places property and persons at serious risk of injury.” *See id.* at 2273–74 (anticipating almost inevitable necessity for police to “approach with guns drawn to effect arrest” once vehicle chase ceases).

62. *See id.* at 2274 (implying vehicle flight has higher degree of risk than enumerated offense—burglary).
cantly more risky than the “‘closest analog among the enumerated offenses.’” 63

The holding in Sykes is consistent with past residual clause precedent, but the Court went out of its way to suggest offenses no longer need to be classified as “purposeful, violent, and aggressive” in order to be characterized as a crime of violence. 64 The Court explained that Begay involved a strict liability offense—driving under the influence—and the “purposeful, violent, and aggressive” analysis was only meant to explain that result. 65 The Sykes Court suggested that the Begay analysis was only applicable to strict liability offenses that do not require purposeful conduct. 66

Thus, the Court attempted to narrow the analysis and focus primarily on whether the offense at bar is “similar in risk” to the enumerated offenses. 67 Despite slightly undermining the Begay/Chambers rationale, the Court recognized the intentional, active, and destructive nature of vehicular flight and noted that the Begay analysis is “an addition to the statutory text” and “[i]n many cases . . . will be redundant . . . .” 68 As Justice Scalia

63. Id. at 2273 (quoting James v. United States, 550 U.S. 192, 203 (2007)) (holding vehicular flight was violent felony because it created significantly more risk of physical injury to others than risk presented by similar enumerated offense). See Runyon, supra note 38, at 459–60 (citing Sykes, 131 S. Ct. at 2274) (comparing statistics resulting in physical injury during burglaries with statistics resulting in physical injury during vehicle flights). Of 7,737 police pursuits, 313 injuries to police and bystanders occurred, a rate of more than 4 injuries to non-suspects per 100 pursuits. See Sykes, 131 S. Ct. at 2274. Of the average 3.7 million annual burglaries, 118,000 resulted in physical injuries to innocent third parties, or 3.2 injuries for every 100 burglaries each year. See id.

64. See id. at 2275 (indicating Begay’s “purposeful, violent, and aggressive” test should be limited).

65. See id. at 2275–76 (“The phrase ‘purposeful, violent, and aggressive’ has no precise textual link to the residual clause.”). For a discussion of why this test/phrase in Begay could not have been intended for solely reckless, or non-purposeful crimes, see infra note 66 and accompanying text.

66. See Sykes, 131 S. Ct. at 2285 (Scalia, J., dissenting) (explaining scope of Begay’s purposeful, violent, and aggressive analysis). Although the Court alleges Begay was intended solely for non-purposeful offenses, Justice Scalia correctly notes that such an interpretation “makes no sense.” See id. at 2285 (reasoning that if Begay test was to apply to only unintentional crimes, “it would be recast as the ‘purposeful’ test, since the last two adjectives (‘violent, and aggressive’) would do no work”).

67. Id. at 2276 (majority opinion) (emphasis added) (noting that comparing risk level of offense at bar to enumerated offense provides manageable approach when considering intentionally committed offenses). Nevertheless, the Court goes on to state that this approach “suffices to resolve the case before us.” See id. (emphasis added) (implying it is not only approach courts may use, and suggesting approach is not dispositive).

68. See id. at 2275 (describing nature of felony vehicular flight). The opinion certainly articulated the nature of the conduct at issue, describing felony vehicular flight as “entail[ing] intentional release of a destructive force dangerous to others” and consisting of a “provocative and dangerous act.” See id. at 2273–75 (asserting Begay test will not be necessary or dispositive analysis in most cases because “crimes that fall within the [Begay] formulation and those that present serious potential risks of physical injury to others tend to be one and the same”). But see id. at 2285
added in his dissent, the \textit{Begay} test “has been neither overlooked nor renounced in today’s tutti-frutti opinion.”

The Supreme Court’s slightly inconsistent analyses have created a spectrum that courts must consider when determining whether an offense falls within the residual clause. On the left of the spectrum is the purposeful, violent, and aggressive standard proclaimed in \textit{Begay}, which also requires the crime to be “similar in kind” to the enumerated offenses. On the right of the spectrum, the only consideration is whether a crime poses substantial risk of physical injury to others and whether the risk posed by the present offense is comparable to the “closest analog” of the enumerated offenses. \textit{Chambers} successfully balanced these two competing ideologies by considering the comparative nature of the offense as well as the comparative risk to others during its commission. The Court’s decision in \textit{Sykes}, however, leaned right and emphasized the risk posed by vehicular flight comparatively to the enumerated offenses. Nevertheless, the opinion implicitly considered the comparative nature of the offense, leaving lower courts and scholars inconsistently applying \textit{Chambers} and \textit{Sykes}.

\begin{itemize}
\item (Scalia, J., dissenting) (“That seems to be the case here—though why, and when it will not be the case, are not entirely clear.”).
\item 69. \textit{See id.} at 2285 (Scalia, J., dissenting) (acknowledging Court failed to clarify impact of \textit{Begay} analysis going forward).
\item 70. For a discussion of the spectrum that the Supreme Court has created with regard to the residual clause analysis, see \textit{infra} notes 71–78 and accompanying text.
\item 71. For a discussion of \textit{Begay} and the Court’s analysis, see \textit{supra} notes 46–51 and accompanying text.
\item 72. \textit{See Sykes}, 131 S. Ct. at 2271, 2273, 2275 (“In general, levels of risk divide crimes that qualify from those that do not.”). Not within the spectrum is Justice Thomas’s suggested analysis catalogued in his \textit{Begay} dissent as well as his \textit{Sykes} concurrence: “[t]he only question” is whether conduct in an ordinary case “presents a serious potential risk of physical injury to another.” \textit{Sykes}, 131 S. Ct. at 2278 (Thomas, J., concurring) (quoting 18 U.S.C. § 924(e)(2)(B)(ii) (2006)) (advocating courts should essentially ignore enumerated offenses, and as long as offense presents serious potential risk to another, it should fall within scope of residual clause); \textit{see also} United States v. \textit{Begay}, 555 U.S. 137, 156 (2008) (Alito, J., dissenting) (same). This approach is inconsistent with principles of statutory interpretation because had Congress intended that all offenses possessing a risk of injury to others be included they would not have enumerated the offenses of burglary, arson, and use of explosives as guidance; these words would be superfluous. \textit{See Begay}, 555 U.S. at 142 (acknowledging enumerated offenses were meant to limit reach of residual clause). Justice Thomas’s suggested interpretation is off to the far right of the spectrum and is not further discussed because it does not comply with principles of statutory interpretation and ignores congressional intent. \textit{See id.} (same).
\item 73. For a discussion of \textit{Chambers} and the Court’s analysis, see \textit{supra} notes 52–56 and accompanying text.
\item 74. \textit{See Sykes}, 131 S. Ct. at 2276 (asserting that if offense is “similar in risk” to enumerated offenses it presents sufficient potential risk to others to classify it as crime of violence).
\item 75. \textit{See United States v. Mobley}, 687 F.3d 625, 633 (4th Cir. 2012) (Wynn, J., dissenting) (acknowledging that “no [Supreme Court] case overrule[d] a prede-
Lower courts that have chosen to read Sykes broadly have improperly disregarded the enumerated offenses’ primary characteristic—conduct that is aggressive, violent, and intentional.\textsuperscript{76} The test outlined in Begay was meant to direct courts to focus on the nature of the offense as well as the degree of risk posed.\textsuperscript{77} The Sykes court, however, may have opened the door once again—as it was pre-Begay—to crimes that are “wholly divergent” from the crimes enumerated in the statute.\textsuperscript{78}

cessor” and more importantly all four cases considered the “concern first identified in Begay—namely that violent felonies must both ‘present[] a serious potential risk of physical injury to another’ and be ‘similar, in kind as well as in degree of risk posed, to the examples’ set out in the statute” (quoting Begay, 553 U.S. at 141, 143 (last alteration in original) (emphasis added))). For a discussion of the Court’s implicit reliance on Begay by recognizing the violent, aggressive nature of vehicular flight, see supra notes 68–69 and accompanying text.\textsuperscript{77} For a discussion of the Court’s analysis in Begay, see supra notes 46–51 and accompanying text.\textsuperscript{78} Runyon, supra note 38. The current state of residual clause analysis is both flawed and confusing to apply because courts are focusing on the offense’s secondary characteristic, the potential of injury to others, rather than focusing on the nature of the offense itself. See id.

76. See, e.g., United States v. Perez-Jimenez, 654 F.3d 1136 (10th Cir. 2011) (holding that possession of knife in prison is violent felony under residual clause). Courts such as Perez-Jimenez overlooked the enumerated offenses when attempting to follow Sykes. See Sykes, 131 S. Ct. at 2273 (explaining enumerated offenses “provide guidance” in determining whether offenses present serious potential risk of physical injury to another). The following hypothetical demonstrates the problem inherent in failing to consider the nature of the enumerated offenses:

Imagine that the residual clause requires the ACCA’s sentencing enhancement to be applied to red hippopotamuses because the color red is associated with conduct that poses a substantial risk of physical injury to others. Moreover, this requirement is immediately preceded in the same subsection by a clause listing four blue hippos with red spots, named Bergman, Arnold, Edmund, and Urban. Bergman, Arnold, Edmund, and Urban are blue because the color blue is associated with crimes typically committed by intentional and aggressive conduct toward property. Intentional and aggressive conduct toward property also typically creates a risk of physical injury to others as well; thus, the four named hippos have red spots.

This hypothetical violent felony provision would read: the “sentencing enhancement shall apply to Bergman, Arnold, Edmund, or Urban, or otherwise to red hippopotamuses.” The Court’s current residual clause analysis focuses on the named hippos’ red spots—symbolizing the risk of physical injury to others—which is their secondary and more unusual characteristic. But, being blue—symbolizing intentionally aggressive acts toward others’ property—is the named hippos’ primary and readily identifiable characteristic. The Court’s use of the secondary characteristic to connect the residual clause to the enumerated felonies frustrates the sensible guidance the enumerated felonies could provide for the residual clause. It would be more reasonable to interpret the statute so that the residual clause only encompasses other blue hippos with red spots, rather than hippos of any color with a splotch or two of red.

Runyon, supra note 38. The current state of residual clause analysis is both flawed and confusing to apply because courts are focusing on the offense’s secondary characteristic, the potential of injury to others, rather than focusing on the nature of the offense itself. See id.

77. For a discussion of the Court’s analysis in Begay, see supra notes 46–51 and accompanying text.

78. See Runyon, supra note 38, at 466 (explaining courts, since Sykes, have considered offenses that were properly disposed of in Chambers and Begay). The Eleventh Circuit, in a decision preceding Begay, upheld a lower court’s holding that carrying a concealed weapon was a violent felony. See United States v. Hall, 77 F.3d
IV. THE SENTENCING COMMISSION AMENDS THE COMMENTARY AND OVERLY EXPANDS SCOPE OF RESIDUAL CLAUSE

The Supreme Court has yet to hear a case involving mere possession of a prohibited weapon or a case involving an offender carrying a concealed weapon. As a result, lower courts have struggled to achieve consistency in light of vague congressional drafting and "tutti-frutti" Supreme Court precedent. The closest established precedent seems to be Chambers, which dealt with a passive, non-active, and non-violent offense. Nevertheless, some recent circuit court decisions have relied more heavily on Sykes, ignored Chambers, and limited the scope of Begay beyond the Court's intent due in large part to the Sentencing Commission's confusing directive in its commentary.

On November 1, 2004, the Sentencing Commission amended the commentary of the Sentencing Guidelines to expressly provide that "[u]nlawfully possessing a firearm described in 26 U.S.C. § 5845(a) (e.g., a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun) is a 'crime of violence.'" Since the amendment, courts analyzing the status...
tory language of the Sentencing Guidelines have been bound to classify possession of such firearms as crimes of violence in light of the Supreme Court’s decision in *Stinson v. United States*.\(^8^4\) *Stinson* held that the commentary interpreting the Sentencing Guidelines is authoritative “unless it violates the Constitution . . . or is inconsistent with, or a plainly erroneous reading of, that guideline.”\(^8^5\) Although the Guidelines as a whole are only advisory after *United States v. Booker*,\(^8^6\) they still remain highly influential when determining the sentencing range for a particular conviction.\(^8^7\)

Many courts have also relied on the Sentencing Guidelines’ commentary to interpret the language in the ACCA—withstanding that the

Of less than 16 inches in length; (5) any other weapon, as defined in subsection (e); (6) a machinegun; (7) any silencer (as defined in section 921 of Title 18, United States Code); and (8) a destructive device. The term “firearm” shall not include an antique firearm or any device (other than a machinegun or destructive device) which, although designed as a weapon, the Secretary finds by reason of the date of its manufacture, value, design, and other characteristics is primarily a collector’s item and is not likely to be used as a weapon.

26 U.S.C. § 5845(a) (2006). Nevertheless, the amended commentary only directly applies to the Sentencing Guidelines, not the ACCA because no provision or commentary in the ACCA mandates that certain possession offenses receive enhanced sentencing. See 18 U.S.C. § 924(e)(2)(B) (2006) (illustrating what constitutes “violent felony” in ACCA). As previously discussed, however, the statutory analysis is virtually identical due to the reciprocal language in the statutes. For a discussion of courts treating the analyses as identical, see *supra* note 32 and accompanying text.

84. 508 U.S. 36 (1993) (holding commentary that defines Guidelines more precisely is “authoritative”).

85. *See id.* at 38 (directing courts to consider commentary enacted by Sentencing Commission as authoritative unless it is “inconsistent” with statutory interpretation).

86. 543 U.S. 220 (2005) (holding Sentencing Guidelines are advisory, not mandatory, when considering proper sentencing range). A sentencing court is required to “consider [the] Guidelines ranges, but permit[ed] . . . to tailor the sentence in light of other statutory concerns.” *Id.* at 222 (internal citation omitted).

87. *Id.* (acknowledging Guidelines remain highly influential); *see also United States v. Schwartz*, 408 Fed.Appx. 868, 871 (6th Cir. 2010) (explaining that although courts must still apply definitions that are proscribed in Guideline’s commentary under *Stinson*, this does not mean that sentencing range resulting from that calculation is mandatory). Pre-Booker, courts were bound by the definitions set forth in the commentary and by the range such Guidelines imposed; thus, the commentary essentially had the full force and effect of the Guidelines’ themselves, which allowed the Sentencing Commission the power to “make law without the participation of Congress.” *See Ira Bloom, The Aftermath of Mistretta: The Demonstrated Incompatibility of the United States Sentencing Commission and Separation of Powers Principles, 24 AM. J. CRIM. L. 1, 10 (1996)* (explaining amended commentary now has same effect as “statutorily prescribed” method after *Stinson*); *see also Joseph W. Luby, Reining in the “Junior Varsity Congress”: A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines, 77 WASH. U. L.Q. 1199, 1204 (1999)* (suggesting Sentencing Commission should be subject to greater transparency and judicial review).
commentary is not directly applicable to the ACCA. For example, the Fifth Circuit held that possession of a pipe bomb constituted a crime of violence because by its nature, possessing a pipe bomb creates a substantial risk of physical injury. The court reasoned that there is no lawful or legitimate purpose for possession of a pipe bomb such as use for sport or self-defense. Ultimately, these courts have concluded that the inherent danger associated with the character of the weapon implied that possession would inevitably result in use and violence.

Courts analyzing the ACCA that have opted not to follow the commentary have recognized that mere possession of a “firearm” under Section 5845(a) lacks the overt, violent conduct contemplated by the enumerated offenses. Even when considering the comparative risk of firearm possession with the risk posed by the enumerated offenses (the test emphasized in Sykes), “[c]ommon-sense tells us that possession of a dangerous item does not pose the same or similar degree of risk as the use of...

88. See, e.g., United States v. Lillard, 685 F.3d 773, 777 (8th Cir. 2012) (explaining possession of short shotgun is “roughly similar to the listed offenses within the ACCA”); United States v. Vincent, 575 F.3d 820, 826–27 (8th Cir. 2009) (holding possession of sawed-off shotgun was sufficient to constitute crime of violence because commentary was applicable).

89. See United States v. Jennings, 195 F.3d 795, 798 (5th Cir. 1999) (focusing on nature of weapon, not circumstances surrounding possession); cf. Staples v. United States, 511 U.S. 600, 611–12 (1994) (explaining that possession of Section 5845(a) “firearms” presents significant risk of physical injury to others because of their “quasi-suspect character”).

90. See Jennings, 195 F.3d at 798 (explaining that unlike handguns, pipe bombs have no recreational, legitimate uses such as hunting or “engag[ing] in target practice”). The court also recognized that self-defense, a legitimate and lawful purpose for possessing a weapon, would be “quite difficult” and wholly unrealistic with a pipe bomb. See id. (explaining possession of pipe bombs have “no peaceful purpose”); cf. United States v. Drapeau, 188 F.3d 987, 990 n.4 (8th Cir. 1999) (discussing inherent dangerousness of pipe bomb itself); United States v. Dempsey, 957 F.2d 831, 834 (11th Cir. 1992) (recognizing pipe bombs have no legitimate purpose and have potential to “kill indiscriminately, without warning, and with less chance that the perpetrator will be caught”).

91. See Jennings, 195 F.3d at 799 (reasoning possession of inherently dangerous pipe bomb will “inevitably . . . result in violence”). Courts have suggested that mere possession of these weapons is sufficient to trigger sentencing enhancement under the residual clause because of the weapon’s violent nature, without considering whether the weapon was ever used or intended to be used. See United States v. Golding, 332 F.3d 838, 842 (5th Cir. 2003) (holding machine guns are “firearms” as defined in Section 5845, possession of which constitutes crime of violence). The court added that such firearms are “highly dangerous offensive weapons” that are regulated “in the interest of public safety.” See id. (quoting United States v. Freed, 401 U.S. 601, 609 (1971)).

92. See, e.g., United States v. McGill, 618 F.3d 1273, 1279 (11th Cir. 2010) (holding possession of short-barreled gun is not violent felony because it is not “similar in kind” to enumerated offenses (quoting Begay v. United States, 553 U.S. 137, 143 (2008))); United States v. Haste, 292 Fed. App’x 249, 250 (4th Cir. 2008) (per curiam) (holding possession of “weapon of mass destruction” is not violent felony under ACCA).
that item.”93 Concluding otherwise confuses offenses that may, by their nature, enable violence or the threat of violence with offenses that actually involve violent and aggressive conduct.94 The residual clause was only intended to target the latter, thus, the commentary has been more of a source of confusion rather than one of clarity.95

V. POSSESSION OF PROHIBITED WEAPONS IN PRISON: UNITED STATES V. MOBLEY

On July 13, 2012, the Fourth Circuit issued a decision declaring that passive possession of a homemade knife in prison constituted a “crime of violence” under the Sentencing Guidelines in United States v. Mobley.96 The court relied heavily on similar federal circuit opinions and analogized the possession of a knife to the possession of a weapon of mass destruction, such as a bomb, machine gun, or explosive.97 Despite the Supreme Court dispelling non-active crimes a “far cry” from the types of offenses the Guidelines intended to cover, Mobley adds to the confusion surrounding residual clause interpretation by considering the circumstances surrounding the weapons possession rather than the nature of the weapon itself.98

A. Facts and Procedural Background

Jermaine Mobley was an inmate at a Federal Correctional Institution near Raleigh, North Carolina, and was serving a 151-month sentence for possession with intent to distribute.99 On September 14, 2009, Mobley sought medical treatment at the prison infirmary, complaining of soreness

93. United States v. Bradford, 766 F. Supp. 2d 903, 910 (E.D. Wis. 2011) (explaining ACCA targets potential risk associated with use of dangerous weapons, not merely possession of them). See McGill, 618 F.3d at 1279 (realizing that targeting possession of weapons is beyond scope of residual clause). Such an interpretation would effectively read the word “use” out of the statute. See id. (implicating each word in statute).

94. See United States v. Vincent, 575 F.3d 820, 830 (8th Cir. 2009) (Gruender, J., dissenting) (concluding that possession of dangerous weapon may enable violence, but offense of possessing prohibited weapon does not involve violent conduct).

95. See James G. Levine, supra note 32, at 545 (acknowledging that Congress’s intent was to keep society safer by targeting those relatively small number of habitual offenders that were “responsible for a large fraction of crimes”).

96. 687 F.3d 625 (4th Cir. 2012). For a discussion of the background and the holding in Mobley, see infra notes 96–107 and accompanying text.

97. For a discussion of the reasoning employed in Mobley, see infra notes 108–12 and accompanying text.

98. For a discussion of the ramifications of the Mobley decision, see infra notes 113–41 and accompanying text.

99. See Mobley, 687 F.3d at 626 (explaining background of prior sentence for possession with intent to distribute heroin).
and numbness in his feet.\textsuperscript{100} The physical therapist picked up Mobley’s right shoe to examine its insole and found a concealed shank inside.\textsuperscript{101} Mobley immediately attempted to hide the knife under the examination table, but the prison staff soon recovered it.\textsuperscript{102}

Mobley pled guilty to possession of a prohibited object in prison under Title 18 of the United States Code.\textsuperscript{103} Under Title 18, a “prohibited object” is defined as “an object that is designed or intended to be used as a weapon or to facilitate escape from a prison.”\textsuperscript{104} Subsequently, Mobley was labeled a “Career Offender” under the Sentencing Guidelines because he had two prior felony convictions for controlled substance offenses, and the district court found that Mobley’s instant offense constituted a “crime of violence.”\textsuperscript{105} Although Mobley objected to this designation, the district court overruled his objection and found “there is no passive possession of a weapon in a prison setting.”\textsuperscript{106} Mobley appealed the court’s designation as a “Career Offender” to the Fourth Cir-

\textsuperscript{100.} See id. (describing Mobley’s condition that prompted him to seek medical treatment).

\textsuperscript{101.} See id. at 626 n.1 (citation omitted) (explaining shanks are homemade knives made from bits and pieces of metal and sharpened against concrete).

\textsuperscript{102.} See id. at 626 (describing passive nature of Mobley’s possession). Mobley’s active attempt to hide the knife from the prison guards is evidence that he was not attempting to use or threaten to use the knife in any respect. See United States v. Chapple, 942 F.2d 439, 442 (7th Cir. 1991) (explaining defendant’s attempt to hide weapon from officers who were approaching indicates that he “in no way attempted to use the weapon to prevent his arrest”).

\textsuperscript{103.} See Mobley, 687 F.3d at 626 (describing Mobley’s guilty plea); 18 U.S.C. § 1791(a)(2) (2006) (detailing offense of inmate in possession of prohibited object in prison).

\textsuperscript{104.} 18 U.S.C. § 1791(d)(1)(B) (2006). Nevertheless, the definition of a “prohibited object” is broad, and also encompasses objects such as controlled substances, currency, and telephones. See id. § 1791(d)(1) (defining “prohibited object”).

\textsuperscript{105.} See Mobley, 687 F.3d at 627 (discussing how Mobley’s base level offense for instant crime rose four levels because court ruled that instant offense was crime of violence, subjecting Mobley to “Career Offender” sentencing enhancement). Mobley’s sentencing range would have been an additional twenty-four to thirty-seven months had the “Career Offender” sentencing enhancement not been applied; instead, the sentencing range increased to thirty-seven to forty-six months for his instant offense. See id. (explaining factual background). Under Section 4B1.1 of the Sentencing Guidelines, a convicted defendant is a career offender if:

1. the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction;
2. the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and
3. the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (2012). For a further discussion of Section 4B1.1 and the statutory language, see supra notes 28–29 and accompanying text.

\textsuperscript{106.} Mobley, 687 F.3d at 627 (holding possession of homemade knife in prison was crime of violence).
cuit, asserting that mere possession of a shank in prison does not constitute a crime of violence under the Sentencing Guidelines. 107

B. The Majority’s Reasoning

The Fourth Circuit began its analysis by briefly considering the Supreme Court opinions in Begay and Sykes, and merely citing Chambers without explaining its precedent. 108 Subsequently, the court declined to follow a factually-similar Third Circuit’s case, which held that possession of a knife in prison did not constitute a crime of violence. 109 Relying almost exclusively on decisions in the Fifth, Eighth, and Tenth Circuits, the court found that “‘[t]here is no legitimate purpose’ for possessing a knife in prison, and therefore, such possession is “similar in kind to the offense of possessing a [sawed-off shotgun] outside of prison[,]” which is recognized as a crime of violence under the commentary of section 4B1.2. 110 The court determined the offense was “similar in kind and degree of risk posed to the enumerated offenses” and consisted of “‘purposeful, violent, and

107. See id.

108. See id. at 628 (dedicating small paragraph to explaining prior Supreme Court precedent on residual clause analysis). Ultimately, the court briefly explained that Sykes “focused on the question of whether the offense of intentional vehicular flight was comparable in degree of risk to the enumerated offenses.” See id. (citing Sykes v. United States, 131 S. Ct. 2267, 2273 (2011)).

109. See Mobley, 687 F.3d at 629–30 (citing United States v. Polk, 577 F.3d 515, 519 (3d Cir. 2009)) (asserting mere possession does not rise to level of violent and aggressive conduct). Polk recognized that the enumerated offenses all involve “overt, active conduct that results in harm to a person or property” and mere possession of a prohibited object in prison does not. Polk, 577 F.3d at 519. The Mobley court gave little reasoning for why it rejected Polk in favor of “[t]hree other of our sister circuits . . . [that] have addressed the same issue and reached a different conclusion.” Mobley, 687 F.3d at 629–30 (justifying result by relying on other circuit court opinions).

110. Mobley, 687 F.3d at 631 (quoting United States v. Perez-Jiminez, 654 F.3d 1136, 1143 (10th Cir. 2011)) (analogizing possession of weapon in prison with possession of prohibited “firearms” in Section 5845(a) because “both of these crimes prohibit the possession of dangerous weapons in contexts where they have no lawful purpose”). The court relied on three alternative circuit court opinions that concluded possession of a prohibited object in prison constituted a crime of violence. See Perez-Jiminez, 654 F.3d at 1143 (reasoning “‘confines of prison preclude any recreational uses for a deadly weapon . . . . [and] [t]he only reason to carry such a weapon is to use it to attack another or to deter an attack’” (quoting United States v. Romero, 122 F.3d 1334, 1341–43 (10th Cir. 1997)); United States v. Boyce, 635 F.3d 708, 711–12 (8th Cir. 2011) (explaining that possession of weapons in prison is “‘similar, in kind as well as degree of risk posed’ to enumerated offenses and involved ‘violent and aggressive’ conduct”); United States v. Marquez, 626 F.3d 214, 222 (5th Cir. 2010) (noting possession of weapons in prison inevitably results in face-to-face confrontation, much like burglary). Nevertheless, the Mobley court admitted that the Tenth Circuit decision in Perez-Jiminez was the only decision that was on “all fours” with the case at issue besides the Third Circuit’s decision in Polk, which was rejected. See Mobley, 687 F.3d at 630 (agreeing with Tenth Circuit’s reasoning).
aggressive” conduct. Thus, mere possession of a prohibited weapon in prison “present[ed] a serious potential risk of physical injury to another” and was subject to Career Offender sentencing enhancement.

VI. THE RAW END OF THE SHANK

The Mobley court’s determination that passive possession of a homemade knife in prison constituted a crime of violence is difficult to justify. The court’s interpretation of the Sentencing Guidelines’ commentary and misapplication of Supreme Court precedent improperly enhanced Mobley’s sentence beyond the statute’s intent. It is imperative that future courts “hesitate[] to greatly expand the list of offenses . . . to any offense that creates a public risk.”

A. Mobley Misapplied Supreme Court Precedent

The Supreme Court decisions interpreting the residual clause have been difficult for district courts and circuit courts to consistently apply, and Mobley is no exception. Mobley correctly considered the Begay test but incorrectly applied it by reasoning that possession of a knife in a prison constituted a purposeful, violent, and aggressive offense. Mobley failed to recognize that the Supreme Court decision in Chambers had already determined that crimes of inaction are a “far cry” from the purposeful, violent, and aggressive conduct inherent in the enumerated offenses.

111. Mobley, 687 F.3d at 630–31 (quoting Begay v. United States, 553 U.S. 137, 145 (2008)) (reasoning possession of weapons in prison “obviously facilitates violence” and therefore, such conduct is similar in kind as well as degree to the enumerated offenses).

112. Mobley, 687 F.3d at 631–32 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2012)) (concluding possession of homemade knife in prison constituted crime of violence). But see id. at 634 (Wynn, J., dissenting) (agreeing with Polk that there is fundamental difference between active, violent, aggressive conduct exemplified by enumerated offenses and “the passive crime[ ] of mere possession” (alteration in original) (quoting Polk, 577 F.3d at 519)).

113. For a discussion of why the Mobley court’s reasoning is difficult to justify, see infra notes 131–41 and accompanying text.

114. For a discussion of how the court did not correctly apply Supreme Court precedent, see infra notes 115–26 and accompanying text. For a discussion of the court’s misplaced reliance on the commentary to the Sentencing Guidelines, see infra notes 128–41 and accompanying text.


116. For a discussion of the inconsistencies inherent in the Supreme Court’s interpretation of the residual clause, see supra notes 67–78 and accompanying text.

117. Mobley, 687 F.3d at 630–31 (citing Begay v. United States, 553 U.S. 137, 144–45 (2008)) (applying Begay analysis). For a discussion of why the Begay test is still appropriate in light of Sykes, see supra notes 68–69 and accompanying text.
Mere possession of a prohibited object cannot be “similar in kind” to the enumerated offenses because it does not involve affirmative, active, and violent behavior—the primary characteristics of the enumerated offenses. Even if the Mobley court analyzed the offense through the narrower Sykes approach, possession does not pose a “similar degree of risk” because mere possession of a weapon cannot possibly pose the same risk as the use of that weapon. The use of explosives subjects the offense to sentencing enhancement, and suggesting that possessing explosives or similarly dangerous weapons suffices completely “read[s] the word ‘use’ out of the . . . statute.”

Moreover, when a penal statute is ambiguous, courts are “obliged to apply the rule of lenity and resolve the conflict in the defendant’s favor.” The rule of lenity requires “ambiguity concerning the ambit of

118. See Chambers v. United States, 555 U.S. 122, 128 (2009) (holding failure to report to penal institution and passive crimes do not constitute crimes of violence); United States v. Polk, 577 F.3d 515, 519 (3d Cir. 2009) (reasoning that although possessing prohibited objects is purposeful, the “act of possession does not, without more . . . , involve any aggressive or violent behavior” (quoting United States v. Archer, 531 F.3d 1347, 1351 (11th Cir. 2008))).

119. See, e.g., Polk, 577 F.3d at 519 (holding possession of weapon in prison was not similar in kind to enumerated offenses of burglary, arson, extortion, or use of explosives). For a discussion of the enumerated offenses primary characteristic, see supra note 76 and accompanying text.

120. See Begay, 553 U.S. at 142 (articulating that statute covers only “similar crimes, rather than every crime that ‘presents a serious potential risk of physical injury to another’” (quoting 18 U.S.C. § 924(e)(2)(B)(i) (2006))). Dangers inherent in possessing a weapon only comes to fruition when the weapon is used. See Serafin v. United States, 562 F.3d 1105, 1115 (10th Cir. 2009) (“[T]he use or risk of force is not implicated in [defendant’s] possession of the unregistered rifle, rather it is the risk [the defendant] would commit another crime to obtain or retain possession.”).

121. United States v. McGill, 618 F.3d 1273, 1279 (11th Cir. 2010) (explaining reluctance to classify possession of dangerous weapon offense as violent felony when statute “speaks only to the use of another”); see also United States v. Flores, 477 F.3d 431, 436 (6th Cir. 2007) (acknowledging that statute enumerates use of dangerous weapons rises to level of violent felony but possession does not). But see United States v. Lillard, 685 F.3d 773, 777 (8th Cir. 2012) (holding possession of short shotgun presents same type of danger involved in use of explosives).

122. United States v. Munn, 595 F.3d 183, 194 (4th Cir. 2010) (establishing when rule of lenity should be applied); see also United States v. Santos, 553 U.S. 507, 515 (2008) (explaining court should not “play the part of a mindreader” and apply rule of lenity in favor of defendants when faced with ambiguous criminal statutory language); Mobley, 687 F.3d at 635 (Wynn, J., dissenting) (stressing court’s obligation to apply rule of lenity); United States v. Cutler, 36 F.3d 406, 408 (4th Cir. 1994) (explaining rule of lenity is applicable in the context of Sentencing Guidelines). The rule of lenity is a “necessary safety valve” to protect defendant’s due process rights and was properly revitalized in the Supreme Court’s decision in United States v. Santos. Note, Rule of Lenity, 122 Harv. L. Rev. 475, 475–76 (2008) (illustrating importance of Santos decision and application of rule of lenity); see also Definition of “Violent Felony”, 121 Harv. L. Rev. 345, 346 (2007) (criticizing Supreme Court’s decision in James because it failed to give enough deference to rule of lenity).
criminal statutes [to] be resolved in favor of lenity.” At the very least, the Career Offender provision and the residual clause in particular are ambiguous, as demonstrated by the plethora of inconsistencies in their application. Mobley failed to address the rule of lenity and ignored the “fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain.” The court also made no effort to support its conclusion with the introduction of statistical data, an analytical tool that was recently endorsed by the Supreme Court in Chambers and Sykes. By failing to apply the rule of lenity, misinterpreting the Court’s decisions in Begay, and ignoring the rationale in Chambers and Sykes,

123. Rewis v. United States, 401 U.S. 808, 812 (1971) (explaining rule of lenity ensures that criminal statutes will provide fair warning before enhancing offenders’ sentences). See 29A OHIO JUR. 3D Criminal Law: Substantive Principles and Offenses § 75 (2012) (stating that rule of lenity “provides that a court will not interpret a criminal statute so as to increase the penalty it imposes on a defendant if the intended scope of the statute is ambiguous”).

124. See Sykes v. United States, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting) (insisting residual clause is so ambiguous it amounts to “a drafting failure” and Supreme Court should “declare it void for vagueness”); see also Mobley, 687 F.3d at 636 (Wynn, J., dissenting) (explaining due to residual clause’s “ambiguity and the confusion experienced, and created, by the courts, inmates lack sufficient notice that simple possession of a shank constitutes a crime of violence”); Montgomery, supra note 10, at 739 (advocating Congress should amend residual provision due to constant inconsistencies in application). The dissenting opinion in Mobley further acknowledges that “varying judicial interpretation” among the circuits is evidence that the residual clause fails to provide “sufficient notice to the public.” See Mobley, 687 F.3d at 636 (Wynn, J., dissenting) (discussing why rule of lenity must be applied in Mobley).

125. Santos, 555 U.S. at 514 (finding correct application of rule of lenity also “places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead”); see Reavis, supra note 39, at 330 (explaining that “ACCA levies too harsh a penalty to be applied with anything less than the caution demanded by the categorical approach”).

126. See Sykes, 131 S. Ct. at 2274–75 (supporting opinion through statistical data); Chambers v. United States, 555 U.S. 122, 128–30 (2009) (same). But see Holman, supra note 35, at 251 (arguing that even if statistics are used accurately, “chosen metric for the ‘ordinary case’ shifts from judge to judge”); cf. Jin Woo Oh, Note, United States v. Chambers: Noncustodial Escapes Do Not Always Constitute a Violent Crime for Purposes of the Armed Career Criminal Act, 4 DUKE J. CONST. L. & PUB. POL’Y SIDE BAR 363, 373 (2009) (explaining that it may not be realistic or possible for studies to be done on every offense, and requiring such “might stymie the sentencing enhancement process and hurt the ACCA’s fundamental purpose of getting violent, recidivist criminals off the street”). The result has been a plethora of inconsistent lower court opinions that hinge on arbitrary, statistical lines that vary depending on the presiding judge. See Holman, supra note 35, at 253 (explaining “[g]oalposts move, depending on the court or the judge”). The Seventh Circuit held that “a two percent incidence of violence during the commission of [an offense]” was a “sufficient risk of injury” to trigger sentencing enhancement. Id. at 253–54 (quoting United States v. Templeton, 543 F.3d 378, 381 (7th Cir. 2008)) (explaining even at low frequencies offense still possesses “serious” risk of physical injury to others). Nevertheless, the problem with relying on a statistical analysis is that it does not provide other courts with a workable framework in determining whether an offense is legally violent. See id. at 254 (criticizing Templeton,
bers, the Mobley decision effectively added to the confusion surrounding residual clause case law and unjustly classified Mobley’s offense as a crime of violence.127

B. A Misplaced Reliance on the Commentary: Transforming a Knife into a Machine Gun

The Mobley decision attempted to buttress its reasoning by equating possession of a knife in prison with possession of an inherently dangerous weapon as defined in 26 U.S.C. § 5845(a), which includes sawed-off shotguns, bombs, and machine guns.128 Courts have recognized that these weapons, by their nature, all have the capability of killing indiscriminately and “lack usefulness except for violent and criminal purposes.”129 Use for sport or self-defense could not conceivably be the primary purpose for possessing any of the listed weapons in Section 5845(a); thus, the commentary directs courts to categorize possession of these weapons as crimes of violence.130

and acknowledging that if two percent incidence of violence is sufficient, then “perhaps any likelihood greater than zero will qualify the crime as legally violent”). Statistics also do not provide offenders with additional notice as to what conduct is violent enough to trigger sentencing enhancement. See id. (explaining lack of uniformity in application of statistics results in inconsistent and arbitrary sentencing enhancement, unbeknownst to offenders). The concurring opinion in Chambers, written by Justice Alito and Justice Thomas, emphasized that the use of statistics was just another way that the Court has led “us further and further away from the statutory text.” See Chambers, 555 U.S. at 134 (Alito, J., concurring) (encouraging Congress to amend ACCA’s residual clause because of constant inconsistencies in application).

127. For a discussion of why the court’s holding unjustly enhanced Mobley’s sentence, see supra notes 128–41 and infra notes 127–40 and accompanying text.

128. See Mobley, 687 F.3d at 631 (asserting that “offense of possessing a shank in prison is similar in kind to the offense of possessing a Section 5845(a) weapon outside of prison”).

129. United States v. Vincent, 575 F.3d 820, 825–26 (8th Cir. 2009) (quoting Unites States v. Childs, 403 F.3d 970, 971 (8th Cir. 2005)) (describing violent nature of sawed-off shotguns); see also United States v. Jennings, 195 F.3d 795, 798 (5th Cir. 1999) (finding no “non-violent or lawful uses for a pipe bomb”). Courts’ analyses have also suggested that because of the violent nature of weapons described in Section 5845(a), there is a “virtual inevitability that such possession will result in violence.” Id. at 799; see also United States v. Golding, 332 F.3d 838, 843 (5th Cir. 2003) (explaining nature of weapon suggests it lacks lawful or legitimate uses). But see Mobley, 687 F.3d at 634 (Wynn, J., dissenting) (reasoning that even acts that are “categorically unlawful” are not transformed into “‘dangerous and provocative act[s]’ that [themselves] endanger[ ] others” (citing Sykes, 131 S. Ct. at 2273)). The dissent in Mobley further recognized the failure to report for confinement in Chambers “cannot be accomplished in any lawful manner; but the Supreme Court nevertheless declared it to be non-violent.” Id. (citing Chambers, 555 U.S. at 128).

130. See Jennings, 195 F.3d at 798 (recognizing that it would be “quite difficult to protect oneself or one’s family with a pipe bomb”). Weapons categorized as “firearms” under Section 5845(a) are “primarily weapons of war and have no appropriate sporting use or use for personal protection.” Id. at 799 n.4 (citation omitted). But see Baron-Evans, supra note 25, at 62 (recognizing exception to pos-
A makeshift knife constructed from bits and shards, however, could be possessed primarily for self-defense and may be the least violent means of protecting oneself in a prison setting.\textsuperscript{131} The constitutional right to self-defense is not “diminished by one’s imprisonment.”\textsuperscript{132} Rather, the right should be afforded greater protection considering inmates are stripped of “virtually every means of self-protection[,]” including “access to outside aid.”\textsuperscript{133} To assume Mobley’s possession was predatory by nature ignores prison’s “state of nature” atmosphere, where the “‘strong will exploit the weak, and the weak are dreadfully aware of it.’”\textsuperscript{134}

Furthermore, the court improperly expanded \textit{Begay} because the test was only meant to apply to offenses “similar in kind” to the statutory offense of Section 5845(a) firearms if weapon is “a collector’s item”). For a further discussion of the impact of the Sentencing Guideline’s commentary, see \textit{supra} notes 79–95 and accompanying text.

\textsuperscript{131} See James E. Robertson, “Fight or F. . . “ and Constitutional Liberty: An Inmate’s Right to Self-Defense When Targeted by Aggressors, 29 Ind. L. Rev. 339, 339 (1995) (acknowledging “staff cannot or will not protect [inmates] from rape, assault, and other forms of victimization”). Although it is possible to use a sawed-off shotgun or machine gun in self-defense, it undoubtedly would not be the least violent weapon or means to achieve that goal. See United States v. Golding, 332 F.3d 838, 842 (5th Cir. 2003) (explaining machine guns are “‘highly dangerous offensive weapons’” (quoting United States v. Freed, 401 U.S. 601, 609 (1971))). Further, Mobley attempted to hide the shank when the physical therapist discovered it in his shoe, and nothing in the case indicates that Mobley was ever charged with use of the weapon while incarcerated. See \textit{Mobley}, 687 F.3d at 626–27 (describing Mobley’s passive possession of knife); \textit{see also} United States v. Chapple, 942 F.2d 439, 442 (7th Cir. 1991) (reasoning that possession of concealed weapon with nothing more did not present “serious potential risk of physical injury to another”).

\textsuperscript{132} Robertson, \textit{supra} note 131, at 358 (alleging contemporary “Hobbesian prison” makes self-defense “more worthy of constitutional protection” in prison setting than “the exercise of self-defense in civil society”).

\textsuperscript{133} Farmer v. Brennan, 511 U.S. 825, 833 (1994) (describing prison guards’ duty to attempt to keep inmates safe). “In the outside world, a person who is verbally or physically harassed can call the police or seek legal assistance to deter the harasser. In prison, there is no one to call. Consequently, there is little choice but to engage in self-help in the settling of disputes.” Matthew Silberman, \textit{A World of Violence: Corrections in America} 75 (1995).

\textsuperscript{134} Robertson, \textit{supra} note 131, at 358–59 (quoting Paul W. Keve, \textit{Prison Life and Human Worth} 54 (1974)) (describing prison atmosphere). The weak have little recourse for self-defense or protection because “vulnerable inmates cannot run from predators” and inmates must sometimes arm themselves to avoid victimization. \textit{Id.} at 361; \textit{see also} Hudson v. Palmer, 468 U.S. 517, 526 (1984) (asserting that “[i]nmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint’”); Gonzales v. Martinez, 403 F.3d 1179, 1186 (10th Cir. 2005) (illustrating that prisons present unique problems because they are “‘necessarily dangerous places [because] they house society’s most . . . violent people in close proximity with one another’” (quoting \textit{Farmer}, 511 U.S. at 858 (Thomas, J., concurring))).
fenses such as burglary and arson.\footnote{See Begay v. United States, 553 U.S. 137, 143 (2008) (explaining that offenses only fall within residual clause if they are “roughly similar, in kind as well as in degree of risk posed, to the examples themselves”).} It was not meant to apply to offenses that are “similar in kind” to the offenses enumerated by the commentary, among which are possession of a machine gun or a bomb.\footnote{See id. at 142 (explaining that “the provision’s listed examples—burglary, arson, extortion, or crimes involving use of explosives—illustrate the kinds of crimes that fall within the statute’s scope”). The Mobley court improperly equated offenses the commentary had ruled were crimes of violence—possession of sawed-off shotguns, machine guns, etc.—with offenses that the statute enumerated as crimes of violence, i.e., burglary, arson, or use of explosives. See Mobley, 687 F.3d at 631 (using Begay’s “similar in kind” rationale to compare homemade knives to other weapons, such as sawed-off shotguns). Nevertheless, the Begay test was only meant to apply to the enumerated, statutorily defined offenses. See Begay, 553 U.S. at 143 (explaining that offenses only fall within residual clause if they are “roughly similar, in kind as well in degree of risk posed, to the examples themselves”).} Nothing in the commentary suggests that the circumstances surrounding the weapons’ possession are relevant in determining its inclusion.\footnote{See U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. 1 (2012) (asserting that possession of any weapon listed under Section 5845(a), i.e., a sawed-off shotgun, machine gun, etc., constitutes crime of violence). For a discussion of why possession of Section 5845(a) weapons constitutes a crime of violence under the commentary, see supra notes 89–91 and accompanying text.} Rather, the commentary recognized that possession of some weapons, based on their offensive and violent nature, are dangerous enough to constitute a crime of violence, such as the “weapons of war” listed in Section 5845(a).\footnote{See United States v. Jennings, 195 F.3d 795, 799 n.4 (5th Cir. 1999) (discussing Congress’s expansion of scope of National Firearms Act to include weapons such as bazookas, sawed-off shotguns, machine guns, and bombs, which have no lawful purpose and are “weapons of war”).} Not surprisingly, a homemade knife is not among them.\footnote{For a discussion of the full list of the enumerated weapons that constitute a violent “firearm” under Section 5845(a), see supra note 83.} Although possessing a knife in some circumstances outside of prison may create a potential risk of physical injury to others, the existence of such circumstances does not transform a homemade knife into a dangerous weapon capable of mass destruction.\footnote{See United States v. Serna, 435 F.3d 1046, 1047 (9th Cir. 2006) (explaining that almost “any object—a car, a golf club, even a pair of nail clipper—can be used to cause physical injury”); United States v. Chapple, 942 F.2d 439, 442 (7th Cir. 1991) (explaining that “possession of any weapon—brass knuckles, black jacks, knives [or] chains” increase risk of physical injury to others, but possessing them is not necessarily crime of violence); State v. McKnight, 19 P.3d 64, 65 (Idaho Ct. App. 2000) (illustrating offense where defendant beat victim with golf club until he bled profusely). Virtually any object can be used to cause physical injury; thus, courts must determine whether the object, by its nature, presents a “serious potential risk” of physical injury.” See Serna, 435 F.3d at 1047 (citation omitted) (describing focus of courts).} The Mobley decision not only improperly assumed that the possession of the shank was not for self-defense purposes, but also
improperly analogized a shank to a dangerous “firearm” by considering the circumstances surrounding the possession rather than the nature of the weapon itself.  

VII. GETTING BACK ON TRACK: CORRECTLY INTERPRETING SUPREME COURT PRECEDENT AND ACHIEVING LEGISLATIVE INTENT CONSISTENTLY

Courts in all jurisdictions have struggled to find the appropriate scope of the residual clause due to inconsistent commentary, which is incompatible with current Supreme Court precedent. The following two solutions suggest ways to create a workable residual clause framework for future courts that encourages consistency. The first is to amend the commentary so that it is consistent with current Supreme Court precedent. The second solution is to judicially limit the reach of possession offenses to those explicitly enumerated as dangerous firearms in Section 5845(a).

A. Amending the Commentary to Achieve Consistency with Supreme Court Precedent

Greater consistency in residual clause interpretation can be achieved by amending the commentary to dictate that possession, without more, cannot be classified as a crime of violence that justifies sentencing enhancement. Generally, it is well catalogued that possession does not amount to a crime of violence unless it is coupled with an overt act indicating or implying use. The Seventh Circuit has recognized that...
“[d]espite the obvious dangers of convicted felons possessing firearms, it is quite a stretch to contend that simple possession alone constitutes a crime of violence.”

Several other circuits have applied similar logic, recognizing that burglary, arson, and use of explosives are illustrative examples that involve “affirmative and active conduct that is not inherent in the crime of carrying a concealed weapon.” Moreover, the “statute provides that the use—rather than the possession—of explosives is conduct of attempting to use gun); United States v. Williams, 892 F.2d 296, 304 (3d Cir. 1989) (holding possession of gun and firing it is crime of violence), superseded by statute on other grounds, U.S. SENTENCING GUIDELINES MANUAL amend. 433 (2003), as recognized in Stinson v. United States, 508 U.S. 36 (1993); United States v. Thompson, 891 F.2d 507, 511 (4th Cir. 1989) (holding possessing gun and pointing it at someone was crime of violence). Simple possession does not “fit easily” within the literal definition of the statute because it lists “specific examples—burglary, arson, extortion, use of explosives—and then adds, ‘or otherwise involves conduct that presents a serious potential risk of physical injury to another.’” See United States v. Doc, 960 F.2d 221, 224 (1st Cir. 1992) (quoting 18 U.S.C. § 924(c)(2)(B)(ii) (2006)) (acknowledging specific statutory language requires active conduct). Although the statute criminalizes possession of a “controlled substance,” sentencing enhancement is not applicable unless the possession is coupled with “intent to manufacture, import, export, distribute, or dispense.” U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2012) (describing situations that require sentencing enhancement when defendant possesses controlled substances). For a full definition of a controlled substance offense, see supra note 28.

148. United States v. Alvarez, 914 F.2d 915, 918–19 (7th Cir. 1990) (“There is a wide expanse of possibilities that fall between firing a gun and merely possessing one. Some of these involve a substantial threat of force; others do not.”), superseded by statute on other grounds, U.S. SENTENCING GUIDELINES MANUAL amend. 433 (2003), as recognized in Stinson v. United States 508 U.S. 36 (2011). Thus, the possession of Mobley’s knife outside of prison would not constitute a crime of violence, as it would be analogous to the possession of an unregistered firearm, except less dangerous. See United States v. Whitfield, 907 F.2d 798, 800 (8th Cir. 1990) (explaining that although “carrying an illegal weapon may involve a continuing risk to others, the harm is not so immediate as to ‘present[] a serious potential risk of physical injury to another’”) (alteration in original) (quoting 18 U.S.C. § 924(c)(2)(B)(ii) (2006)). But see Jeffrey C. Bright, Violent Felonies Under the Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun Without a Permit Should Be Considered a Violent Felony, 48 DUQ. L. REV. 601, 636 (2010) (arguing importance of categorizing possession offenses by felons as crimes of violence because carrier is probably “a person with poor judgment”).

149. United States v. Flores, 477 F.3d 431, 436 (6th Cir. 2007) (explaining difference between mere possession offenses and violent, active, characteristics of enumerated offenses); see also United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) (holding that carrying concealed firearm was not crime of violence). The Archer court relied on the Begay analysis for support. See id. at 1350 (explaining presence of enumerated examples “indicates that the statute covers only similar crimes, rather than every crime that ‘presents a serious potential risk of physical injury to another’”) (quoting Begay v. United States, 553 U.S. 137, 142 (2008))). Had Congress intended mere possession be subject to sentencing enhancement, as well as all other possible crimes that present a serious potential risk of physical injury, it is “hard to see why it would have needed to include the examples at all.” Begay, 553 U.S. at 142 (emphasizing importance of giving meaning to every word in statute). More importantly, to read the statute broadly in order to cover possession offenses “would also bring within the statute’s scope a host of crimes that do not seem to belong there.” See Doc, 960 F.2d at 225 (explaining that “[t]o include
that rises to the level of a violent felony.” Thus, “the risk of force,” in cases dealing with mere possession, “is at least one step removed from the underlying crime.”

The commentary has expanded the scope of the statute beyond its original purpose and it is at odds with several Supreme Court decisions requiring offenses to be similar in kind and degree of risk posed to the enumerated offenses. Only a few courts have reasoned that mere possession of a dangerous weapon and use of that same weapon pose identical risks to others. Doing so assumes inevitability of use, and courts have understandably been reluctant to enhance a defendant’s sentence based on the possibility of future criminal action.

possession, one would have to focus upon the risk of direct future harm that present conduct poses”).

150. Flores, 477 F.3d at 436 (explaining if Congress had intended possession of explosives to be sufficient, they would not have required their use).

151. United States v. Serafin, 562 F.3d 1105, 1115 (10th Cir. 2009) (reasoning use of weapon would result in separate offense that could, potentially, be categorized as crime of violence; however, mere possession of that weapon is not what creates substantial risk of physical injury).

152. See Sykes v. United States, 131 S. Ct. 2267, 2277 (2011) (asserting offense must pose similar degree of risk as enumerated offenses); Bogey, 553 U.S. at 143 (explaining enumerated offenses were meant to limit offenses that fall under residual clause because they must be similar to enumerated offenses); see also Levine, supra note 32, at 545 (describing purpose of Career Offender sentencing enhancement was to make society safer by incarcerating repeat offenders for longer periods of time). The dissent in Mobley recognizes, “nothing indicates that prisoners who possess shanks are career offenders engaged in violent crimes, as opposed to, e.g., ordinary inmates in jail on non-violent drug charges with a crude weapon made for self-defense purposes only.” United States v. Mobley, 687 F.3d 625, 635 (4th Cir. 2012) (Wynn, J., dissenting) (explaining disagreement with majority opinion).

153. See, e.g., United States v. Lillard, 685 F.3d 773, 777 (8th Cir. 2012) (reasoning that possession of short shotgun poses same risk as use of explosives). But see United States v. McGill, 616 F.3d 1273, 1279 (11th Cir. 2010) (explaining it would be improper to “classify possessing one type of [unlawful] weapon as a violent felony when the ACCA speaks only to the use of another. To do so would read the word ‘use’ out of the ACCA statute’); Serafin, 562 F.3d at 1115 (expressing danger of unlawful possession is “inherent to its use, not merely in its possession”); United States v. Bradford, 766 F. Supp. 2d 903, 910 (E.D. Wis. 2011) (“Common-sense tells us that possession of a dangerous item does not pose the same or similar degree of risk as use of that item.”).

154. See Serafin, 562 F.3d at 1115 (acknowledging that “[i]t can hardly be said” individuals possessing unlawful weapons will inevitably use them against others); United States v. Oliver, 20 F.3d 415, 418 (11th Cir. 1994) (“[The enumerated] offenses each manifest affirmative, overt and active conduct in which the danger posed to others extends beyond the mere possession of a weapon, and is far more threatening in an immediate sense.”); United States v. Alvarez, 914 F.2d 915, 919 (7th Cir. 1990) (“There is a wide expanse of possibilities that fall between firing a gun and merely possessing one.”), superseded by statute on other grounds, U.S. Sentencing Guidelines Manual amend. 433 (2003), as recognized in Stinson v. United States 508 U.S. 36 (2011); Bradford, 766 F. Supp. 2d at 908 (suggesting that equating possession with use “confuses the risk of injury that may result from the offense conduct with the violent/aggressive nature of the conduct itself”).
forces courts’ hands when defining the terms enumerated in Guidelines, and has a similar effect in cases analyzing the ACCA because the two analyses have historically been identical.155

Case law interpreting the residual clause was still developing when the commentary was amended to include possession of dangerous firearms in 2004.156 Since the adaptation of the commentary, the Supreme Court has dispelled passive, non-active crimes as a “far cry” from the enumerated offenses.157 Additionally, the Court has required offenses be “similar in kind” and possess an equivalent degree of risk as the enumerated offenses.158 Courts have applied the standard consistently for carrying concealed weapon offenses but have struggled with respect to dangerous “firearms” under Section 5845(a) due in large part to the commentary’s confusing directive.159

Simplifying residual clause case law begins with applying Supreme Court precedent and dispelling the commentary as inconsistent with the Guidelines’ statutory language in light of recent Supreme Court decisions.160 The commentary must be amended so that it only subjects a defendant to sentencing enhancement when possession of a weapon is

155. See Stinson v. United States, 508 U.S. 36, 38 (1993) (holding commentary interpreting sentencing guidelines “is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline”). For a discussion of the similar authority and analysis of the Sentencing Guidelines and the ACCA, see supra notes 31–32 and accompanying text.

156. For a discussion of the evolution of Supreme Court precedent, see supra notes 36–78 and accompanying text.

157. See Chambers v. United States, 555 U.S. 122, 128 (2009) (holding defendant’s failure to report to penal institution was too dissimilar to enumerated offenses that all exhibit active and violent characteristics). For a full discussion of the Chambers rationale, see supra notes 52–56 and accompanying text.

158. See Sykes v. United States, 131 S. Ct. 2267, 2276 (2011) (emphasizing offense must pose similar or equal risk to closest analog enumerated offense); Begay v. United States, 553 U.S. 137, 143 (2008) (explaining enumerated examples limit crimes that fall within residual clause). For a full discussion of Sykes, see supra notes 57–69 and accompanying text. For a full discussion of Begay, see supra notes 46–51 and accompanying text.

159. Compare supra notes 147–51 and accompanying text (discussing courts application of precedent with regards to possession of handguns and carrying concealed weapons), with supra notes 88–95 (discussing courts application of precedent with regard to possessing firearms under Section 5845(a)).

160. See Stinson, 508 U.S. at 38 (holding commentary interpreting sentencing guidelines “is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline”). Nevertheless, “commentary that is broader than the guideline it interprets is invalid.” Baron-Evans, supra note 25, at 88 (“If it were otherwise, the Commission could change the meaning of a guideline through commentary, which Congress does not review.”). If the commentary for a sentencing enhancement “does not reflect the seriousness of the offense, promote respect for the law or provide just punishment for the offense” the commentary must not be applied. United States v. Handy, 570 F. Supp. 2d 437, 480 (E.D.N.Y. 2008) (holding two-level strict liability sentencing enhancement invalid). Not only is the commentary inconsistent with recent Supreme Court decisions, it is also inconsistent and incompatible with the concrete language of the statute that was enacted by Congress. See United States v. McGill,
coupled with indicated or implied use of the weapon. Such an amendment would provide stability among the Federal circuit courts, be consistent with Supreme Court precedent, and be analogous to the statutory requirement for a controlled substance offense.

B. Judicial Limitation of the Commentary: Avoiding Further Chaos in Residual Clause Interpretation

If the current commentary remains authoritative when considering what offenses qualify as crimes of violence, it is imperative that courts limit its reach by considering sentencing enhancement for possession offenses only if the weapon is a dangerous firearm enumerated in Section 5845(a). Nothing in the commentary or the Sentencing Guidelines indicates that courts should consider the circumstances surrounding the possession of the weapon and doing so has led to inconsistent results.

618 F.3d 1273, 1278 (11th Cir. 2010) ("Congress included only the use, but not the possession of, explosives among the ACCA’s example crimes.").

161. See United States v. McNeal, 900 F.2d 119, 123 (7th Cir. 1990) (reasoning offense requires some overt act in addition to possession when defendant is carrying concealed weapon or is felon in possession of firearm in order to constitute crime of violence); United States v. Williams, 892 F.2d 296, 304 (3d Cir. 1989) (holding possession of firearm without firing it is not crime of violence), superseded by statute on other grounds, U.S. SENTENCING GUIDELINES MANUAL amend. 433 (2003), as recognized in Stinson v. United States, 508 U.S. 36 (1993); United States v. Thompson, 891 F.2d 507, 511 (4th Cir. 1989) (holding possession of firearm and pointing it at suspect is crime of violence); see also United States v. Alvarez, 914 F.2d 915, 918 (7th Cir. 1990) (noting that although danger in possession of weapons exists, it is "quite a stretch" to imply that simple possession equates to use or threatened use of that weapon), superseded by statute on other grounds, U.S. SENTENCING GUIDELINES MANUAL amend. 433 (2003), as recognized in Stinson v. United States 508 U.S. 36 (2011). But see United States v. Phillips, 732 F. Supp. 255, 262–63 (D. Mass. 1990) (holding mere possession of firearm is crime of violence).

162. See Chambers, 555 U.S. at 128 (acknowledging non-active and non-aggressive offenses are “a far cry’ from enumerated offenses exemplified in statute). Requiring possession offenses to be coupled with a form of intent or intended use would be more consistent with Chambers, consistent with the common law notion that possession alone cannot constitute a crime of violence, and would create a universal framework for analyzing residual clause cases that would achieve greater consistencies among circuit courts. See id. Furthermore, the guidelines treat illegal substance offenses in the same way. See U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2012) (defining “controlled substance offense” in pertinent part as “possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense”). For a further discussion on how “controlled substance offense” requires an additional overt act accompanying possession, see supra note 28 and accompanying text.

163. For a discussion of the importance of limiting the residual clause commentary, particularly the section designating possession of a Section 5845(a) firearm as a crime of violence, see infra notes 163–72 and accompanying text.

164. See United States v. Perez-Jimenez, 654 F.3d 1136, 1142–43 (10th Cir. 2011) (examining circumstances surrounding possession of weapon in prison is different because they are “inherently dangerous places and they present unique problems”) (quoting United States v. Vahovick, 160 F.3d 395, 397 (7th Cir. 1998)). But see United States v. Polk, 577 F.3d 515, 520 (3d Cir. 2009) (explaining
The commentary directs courts that possessing certain “firearms” amounts to a crime of violence because the nature of the weapon suggests it could not be possessed for any legitimate or lawful purposes.165 This reasoning, however, was only meant to justify the result; it does not necessarily follow that possession of a weapon or object that has “no legitimate use” under certain circumstances should be classified as a crime of violence.166

For example, courts have categorically held that carrying a concealed weapon is not a crime of violence even though there seems to be no lawful or legitimate purpose for possessing a handgun at a bar.167 Possession of a firearm in those circumstances could not conceivably be used for recreational purposes and could only be used to attack or deter attacks.168 Thus, possession of shank in prison presents dangers but that does not, alone, “transform a mere possession offense into one that is similar to the crimes listed”). Courts have properly refrained from considering the circumstances surrounding possession of an unlawful weapon in any other context. See United States v. Vincent, 575 F.3d 820, 826 (8th Cir. 2009) (explaining sawed-off shotguns are capable of inflicting “indiscriminate carnage[,]” regardless of circumstances); United States v. Jennings, 195 F.3d 795, 798–99 (5th Cir. 1999) (discussing inherent dangerous nature of pipe bombs).

165. See United States v. Vincent, 575 F.3d 820, 826 (8th Cir. 2009) (explaining sawed-off shotguns are capable of inflicting “indiscriminate carnage[,]” regardless of circumstances); United States v. Jennings, 195 F.3d 795, 798–99 (5th Cir. 1999) (discussing inherent dangerous nature of pipe bombs).

166. See Polk, 577 F.3d at 520 (reasoning that circumstances surrounding possession do not “transform” possession offense into violent, active, and aggressive crime exemplified in statute). The circumstances surrounding the possession offense also do not transform the object possessed into an inherently dangerous “weapon [of] war.” See Golding, 332 F.3d at 842 (quoting Jennings, 195 F.3d at 799 n.4) (describing firearms under Section 5845(a)); see also United States v. Mobley, 687 F.3d 625, 635 (4th Cir. 2012) (Wynn, J., dissenting) (noting shanks are not included under Section 5845(a), but are also “entirely dissimilar to the weapons that are included”).

167. See, e.g., United States v. Flores, 477 F.3d 431, 435 (6th Cir. 2007) (holding that carrying concealed weapon does not amount to crime of violence under residual clause); see also Stinson v. United States, 508 U.S. 36, 47 (1993) (holding that amended commentary stating that unlawful possession of firearm by felon is not crime of violence was binding on courts interpreting residual clause). Despite the seemingly consistent understanding that mere possession of a standard weapon or object is not an offense that rises to the level of a crime of violence, the reasoning in Mobley clouds that principle because there are some circumstances where possession would be “quasi-suspect” and have no “legitimate purpose.” See Clayton E. Cramer, Violence Policy Center’s Concealed Carry Killers: Less Than It Appears 19 (June 28, 2012), available at http://ssrn.com/abstract=2005754 (explaining that carrying concealed handgun at bar while intoxicated is already criminal offense under North Carolina law).

168. See Mobley, 687 F.3d at 631 (reasoning that possessing prohibited object in prison has no lawful use because “the only reason to carry such a weapon [while in prison] is to use it to attack another or to deter an attack” (quoting Perez-Jiminez,
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following the reasoning in Mobley may lead courts to consider enhancing simple possession offenses outside of prison if the weapon had no legitimate purpose at the time it was being possessed. 169

Extending the reach of the residual clause by considering the specific circumstances surrounding possession not only strains the categorical approach established in Taylor, but also opens the flood gates to include possession offenses involving ordinary weapons or objects as crimes of violence. 170 Mobley expands the residual clause beyond statutory intent and Supreme Court precedent, thereby creating further inconsistencies and confusion. 171 The likelihood of achieving consistent residual clause interpretations hinges on the willingness of courts to limit the reach of the commentary when considering possession offenses to those weapons explicitly enumerated as dangerous firearms, or better yet, to hold that the commentary is inconsistent with the statute in light of recent Supreme Court precedent, the rule of lenity, and appropriate statutory interpretation. 172

654 F.3d at 1143)). Even if this were the case, prisoners still retain their constitutional right to self-defense. For a discussion of prisoners’ right to self-defense, see supra notes 131–54 and accompanying text.

169. See Mobley, 687 F.3d at 634 (Wynn, J., dissenting) (“The mere fact that an act is categorically unlawful does not necessarily render it a ‘dangerous and provocative act’ that . . . endangers others.” (quoting Sykes v. United States, 131 S. Ct. 2267, 2273 (2011))). For example, “failure to report to one’s penal confinement cannot be accomplished in any lawful manner; but the Supreme Court nevertheless declared it to be non-violent.” Id. Implementing Mobley’s reasoning would distort consistent case law where possession of the weapon served no legitimate or lawful purpose at the time it was possessed. For a further discussion of how Mobley’s reasoning contradicts case law, see supra notes 116–27, 165–69 and accompanying text.

170. See Taylor v. United States, 495 U.S. 575, 602 (1990) (directing courts to consider risk posed by ordinary commission of offense and not to consider circumstances surrounding offense). For a full discussion of the categorical approach announced in Taylor, see supra notes 36–45 and accompanying text.

171. See Chambers, 555 U.S. at 128 (holding passive, inactive, offenses do not pose similar risks to others and are not classified as crimes of violence); Jenny W.L. Osborne, Note, One Day Criminal Careers: The Armed Career Criminal Act’s Different Occasions Provision, 44 J. MARSHALL L. REV. 963, 973 (2011) (suggesting that applying sentencing enhancement for mere possession of firearms “strays from the original idea of targeting offenders who repeatedly use firearms during the commission of a robbery or burglary” (emphasis added)).

172. For a discussion of why the commentary is inconsistent with the principles of statutory interpretation and Supreme Court precedent, see supra notes 156–62 and accompanying text. Courts facing the challenge of applying the residual clause to possession offenses in the future should apply the rule of lenity, due to the prior inconsistent interpretations and vague congressional drafting. For a further discussion of why courts should apply the rule of lenity, see supra notes 122–25 and accompanying text. For a discussion of why it is imperative that courts disregard the circumstances surrounding the possession of the weapon, as the court failed to do in Mobley, see supra notes 167–71 and accompanying text.