MATHIS V. UNITED STATES: A REPEATED REQUEST FOR REVISION OF THE ARMED CAREER CRIMINAL ACT

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I. INTRODUCTION

Originally enacted in 1984, the Armed Career Criminal Act (ACCA or Act)[1] set out to punish recidivism for violent "career" criminals. At the time, Congress was concerned that a large number of violent crimes—particularly robbery and burglary—were being committed by a disproportionately small number of repeat offenders.[2] The ACCA was an attempt to prevent these violent acts and punish the worst offenders—especially those who committed crimes while armed.[3]

Regrettably for Congress, the language of the ACCA has caused ample confusion for courts. Early Supreme Court interpretations of the Act struggled to apply its sentence enhancement fairly and consistently.[4] More recently, Court decisions have landed serious blows to effective application of the ACCA, with *Mathis v. United States*,[5] possibly being the knockout punch. This comment proposes that recent courts' decisions concerning the ACCA have removed the teeth from the statute to the point that it can no longer be effective. Widespread confusion within the courts and inconsistent application of the Act's provisions call for a revision of the ACCA and improved cooperation between Congress and state legislators in drafting criminal statutes.

Part II of this comment offers a historical examination of the ACCA's legislation and Supreme Court cases that have preceded the *Mathis* decision, and illustrates how each Supreme Court decision concerning the ACCA has made it more difficult for courts to apply its prescribed sentences. Part III focuses specifically on *Mathis* itself, giving particular attention to the issues separating the majority opinion from the dissenting opinions. This part proposes that neither the majority opinion nor the dissenting opinions were satisfied with the outcome, and no opinion offered an adequate solution for the problems presented by the

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1. 18 U.S.C. § 924(e) (2012). 18 U.S.C. § 924 prescribes penalties for various firearms offenses. The penalties in § 924(e) only apply to "career" criminals who have three or more prior violent felony convictions. Other penalties in this section punish firearms offenses where the offender had fewer or less serious prior convictions.

2. H.R. REP. NO. 98-1073, at 1, 3 (1984).

3. *Id.* at 1.

4. *See generally* Taylor v. United States, 495 U.S. 575 (1990); Custis v. United States, 511 U.S. 485 (1994).

5. 136 S. Ct. 2243 (2016).

ACCA. Finally, Part IV examines the implications of the *Mathis* decision, including an applied analysis of its effect on the states of the Sixth Circuit. As a result of this analysis, this comment argues that the ACCA can no longer effectively punish most of the crimes it was designed to prevent, and Congress must revise the law to avoid further confusion.

II. BACKGROUND

During the twenty years after Congress enacted the ACCA, it faced little serious legal challenge. Early concerns with the Act were predominantly disputes regarding whether the Act was a sentence enhancement or a separate offense.[6] Despite a circuit split on this issue, the Supreme Court repeatedly refused to resolve it.[7] These early challenges, while seemingly innocuous for the long-term viability of the ACCA, hinted at serious problems. At the heart of the distinction between sentence enhancement and separate offense was the issue of who would decide the application of the ACCA's penalty— judges or juries.[8] This issue, in turn, implicated possible violations of the Sixth Amendment and the Due Process Clause of the Fifth and Fourteenth Amendments.

Nearly all of the early appeals court challenges observed the necessity of analyzing the language of the ACCA and discovering Congress's intent in passing the law;[9] however, the courts could not come to a consensus on either point.[10] That early failure to interpret the law uniformly eventually gave rise to the constitutional challenges in *Johnson v. United States*,[11] and *Mathis*. This section will examine the historical development of ACCA jurisprudence leading up to *Mathis*,

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6. *See, e.g.*, Finch v. United States, 842 F.2d 201, 202 (8th Cir. 1988), *cert. denied*, 487 U.S. 1239 (1988); United States v. Brewer, 841 F.2d 667, 669 (6th Cir. 1988), *cert. denied*, 488 U.S. 946 (1988); United States v. Davis, 801 F.2d 754, 755–56 (5th Cir. 1986); United States v. Hawkins, 811 F.2d 210, 220 (3rd Cir. 1987), *cert. denied*, 484 U.S. 833 (1987); United States v. Jackson, 824 F.2d 21, 26 (D.C. Cir. 1987), *cert. denied*, 484 U.S. 1013 (1988). The Court offered no formal explanation for denying a writ of certiorari for any of these cases.

7. *See supra* note 6 and accompanying text; *see also* Jill C. Rafaloff, *The Armed Career Criminal Act: Sentence Enhancement Statute or New Offense?*, 56 FORDHAM L. REV. 1085, 1094 (1988) (suggesting that the Court considered this issue resolved by its decision in *Garrett v. United States*, 471 U.S. 773, 784 (1985), where the Court held that a sentence enhancement for continuing criminal enterprise was a separate offense).

8. *See Jackson*, 824 F.2d at 25.

9. *See, e.g.*, *Jackson*, 824 F.2d 21; *Hawkins*, 811 F.2d 210.

10. *Compare Jackson*, 824 F.2d at 24 ("As originally introduced in the House and Senate, the ACCA clearly and unambiguously created a new federal offense."), *with Hawkins*, 811 F.2d at 220 ("We conclude that the members of Congress viewed the Armed Career Criminal Act as a statute providing for an enhanced penalty . . . .").

11. 135 S. Ct. 2551 (2015).

and show how early ACCA jurisprudence forced the *Mathis* Court into its no-win decision.

A. Legislative History of the ACCA's Burglary Definition

Congress enacted the ACCA in 1984 to punish repeat felons who illegally possess firearms.[12] Under the ACCA, a felon in possession of a firearm who has at least three prior convictions for "violent felonies" receives a minimum fifteen-year prison sentence.[13] Absent the ACCA's provisions, Congress limits the same offense to a maximum ten-year sentence.[14] The original version of the Act placed a heavy focus on robbery and burglary violations due to reports that a large percentage of these violent crimes were committed by a small percentage of repeat offenders.[15] According to congressional reports, even though these crimes were not always violent crimes, the likelihood of a robbery or burglary becoming a violent crime is very high, especially when the defendant possesses a firearm.[16]

Interestingly, Congress chose to explicitly define "burglary" in this initial incarnation of the Act. In an attempt to bridge common law burglary and the variety of state burglary statutes, Congress took a middle road, defining burglary as "any felony consisting of entering or remaining surreptitiously within a building that is property of another with intent to engage in conduct constituting a Federal or State offense."[17] This definition is an invention of the Act, both broader than the common law definition[18] and narrower than many state burglary statutes.[19] By including this definition, Congress wanted to ensure that the Act would apply fairly, overcoming both the discrepancies of state burglary statutes and the inconsistencies of the common law definition.[20] In other words, a uniform definition would guarantee that two defendants who committed the same act in different states would not receive different federal sentences.

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12. H.R. REP. NO. 98-1073, at 1 (1984).

13. 18 U.S.C. § 924(e)(1) (2012).

14. 18 U.S.C. § 924(a)(2).

15. Taylor v. United States, 495 U.S. 575, 581 (1990).

16. *Id.* at 585–86.

17. *Id.* at 581.

18. *See* SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 63 (1644) (defining a burglar as a felon who "in the night break[s] and ent[ers] into a . . . house of another, of intent to . . . commit some . . . felony within the same, whether his felonious intent be executed or not.").

19. *See, e.g.*, CAL. PENAL CODE § 459 (2016) (including shoplifting and entering a locked vehicle in its definition of burglary); 720 ILL. COMP. STAT. ANN. 5/19-1 (2016) (including entering an aircraft and watercraft).

20. *Taylor*, 495 U.S. at 582.

Nevertheless, in the amended and final version of the ACCA, this definition of burglary disappeared.[21] Congress never stated a reason for removing the definition, although some have speculated that its exclusion was simply "an inadvertent casualty of a complex drafting process" when legislators negotiated over the final language of the amendment.[22] Unfortunately, without an explanation for the omission, courts were left to wonder whether it was intentional or unintentional. If intentional, it could indicate that Congress wanted to defer to the state burglary statute, regardless of their variances;[23] if unintentional, it would mean that Congress still wanted to apply some universal, generic burglary definition that would supersede state laws for purposes of the ACCA.[24] Fortunately, the Supreme Court found it necessary to resolve this issue to prevent any further disparity in ACCA sentences.

B. Taylor v. United States*: First Attempt at Resolution*

Following the ACCA's revision in 1986, courts increasingly had trouble deciding whether state burglary convictions should always be considered "violent felonies."[25] For the sake of uniformity and fairness, the Supreme Court wanted to ensure that lower courts had a standard by which to interpret state burglary statutes.[26] And in deciding *Taylor*, the Supreme Court gave a unanimous and unwavering opinion that Congress intended a traditional, "generic" burglary definition, even where state burglary statutes gave the crime a broader scope.[27]

After a thorough examination of the legislative history of the Act, the Court came to several conclusions about the events leading up to the original ACCA and its subsequent amendments. First, Congress placed a special emphasis on the crime of burglary during the formulation of this law, apparently "because of its inherent potential for harm to persons."[28] Thus, Congress viewed all burglaries as having the potential for death or serious bodily harm, and wanted repeat offenders this crime to suffer serious penalties. Second, the ACCA always intended a "categorical approach" to all predicate offenses—Congress wanted sentence enhancements to be prompted by crimes that had specific elements, not just those branded as "burglary," "arson," or "robbery,"

21. *Id.*

22. *Id.* at 589–90.

23. *E.g.*, United States v. Taylor, 864 F.2d 625, 627 (8th Cir. 1989).

24. *E.g.*, United States v. Headspeth, 852 F. 2d 753, 757 (4th Cir. 1988).

25. *See, e.g.*, United States v. Dickerson, 857 F.2d 414, 419 (7th Cir. 1988); United States v. Palmer, 871 F.2d 1202, 1207–09 (3rd Cir. 1989).

26. *Taylor*, 495 U.S. at 592.

27. *Id.* at 599.

28. *Id.* at 588.

etc.[29] Third, the original version of the ACCA clearly intended a generic definition of burglary that roughly corresponded to a majority of state criminal codes. Because Congress intended uniform criminal sentencing, and offered no explanation for removing the generic definition, it is safe to conclude that a generic definition should still apply.[30] Taking all three conclusions together, the Court found it "implausible" that Congress would have desired the consequences of deferring to the burglary definitions contained in various state statutes.[31]

After making these conclusions regarding the legislative history of the ACCA, the Court offered some practical analysis for applying "generic" burglary to state convictions. Recognizing that (1) only a few states have retained the common law definition of burglary, and (2) the common law definition "would not comport with the purposes of the enhancement statute,"[32] the Court thought it best to provide its own definition of burglary: "any crime, regardless of its exact definition or label, having the basic elements of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[33] This definition, nearly identical to the 1984 definition, must be the standard by which state statutes are measured according to the *Taylor* Court.[34] Where state burglary statutes are narrower than this definition, burglary convictions will always be predicate offenses for ACCA purposes.[35] However, where a statute defines burglary more broadly, courts must apply a categorical analysis—looking only to statutory elements of burglary, and never to the unique facts underlying a burglary conviction.[36] In short, where states define burglary more broadly than the generic definition, convictions cannot be ACCA predicate offenses unless an indictment or jury instruction show that a particular conviction corresponds to the generic definition. Only in these cases is a jury required to find all the elements of generic burglary.[37] Otherwise, no fact-finding mission is permissible for this purpose. In this analysis, the *Taylor* Court created the "categorical approach" that remains the standard for evaluating ACCA predicate convictions even today.

29. *Id.*
30. *Id.* at 589.
31. *Id.* at 590.
32. *Taylor*, 495 U.S. at 593.
33. *Id.* at 599.
34. *Id.* at 598–99.
35. *Id.* at 599.
36. *Id.* at 600.
37. *Id.* at 601–02.

C. Shepard v. United States*: Refining the Categorical Approach in Light of* Apprendi *and Sixth Amendment Challenges*

For ten years after *Taylor*, the Court's mode of analysis for ACCA predicate crimes was mostly effective. But before the next time the Court would hear another case concerning the ACCA, it decided a tremendously influential case in *Apprendi v. New Jersey*. There, the Court held that,[38] "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[39] Any other facts used to increase a penalty would violate the Sixth Amendment.[40] Although the case did not deal directly with ACCA sentence enhancements, its effect was apparent: facts used to enhance sentences under the ACCA cases must have been unanimously decided by a jury, and not applied by a judge. This reliance on convictions over facts seemed to reaffirm the Court's *Taylor* decision. But in light of the holding in *Apprendi*, the *Taylor* mode of analysis required clarification.[41]

This essential clarification was the key issue of *Shepard v. United States*.[42] The defendant in *Shepard* pleaded guilty to illegally possessing a firearm under 18 U.S.C. § 922(g)(1).[43] Prosecutors argued that Shepard's four prior guilty pleas to burglary in Massachusetts triggered the ACCA enhancement.[44] Unpersuaded, the district court found that Massachusetts's burglary statute was broader than the generic definition in *Taylor* (because it prohibited illegal entry into boats and cars), and that indictments in the cases did not narrow that definition sufficiently.[45] The court also denied the government's request to review police complaints, concluding that these documents were not permissible under *Taylor*.[46] As a result, the district court refused to consider an ACCA enhancement.[47] Disagreeing with that decision, the First Circuit reversed, finding that, in the absence of adequate indictment forms or jury instructions, police reports were "sufficiently reliable evidence" to determine whether the guilty pleas fit within the

38. 530 U.S. 466 (2000).
39. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).
40. *Id.* at 488–90.
41. Shepard v. United States, 544 U.S. 13, 24, 25–26 (2005).
42. 544 U.S. 13.
43. *Id.* at 16.
44. *Id.*
45. *Id.* at 16–17.
46. *Id.* at 17.
47. *Id.* at 18.

generic definition of burglary.[48]

The Supreme Court reversed the First Circuit decision on the grounds that nothing in *Taylor* authorized the use of police reports or similar documents to establish the elements of generic burglary.[49] Initially, the Court agreed with the First Circuit's assertion that nothing in the ACCA or *Taylor* set different standards for establishing the elements of prior convictions in cases that ended in a jury conviction or a plea.[50] Further, the *Taylor* Court never prohibited sentencing courts from looking beyond indictments and jury instructions to support a generic burglary conviction.[51] However, looking to documents that are non-elemental in their descriptions of a crime is contrary to the categorical approach of the *Taylor* holding. Even when other documents, such as police reports, are reliably accurate, they do not purport to establish the necessary criminal elements of generic burglary, and are therefore insufficient to establish an ACCA predicate offense.[52] In fact, the Court states that looking beyond court documents that contain these necessary elements would be a violation of the Sixth Amendment's guarantee that a jury will determine any disputed facts necessary to increase a sentence.[53] In the end, the *Shepard* Court reinforced the *Taylor* holding while clarifying some of the limitations of fact-finding for the sake of ACCA sentencing.

D. Descamps v. United States*: Signs of Trouble*

In the years following the *Shepard* decision, a new language developed in ACCA cases that altered *Taylor*'s mode of analysis. The newly branded "modified categorical approach" seems to have gained support in the circuit courts in the years following *Shepard*,[54] but had never been formally endorsed by the Supreme Court. In fact, the Court never once mentions this phrase in its opinions in *Taylor* or *Shepard*. Nonetheless, this doctrine had become so enshrined in ACCA jurisprudence by the time the Court decided *Descamps v. United States*,[55] that Justice Kagan makes it a central theme in the Court's opinion, and attributes its origins to the *Taylor* Court. It appears that "modified categorical approach" began as a way to describe *Taylor*'s

48. *Shepard*, 544 U.S. at 18.

49. *Id.* at 26

50. *Id.* at 19.

51. *Id.* at 20.

52. *Id.* at 21–22.

53. *Id.* at 25.

54. *See, e.g.*, Conteh v. Gonzales, 461 F.3d 45, 55 (1st Cir. 2006); Arguelles-Olivares v. Mukasey, 526 F.3d 171, 177 (5th Cir. 2008).

55. 133 S. Ct. 2276, 2283 (2013).

permissive review of indictments and jury instructions for overly broad burglary statutes, as opposed to the "strict" categorical approach for convictions whose statutes fit the generic burglary definition.[56] In *Taylor*, both of these exercises fall under the same "categorical approach" because either assures that only the category of a crime, not its underlying facts, are considered for ACCA sentence enhancements. Despite the mysterious origins of the modified categorical approach, the Court embraces this mode of analysis in *Descamps*.

The Court begins by asserting that it has only allowed the modified approach to "implement the categorical approach when a defendant was convicted of violating a divisible statute."[57] This means that for a single statute that lists several different crimes, some of which would not be ACCA predicate offenses, materials outside the statute may be used only when the statute is clearly divisible—when it lists the crimes in different subsections, subjects them to different penalties, etc. For statutes that are broader than generic burglary, but are not divisible, the modified categorical approach cannot apply.[58] Because these statutes do not require a court or a jury to prove the elements of generic burglary to get a conviction, these convictions can never serve as an ACCA predicate offense, even if the defendant's admission fits the generic definition.[59]

Throughout its opinion, the Court is very critical of the Ninth Circuit Court of Appeals for not recognizing the distinction between a divisible and indivisible statute.[60] To permit the modified categorical approach for indivisible statutes, the Court asserts, would result in the exact kind of disparate treatment that Congress was trying to prevent in enacting the ACCA.[61] That is, states with overbroad burglary statutes might be able to find that some, but not all, defendants had committed generic burglary even if all had committed the same act. Here, the *Descamps* Court appears unwilling to risk severe sentence enhancements based on information that does not factor elements of the crime.[62]

Moreover, the Court states that permitting this approach for indivisible statutes violates the Sixth Amendment.[63] The constitutional guarantee to a jury requires that a jury, and not a sentencing judge, will be the finder of facts that would require a sentence enhancement under

56. *See* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 187 (2007).
57. *Descamps*, 133 S. Ct. at 2285.
58. *Id.*
59. *Id.* at 2286.
60. *Id.* at 2286–91.
61. *Id.* at 2288.
62. *See id.* at 2288.
63. *Descamps*, 133 S. Ct. at 2288–89.

the ACCA. A sentencing court is not able to use facts from a trial concerning the defendant's conduct, and thus must be limited to court documents—such as indictments or jury instructions—that clearly delineate the elements of generic burglary based on the statute of conviction. In the Court's opinion, "only divisible statutes enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime."[64] Even if a court is hypothetically able to establish the elements of generic burglary with a conviction under an indivisible statute, this would break down the distinction between an elements-based approach and a facts-based approach, giving courts excessive liberty to ask "whether a particular set of facts leading to a conviction conforms to a generic ACCA offense."[65] This, says the Court, is precisely what *Taylor* forbids.[66]

E. Johnson v. United States*: A Cautionary Tale*

Before beginning a focused analysis on the Court's opinion in *Mathis*, it would be helpful to know what is at stake. The legal and social impact of certain Supreme Court decisions is known immediately—the decisions in these cases have an instantaneous and widespread effect that is predictable even before the Court's decision is published. One recent example is *Obergefell v. Hodges*, which struck down gay marriage bans in all fifty states.[67] Conversely, some decisions seem to have limited significance at first, but take on a legal life of their own as the holding influences other cases. Perhaps because it was decided on the same day as *Obergefell*, the Court's decision in *Johnson v. United States*[68] falls into the latter category.

The petitioner in *Johnson* had been convicted under the ACCA.[69] One of his predicate state convictions—possession of a short-barreled shotgun—was not specifically mentioned as a "violent felony" under the ACCA.[70] Nonetheless, the district court counted it as a one of three prior violent felonies under the law's "residual clause" in order to enhance *Johnson*'s sentence.[71] This residual clause attaches the sentence enhancement when one of the predicate convictions is for "any

64. *Id.* at 2290.

65. *Id.* at 2291.

66. *See id.*

67. Obergefell v. Hodges, 135 S. Ct. 2585, 2608 (2015) (holding that state bans on same-sex marriage violated the Due Process Clause of the Fourteenth Amendment).

68. 135 S. Ct. 2551 (2015).

69. *Id.* at 2556.

70. *Id.*

71. *Id.*

crime punishable by imprisonment for a term exceeding one year . . . that . . . involves conduct that presents a serious potential risk of physical injury to another . . . ."[72] Johnson later contested his sentence, arguing that possession of a short-barreled shotgun is not a violent felony under the ACCA's residual clause.[73] The Eight Circuit Court of appeals affirmed the lower court's decision.[74] The Supreme Court reversed, holding that the residual clause is unconstitutionally vague, and therefore enhancing a sentence under it violates the Due Process Clause.[75] In doing so, the Court also explicitly overruled two earlier cases that had upheld the legality of the residual clause.[76]

At the time of the *Johnson* decision, not many could have predicted the impact it would have on cases far beyond ACCA convictions. The first, somewhat foreseeable consequence of *Johnson* was that the Court held the decision to be retroactive on collateral review.[77] This result meant that any prisoner sentenced under the ACCA, one of whose predicate offenses fell under the residual clause, was eligible for a reduced or vacated sentence. Two less probable lines of cases have also emerged, attempting to stretch the *Johnson* holding beyond the ACCA. First, several federal appeals court cases have questioned whether *Johnson* extends to the residual clause in the U.S. Sentencing Guidelines.[78] That clause is nearly identical in language to the now-unconstitutional clause in the ACCA, and many courts have determined that if one is unconstitutionally vague, it follows logically that the other must be.[79] Federal appeals courts are currently split on the question.[80]

Further, several circuit courts have recently decided that the *Johnson* holding encompasses similar language in the Immigration and Nationality Act (INA).[81] These decisions could halt the deportation of many non-citizen U.S. residents who have been convicted of a crime of violence under the INA's own residual clause.[82] Little by little, courts

72. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

73. United States v. Johnson, 526 F. App'x 708, 709 (8th Cir. 2013).

74. *Id.* at 712.

75. *Johnson*, 135 S. Ct. at 2563.

76. *Id.* The two cases the Court overruled were *James v. United States*, 550 U.S. 192 (2007) and *Sykes v. United States*, 564 U.S. 1 (2011).

77. Welch v. United States, 136 S. Ct. 1257, 1268 (2016).

78. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(1) (2016) (U.S. SENTENCING COMM'N 2004).

79. *See, e.g.*, United States v. Hurlburt, 835 F.3d 715 (7th Cir. 2016).

80. *See Hurlburt*, 835 F.3d at 726; Beckles v. United States, 616 F. App'x 415, 416 (11th Cir. 2015); United States v. Howell, 838 F.3d 489 (5th Cir. 2016).

81. *See* Shuti v. Lynch, 828 F.3d 440 (6th Cir. 2016); United States v. Vivas–Ceja, 808 F.3d 719 (7th Cir. 2015); Dimaya v. Lynch, 803 F.3d 1110 (9th Cir. 2015), *cert. granted*, 137 S. Ct. 31 (2016); Golicov v. Lynch, 837 F.3d 1065 (10th Cir. 2016).

82. *See* 18 U.S.C. § 16(b) (2012), 8 U.S.C. § 1101(a)(43)(F) (2012); *see also Golicov*, 837 F.3d

have found applications for *Johnson* that reach beyond the limited scope of the Court's original decision. Given the parallel in jurisprudence between the residual clause and the burglary clause, *Mathis* could produce similar consequences.

III. *MATHIS V. UNITED STATES*: CLARIFYING THE LAW OR MUDDYING THE WATERS?

The Court in *Mathis* picks up where *Descamps* left off. Between the two cases, courts found the *Descamps* mandate to distinguish divisible and indivisible statutes difficult.[83] Once again, inconsistent application of ACCA enhancements became the rule. The primary obstacle for these courts, which became the central issue in *Mathis*, was whether alternative means of committing an ACCA predicate offense constituted the necessary elements of the crime that a jury must find to convict a defendant.[84] For example, the defendant in *Mathis* had five prior convictions under Iowa's burglary statute.[85] That statute criminalized the unlawful entry into "any building, structure . . . land, water, or air vehicle . . . ,"[86] thereby making it broader than the "generic" burglary definition offered in *Taylor*.[87] The statute was not obviously divisible because the penalty was the same whether a defendant entered a building or a boat. So the question for the Court was whether simply mentioning "building" and "water vehicle" separately (as opposed to "any structure") made a statute divisible.[88]

The Court responded in the negative on the grounds that "our precedents make this a straightforward case."[89] Relying heavily on the *Taylor* and *Shepard* decisions, the majority found that alternative means of committing a crime do not constitute the necessary means for convicting a defendant of that crime.[90] This finding was based on three basic reasons: (1) the "ACCA's text favors that approach;"[91] (2) permitting a sentencing judge to enhance a sentence would raise Sixth

at 1065; Xiong v. Lynch, 836 F.3d 948, 950 (8th Cir. 2016).

83. *See, e.g.*, United States v. Cisneros, 826 F.3d 1190 (9th Cir. 2016); United States v. Mathis, 786 F.3d 1068 (8th Cir. 2015); United States v. Tendrich, 638 F. App'x 980 (11th Cir. 2016).

84. Mathis v. United States, 136 S. Ct. 2243, 2246 (2016).

85. *Id.* at 2250.

86. IOWA CODE ANN. § 713.1 (West 2016); *see also* IOWA CODE ANN. § 702.12 (West 2016) (defining "occupied structure").

87. Taylor v. United States, 495 U.S. 575, 598–99 (1990).

88. *Mathis*, 136 S. Ct. at 2250–51.

89. *Id.* at 2257.

90. *Id.* at 2253.

91. *Id.* at 2252. The Court observes that the ACCA specifies "previous convictions" for a crime. This language favors an "elements" approach over a "factual" approach.

Amendment concerns and violate the Court's holding in *Apprendi*;[92] and (3) this approach "avoids unfairness to defendants."[93] In short, the majority in *Mathis* finds that the Court's previous ACCA decisions left it no choice but to follow a strictly elements-based analysis. Factual circumstances such as alternative means to commit an element of a crime must not affect a sentence because a jury is not required to find these facts.[94]

After the majority opinion, Justice Breyer, joined by Justice Ginsburg, offers a compelling dissent. Here, the dissent argues that the statutes weighed in *Taylor* and *Shepard* were nearly identical to the Iowa statute considered in *Mathis*, yet the outcomes were very different.[95] The earlier cases permitted a sentencing judge to look at an indictment or jury instruction for evidence that a defendant broke into a building or a boat; the Court should not find any differently now.[96] In Justice Breyer's thinking, there is no clear line between the "elements" and "means" distinction promoted by the majority.[97] Instead, for the purposes of conviction and sentencing, the two are one and the same.[98]

In support of this argument, the dissent points out that *Taylor* permits a court to "go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the elements of generic burglary."[99] However, the *Taylor* and *Shepard* decisions mentioned nothing about a distinction between elements and means, and therefore the majority has not simply followed precedent, but established new doctrine.[100] Further, the statute affecting the *Descamps* decision was distinguishable from the Iowa statute here because it did not list alternative means for committing a crime.[101] In the dissent's view, the majority is further complicating an already convoluted method of analysis for ACCA predicate crimes.[102] The precedent set forth by *Taylor* and *Shepard* are sufficient to resolve this case; there is no reason to take a different view.[103]

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92. *Id.*

93. *Mathis*, 136 S. Ct. at 2253. The Court notes that statements in the record may be erroneous because they had no impact on the original conviction. It would not be fair to permit an untrue statement to later enhance a punishment.

94. *Id.*

95. *Id.* at 2260 (Breyer, dissenting).

96. *Id.*

97. *Id.* at 2261.

98. *Id.* at 2261.

99. *Mathis*, 136 S. Ct. at 2266 (quoting Taylor v. United States, 495 U.S. 575, 602 (1990)).

100. *Id.* at 2265, 2266.

101. *Id.* at 2265–66.

102. *Id.* at 2263.

103. This comment does not wish to ignore Justice Alito's dissent in *Mathis*. It is remarkably entertaining for its inclusion of the story of Sabine Moreau, a Belgian woman who, intending to pick up

IV. DISCUSSION

When the Court decided *Taylor* only twenty-six years ago, it is improbable that it could have foreseen the judicial development leading to the *Mathis* holding. The *Taylor* Court, while seemingly admitting that the ACCA was not a model of clarity,[104] was unanimous in its belief that permitting a sentencing court to apply a categorical approach to overbroad criminal statutes would tidily resolve the issue. Obviously, that has not been the case. Subsequent cases have amended the once "simple" categorical approach to include a "modified" categorical approach, a doctrine on the divisibility of statutes, and a distinction between the means and elements of a crime of conviction.

This section will argue that the ACCA has been eroded beyond repair and is at risk of further erosion in its current form. Not only is the Act ineffective at achieving its original purpose, it is also weighing down federal courts with unnecessary confusion and costly appeals. After an evaluation of possible solutions, this comment will conclude that the most effective resolution to the ACCA will be a revision of the language of the statute. An ideal revision would include clear, specific language of the predicate crimes under the ACCA, along with an incentive for state legislators to amend their statutes to more closely adhere to the generic crime definitions.

A. How Johnson *and* Mathis *Eliminated the ACCA's Flexibility*

As noted above, courts initially had difficulty finding an appropriate application for the Court's *Descamps* holding.[105] The difficulty revolved around the challenge of knowing whether a statute was divisible, and consequently whether a court could apply the modified categorical approach.[106] An obvious example of this difficulty was the Eight Circuit's handling of Iowa's burglary statute in the *Mathis* case that eventually led to the Supreme Court's ruling. The Iowa statute in question closely resembled generic burglary, but replaced "building" with "occupied structure."[107] Read facially, it is likely that Iowa

her friend from a train station thirty-eight miles from her home, instead drove 900 miles over two days to Zagreb, Croatia, because that was the route her GPS erroneously gave her. Another amusing tidbit from this dissent is a hypothetical conversation among a court, a defendant, and defense counsel trying to pinpoint whether the defendant burglarized a house or a boat. Both passages illustrate the sometimes-absurd challenges facing courts when trying to sentence under the ACCA, but this dissent as a whole does not offer any unique analysis worth including here.

104. *Taylor*, 495 U.S. at 587.

105. *See, e.g.*, United States v. Cisneros, 826 F.3d 1190 (9th Cir. 2016); United States v. Mathis, 786 F.3d 1068 (8th Cir. 2015); United States v. Tendrich, 638 F. App'x 980 (11th Cir. 2016).

106. *Id.*

107. IOWA CODE ANN. § 713.1 (West 2016).

burglary would be an ACCA predicate offense. However, once courts applied the prescribed definition for "occupied structure,"[108] it was clear that Iowa burglary exceeded the bounds of generic burglary.

Iowa burglaries were not the sole source of headaches for sentencing courts seeking to apply the ACCA. Following *Descamps*, the burglary statutes in Arizona, California, Idaho, Illinois, Nevada, and Rhode Island—states comprising twenty percent of the nation's population—were wholly ineligible for ACCA sentencing consideration.[109] Many other state laws were similar to the Iowa statute, where an applied definition made an otherwise generic burglary law overly broad.[110]

Courts dealt with this challenge in one of two ways, depending on whether the court found the statute divisible or indivisible. For divisible statutes, the outcome was predictable. If the eligible "*Shepard* documents" supported a finding that the defendant had committed generic burglary, then the sentence enhancement could apply.[111] For indivisible statutes (and occasionally statutes whose divisibility status was unclear) courts frequently turned to a reliable backup—the ACCA's residual clause.[112] In doing so, courts were essentially declaring that, although they were uncertain about an act's status as burglary, it still constituted a violent felony for purposes of the ACCA.[113]

This line of jurisprudence led to a hope that violent burglars would still be punished even if courts had difficulty deciphering the *Descamps* holding. In other words, the combination of the modified categorical approach and the residual clause weaved a safety net that prevented obvious acts of burglary from going unpunished.[114] However, with its holdings in *Johnson* and *Mathis*, the Supreme Court removed this safety net altogether. Because of *Johnson*, courts could no longer depend on the wide-ranging residual clause to convert ambiguously violent acts

108. *Id*. § 702.12 (defining "occupied structure" to include land, water, and air vehicles, among other items).

109. Mark Middaugh, *Debriefing* Descamps*: A Comment on Burglary and the Armed Career Criminal Act*, 67 Stanford L. Rev. 723, 727–28 (2015).

110. *See, e.g.*, N.J. STAT. ANN. 2C:18-2 (West 2010); OHIO REV. CODE ANN. § 2911.11 (West 1996).

111. *E.g.*, United States v. Mathis, 786 F.3d 1068, 1075 (8th Cir. 2015); United States v. Sanders, 635 F. App'x 286, 288–89 (6th Cir. 2016).

112. *E.g.*, United States v. Fountain, 643 F. App'x 543, 544 (6th Cir. 2016); United States v. Waagner, No. 1:02-CR-007, 2016 WL 2853563, at *3 (S.D. Ohio May 16, 2016).

113. *See Fountain*, 643 F. App'x at 547 (observing that the district court had the option of either using the modified categorical approach or falling back on the residual clause for a statute that was ambiguously divisible).

114. Middaugh, *supra* note 109, at 732–34 (discussing the Supreme Court's "Risk of Violence" jurisprudence as a resolution to ambiguous burglary statutes); *see also* Ted Koehler, *Assessing Divisibility in the Armed Career Criminal Act*, 110 MICH. L. REV. 1521, 1536–40 (2012) (distinguishing a "functional method" and a "formal method" for applying the modified categorical approach for ACCA predicate crimes).

into ACCA crimes. Nor could they apply the modified categorical approach as broadly as before due to *Mathis*. As a result, all courts—including the Supreme Court—were left ruing a scenario where the difference of one word might determine whether burglary in one state would be punished the same as an identical burglary in another.[115]

B. The Sixth Circuit: A Case Study

Since the *Mathis* decision, there have been some predictably undesirable effects for application of the ACCA. A comprehensive examination of its effects on every state burglary law is beyond the scope of this comment. Still, post-*Mathis* court decisions in the Sixth Circuit states—Kentucky, Michigan, Ohio, and Tennessee—provide a satisfying sample of the difficulties sentencing courts now face when applying the ACCA to burglary convictions. Based on post-*Mathis* court decisions in these four states, it is clear that a change to the ACCA is necessary.

1. Kentucky

As applied to Kentucky's burglary statute alone, *Mathis* produces a result ridiculous enough to justify a revision of the ACCA. Kentucky's statute provides for three degrees of burglary. Second-degree burglary is the simplest, designating as a Class C felony "when, with the intent to commit a crime, [a person] knowingly enters or remains unlawfully in a dwelling."[116] The definition of "dwelling" for purposes of the statute is equally simple: "a building which is usually occupied by a person lodging therein."[117] The law's simplicity is what holds it intact under the scrutiny of *Mathis*—were the statute to expand the definition of "second-degree burglary" or "dwelling" any further, it would likely be overly broad. Thus, a recent district court decision upheld a second-degree burglary conviction in Kentucky as generic burglary.[118]

On the other hand, Kentucky's first- and third-degree burglary statutes have not been as fortunate. Each of these statutes applies to a

115. *See* Mathis v. United States, 136 S. Ct. 2243, 2257 (2010) (writing for the majority, Justice Kagan, seemingly in frustration, writes "whether for good or ill, the elements-based approach remains the law.").

116. KY. REV. STAT. ANN. § 511.030 (West 2017).

117. *Id.* § 511.010.

118. United States v. Fox, Nos. 6:11-CR-84-GFVT-REW, 6:16-CV-123-GFVT-REW, 2016 WL 4579123 at * 4 (E.D. Ky. Aug. 4, 2016). Although this decision applied to United States Sentencing Guidelines § 4B1.2(a)(2) and not the ACCA, courts have frequently applied the same standards to both sentence enhancements in the past. *See, e.g.*, United States v. Hurlburt, 835 F.3d 715, 718 (7th Cir. 2016); United States v. Pawlak, 822 F.3d 902, 903 (6th Cir. 2016).

person who "knowingly enters or remains unlawfully in a building," with first-degree burglary adding aggravating circumstances.[119] The definition for "building" for purposes of these statutes includes "any structure, vehicle, watercraft or aircraft,"[120] making it very similar to the Iowa statute that the *Mathis* Court found overly broad. Indeed, a district court found the ACCA inapplicable to a Kentucky third-degree conviction just a month after *Mathis* was decided.[121] Given that court's rationale for doing so, Kentucky's first-degree burglary statute must also be overly broad for ACCA purposes.[122] Consequently, courts are left with the very undesirable and inconsistent result that a less-serious offense—second-degree burglary—might trigger a severe sentence enhancement when a more serious offense—first-degree burglary—would not. Prior to *Johnson* and *Mathis*, this was not the case.[123]

2. Michigan

Michigan's Penal Code fails to list any crime under the title "burglary," but courts have found its "breaking and entering" statute[124] similar enough to generic burglary to qualify for ACCA treatment.[125] Even so, a quick reading of the statute in light of *Mathis* settles any doubt whether the law would qualify as an ACCA predicate crime: any person breaking and entering "a tent, hotel, office, store, shop, warehouse, barn, granary, factory or other building, structure, boat, ship, shipping container, or railroad car" is guilty of a felony.[126] The Michigan statute may be lauded for its candor—it doesn't even force the reader to look up a definition for "building" or "structure" to conclude that it is too broad to be generic burglary. Accordingly, the Sixth Circuit wasted little time before deciding that "[o]nly one conclusion is possible under *Mathis*: a conviction under § 750.110 cannot serve as a predicate offense under ACCA."[127] So while the Michigan statute is overbroad for ACCA purposes, its overreach was so obvious that it

119. KY. REV. STAT. ANN. §§ 511.020, 511.040 (West 2017).

120. *Id.* § 511.010.

121. United States v. Barnett, No. 06-CR-71-JMH-1, 2016 WL 3983318 at * 3 (E.D. Ky. July 25, 2016).

122. *Id.* at *2.

123. *See, e.g.*, United States v. Walker, 599 F. App'x 582, 583 (6th Cir. 2015) (finding Kentucky second-degree burglary equivalent to generic burglary and Kentucky third-degree burglary divisible and subject to the modified categorical approach).

124. MICH. COMP. LAWS ANN. § 750.110 (West 2008).

125. *See, e.g.*, United States v. Fish, 928 F.2d 185, 188 (6th Cir. 1991); United States v. Sanders, 635 F. App'x 286, 289 (6th Cir. 2016).

126. MICH. COMP. LAWS ANN. § 750.110(1) (West 2008).

127. United States v. Ritchey, 840 F.3d 310, 321 (6th Cir. 2016).

avoided any confusion among the courts.

3. Ohio

Among the burglary statutes in the Sixth Circuit states, Ohio's is unique in that, as of the writing of this comment, no court has ruled on its post-*Mathis* ACCA applicability. Nonetheless, one can predict the answer to this question due to the close similarity between Ohio's statute and the Iowa statute scrutinized in *Mathis*. The statutes for both burglary[128] and aggravated burglary[129] prohibit unauthorized entry into an "occupied structure," defined as "any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure." Before the *Mathis* decision, courts had already found that Ohio's statute exceeded the definition of generic burglary,[130] but had also found the statute to be divisible for applying a modified categorical analysis.[131] Yet, given the similarity of Ohio's statute to Iowa's, one can reasonably conclude that courts must now treat Ohio's statute the same as the Supreme Court treated Iowa's in *Mathis*.

4. Tennessee

Finally, the Tennessee burglary statutes are the most ambiguous of the four analyzed here in its relation to the ACCA. Tennessee's burglary statute states:

> (a) A person commits burglary who, without the effective consent of the property owner:
>
> (1) Enters a building other than a habitation (or any portion thereof) not open to the public, with intent to commit a felony, theft or assault;
>
> (2) Remains concealed, with the intent to commit a felony, theft or assault, in a building;
>
> (3) Enters a building and commits or attempts to commit a felony, theft or assault; or
>
> (4) Enters any freight or passenger car, automobile, truck, trailer, boat, airplane or other motor vehicle with intent to commit a felony, theft or assault or commits or attempts to commit a

128. OHIO REV. CODE ANN. § 2911.12 (West 1996).

129. *Id.* § 2911.11.

130. *See, e.g.*, United States v. Waagner, No. 1:02-CR-007, 2016 WL 2853563, at *2 (S.D. Ohio May 16, 2016).

131. United States v. Fountain, 643 F. App'x 543, 547 (6th Cir. 2016).

felony, theft or assault.[132]

Because each variant of this paragraph is distinct, the Sixth Circuit found the statute divisible and has held that variants (1) through (3) correspond to generic burglary, but variant (4) does not.[133] Earlier, the Sixth Circuit held that Tennessee's aggravated burglary law[134] was a predicate offense for ACCA purposes,[135] but that position has not been reaffirmed since the *Mathis* decision. In fact, district courts have stayed many cases[136] until the Sixth Circuit decides this issue in *United States v. Stitt*[137]—an en banc rehearing of an earlier decision, vacated to reconsider in light of *Mathis*.[138]

In the earlier *Stitt* decision, the court recognized that "aggravated burglary's inclusion of self-propelled vehicles expands the statute beyond generic burglary, which requires buildings or structures."[139] Nevertheless, the court refused to apply the modified categorical approach because its own precedent barred that possibility.[140] So until the rehearing of *Stitt*, Tennessee's aggravated burglary statute remains in limbo, but signs point to the Sixth Circuit declaring it overbroad.[141] If the court decides this way, Tennessee will join Kentucky in the number of states where less serious burglary convictions might be punished with longer sentences than more serious convictions.

C. Possible Resolutions

After the toll that *Johnson* and *Mathis* have taken on the ACCA, it is incapable of accomplishing its original purpose. As it currently stands, the Act only applies to serious drug offenses, arson, extortion, crimes involving explosives, or other crimes that have an element of physical force against another person.[142] That list may still seem to cover a significant portion of crimes. But to understand the devastating effect

132. TENN. CODE ANN. § 39-14-402 (West 2016).

133. United States v. Priddy, 808 F.3d 676, 684-85 (6th Cir. 2015).

134. TENN. CODE ANN. § 39-14-403 (West 2016).

135. *Priddy*, 808 F.3d at 684.

136. *E.g.*, Buckles v. United States, No. 3:12-CR-89-TAV-HBG-1, 2016 WL 6683476, at *4 (E.D. Tenn. Nov. 14, 2016); Wells v. United States, No. 4:13-CR-HSM-SKL-1, 2016 WL 6106410, at *3 (E.D. Tenn. Oct. 19, 2016).

137. 646 F. App'x 454 (6th Cir. 2016).

138. United States v. Stitt, 637 F. App'x 927 (6th Cir. 2016).

139. *Id*. at 931.

140. *Id.*

141. *Id.* at 932 (noting that the statute is likely overbroad for ACCA purposes, but only an en banc court can overturn earlier cases that prevent this holding).

142. 18 U.S.C. § 924(e)(2)(A)–(B) (2012).

these two Supreme Court cases have had on the ACCA, one must remember that burglary was one of the targeted crimes of the original ACCA.[143] Moreover, a quick search of FBI crime statistics shows that, excluding drug offenses,[144] burglary convictions outnumber all other violent felonies named in the ACCA combined.[145]

Further exacerbating this problem is the unique relationship between federal sentencing laws and state laws—only the legal fields of immigration and criminal sentencing can punish state crimes with federal penalties. As a result, there is sparse precedent for how to handle a situation like the one the ACCA now faces. With this understanding, this subsection will discuss solutions available to Congress to restore the ACCA to its intended purpose.

1. Do Nothing

The default response to the growing ACCA problem is for Congress to do nothing and let the courts proceed as they see fit. This approach would not be unprecedented.[146] Indeed, if Congress, since legislating the Act, has concluded that it was overreaching or overly harsh in its application, this may be the best alternative. This response would give the courts absolute power over the ACCA's application and future development.

As easy a solution as this would be for Congress, this reaction is problematic for two reasons. First, it permits congressional inertia to determine the outcome of an important criminal sentencing law. It is clear from the legislative history that Congress believed repeat violent

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143. *See supra* Part II.A.

144. This comment does not intend to discount the significant number of predicate drug offenses that trigger the ACCA. However, the ACCA does not require prior drug offenses to be violent, so a head-to-head numbers comparison with violent felonies seems unproductive.

145. *2015 Crime in the United States*, FBI CRIM. JUST. INFO. SERV. DIVISION, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/home (last visited Jan. 26, 2017). This report tallied 1,579,527 burglaries, 41,376 arsons, and 1,197,704 violent crimes (murder, rape, robbery, and aggravated assault). It is possible that certain crimes not included in these statistics could still be considered violent felonies under the ACCA. It is also unclear how many of the burglary convictions would be generic burglary for ACCA purposes. A separate FBI study found 6 bank extortions and roughly 2,400 cyber-extortions (via ransomware) in 2015. *See Bank Crime Statistics 2015*, FBI (April 26, 2016), https://www.fbi.gov/file-repository/stats-services-publications-bank-crime-statistics-2015-bank-crime-statistics-2015/view; Vicki D. Anderson, *Ransomware: Latest Cyber Extortion Tool*, FBI CLEVELAND (Apr. 26, 2016), https://www.fbi.gov/contact-us/field-offices/cleveland/news/press-releases/ransomware-latest-cyber-extortion-tool.

146. *E.g.*, Marbury v. Madison, 5 U.S. 137, 180 (1803) (declaring unconstitutional the Judiciary Act of 1789); United States v. Booker, 543 U.S. 220, 220 (2005) (finding sentencing laws that require judges to be finders of fact a violation of the Sixth Amendment); Shelby County, Ala. v. Holder, 133 S. Ct. 2612 (2012) (declaring unconstitutional a provision of the Voting Rights Act that set forth a coverage formula for certain states).

offenders should be punished harshly for illegally possessing firearms.[147] It is also evident that Congress found burglary to be one of the more important predicate offenses due to the likelihood of this crime resulting in violence.[148] Some may argue that the violent crime rate has been steadily declining for almost thirty years,[149] that U.S. prison populations, although level over the past ten years, have skyrocketed since the 1980s,[150] and that there is no need for such lengthy sentences. While these trends in crime and incarceration present problems of their own, this comment takes no stance on the crimes that the ACCA punishes or the length of its sentences. Rather, it proposes that if Congress desires the ACCA to regain the effect it intended in 1984, it must make changes to the law as it currently stands.

A second problem is the potential for even further deterioration of the Act by legal challenges in the courts. Now that defendants have had success in challenging the residual clause in *Johnson* and part of the enumerated clause in *Mathis*, they will be encouraged to test the legality of other parts of the ACCA. If the residual clause is unconstitutionally vague, it is possible that the definition of "serious drug offense"[151] is also overly vague. A defendant might also challenge the first subparagraph of the "violent felony" definition, which resembles the ambiguous language of the residual clause.[152] A challenge to that definition would encompass many robbery and assault convictions—violations of statutes that have as wide a variation as state burglary statutes. While these threats to the ACCA are speculative at this point, it is safe to say that courts are not going to reinstate any part of the Act they have already struck down. Rather, without congressional intervention, the ACCA will only become frailer.

2. Revise the ACCA and Incentivize State Cooperation

The only effective response to the stripped-down ACCA is to revise the law and ask state legislatures for cooperation in making statutes clearer for ACCA enumerated offenses. This task would be a major undertaking and would test the limits of federalism. But if Congress

147. *See supra* Part II.A.

148. *Id.*

149. *Uniform Crime Reporting Statistics*, BUREAU OF JUST. STAT., www.bjs.gov/ucrdata/Search/Crime/State/RunCrimeTrendsInOneVar.cfm (last visited Jan. 26, 2017).

150. *Trends in U.S. Corrections*, SENTENCING PROJECT (Mar. 2017), http://sentencingproject.org/wp-content/uploads/2016/01/Trends-in-US-Corrections.pdf.

151. *See* 18 U.S.C. § 924(e)(2)(A) (2012).

152. *Id.* § 924(e)(2)(B)(i) (defining "violent felony" as one that "has as an element the use, attempted use, or threatened use of physical force against the person of another").

wants courts to be unambiguous in implementing ACCA sentence enhancements, this is the only practical solution.

The first step in revising the ACCA would be to draft a new law without any of the ambiguous language that has troubled the current Act. By doing so, Congress would circumvent the problems surrounding the residual clause struck down in *Johnson*, and avoid any similar vagueness problems in the future. Specificity would be essential for a successful revision—the proposed revision would have to mention precise drug offenses and particular violent crimes. Because federal law does not encompass most criminal acts that would trigger this sentence enhancement, the cooperation and advice of state legislators would be important in developing definitions and parameters for the crimes to be punished.

The second step in revising the ACCA would be to incentivize state legislatures to cooperate with the federal law by redrafting the criminal statutes to be punished by the Act. This step would avoid the problems created by *Mathis* and the cases leading up to it. Because of issues with federalism—specifically, that criminal punishment is traditionally governed at the state level—this step has no guarantee of success. In addition, it is unclear what motivation states would have in revising their criminal codes to facilitate federal sentencing laws. Consequently, only a proactive approach toward revising the ACCA will prevent further erosion of its application—Congress will have to incentivize states to cooperate.[153]

One feasible solution is an adoption of sections of The American Law Institute's Model Penal Code (MPC) in drafting a new ACCA-type law. Such a scenario would see Congress espouse the MPC's definition of burglary and other named crimes into the ACCA's definition of these crimes. Because the MPC already serves as a normative standard adopted—at least in part—by a majority of states,[154] there would be minimal bickering within Congress or among the states about wording, inclusions, or omissions. Even better, the MPC's burglary definition[155] already embraces the generic definition of burglary endorsed by the Court in *Taylor*, so the new law would have the support of Supreme Court jurisprudence. The wording of the new ACCA would require

153. Presumably, these incentives would be financial—federal funding for cooperative states or penalties for uncooperative states. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203, 211–12 (1987) (holding that Congress could indirectly incentivize states to change the minimum legal age for drinking alcohol). *But see* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2574 (2012) (finding that incentivizing states to implement certain parts of the Affordable Care Act was coercive and impermissible under Congress's spending power).

154. Markus Dirk Dubber & Paul H. Robinson, *An Introduction to the Model Penal Code* 5, https://www.law.upenn.edu/fac/phrobins/intromodpencode.pdf (last visited Dec. 1, 2016).

155. MODEL PENAL CODE § 221.1 (AM. LAW INST., Proposed Official Draft 1962).

cooperative states to adopt in full certain MPC crimes as part their criminal statutes. Any statutory offenses outside the named crimes must be listed in a separate section or paragraph of a state's criminal code—for example, breaking into a watercraft would have to be listed distinctly separate from MPC burglary. In this way, the new ACCA would avoid the divisibility debate of Decamps and *Mathis*. Finally, Congress would authorize the payment of funds to cooperative states to alleviate the growing costs of maintaining state prisons.[156] Thus, the funds would not only relate to the problem being addressed by the ACCA (criminal punishment), but also incentivize states to take the modest step of adopting the MPC definition of these crimes. Certainly, this solution is desperately simple and likely to face difficulties[157] before becoming reality. But its simplicity is also what could make it so effective.

V. CONCLUSION

The ACCA in its present form is a shadow of what Congress desired it to be. Decades of confusing court decisions and convoluted tests for divisibility have tied the hands of sentencing courts seeking to punish the predicate crimes the Act originally targeted. The final straws for the ACCA came in two recent Supreme Court cases—*Johnson* in 2015 and *Mathis* in 2016. As a result of these two decisions, the ACCA has lost its strength and flexibility. It can now only punish a select group of especially egregious crimes, but has been rendered impotent toward many of the more common violent crimes. If Congress does not revise the ACCA, its authority will only continue to fade. This comment endorses a full revision of the ACCA, including specific language, removing any potentially vague provisions, and cooperating with state legislatures to maximize the efficacy of a new law. Only under these circumstances will the ACCA regain its full power to punish the most violent armed felons.

156. *The Price of Prisons*, VERA INSTIT. OF JUST., https://www.vera.org/publications/the-price-of-prisons-what-incarceration-costs-taxpayers (last visited Jan. 26, 2017).

157. One obvious problem is that the MPC does not include many specific drug-related offenses.