North Dakota Law Review

Volume 93 | Number 2 Article 6

1-1-2018

Erased: State Burglary Convictions as Violent Felonies Under the Armed Career Criminal Act

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ERASED: STATE BURGLARY CONVICTIONS AS VIOLENT FELONIES UNDER THE ARMED CAREER CRIMINAL ACT

ABSTRACT

18 U.S.C. § 924(e), commonly referred to as the Armed Career Criminal Act, imposes a fifteen-year mandatory minimum federal prison sentence for a felon in possession of a firearm previously convicted of three "violent felonies." Although at first glance the specific inclusion of burglary in the definition of qualifying offenses appears to encompass any state-law burglary conviction, a morass of judicial tinkering has all but erased burglary from the statute. The Armed Career Criminal Act now applies haphazardly based solely on whether a defendant's statute of conviction comports with several layers of complex judicially created tests. As a result, the law subjects some defendants to stiff mandatory minimum sentences while others who commit identical crimes escape federal prosecution altogether. Through the lens of recent decisions of the United States Court of Appeals for the Eighth Circuit, including an analysis of North Dakota's burglary statute, this Note will illustrate the manifest uncertainty and frequent division among federal appellate courts in determining if a state burglary conviction qualifies as a violent felony. Furthermore, it will argue that Congress must revisit the Armed Career Criminal Act to mandate a conduct-based approach to analyzing burglary convictions if the plain meaning of the statute, and its critical purpose of imposing uniform prison sentences on dangerous recidivists, is to be preserved.

I. INTRODUCTION

On November 4, 2014, a West Fargo, North Dakota police officer approached a man walking near a red Mitsubishi Eclipse that had been the focus of police attention for suspicious activity the day before.[1] "Jon," the man said when the officer asked his name, refusing to provide further information.[2] Because the car lacked registration and a license plate, officers impounded the vehicle.[3]

1. Brief for Appellee at 3, United States v. Kinney,—F.3d —, 2018 WL 1903772 (8th Cir. Apr. 23, 2018) (No. 16-3764).
2. *Id.*
3. *Id.*

After conducting an inventory search, police discovered the car had been registered temporarily to Jonathan Lee Kinney, a five-time convicted felon.[4] Under the driver's seat of the vehicle, carefully wrapped in a handkerchief, law enforcement discovered a handgun.[5] Several months later in April 2015, during a routine probation search of Kinney's home, law enforcement discovered yet another firearm.[6]

North Dakota prohibits convicted felons from possessing firearms for ten years following the latter of the date of conviction or completion of sentence, imposing a maximum penalty of five years in prison for a violation of the statute.[7] However, because four of Kinney's five prior convictions were for accomplice to burglary, he instead found himself staring down a mandatory minimum sentence of fifteen years in federal prison.[8] Kinney's burglary convictions qualified him for the stout penalty created by the Armed Career Criminal Act ("ACCA" or "Act"), a statute enacted to impose uniform and severe prison sentences on dangerous repeat felons who continue to illegally possess firearms.[9]

Codified as 18 U.S.C. § 924(e), ACCA, as amended in 1986, subjects a felon in possession of a firearm previously convicted of three violent felonies to a fifteen-year mandatory minimum federal prison sentence enhancement.[10] In the absence of three qualifying violent felonies, the maximum penalty for violating the federal felon in possession of a firearm statute is ten years.[11] In particular, § 924(e)(2)(B) provides three different routes for a court to find a defendant's prior conviction qualifies as a violent felony and therefore warrants an ACCA enhancement.[12]

First, a prior conviction is a violent felony if it "has as an element the use, attempted use, or threatened use of physical force against the person of

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4. *Id*. at 3–4.

5. *Id*. at 3.

6. Brief for Appellee at 4, *Kinney*,—F.3d —, 2018 WL 1903772 (No. 16-3764).

7. N.D. CENT. CODE ANN. § 62.1-02-09 (West 2017); *see also* N.D. CENT. CODE ANN. § 12.1-32-01 (West 2017) (defining the maximum allowable penalty for a class C felony as five years in prison).

8. Brief for Appellee at 6–7, *Kinney*,—F 3d —, 2018 WL 1903772 (No. 16-3764).

9. *Id*.; *see also* H.R. REP. NO. 98-1073, at 2–3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3662 (noting in the context of ACCA "[b]oth Congress and local prosecutors around the nation have recognized the importance of incapacitating these repeat offenders").

10. 18 U.S.C. § 924(e) (2012).

11. *See* 18 U.S.C. § 922(g)(1) (2012) (establishing as unlawful the possession of a firearm by a person convicted of "a crime punishable by imprisonment for a term exceeding one year"); 18 U.S.C. § 924(a)(2) (2012) (defining the maximum allowable penalty for a violation of 18 U.S.C. § 922(g) as ten years imprisonment).

12. 18 U.S.C. § 924(e)(2)(B) (2012).

another," commonly referred to as the force clause.[13] Second, a prior conviction qualifies if it is burglary, arson, extortion, or involves the use of explosives, referred to as the enumerated offenses clause.[14] Finally, the statute states a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another" also qualifies as a violent felony, referred to as the residual clause.[15] The Supreme Court held the residual clause invalid as unconstitutionally vague in 2015.[16] Accordingly, a conviction must now satisfy either the elements clause or the enumerated offenses clause to qualify as a violent felony.[17]

Ultimately, Kinney provided the government with substantial assistance in an ongoing investigation, resulting in the district court imposing a significantly reduced sentence of ninety months in federal prison.[18] Even so, *United States v. Kinney* illustrates the potency of the Armed Career Criminal Act, which often swaps a felon in possession charge that will likely amount to a slap on the wrist in state court and replaces it with momentous, life-altering consequences.[19] ACCA is undoubtedly a critical, and indeed commonly employed, tool in the arsenal of federal prosecutors.[20] But this tool will only remain effective so long as it is applied consistently. That consistency is now in serious jeopardy following several recent decisions of the United States Supreme Court regarding ACCA's specific inclusion of burglary as a qualifying violent felony.[21]

The Supreme Court's judicially created tests to determine if a state burglary conviction qualifies as the "violent felony" variety of burglary is mind-bogglingly complex at times and produces wildly inconsistent outcomes from federal courts across the country. The result? Gaping disparity in sentences

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13. 18 U.S.C. § 924(e)(2)(B)(i) (2012).

14. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

15. *Id*.

16. Johnson v. United States, 135 S. Ct. 2551, 2563 (2015).

17. *See id*.

18. Brief for Appellee at 7, United States v. Kinney,—F.3d —, 2018 WL 1903772 (8th Cir. Apr. 23, 2018) (No. 16-3764); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (U.S. SENTENCING COMM'N 2016) (permitting federal trial courts to impose a sentence lower than a prescribed statutory minimum for substantial assistance to authorities upon motion by the government).

19. *Compare* N.D. CENT. CODE ANN. § 12.1-32 (West 2017), *with* 18 U.S.C. § 924(e) (2012).

20. *See* DEP'T OF JUST., U.S. ATT'YS ANN. STAT. REP. at 16 (2016) (showing U.S. Attorneys' Offices charged 11,656 defendants with violations of 18 U.S.C. §§ 922, 924 in Fiscal Year 2016).

21. *Compare* United States v. Bess, 655 F. App'x 518, 520 (8th Cir. 2016) (holding Missouri's second-degree burglary statute divisible and therefore a qualifying ACCA predicate); United States v. Sykes, 844 F.3d 712, 715 (8th Cir. 2016) (same); *and* United States v. Phillips, 853 F.3d 432, 435 (8th Cir. 2017) (same), *with* United States v. Naylor, 887 F.3d 397, 407 (8th Cir. 2018) (en banc) (holding Missouri's second-degree burglary statute indivisible and therefore not a qualifying ACCA predicate); *and* United States v. Bell,—F. App'x —, 2018 WL 1834502, at *1 (8th Cir. Apr. 18, 2018) (same).

for defendants convicted under qualifying burglary statutes.[22] With the only difference being the state of conviction, some defendants face the full brunt of the fifteen-year mandatory minimum penalty while others may not face federal prosecution at all.[23] Moreover, the Supreme Court's interpretation of ACCA has all but erased the word "burglary" from the statute, presenting a stark example of judicial overreach into the prerogative of Congress.[24]

Part II of this Note provides background on the Supreme Court decisions that create the modern framework for analyzing whether a state burglary conviction qualifies as a violent felony. Part III analyzes three recent decisions from the Eighth Circuit Court of Appeals that attempt to apply the Supreme Court's framework, illustrating multiple splits among the federal courts of appeals. Part IV discusses the impact of the virtual erasure of burglary from ACCA and argues that Congress must revisit the Act to endorse conduct-based inquires for burglary offenses to remold ACCA into the effective law enforcement tool the legislative branch originally designed. Finally, Part V concludes this Note.

II. THE JUDICIAL FRAMEWORK FOR STATE BURGLARY CONVICTIONS AS VIOLENT FELONIES

Four Supreme Court decisions demarcate the evolution of ACCA. In 1990, four years after the current version of the Act took effect, *Taylor v. United States*[25] determined state burglary statutes had to be the same or narrower than the Court's *sui generis* definition of federal generic burglary to qualify as ACCA predicates.[26] Moreover, *Taylor* established the categorical and modified categorical approaches to test whether state burglary statutes comport with that generic federal definition.[27] Fifteen years later, *Shepard v. United States*[28] conclusively defined the class of documents available for

22. For example, a person convicted of three burglaries in Wisconsin qualifies for an ACCA enhancement. United States v. Lamb, 847 F.3d 928, 932 (8th Cir. 2017), *petition for cert. filed* (U.S. Jul. 10, 2017) (No. 17-5152). Meanwhile, a person convicted of three identical burglaries just across the St. Croix River in Minnesota would not qualify for the fifteen-year mandatory minimum. United States v. McArthur, 850 F 3d 925, 940 (8th Cir. 2017).

23. *See* BUREAU OF JUST. STAT., NCJ 250183, FED. JUST. STAT., 2014 STAT. TABLES at 11-12 (2017) (demonstrating United States Attorneys' Offices decline federal prosecution for weapons offenses in 26 3% of cases).

24. *See* discussion *infra* Part IV.

25. 495 U.S. 575 (1990).

26. *Taylor*, 495 U.S. at 599.

27. *Id.* at 602.

28. 544 U.S. 13 (2005).

trial courts to analyze beyond the plain language of a state burglary statute for ACCA purposes.[29]

Two opinions authored by Justice Kagan provide guideposts for the modern analysis of burglary statutes under ACCA: *Descamps v. United States*[30] and *Mathis v. United States*[31]. These decisions denote a renewed focus on the exact verbiage of state burglary laws to discern whether a statute is divisible into separate elements or merely lists indivisible alternative means.[32] The Supreme Court's convolution of ACCA's enumerated offense clause has caused considerable headache for the federal judiciary, as evidenced by multiple splits among the federal courts of appeals following *Mathis*, addressed in Part III.

A. CONGRESSIONAL INTENT, THE GENERIC FEDERAL DEFINITION OF BURGLARY, AND THE CATEGORICAL APPROACHES

Constructing the framework for the modern treatment of state-law burglary convictions under ACCA necessarily begins with its plain language and the prescribed congressional intent behind the statute. In particular, through a protracted, and somewhat dubious, interpretation of the legislative history of ACCA, the Supreme Court's decision in *Taylor v. United States* established a generic federal definition of burglary as the measuring stick for whether a state burglary conviction qualifies as a violent felony.[33] To qualify, a state burglary statute must be the same as, or narrower than, the judicially determined generic federal definition of the crime.[34] The case also articulated two basic tests – the categorical and modified categorical approaches – to determine if a state burglary statute comports with federal generic burglary.[35]

To illustrate, in *Taylor*, the defendant challenged the application of the fifteen-year ACCA enhancement the district court applied to his sentence.[36] The defendant did not dispute that his prior robbery and assault convictions qualified under the force clause but instead argued his two Missouri burglary convictions did not qualify as violent felonies because they posed no risk of

29. *Shepard*, 544 U.S. at 26.
30. 570 U.S. 254 (2013).
31. 136 S. Ct. 2243 (2016).
32. *See* discussion *infra* Part II.B.
33. *Taylor*, 495 U.S. at 599.
34. *Id.* at 602.
35. *Id.*
36. *Id.* at 579.

physical harm to others.[37] The Eighth Circuit affirmed the defendant's sentence, concluding the specific use of the word "burglary" in ACCA meant the enhancement applied regardless of the state's definition of the offense.[38]

The Supreme Court ultimately reversed, but most importantly, the High Court's burglary definition differed dramatically, setting the stage for decades of confusion.[39] To get to a final definition, Justice Blackmun, writing for the majority, examined the legislative history of ACCA extensively.[40] The Ninety-Eighth Congress originally enacted a much narrower version of the Act in 1984, specifically applying the sentence enhancement only to convictions "for robbery or burglary."[41] The earliest iteration of the statute included an explicit definition for a qualifying 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."[42]

Critically, the modern version of the Act considered in *Taylor* inexplicably omits a specific definition of burglary.[43] Notably, the Senate Report on the original Act stated the purpose for explicitly defining burglary was to "ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases."[44] Rather than assume this later omission signaled a shift in congressional intent, the Court dismissed the lack of a definition as an oversight, speculating it "may have been an inadvertent casualty of a complex drafting process."[45]

After rejecting each of the various definitional alternatives other federal appellate courts and the defendant proffered, the Court arrived at its own definitive definition through the examination of contemporary American criminal law.[46] The Court accordingly held *sui generis*, citing from a lone treatise, the generic federal definition of burglary to be "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[47] Even so, the Court still faced the task of establishing a judicial

37. *Id*.
38. *Id*.
39. *See* discussion *infra* Part III.
40. *Taylor*, 495 U.S. at 581.
41. *Id*.
42. *Id*.
43. *Id*. at 582.
44. S. REP. NO. 98-190, at 20 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3199.
45. *Taylor*, 495 U.S. at 589–90.
46. *Id*. at 598.
47. *Id*. at 599.

approach to determine whether a state burglary statute comported with the newfound definition.

To accomplish this task, the Court explained that if a state burglary statute had the same elements as generic burglary, or a narrower definition that necessarily required finding the generic elements, the statute qualified under the categorical approach.[48] However, the Court next noted every federal court of appeals had held a strict categorical approach applied, meaning courts could only compare the language of the statute at issue to the generic federal definition.[49] Accordingly, the rote and exclusive application of the categorical approach precluded courts from examining the underlying facts of a prior conviction to determine if the defendant's conduct met the generic definition.[50] The Supreme Court, recognizing the obvious constriction imposed by the status quo, consequently endorsed an additional test for courts to apply if the plain language of the statute swept broader than the generic federal definition, later mundanely dubbed the modified categorical approach.[51]

Under the modified categorical approach, a court may find that a burglary offense qualifies as a violent felony if, even though the state statute of conviction is broader than the generic federal definition, the jury necessarily had to find each element of generic burglary.[52] As an example, the Court proffered a hypothetical statute that proscribed unlawfully entering both a building and an automobile.[53] The Court explained if the charging instrument and the jury instructions only specified the defendant unlawfully entered a building and not an automobile, then it followed that the jury necessarily found each element of generic burglary to reach a guilty verdict.[54] Thus, the Court endorsed the ability of trial judges to look past the language of the statute to a narrow class of documents, non-exhaustively including the charging instrument and jury instructions, to determine if a prior conviction constitutes a violent felony.[55]

Although the *Taylor* Court definitively included charging documents and jury instructions as proper sources for trial courts to inquire into, it left

48. *Id.*
49. *Id.* at 600.
50. *Id.* at 602.
51. *Taylor*, 495 U.S. at 602.
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*

open whether the modified categorical approach encompassed other trial-record documents.[56] In 2005, the Supreme Court revisited *Taylor* for the first time to conclusively determine the level of inquiry permissible beyond the plain language of a statute when applying an ACCA enhancement.[57]

The *Shepard* Court decided to "adhere to the demanding requirement that any sentence under ACCA rest on a showing that a prior conviction 'necessarily' involved (and a prior plea necessarily admitted) facts equating to generic burglary."[58] Thus, the Court modestly expanded the permissible documents for examination to include the terms of a plea agreement or the transcript of a plea colloquy, in addition to charging documents and jury instructions.[59]

B. DIVISIBILITY AND ELEMENTS VERSUS MEANS: TOWARD A GORDIAN KNOT

Although the Supreme Court definitively resolved the question of what documents trial courts may inquire into, the modified categorical approach remained nebulous. Rather than provide clarity, the Court's next ACCA decision in 2013, *Descamps v. United States*, further muddied the waters and began the path to erasing "burglary" from the statute.[60] Most recently, in 2016, the Court's decision in *Mathis v. United States* placed even more stringent scrutiny on burglary convictions as ACCA predicates, leading to a deluge of federal appellate court reviews of state burglary statutes.[61]

In *Descamps*, the Supreme Court scrutinized the application of the modified categorical approach to California's burglary statute.[62] The plea colloquy record showed the defendant burglarized a grocery store, an offense that undoubtedly met the elements of generic burglary.[63] California's burglary statute was notoriously broad – it did not specify whether the offense required unlawful entry, meaning felony burglary under California law could have conceivably included offenses such as shoplifting.[64] Because of the statute's breadth, it did not qualify as an ACCA predicate under the formal categorical approach.[65] The federal district court then faithfully applied the modified

56. *Id.*
57. Shepard v. United States, 544 U.S. 13, 16 (2005).
58. *Id.* at 24.
59. *Id.* at 26.
60. *See* discussion *infra* Part IV.
61. *See* cases discussed *infra* Part III.
62. Descamps v. United States, 570 U.S. 254, 258–59 (2013).
63. *Id.* at 259.
64. *Id.*
65. *Id.* at 261.

categorical approach, examining the defendant's plea colloquy, one of the documents the Supreme Court specifically endorsed just eight years before in *Shepard*.[66] The district court found clear evidence from the colloquy that the defendant admitted to unlawfully entering a grocery store with the intent to commit a crime and applied an ACCA enhancement.[67]

Even though the district court complied steadfastly with the modified categorical approach, the Supreme Court nevertheless reversed.[68] In the first of two significant ACCA opinions authored by Justice Kagan, the Court held trial courts could not apply the modified categorical approach to California's statute because it was indivisible.[69] The Court reasoned the absence of a requirement for unlawful entry meant a jury could convict the defendant of burglary under California law without finding a necessary element of the generic offense.[70] Requiring a sentencing judge to examine the specific factual circumstances of a prior conviction that the jury or plea judge did not necessarily have to find to convict the defendant, the Court explained, ran afoul of the modified categorical approach.[71] Therefore, even though the plea colloquy plainly demonstrated the defendant's crime satisfied the elements of generic burglary, the Supreme Court held the modified categorical approach did not apply to indivisible statutes.[72]

Justice Alito countered the majority's constriction of burglary as a predicate offense under ACCA with a vociferous dissent. First, and critical to understanding the Court's later decision in *Mathis*, Justice Alito argued the Court's assumption that a statute proscribing burglary of a building, vessel, or vehicle enumerated separate elements of burglary rested on unstable ground.[73] He asserted such a statute did not necessarily require a jury to find unanimously, or a defendant to admit to a judge during a plea colloquy, the specific place burglarized.[74] For example, jurors tasked with deliberating a burglary charge, but unable to determine unanimously if a defendant broke into a building or a vehicle, could nonetheless convict the defendant of burglary under many state statutes.[75] Accordingly, what the majority presumed to be a clear-cut example of delineated alternative *elements* in fact potentially

66. *Id*. at 259; Shepard v. United States, 544 U.S. 13, 15 (2005).
67. *Descamps*, 570 U.S. at 259.
68. *Id*. at 260.
69. *Id*. at 278.
70. *Id*. at 264–65.
71. *Id*. at 265.
72. *Id*. at 278.
73. *Descamps*, 570 U.S. at 285–86 (Alito, J., dissenting).
74. *Id*. at 286.
75. *Id*. at 286–87.

articulated alternative *means* of committing the crime.[76] Justice Alito expressed dismay that the majority's half-hearted divisibility analysis opened the door to a strict elements versus means test – a prescient prediction later vindicated in *Mathis*.[77]

Significantly, Justice Alito also pointed out that the Court's holding thwarted *Taylor* because it reverted to a modified categorical approach that depended to some extent on the vagaries of state-specific statutes – a principle Congress explicitly rejected.[78] Indeed, the majority's holding effectively eliminated convictions under California's burglary statute from counting as ACCA predicates, rendering conduct in California otherwise punishable in qualifying states unusable for the enhancement.[79]

In place of the majority's preclusion of the modified categorical approach, Justice Alito proffered a streamlined test that would allow a sentencing court to find a violent felony if "a defendant necessarily admitted or the jury necessarily found that the defendant committed the elements of generic burglary."[80] Because Descamps admitted he broke into a grocery store with the intent to commit theft, Justice Alito asserted the conviction should have counted as an ACCA predicate.[81]

Moreover, while Justice Kennedy joined the majority opinion, he expressed serious reservations about the Court's reasoning and acknowledged the validity of Justice Alito's concerns.[82] Importantly, he agreed that the distinction between divisible and indivisible criminal statutes was unclear and feared the majority's decision would invalidate "likely a large number" of state burglary statutes as ACCA predicates, forcing legislatures to rewrite their laws.[83] Justice Kennedy concluded, "If Congress wishes to pursue [ACCA] in a proper and efficient way without mandating uniformity among the States with respect to their criminal statutes . . . [it] should act at once."[84]

Unfortunately, rather than heed Justice Alito's strict elements versus means test warning, the Court barreled headlong into adopting that very test only three years later.[85] In *Mathis v. United States*, the Court declared statutes that merely list alternative means of committing burglary indivisible and

76. *Id*. at 287.
77. *Id*. at 293; *see generally* Mathis v. United States, 136 S. Ct. 2243 (2016).
78. *Descamps*, 570 U.S. at 293 (Alito, J., dissenting).
79. *Id*.
80. *Id*. at 281.
81. *Id*. at 296.
82. *See id*. at 279 (Kennedy, J., concurring).
83. *Id*.
84. *Descamps*, 570 U.S. at 279.
85. *See* Mathis v. United States, 136 S. Ct. 2243, 2248 (2016).

thus incompatible with the modified categorical approach.[86] The result exacerbated Justice Kennedy's fears, today making a trial court's determination as to whether burglary convictions qualify as ACCA predicates almost wholly dependent on the exact wording of state law – a result Congress overtly intended to avoid.[87]

In *Mathis*, the Court examined Iowa's burglary statute. The law criminalized not only burglarizing a building or other structure, but also land, water, or air vehicles.[88] The government and the defendant agreed the statute failed the formal categorical approach because the Iowa statute swept broader than the generic federal definition of burglary on its face.[89] The government instead argued the defendant's five prior burglary convictions qualified as violent felonies because the *Shepard* documents for each conviction showed the defendant burglarized structures, not vehicles.[90] The Eighth Circuit sided with the government, finding the modified categorical approach applied even if the statute listed alternative means.[91] Accordingly, the appeals court applied the modified categorical approach and affirmed the ACCA enhancement.[92]

After granting certiorari, the Supreme Court reversed, finding the statute indivisible because it listed the burglary of a building or other structure and the burglary of a vehicle as alternative means of committing the crime.[93] Justice Kagan, again writing for the Court, explained that the text and legislative history of ACCA favored focusing exclusively on the elements of an offense,

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86. *Id*. at 2257.

87. *See* Taylor v. United States, 495 U.S. 575, 589 (1990) (interpreting Congressional intent behind the 1986 amendments to ACCA as "extending the range of predicate offenses to all crimes having certain common characteristics . . . regardless of how they were labeled by state law."); *see also* S. REP. NO. 98-190, at 20 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3199 (stating a purpose for the inclusion of burglary in ACCA as being to "ensure, to the extent that it is consistent with the prerogatives of the States in defining their own offenses, that the same type of conduct is punishable on the Federal level in all cases.").

88. *Mathis*, 136 S. Ct. at 2250.

89. *Id*.

90. *Id*.

91. *Id*.

92. *Id*. at 2250–51. The Court noted the Eighth Circuit's *Mathis* decision widened a circuit split. *Compare* United States v. Mathis, 786 F.3d 1068 (8th Cir. 2015) (holding statutes listing alternative means qualified as predicate ACCA felonies under the modified categorical approach); United States v. Ozier, 796 F.3d 597 (6th Cir. 2015) (same); *and* United States v. Trent, 767 F.3d 1046 (10th Cir. 2014) (same), *with* Rendon v. Holder, 764 F.3d 1077 (9th Cir. 2014) (holding statutes listing alternative means precluded application of the modified categorical approach); *and* Omargharib v. Holder, 775 F.3d 192 (4th Cir. 2014) (same).

93. *Mathis*, 136 S. Ct. at 2251.

not its underlying factual circumstances.[94] The Court reasoned ACCA's language applied the enhancement only for "previous convictions," not for simply committing the offense regardless of the conclusion of a trier of fact, accordingly precluding circumstance-specific inquiries.[95] Therefore, the Court held the Eighth Circuit erred in applying the modified categorical approach to Iowa's burglary statute.[96]

Much like the *Taylor* Court articulated tests for when a burglary conviction qualified as an ACCA predicate, the *Mathis* Court had to enunciate a standard for when a statute listed separate elements of burglary versus alternative means of committing the crime.[97] First, the Court explained if state case law has explicitly held a burglary statute lists alternative elements or alternative means, that interpretation quickly dispenses with the issue.[98] Conveniently, the Iowa Supreme Court had previously held the state's burglary statute enumerated "alternative methods" of committing burglary, resolving the issue and precluding the application of the modified categorical approach.[99]

Inconveniently, not a single state high court other than Iowa's had definitively ruled as to whether their state's burglary statute listed alternative elements or means.[100] In the absence of case law, the Court explained the plain language of a state statute could also shed light on the elements versus means distinction.[101] For example, if a burglary statute ascribes different criminal penalties for violations of the various alternatives, then the alternatives would be separate elements.[102] On the other hand, if the alternatives simply list "illustrative examples" of methods for committing burglary, then those examples would be means.[103] Penultimately, in a seeming about-face

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94. *Id*.

95. *Id*. at 2252.

96. *Id*. at 2253.

97. *Id*. at 2256.

98. *Id*.

99. *Mathis*, 136 S. Ct. at 2256 (noting further the "alternative methods" designation by the Iowa Supreme Court meant the statute did not require jury unanimity as to whether the location burglarized was a building, other structure, or vehicle).

100. *Id*. at 2269 (Alito, J., dissenting).

101. *Id*. at 2256 (majority opinion).

102. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The Court has frequently intimated, but never explicitly held, that *Apprendi* poses Sixth Amendment right to trial by jury issues in the context of fact-specific inquires under ACCA. *See generally* Rebecca Sharpless, *Finally, a True Elements Test:* Mathis v. United States *and the Categorical Approach*, 82 BROOK. L. REV. 1275, 1295–98 (2017). For the limited purpose of examining state burglary convictions as violent felonies under ACCA, this Note does not examine these Sixth Amendment concerns in detail.

103. *Mathis*, 136 S. Ct. at 2256.

from *Taylor* and *Shepard*, the Court endorsed a "peek" at the record documents not to determine if the jury or plea judge necessarily found the defendant committed generic burglary, but rather only for the extremely narrow purpose of discerning whether the statute in fact listed alternative elements for burglary.[104] Finally, the Court admitted in situations where both the statute and the record failed to provide clarity, *Taylor's* "demand for certainty" simply ruled out the application of an ACCA enhancement altogether.[105]

Justice Kennedy again joined the majority decision, believing it to accurately reflect the Court's ACCA precedent.[106] But he wrote separately to express serious doubt about the direction of that precedent, characterizing the decision as a "stark illustration of the arbitrary and inequitable results produced by applying an elements based approach to this sentencing scheme."[107] He asserted Congress simply could not have intended to subject the same criminal conduct to wide disparities in sentencing based on the specific wording of state law and advocated for revisiting the Court's ACCA decisions.[108]

Mathis also drew two dissents, one from Justice Breyer and another from Justice Alito. Although Justice Breyer joined the majority in *Descamps*, he asserted the Court's decision to preclude the application of the modified categorical approach to any statute that lists alternative means went too far.[109] He argued the trial court's finding – through the documents specifically endorsed in *Taylor* and *Shepard* – that the defendant had in fact committed generic burglary should have been enough to satisfy the ACCA requirement.[110] Poignantly, Justice Breyer cited to eight state burglary statutes nearly identical to Iowa's that the Court's decision jeopardized and argued *Taylor* required ACCA burglary to reflect the laws of most states.[111] Finally, he asserted most prosecutors clearly allege the means a defendant employs in committing a crime, intimating a jury oftentimes still necessarily finds generic burglary under an indivisible statute.[112]

Justice Alito penned a scathing dissent, using a hypothetical plea colloquy as an example of what he asserted was the absurdity of the majority's

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104. *Id.* at 2256–57 (citing Rendon v. Holder, 782 F.3d 466, 473–74 (9th Cir. 2015) (Kozinski, J., dissenting from denial of reh'g en banc)).

105. *Id.* at 2257.

106. *Id.* at 2258 (Kennedy, J., concurring).

107. *Id.*

108. *Id.*

109. *Mathis*, 136 S. Ct. at 2259 (Breyer, J., dissenting).

110. *Id.* at 2260.

111. *Id.* at 2263–64; *see, e.g.*, MONT. CODE ANN. §§ 45-2-101, 45-6-201, 45-6-204 (West 2017); N.D. CENT. CODE ANN. §§ 12.1-22-02, 12.1-22-06 (West 2017); S.D. CODIFIED LAWS §§ 22-32-1, 22-32-3, 22-32-8 (2017).

112. *Mathis*, 136 S. Ct. at 2264 (Breyer, J., dissenting).

elements versus means conclusion.[113] The hypothetical presented a trial judge repeatedly asking a defendant whether he had burglarized a building.[114] After the defendant admitted to burglarizing a house at 10 Main Street, the fictitious judge proceeded to ask questions such as, "Could it have actually been a boat?" and "Is 10 Main Street possibly a vehicle?" to which the defendant consistently responded the burglary took place in a house.[115] Justice Alito's point, of course, was that even when a defendant unequivocally, absolutely admits to an offense containing the elements of generic burglary, the Court's holding barred the application of an ACCA enhancement simply because the state's statute listed alternative means of committing the crime.[116]

With the sheer volume of guidance the Supreme Court has provided lower federal courts, determining when a state burglary conviction qualifies as a violent felony under ACCA should be "easy" for federal sentencing judges, as Justice Kagan predicted.[117] Dishearteningly, the reality has been much closer to Justice Alito's dissenting wish to judges tasked with applying ACCA — "good luck."[118]

III. POST-*MATHIS* EIGHTH CIRCUIT DECISIONS INVALIDATING STATE BURGLARY STATUTES AS PREDICATE FELONIES

Instead of providing clarity to federal appellate courts, *Mathis* has produced multiple circuit splits and inconsistency across the board.[119] Moreover, federal courts of appeals have scrambled frenetically to revisit state burglary statutes long held to qualify as ACCA predicates, invalidating many.[120] A flurry of recent Eighth Circuit Court of Appeals decisions illustrates this trend. The Eighth Circuit's analysis of three state burglary statutes highlights two circuit splits directly resulting from *Mathis*.[121] More importantly, the overwhelming result of *Mathis* has been the erasure of state burglary convictions as qualifying violent felonies under ACCA.[122]

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113. *Id*. at 2270 (Alito, J., dissenting).
114. *Id*.
115. *Id*.
116. *Id*. at 2271.
117. *Id*. at 2256 (majority opinion).
118. *Mathis*, 136 S. Ct. at 2268 (Alito, J., dissenting).
119. *See infra* notes 134, 142.
120. *See infra* note 170.
121. *See, e.g*., Recent Case, *Criminal Law – Armed Career Criminal Act – Eighth Circuit Holds that Generic Burglary Requires Intent at First Moment of Trespass*, 131 HARV. L. REV. 642, 645 (2017).
122. *See* discussion *infra* Part III.A–C.

A. MINNESOTA: *UNITED STATES V. MCARTHUR*

One of the Eighth Circuit's first decisions invalidating a burglary statute as an ACCA predicate came only seven months after *Mathis*.[123] In *United States v. McArthur*, William Morris, one of three defendants in the case, challenged the application of an ACCA enhancement to his sentence, arguing his third-degree Minnesota burglary convictions did not qualify as violent felonies.[124] The court determined the Minnesota statute listed alternative means of committing burglary, which reads:

> Whoever enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building, or enters a building without consent and steals or commits a felony or gross misdemeanor while in the building . . . commits burglary in the third degree and may be sentenced to imprisonment for not more than five years.[125]

Although the first clause, requiring intent to commit a crime, contains the generic elements of burglary, the second clause does not require intent and therefore sweeps broader than generic federal burglary.[126] Thus, the case hinged on whether the statute was divisible into separate elements or simply listed alternative means to commit the offense.[127]

Just one year earlier, the disjunctive "or" separating the first and second offense clauses convinced the court that the exact same statute listed alternative elements.[128] But *Mathis* demanded a different outcome.[129] The court pointed to an unpublished Minnesota Court of Appeals decision holding jury unanimity on the defendant's intent, or lack thereof, to commit a crime was not required for a third-degree burglary conviction.[130] Accordingly, the court

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123. United States v. McArthur, 850 F.3d 925 (8th Cir. 2017).

124. *Id.* at 937.

125. *Id.*; MINN. STAT. ANN. § 609.582(3) (West 2017).

126. *McArthur*, 850 F.3d at 938.

127. *Id.*

128. *See* United States v. McArthur, 836 F.3d 931, 943 (8th Cir. 2016) (stating without explanation that Minnesota's third-degree burglary statute "is divisible."), *amended and superseded by McArthur*, 850 F.3d 925.

129. *McArthur*, 850 F.3d at 938 ("Here, *Mathis* requires us to treat the alternatives in the Minnesota third-degree burglary statute as 'means' rather than 'elements.'").

130. *Id.* (citing Minnesota v. Gonzales, No. A15-0975, 2016 WL 3222795, at *2–3 (Minn. Ct. App. Jun. 13, 2016)).

held the statute listed alternative means, compelling the court to examine the statute under only the formal categorical approach.[131]

Notwithstanding the inability to use the modified categorical approach, the government argued the generic federal definition of burglary was broad enough to encompass the second alternative categorically because an offender necessarily formed the intent to commit a crime while "remaining in" the building or occupied structure.[132] The court disagreed with the government's position, reasoning that to qualify as generic burglary, a defendant had to form the intent to commit a crime *before* trespassing, whether by unlawful entry or remaining past the owner's consent.[133] The court also pointed to a circuit split on the issue, with the Fourth and Sixth Circuit Courts of Appeals finding no intent required at the time of the trespass, and the Fifth and the Eighth finding the opposite.[134] Consequently, the court held Morris' conviction did not qualify as an ACCA predicate.[135]

B. ARKANSAS: *UNITED STATES V. SIMS*

Less than three months after *McArthur*, the Eighth Circuit invalidated yet another state burglary statute as a qualifying offense under ACCA.[136] In *United States v. Sims*, the court considered Arkansas' residential burglary statute, codified as "enter[ing] or remain[ing] unlawfully in a residential occupiable structure of another person with the purpose of committing in the residential occupiable structure any offense punishable by imprisonment."[137] The court focused its attention on the phrase "residential occupiable structure," which state law defined as a "vehicle, building, or other structure: (i) [i]n which any person lives; or (ii) [t]hat is customarily used for overnight accommodation of a person whether or not a person is actually present."[138]

The Supreme Court in *Mathis* stated burglary statutes encompassing land, air, or water vehicles swept broader than the generic federal definition of burglary.[139] However, the government argued that because the Arkansas

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131. *Id.*

132. *Id.* at 939.

133. *Id.* at 940.

134. *Id.* at 939; *compare* United States v. Priddy, 808 F.3d 676, 685 (6th Cir. 2015); United States v. Bonilla, 687 F.3d 188, 192–194 (4th Cir. 2012), *with McArthur*, 850 F.3d at 939; United States v. Herrera-Montes, 490 F.3d 390, 392 (5th Cir. 2007).

135. *Id.*

136. United States v. Sims, 854 F.3d 1037 (8th Cir. 2017).

137. ARK. CODE ANN. § 5-39-201(a)(1) (West 2017).

138. *Sims*, 854 F.3d at 1039 (citing ARK. CODE ANN. § 5-39-101(4)(A)); *see also* ARK. CODE ANN. § 5-39-101(8)(A) (defining "residential occupiable structure").

139. *Sims*, 854 F.3d at 1040 (citing Mathis v. United States, 136 S. Ct. 2243, 2250 (2016)).

statute only proscribed the burglary of vehicles used as living accommodations, the provision fit within the "occupied structure" language of the generic federal definition.[140] Again, the appeals court pointed to a circuit split *Mathis* exacerbated.[141] For example, the Tenth Circuit concluded burglary of vehicles "adopted for overnight accommodation" constituted generic burglary of an occupied structure while the Fourth and the Ninth Circuits rejected similar arguments.[142] Relying on its prior decision in *United States v. Lamb*,[143] which held burglary of a motor home was broader than generic burglary, the court rejected the government's argument and precluded application of the modified categorical approach to the Arkansas residential burglary statute.[144]

C. NORTH DAKOTA: *UNITED STATES V. KINNEY*

Circling back to Jonathan Kinney, following the district court's imposition of a ninety-month federal prison sentence, he challenged the application of the ACCA enhancement in the Eighth Circuit Court of Appeals.[145] Kinney argued North Dakota's burglary statute was overbroad because, like the Arkansas statute, the term "occupied structure" included vehicles.[146] The North Dakota burglary statute reads as follows:

> A person is guilty of burglary if he willfully enters or surreptitiously remains in a building or occupied structure, or a separately secured or occupied portion thereof, when at the time the premises are not open to the public and the actor is not licensed, invited, or otherwise privileged to enter or remain as the case may be, with intent to commit a crime therein.[147]

At first blush, the statute appears to mirror the generic federal definition almost exactly, and indeed the district court explicitly stated as much.[148] The North Dakota statute plainly satisfies the first and third elements of generic

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140. *Id.*

141. *Id.*

142. *Compare* United States v. Spring, 80 F.3d 1450, 146–62 (10th Cir. 1996), *with Sims*, 854 F.3d at 1040; United States v. White, 836 F.3d 437, 444–46 (4th Cir. 2016); *and* United States v. Grisel, 488 F.3d 844, 850–51 (9th Cir. 2007) (en banc).

143. 847 F.3d 928 (8th Cir. 2017), *petition for cert. filed*, (U.S. Jul. 10, 2017) (No. 17-5152).

144. *Sims*, 854 F.3d at 1040.

145. Brief for Appellant at 2, United States v. Kinney,—F 3d —, 2018 WL 1903772 (8th Cir. Apr. 23, 2018) (No. 16-3764).

146. *Id.* at 5.

147. N.D. CENT. CODE ANN. § 12.1-22-02(1) (West 2017).

148. Brief for Appellee at 7, *Kinney*,—F.3d —, 2018 WL 1903772 (No. 16-3764).

burglary because it requires unlawful entry and intent to commit a crime prior to trespassing.[149] Yet, the "building or occupied structure" element posed a problem. Buried one layer deeper in the Century Code, "occupied structure" is defined as:

> A structure *or vehicle*:
>
> a. Where any person lives or carries on business or other calling; or
>
> b. Which is used for overnight accommodation of persons.
>
> c. Any such structure or vehicle is deemed to be "occupied" regardless of whether a person is actually present.[150]

Accordingly, *Kinney* raised two issues for the court to consider: (1) whether the "building or structure" element of generic burglary encompassed vehicles used only for living or business purposes under the categorical approach; and (2) if not, whether the "building or occupied structure" language in the North Dakota statute was divisible into separate elements and thus amenable to analysis under the modified categorical approach.[151] The Eighth Circuit resolved both of these issues in two separate decisions, leading to the demise of North Dakota's burglary statute as an ACCA predicate.[152]

The Eighth Circuit quickly answered the first question. Kinney and the government filed briefs for the appeal prior to the decision in *United States v. Sims*, which conclusively held vehicles used for living accommodations do not satisfy the "occupied structure" element of generic burglary, as explained above.[153] Accordingly, the court held the North Dakota statute was categorically broader than generic burglary.[154]

The Eighth Circuit settled the thornier issue, whether the North Dakota statute was divisible, when it decided *United States v. Naylor*, an en banc decision examining nearly identical "building or inhabitable structure" language in Missouri's second-degree burglary statute.[155] *Naylor* relied heavily

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149. *Id.* at 18–19.

150. N.D. CENT. CODE ANN. § 12.1-22-06(4) (West 2017) (emphasis added).

151. *See* Brief for Appellee at 18, 27, *Kinney*,—F.3d —, 2018 WL 1903772 (No. 16-3764).

152. Kinney,—F.3d —, 2018 WL 1903772, at *3.

153. United States v. Sims, 854 F.3d 1037, 1040 (8th Cir. 2017); *see also* United States v. Lamb, 847 F.3d 928, 931 (8th Cir. 2017), *petition for cert. filed*, (U.S. Jul. 10, 2017) (No. 17-5152).

154. *Kinney*,—F.3d —, 2018 WL 1903772, at *2.

155. United States v. Naylor, 887 F.3d 397 (8th Cir. 2018) (en banc).

on state case law to conclude that the "building or inhabitable structure" language constituted alternative means, even though "Missouri courts ha[d] not yet decided the precise issue."[156] Notably, *Naylor's* reasoning appears to significantly expand the scope of decisional law available for review to determine divisibility. *Mathis* only endorsed looking to case law that "definitively answers" the elements versus means question.[157] But the Eighth Circuit went far beyond that, relying on "Missouri's well-established rule that disjunctive phrases in criminal statutes should be treated as methods of committing a single crime" emanating from multiple decisions.[158] True to form for ACCA decisions, *Naylor* drew two dissents. Judge Loken in particular argued the majority impermissibly construed *Mathis* as overruling *Taylor* by entirely disallowing review of the trial-record documents in favor of examining case law and model jury instructions.[159] He also asserted the decision came to "a result so contrary to the obvious intent of Congress as to constitute judicial legislation that is beyond our Article III powers."[160] Nonetheless, the court held Missouri's second-degree burglary statute was indivisible and therefore did not qualify as a violent felony.[161]

As a result, the government's primary argument in *Kinney* for the North Dakota burglary statute's divisibility – the existence of the disjunctive "or" separating "building" from "occupied structure" – did not persuade the panel.[162] In a footnote, the court explained the disjunctive "or" did not conclusively establish divisibility, but instead merely triggered the elements versus means analysis.[163] Even prior to *Naylor*, a careful reading of the Eighth Circuit's decision in *McArthur* likely doomed the North Dakota statute. There, the court reissued a previously rendered opinion specifically to address a similar issue in Minnesota's burglary statute.[164] Despite the existence of a disjunctive "or," the court nevertheless found "*Mathis* requires us to treat the alternatives . . . as 'means' rather than 'elements.'"[165] Perhaps most convincingly, Justice Breyer explicitly pointed to North Dakota's burglary statute as being "very much like" the Iowa statute the Supreme Court invalidated

156. *Id*. at 402.
157. Mathis v. United States, 136 S. Ct. 2243, 2256 (2016).
158. Naylor, 887 F.3d at 402.
159. *Id*. at 409 (Loken, J., dissenting).
160. *Id*.
161. *Id*. at 406–07 (majority opinion).
162. Brief for Appellee at 29, United States v. Kinney,—F.3d —, 2018 WL 1903772 (8th Cir. Apr. 23, 2018) (No. 16-3764).
163. Kinney,—F.3d —, 2018 WL 1903772, at *3 n.1.
164. *See* United States v. McArthur, 850 F.3d 925, 938 (8th Cir. 2017).
165. *Id*.

in *Mathis*.[166] After finding state case law and the plain language of the North Dakota statute unhelpful, the *Kinney* court resorted to a "peek" at the trial record documents.[167] The indictment charged the defendant with burgling "a building or occupied structure" without specificity.[168] Therefore, the court determined the statute listed alternative means and invalidated the North Dakota burglary statute as a qualifying ACCA offense.[169]

IV. EFFECT OF THE ABROGRATION OF BURGLARY AS A QUALIFYING ENUMERATED OFFENSE

With the Eighth Circuit's recent nullification of the North Dakota and Missouri statutes, burglary convictions in only *two of seven* states under the court's jurisdiction now qualify as violent felonies.[170] From a law intended to uniformly punish "the same type of conduct" across the nation, to a law that today punishes based largely on which side of a river the defendant commits burglary on, the modern application of ACCA is a judicial disaster.[171] *Mathis* and its lower court progeny now wreak two kinds of havoc. First, the Act's application flies in the face of a bedrock tenet of the American justice system: fairness. The imposition of a fifteen-year mandatory minimum federal prison sentence applies erratically – harming, not helping, unwitting defendants caught on the wrong side of a state line.[172] Second, the Supreme Court's virtual elimination of burglary as a violent felony from a statute that manifestly, unquestionably includes burglary, represents a frightening end-around of the separation of powers between Congress and the judiciary.[173] Consequently, the time has come for Congress to reassert its authority and resurrect ACCA as an effective law enforcement tool.

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166. Mathis v. United States, 136 S. Ct. 2243, 2263 (2016) (Breyer, J., dissenting).

167. Kinney,—F.3d —, 2018 WL 1903772, at *3.

168. *Id*.

169. *Id*.

170. *See Mathis*, 136 S. Ct. 2243 (majority opinion) (Iowa); *Kinney*,—F 3d —, 2018 WL 1903772 (North Dakota); United States v. Naylor, 887 F 3d 397 (8th Cir. 2018) (en banc) (Missouri); United States v. Sims, 854 F.3d 1037 (8th Cir. 2017) (Arkansas); United States v. McArthur, 850 F.3d 925 (8th Cir. 2017) (Minnesota).

171. *Compare* United States v. Lamb, 847 F.3d 928, 932 (8th Cir. 2017), *petition for cert. filed*, (U.S. Jul. 10, 2017) (No. 17-5152), *with McArthur*, 850 F.3d at 940.

172. *See* cases cited *supra*, note 171.

173. *See* Michael M. Pacheo, Comment, *The Armed Career Criminal Act: When Burglary Is Not Burglary*, 26 WILLAMETTE L. REV. 171, 190 (1989) (arguing an interpretation of burglary under the Act exclusive of most states' burglary statutes "would lead to an absurd result.").

A. FLAWS IN THE MODERN APPLICATION OF THE ARMED CAREER CRIMINAL ACT

When adopting the generic federal definition of burglary, the Supreme Court hoped defendants would be "protected . . . from the unfairness of having enhancement depend upon the label employed by the State of conviction."[174] Twenty-eight years after *Taylor*, the verdict is in – the Court failed. Today, more than any other time in its three-decade history, the application of ACCA is unjust.

First, the modern application of the Act is arbitrary, depending almost exclusively on the precise verbiage of state law.[175] This despite overt Congressional intent to ensure "the same type of *conduct* is punishable on the Federal level in all cases."[176] In the wake of *Mathis*, it no longer matters whether a defendant like Jonathan Kinney plainly admits to burglarizing a grocery store or storage unit – conduct that no doubt satisfies the generic definition of burglary.[177] A court's consideration is now limited almost exclusively to the words of the statute in front of it, the very "vagaries of state law" both Congress and the Supreme Court sought to avoid.[178] The murkiness of ACCA is most frightening for defendants, those with the most to lose from its arbitrary application. Predictability of outcome is a paramount purpose of law – ACCA today offers none.[179]

The present application of ACCA is also patently unfair to defendants unfortunate enough to have three burglary convictions in a state with a qualifying statute. Why should a person who sticks up three grocery stores in Wisconsin receive fifteen years in prison while a person who does the same in Minnesota receives less than one?[180] Here, ACCA throws "fundamental

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174. Taylor v. United States, 495 U.S. 575, 589 (1990).

175. Descamps v. United States, 570 U.S. 254, 293 (2013) (Alito, J., dissenting).

176. S. REP. NO. 98-190, at 20 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3199 (emphasis added).

177. Brief for Appellee at 3–5, United States v. Kinney,—F.3d —, 2018 WL 1903772 (8th Cir. Apr. 23, 2018) (No. 16-3764).

178. Mathis v. United States, 136 S. Ct. 2243, 2257 (2016) (explaining analysis under ACCA "involves, and involves only, comparing elements").

179. *See* Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 588 (1990) ("Besides its centrality to the rule of law in general, consistency has a special role to play in judge-made law – both judge-pronounced common law and judge-pronounced determinations of the application of statutory and constitutional provisions."); *see also* cases cited *supra* note 171 and accompanying text.

180. Because the Minnesota statute does not qualify as an ACCA predicate, convicted burglars unlawfully in possession of firearms in Minnesota are subject only to state criminal penalties. MINN. STAT. ANN. § 624.713(2)(c) (West 2017); *see also* MINN. STAT. ANN. § 609.02(3) (West 2017) (defining gross misdemeanor as an offense carrying a sentence of more than ninety days, but less than one year).

fairness," an express aim of Congress when enacting the statute, to the wind.[181] Still, some commentators have enthusiastically welcomed the abrogation of burglary convictions as qualifying ACCA offenses in the name of "soften[ing] the edges of harsh federal sentencing practices."[182] Reducing the length of prison sentences is certainly a worthy goal. But placing that goal above the basic fairness of our justice system is a price too steep to pay. Although the net result of *Mathis* and its progeny will certainly be fewer ACCA sentences, thousands of defendants will remain incarcerated for the duration of a fifteen-year term while others who committed identical crimes go free.[183] The sole difference for those left behind will be their state of conviction.

Furthermore, with the onslaught of state burglary statutes invalidated after *Mathis*, judicial interpretation of the statute now thwarts ACCA's plain language.[184] The *Taylor* Court benevolently noted its generic definition struck a balance "roughly corresponding to the definitions of burglary in a majority of States' criminal codes."[185] As the paltry number of qualifying burglary statutes in the Eighth Circuit now demonstrates, the Court's elements versus means test falls far short of this goal as well.[186] As a result, the mandate that "burglary" qualify as a violent felony under 18 U.S.C. § 924(e)(2)(B)(ii) is now gutted, left to the flimsy distinction between elements and means, a distinction state legislatures could not possibly have anticipated when drafting burglary statutes.[187] The Court has now all but erased a class of offenses Congress unequivocally included in a sentencing scheme.[188] The Court's usurpation of legislative authority is exacerbated because burglary was one of only two crimes that triggered ACCA enhancement in the original iteration of the statute.[189]

The Supreme Court's eagerness to discard the plain language of ACCA is all the more perplexing because *Mathis* bucked the Court's own precedent.

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181. *See supra* note 176.

182. Rebecca Sharpless, *Finally, a True Elements Test:* Mathis v. United States *and the Categorical Approach*, 82 BROOK. L. REV. 1275, 1276 (2017); *see also*, Jessica A. Roth, *The Divisibility of Crime*, 64 DUKE L.J. ONLINE 95, 97 (2015) (explaining the Supreme Court's divisibility analysis "prompted the reversal of a number of . . . federal ACCA sentences.").

183. *See supra* note 170 and accompanying text.

184. Mathis v. United States, 136 S. Ct. 2243, 2268 (2016) (Alito, J., dissenting) ("Congress indisputably wanted burglary to count under ACCA").

185. Taylor v. United States, 495 U.S. 575, 589 (1990).

186. *See* cases cited *supra* note 170.

187. Descamps v. United States, 570 U.S. 254, 279 (2013) (Kennedy, J., concurring) (explaining the effect of the divisibility analysis is "an unspecified number, but likely a large number, of state criminal statutes . . . now must be amended by state legislatures.").

188. *See supra* note 175.

189. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, ch. 18, 98 Stat. 1837.

Justice Kagan's *Mathis* opinion concluded "we have repeatedly made clear that application of ACCA involves, and involves only, comparing elements."[190] If this had indeed been the Court's stance "[f]or more than 25 years," then the federal district and appellate courts tasked with the everyday administration of ACCA sentences missed the memo.[191] Had an elements-only approach truly represented the Court's uninterrupted precedent from ACCA's enactment onward, *Mathis* would have changed nothing. Instead, it has resulted in the annulment of almost every state burglary statute in the Eighth Circuit in less than two years.[192]

B. CONGRESS MUST REVISIT THE ARMED CAREER CRIMINAL ACT TO ENDORSE CONDUCT-BASED INQUIRIES

The judicially created imbroglio that is the modern ACCA demands Congressional action. Twice in the last five years, Justice Kennedy has explicitly called for the legislative branch to provide clarity.[193] Most recently, he expressed dismay at the ability of Congress to respond in his *Mathis* concurrence, and even signaled the Court should revisit its ACCA decisions in the future.[194] Despite Justice Kennedy's pessimism for Congressional action, less than two months after the announcement of *Mathis*, the U.S. Sentencing Commission submitted a report to Congress on recidivist sentence enhancements that has already spurred the seeds of change.[195]

In the report, the Commission relayed its decision to eliminate burglary as a "crime of violence" under the career offender sentencing guidelines and urged Congress to adopt a similar stance for the definition of "violent felony" under ACCA for uniformity.[196] However, the purpose of ACCA is fundamentally different from the career offender guidelines.[197] The "crime of violence" provision is aimed squarely at violent recidivism, whereas ACCA is

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190. Mathis v. United States, 136 S. Ct. 2243, 2257 (2016).

191. *Id.*; *see, e.g.*, United States v. McArthur, 850 F.3d 925 (8th Cir. 2017) (reversing previously published opinion in light of *Mathis*.).

192. *See* cases cited *supra* note 170.

193. *Mathis*, 136 S. Ct. at 2258 (Kennedy, J. concurring); Descamps v. United States, 570 U.S. 254, 279 (2013) (Kennedy, J., concurring).

194. *Mathis*, 136 S. Ct. at 2258 (Kennedy, J. concurring) (expressing "continued congressional inaction in the face of a system that each year proves more unworkable should require this Court to revisit its precedents in an appropriate case.").

195. U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: CAREER OFFENDER SENTENCING ENHANCEMENTS (2016), *available at* https://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/criminal-history/201607_RtC-Career-Offenders.pdf.

196. *Id.* at 55.

197. *Compare* 18 U.S.C. § 924(e)(2)(B), *with* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2016) (in addition to those codified in ACCA, the "crime of

concerned with both violent crime and significant harm to property.[198] Indeed, the House report on the original version of ACCA labeled burglaries as "the most damaging crimes to society" specifically because of their violent nature and ruinous impact on property.[199] Eliminating burglary would directly contravene the genesis for enacting ACCA in the first place, leaving a wide gap in federal law enforcement capabilities.[200]

Accordingly, Congress should permit federal sentencing judges to employ conduct-based inquires for ACCA purposes.[201] As Justice Alito stated in *Descamps*, "When it is clear that a defendant necessarily admitted or the jury necessarily found that the defendant committed the elements of generic burglary, the conviction should qualify."[202] ACCA's predicament does not result from the definition the Supreme Court selected, even though it is highly questionable that Congress intended for a generic definition of burglary. The true dilemma is the method used to determine if that definition is satisfied.[203] A conduct-based inquiry, wielding only the documents endorsed in *Taylor* and *Shepard*, would return ACCA to punishing "the same conduct" uniformly.[204] In endorsing Justice Alito's approach, Congress can ensure fundamental fairness in the application of the law and renew ACCA's effectiveness as a tool to keep Americans safe.

V. CONCLUSION

The Armed Career Criminal Act's nearly three-decade history is a microcosm of several important debates in our society, ranging from recidivism and mass incarceration to the separation of powers between co-equal branches of government. *Mathis* and the slew of federal appellate decisions it has spawned sharpen those debates exponentially.[205] Of particular note to local practitioners, the Eighth Circuit Court of Appeals recently invalidated North Dakota's burglary statute as a violent felony for ACCA purposes.[206] As a result, *Kinney* will touch off a firestorm of litigation for federal criminal

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violence" enumerated offenses include murder, voluntary manslaughter, kidnapping, aggravated assault, and forcible sex offenses).

198. *See infra* note 199.

199. H.R. REP. NO. 98-1073, at 2–3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3663.

200. *See id.*; DEP'T OF JUST., U.S. ATT'YS ANN. STAT. REP. at 16 (2016).

201. Descamps v. United States, 570 U.S. 254, 284 (Alito, J., dissenting). Justice Alito also dismissed the majority's Sixth Amendment concerns with a conduct-based approach. *Id.* at 291.

202. *Id.* at 281.

203. Mathis v. United States, 136 S. Ct. 2243, 2258 (Kennedy, J., concurring).

204. *See supra* note 176.

205. *See supra* note 170.

206. *See supra* Part III.C.

law practitioners in North Dakota. And it has eliminated yet another statute from a sentencing scheme unquestionably intended to encompass burglary convictions from its inception.[207] The onus now falls on Congress to wrangle the runaway application of ACCA back from the judiciary. Every moment of delay perpetuates the unequal application of a law that exacts retribution in fifteen-year increments.

Matthew Kopp[*]

207. Mathis v. United States, 136 S. Ct. 2243, 2268 (2016) (Alito, J., dissenting).

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