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## Triggerman: Maintaining the Distinction Between Deliberate Violence and Conspiracy Under the Armed Career Criminal Act

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## NOTES

### TRIGGERMAN: MAINTAINING THE DISTINCTION BETWEEN DELIBERATE VIOLENCE AND CONSPIRACY UNDER THE ARMED CAREER CRIMINAL ACT

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### INTRODUCTION

On December 8, 2007, Thomas Gore was illegally hunting deer with his son in the woods of eastern Texas, where he was discovered by the police with a loaded Remington rifle.<sup>1</sup> Gore was cited for baiting deer and indicted for being a felon in possession of a firearm.<sup>2</sup> He had four prior felony convictions: three for drug offenses in 1997 and one for conspiracy to commit aggravated robbery in 1982.<sup>3</sup> During the 1982 conspiracy, Gore did not have a firearm and did not participate in the commission of the substantive offense.<sup>4</sup>

The United States District Court for the Eastern District of Texas found that Gore's prior convictions qualified for imposition of the fifteen-year mandatory minimum sentence under the Armed Career Criminal Act<sup>5</sup> ("ACCA"), a sentence reserved for those convicted of felonious possession of firearms or ammunition who previously were convicted of at least three violent felonies or serious drug offenses.<sup>6</sup> Normally, Gore would not have qualified

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<sup>1</sup> Brief of Appellant Thomas Gore at 2, *United States v. Gore*, 636 F.3d 728 (5th Cir. 2011) (No. 09-41064), 2010 WL 5778111; Brief for the United States at 3, *Gore*, 636 F.3d 728 (No. 09-41064), 2010 WL 5778113.

<sup>2</sup> Brief for the United States, *supra* note 1. Gore was also cited for not having a valid driver's license. *Id.*

<sup>3</sup> *Id.* at 3–4. Gore received probation for the conspiracy conviction. Brief of Appellant Thomas Gore, *supra* note 1. Two of Gore's drug offenses occurred on the same occasion and were considered one offense for ACCA sentencing purposes. Brief for the United States, *supra* note 1, at 5.

<sup>4</sup> Brief of Appellant Thomas Gore, *supra* note 1.

<sup>5</sup> 18 U.S.C. § 924(e)(1) (2012); Brief for the United States, *supra* note 1, at 4.

<sup>6</sup> § 924(e)(1). Combining prior serious drug offenses and violent felonies to reach three offenses for sentencing is permitted, but this Note focuses on violent felonies. *See id.*

for the enhanced sentence and would have been sentenced to approximately three years in prison,<sup>7</sup> but because the court labeled Gore's conspiracy conviction as an ACCA violent felony, Gore received a fifteen-year prison sentence.<sup>8</sup> The United States Court of Appeals for the Fifth Circuit affirmed Gore's sentence.<sup>9</sup> Gore was not a violent career criminal in any colloquial sense of the term.<sup>10</sup> Only one of Gore's prior convictions was for what the district court considered to be a violent felony, the 1982 conspiracy conviction,<sup>11</sup> and Gore was not even armed in connection with the commission of this conspiracy.<sup>12</sup>

Gore's situation reveals the devastatingly unjust effect the ACCA mandatory minimum can have on an individual who is not in fact a violent criminal. This Act was drafted to incapacitate recidivists who had proven themselves to be capable of deliberate violence,<sup>13</sup> yet here it was used to imprison a reformed father for a mandatory fifteen years.<sup>14</sup>

Recently, in *Johnson v. United States*,<sup>15</sup> the United States Supreme Court confronted the ACCA definition of violent felony and found one provision, known as the residual clause, to be unconstitutionally vague in violation of the Fifth Amendment Due Process Clause.<sup>16</sup> The Court noted that this vague provision created a split of authority among the United States Circuit Courts of Appeals about conspiracy under the residual clause and

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<sup>7</sup> Brief of Appellant Thomas Gore, *supra* note 1; Brief for the United States, *supra* note 1, at 4.

<sup>8</sup> Brief for the United States, *supra* note 1, at 4.

<sup>9</sup> *United States v. Gore*, 636 F.3d 728, 729 (5th Cir. 2011).

<sup>10</sup> *Career Criminal Definition*, COLLINS ENGLISH DICTIONARY, <http://www.collinsdictionary.com/dictionary/english/career-criminal> (last visited Apr. 8, 2016) (defining "career criminal" as "a person who earns his income through criminal activities"); *Violent Definition*, COLLINS ENGLISH DICTIONARY, <http://www.collinsdictionary.com/dictionary/english/violent> (last visited Apr. 8, 2016) (defining "violent" as "tending to the use of violence, esp [sic] in order to injure or intimidate others").

<sup>11</sup> Brief for the United States, *supra* note 1, at 3–4.

<sup>12</sup> Brief of Appellant Thomas Gore, *supra* note 1.

<sup>13</sup> *See infra* Part I.A.

<sup>14</sup> Gore was sentenced under the residual clause and would not have been convicted by the Fifth Circuit under § 924(e)(2)(B)(i). *Gore*, 636 F.3d at 730. However, *Gore* still serves as a stunning example of the extreme, negative effects of a crime being deemed a violent felony. *See generally Gore*, 636 F.3d 728.

<sup>15</sup> 135 S. Ct. 2551 (2015).

<sup>16</sup> U.S. CONST. amend. V; *Johnson*, 135 S. Ct. at 2557. The Supreme Court has not directly or definitively addressed whether conspiracy crimes are violent felonies under the ACCA.

was extremely difficult to precisely apply.<sup>17</sup> However, the Court also clarified that its *Johnson* decision did not call into question the remainder of the ACCA's definitions of violent felony, including that under § 924(e)(2)(B)(i).<sup>18</sup>

While the *Johnson* decision was a move toward a more just sentencing scheme, it did not go far enough. Courts are still split on whether to classify conspiracies to commit violent felonies as violent felonies.<sup>19</sup> Although conspiracy crimes can no longer be classified as violent crimes under § 924(e)(2)(B)(ii), courts have done so in the past and are permitted by the Supreme Court to continue classifying conspiracy crimes as violent felonies under § 924(e)(2)(B)(i).<sup>20</sup>

When considering whether or not a crime is a violent felony, courts apply a formal categorical test, meaning the court only looks to statutory definitions of prior offenses and not underlying facts.<sup>21</sup> The circuit courts disagree over whether they should look to both the elements of the conspiracy and the elements of the underlying crime in determining whether conspiracy to commit that crime is a violent felony.<sup>22</sup>

This Note argues that conspiracies to commit violent felonies are not violent felonies under § 924(e)(2)(B)(i) because, while criminals may participate in conspiracies in the hopes of accomplishing the underlying offense, conspiracies are distinct crimes and do not categorically have elements of threatened, attempted, or actual use of physical force. Part I of this Note describes relevant legal history behind the ACCA, the applicable law, and the process courts use to determine whether criminals are subject to the fifteen-year mandatory minimum. Part II analyzes the approaches represented in the circuit split. Part III demonstrates how relevant legislative history, case law, and policy considerations indicate that conspiracies to commit violent felonies are not violent felonies under the ACCA. Part III also proposes a rearrangement of factors considered in the categorical approach.

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<sup>17</sup> *Johnson*, 135 S. Ct. at 2560.

<sup>18</sup> *Id.* at 2563.

<sup>19</sup> *See infra* Part II.

<sup>20</sup> *See Johnson*, 135 S. Ct. at 2563.

<sup>21</sup> *Taylor v. United States*, 495 U.S. 575, 600 (1990).

<sup>22</sup> *See infra* Part II.

## I. HISTORY AND BACKGROUND

A. *Circumstances Surrounding the Adoption of the ACCA*

In the 1970s, crime rates, particularly for violent crimes, looked to be on an unstoppable climb.<sup>23</sup> As a result, the American public was very uneasy, and Congress felt enormous pressure to take some sort of action.<sup>24</sup> Thus, Congress began promulgating aggressive anticrime legislation.<sup>25</sup> In this legislation, Congress addressed public anxiety by extending incarceration and implementing a fifteen-year mandatory minimum for armed career criminals responsible for multiple violent offenses.<sup>26</sup> In the discussion in the House of Representatives, Representative Jerry Patterson stated that this use of sentencing would “continue[] the war against crime by substantially increasing sentences for violent offenders.”<sup>27</sup> In the same discussion, Representative Patterson specifically referred to recidivists convicted of armed burglary or robbery as the “segment of the criminal population” that Congress wanted to get “off the street” to reduce violent crime.<sup>28</sup> Additionally, the lawmakers cited numerous statistics about the pervasiveness of violent crime and the small number of recidivists responsible.<sup>29</sup> In 1984, Congress passed the Armed Career Criminal Act of 1984,<sup>30</sup> which defined “violent felony” as “robbery or burglary, or both.”<sup>31</sup> Significantly, Congress specifically eliminated a

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<sup>23</sup> *Uniform Crime Reports: Total Arrests by Age and Crime, 1970–2003*, BUREAU OF JUSTICE STATISTICS (Dec. 15, 2004), <http://www.bjs.gov/content/dtdata.cfm> (spreadsheet available by clicking hyperlink after “Arrests by age group”).

<sup>24</sup> 130 CONG. REC. 29,671 (1984) (statement of Sen. Biden). During congressional discussion about the formation of the ACCA, Representative Hughes stated that “[crime] is unquestionably one of the top concerns of the people of America.” *Id.* at 30,314.

<sup>25</sup> *Id.* at 29,999 (statement of Rep. Reid) (“There is no doubt that we need tougher crime controls, and [mandatory minimum sentencing] is just one important way to show our Nation that we are prepared to legislate . . . to help resolve this terrible problem [of violent crime].”).

<sup>26</sup> *Id.* at 29,688 (statement of Sen. Specter).

<sup>27</sup> *Id.* at 31,742.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 29,671, 29,688, 29,695–96.

<sup>30</sup> Pub. L. No. 98-473, § 1802, 98 Stat. 2185.

<sup>31</sup> H.R. REP. NO. 98-1078, at 3, 8 (1984).

proposed definition of violent felony that included “any robbery or burglary offense, or a conspiracy or attempt to commit such an offense.”<sup>32</sup>

In 1986, Congress amended the ACCA definition of violent felony to comprise burglary, arson, extortion, crimes that involve the use of explosives, or crimes that “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.”<sup>33</sup> But, like in 1984, Congress declined to expressly include conspiracy crimes as violent felonies.<sup>34</sup> Section 924(e) of the ACCA has not been amended since 1986.<sup>35</sup>

### B. *The Applicable Law in Determining Whether Conspiracy Is a Violent Felony*

#### 1. The Structure of the Relevant Section of the ACCA<sup>36</sup>

For the mandatory minimum under § 924(e)(1) to apply, a defendant first must have violated 18 U.S.C. § 922(g).<sup>37</sup> This statute makes it a crime for a person who has been convicted of a felony to possess a gun or ammunition.<sup>38</sup> If convicted, a defendant cannot be sentenced to more than ten years.<sup>39</sup>

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<sup>32</sup> S. 52, 98th Cong. § 2 (2d Sess. 1984).

<sup>33</sup> Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3240 (internal quotation mark omitted).

<sup>34</sup> *Id.*

<sup>35</sup> *See id.*; 18 U.S.C. § 924(e) (2012).

<sup>36</sup> The Sentencing Guidelines’ language is almost identical to that of the ACCA, except the Guidelines refer to “crime of violence” in place of “violent felony.” U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2015); 18 U.S.C. § 924(e)(2)(B). Application Note 1 to the relevant Guideline provision states that conspiracy crimes are crimes of violence. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1. However, the Guidelines and the ACCA are distinct because the Guidelines do not share the ACCA’s mandatory minimum sentence. *United States v. Raupp*, 677 F.3d 756, 760 (7th Cir. 2012). Therefore, courts have held that analysis involving the ACCA term “violent felony” should be separate from Guidelines analysis, and the Application Note does not apply to ACCA analysis. *United States v. Miller*, 721 F.3d 435, 441 (7th Cir. 2013).

<sup>37</sup> 18 U.S.C. § 924(e)(1).

<sup>38</sup> 18 U.S.C.A. § 922(g) (West 2014). Section 922(g) includes an extensive list of other persons for whom it would be unlawful to possess firearms or ammunition, but felons are most relevant to this Note. *Id.*

<sup>39</sup> § 924(a)(2).

However, if the defendant has three prior convictions for violent felonies, committed on different occasions, the defendant is subject to a fifteen-year mandatory minimum sentence.<sup>40</sup> The ACCA defines “violent felony” as any felony that “has as an element the use, attempted use, or threatened use of physical force against the person of another.”<sup>41</sup> Thus, the ten-year maximum sentence for violating § 922(g) becomes a fifteen-year mandatory minimum if one has been convicted of three prior violent felonies.<sup>42</sup>

## 2. Elements of a Conspiracy Offense

Generally, to be convicted of conspiracy to commit a crime, one must, with intent to contribute to the commission of the underlying offense, agree with at least one other person to either commit that crime or to aid in the commission of that crime.<sup>43</sup> The Supreme Court has “consistently held that the common law understanding of conspiracy ‘does not make the doing of any act other than the act of conspiring a condition of liability.’”<sup>44</sup> However, some state statutes require that a conspirator also perform an overt act in furtherance of the conspiracy or that someone in the conspiracy performs such overt act.<sup>45</sup> The overt

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<sup>40</sup> § 924(e)(1). Convictions for serious drug offenses also count and may be combined with any violent felony to subject the defendant to the ACCA mandatory minimum. *Id.*

<sup>41</sup> § 924(e)(2)(B)(i). A crime may also qualify as a violent felony under § 924(e)(2)(B)(ii), but this provision is irrelevant to the issue of conspiracy. Section 924(e)(2)(B)(ii) states that a crime is a violent felony if it “is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.” In *Johnson v. United States*, the Supreme Court held that the residual clause following the list of qualifying felonies is unconstitutionally vague because it leaves “grave uncertainty” both about how to estimate risk posed by a crime and about how much risk is needed for a crime to be a violent felony. 135 S. Ct. 2551, 2557–58 (2015). Thus, only burglary, arson, extortion, or crimes involving the use of explosives are violent felonies under § 924(e)(2)(B)(ii). *See id.* at 2563.

<sup>42</sup> § 924(a)(2), (e)(1).

<sup>43</sup> *See* *United States v. Shabani*, 513 U.S. 10, 16 (1994).

<sup>44</sup> *Id.* at 13–14 (quoting *Nash v. United States*, 229 U.S. 373, 378 (1913)).

<sup>45</sup> For example, under the Model Penal Code, persons may be convicted of conspiracy if, to “promot[e] or facilitat[e]” the commission of the substantive offense, they agreed with others to commit a crime or to aid in the commission of a crime and if one of the conspirators committed “an overt act in pursuance of such conspiracy.” MODEL PENAL CODE § 5.03(1), (5) (2015). Numerous state conspiracy statutes use the same or a substantially similar definition of conspiracy. *See* ARIZ. REV. STAT. ANN. § 13-1003 (2016); CAL. PENAL CODE § 184 (West 2016); IOWA CODE ANN. § 706.1 (West 2016); KAN. STAT. ANN. § 21-5302 (West 2015); N.J. STAT.



act requirement is not onerous.<sup>46</sup> Normally, in states with an overt act requirement, any act in furtherance of the conspiracy is sufficient for a conspiracy conviction;<sup>47</sup> an act that would be legal but for the conspiracy qualifies as an overt act.<sup>48</sup>

*C. Determining Whether a Felon Should Be Sentenced Under the ACCA*

If a prosecutor believes that a defendant qualifies as an armed career criminal and should be sentenced as one, the prosecutor may request sentencing under the ACCA.<sup>49</sup> The prosecution has substantial discretion in determining whether or not to invoke the ACCA.<sup>50</sup> Once the prosecution shows that the mandatory minimum applies, the judge has no discretion to impose a lesser sentence, even if the judge believes that justice requires a sentence of less than fifteen years in prison.<sup>51</sup>

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ANN. § 2C:5-2 (West 2015); N.Y. PENAL LAW § 105.20 (McKinney 2016); N.D. CENT. CODE ANN. § 12.1-06-04 (West 2015); OKLA. STAT. ANN. tit. 21, § 423 (West 2016); 18 PA. CONS. STAT. ANN. § 903 (West 2016). However, some states do not require commission of overt acts for conspiracy convictions. *See* FLA. STAT. ANN. § 777.04 (West 2016); NEV. REV. STAT. ANN. § 199.490 (West 2015); N.M. STAT. ANN. § 30-28-2 (West 2016); OR. REV. STAT. ANN. § 161.450 (West 2016).

<sup>46</sup> *United States v. Valle*, 301 F.R.D. 53, 82 (S.D.N.Y. 2014) (“[T]he purpose of [the overt act] element is to require the Government to demonstrate that the conspiracy was actually ‘at work.’”); *In re Interest of J.C.S.*, 565 N.W.2d 759, 761 (N.D. 1997) (“The burden to prove an overt act is minimal, since nearly any act in furtherance of the agreed-upon crime will satisfy the requirement.”).

<sup>47</sup> *Valle*, 301 F.R.D. at 82.

<sup>48</sup> *Id.* (“The overt act may itself be lawful . . .”).

<sup>49</sup> Brief for the United States, *supra* note 1, at 2. PSR stands for pre-sentence report. *Id.*

<sup>50</sup> Crime rates of some of the most common violent felonies—burglary and robbery—have fallen from a rate of 684.5 per 100,000 in 1995 to 403.6 per 100,000 in 2010. *Crime in the United States by Volume and Rate Per 100,000 Inhabitants, 1991–2010*, FED. BUREAU OF INVESTIGATION, <https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/tables/10tbl01.xls> (last visited June 12, 2016). But during the same time, the number of prisoners defined as armed career criminals increased from 1.4% in 1995 to 2.9% in 2010. U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM, ch. 9, at 288 (2011), available at <http://www.uscc.gov/news/congressional-testimony-and-reports/mandatory-minimum-penalties/report-congress-mandatory-minimum-penalties-federal-criminal-justice-system>. This trend suggests the possible overuse of the ACCA fifteen-year sentence. At minimum, the figures demonstrate a need to reexamine which crimes qualify as violent felonies under the ACCA.

<sup>51</sup> *See* 18 U.S.C. § 924(e)(1) (2012).

To assist courts in determining whether a crime is a violent felony under the ACCA, the Supreme Court has adopted a categorical test (“categorical test”).<sup>52</sup> This test requires courts to look to the elements of previous crimes rather than any underlying facts in determining whether or not the previous crimes qualify as violent felonies.<sup>53</sup> The categorical test applied by courts reflects Congress’s effort to target specific types of crime through the ACCA sentencing enhancements by providing enhanced sentencing for “all crimes having certain common characteristics—the use or threatened use of force, or the risk that force would be used—regardless of how they were labeled by state law.”<sup>54</sup> Thus, the categorical test ensures that the ACCA is applied to those crimes it was drafted to target.<sup>55</sup>

## II. THE DIVISION AMONG THE CIRCUIT COURTS

Although all circuit courts generally apply the categorical test, they are divided on whether conspiracies to commit violent felonies are themselves violent felonies under the ACCA.<sup>56</sup> Essentially, the circuit courts dispute whether courts, in applying the categorical test to determine whether or not a crime is a violent felony under the ACCA, should look solely to the elements of the conspiracy offense or to those of the underlying crime.<sup>57</sup>

### A. *Circuits That Have Held Conspiracy To Commit a Violent Felony To Be a Violent Felony Under the ACCA*

The United States Courts of Appeal for the First, Third, Sixth, and Eleventh Circuits (“majority”) applied the categorical test and determined that each of the defendants’ prior conspiracy

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<sup>52</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015) (citing *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

<sup>53</sup> *Taylor*, 495 U.S. at 602.

<sup>54</sup> *Id.* at 589.

<sup>55</sup> *See id.*

<sup>56</sup> *See infra* Part II.A–B.

<sup>57</sup> *Compare* *United States v. Preston*, 910 F.2d 81, 86–87 (3d Cir. 1990), *with* *United States v. Gore*, 636 F.3d 728, 730 (5th Cir. 2011).

convictions qualified as violent felonies.<sup>58</sup> The majority reasoned that conspiracy crimes are violent felonies when the underlying crime is a violent felony.<sup>59</sup>

The Third Circuit's decision in *United States v. Preston*<sup>60</sup> best illustrates the reasoning used by the majority. Dale Preston asserted that the district court erred in applying the ACCA mandatory minimum sentence because he had not been convicted of three prior violent felonies;<sup>61</sup> the court had considered his conviction for conspiracy to commit robbery to be one of the predicate violent felonies.<sup>62</sup> The Third Circuit affirmed, finding that conspiracy to commit robbery is a violent felony under § 924(e)(2)(B)(i).<sup>63</sup> The court reasoned that, because Pennsylvania's conspiracy statute requires the prosecution to show that a specific crime was underlying the conspiracy, the conspiracy crime subsumes the elements of the underlying crime.<sup>64</sup> Thus, applying the categorical test in this context, the court held that conspiracy to commit robbery was a violent felony because it subsumes the elements of the object of the conspiracy—robbery, a violent felony.<sup>65</sup> Similar reasoning is used by the other circuits.<sup>66</sup>

As *Preston* indicates, the majority asserts that, when applying the categorical test, courts should consider conspiracy convictions to include each of the elements of the substantive crime; the result is that a conspiracy conviction is a violent felony when the object of the conspiracy was a violent felony.<sup>67</sup>

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<sup>58</sup> *United States v. Wilkerson*, 286 F.3d 1324, 1325 (11th Cir. 2002) (per curiam); *United States v. Hawkins*, 139 F.3d 29, 34 (1st Cir. 1998); *Preston*, 910 F.2d at 87.

<sup>59</sup> *Hawkins*, 139 F.3d at 34; *Wilkerson*, 286 F.3d at 1325; *Preston*, 910 F.2d at 87.

<sup>60</sup> 910 F.2d 81.

<sup>61</sup> *Id.* at 84.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 86.

<sup>64</sup> *Id.* at 86–87.

<sup>65</sup> *Id.* at 87.

<sup>66</sup> *United States v. Wilkerson*, 286 F.3d 1324, 1325 (11th Cir. 2002) (per curiam) (considering both of the definitions of violent felony under the ACCA and stating that the formation of an agreement to commit a violent felony would be sufficient, regardless of any overt act element); *United States v. Hawkins*, 139 F.3d 29, 34 (1st Cir. 1998) (holding that, because robbery is a violent felony under the ACCA, “it is clear that the district court committed no error in concluding that [Hawkins’s] conviction for conspiracy to commit armed robbery was a qualifying predicate to his being sentenced under the mandatory minimum sentencing requirements”).

<sup>67</sup> See *Wilkerson*, 286 F.3d at 1326; *Hawkins*, 139 F.3d at 34.

Essentially, if the state conspiracy statute requires anything concerning the specific underlying crime, and that underlying crime is a violent felony, the conspiracy itself is a violent felony under § 924(e)(2)(B)(i).<sup>68</sup> Thus, the majority broadly defines “violent felony” to include conspiracy crimes.

*B. Circuits That Have Held Conspiracy To Commit a Violent Felony To Not Be a Violent Felony Under the ACCA*

Applying the same categorical test, the United States Courts of Appeals for the Fourth, Fifth, and Tenth Circuits (“minority”) have determined that conspiracies to commit violent felonies are not themselves violent felonies.<sup>69</sup> These circuit courts have held that conspiracies to commit violent felonies do not have as elements “the use, attempted use, or threatened use of physical force against the person of another.”<sup>70</sup>

For the minority, the categorical test limits courts to examining elements of the charged crime—conspiracy—and not the underlying one.<sup>71</sup> For example, in *United States v. Fell*,<sup>72</sup> Nathaniel Fell was convicted of conspiracy to commit burglary, and the district court determined that he committed a violent felony under the ACCA.<sup>73</sup> Fell appealed, and the Tenth Circuit held that the conspiracy crime was not a violent felony under § 924(e)(2)(B)(i) because “Colorado law does not require proof of the use, attempted use, or threatened use of physical force to sustain a conviction for conspiracy to commit second degree burglary.”<sup>74</sup> Similarly, when faced with a defendant who had been convicted of conspiracy to commit robbery, the Fifth Circuit,

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<sup>68</sup> See *Preston*, 910 F.2d at 86–87; see also *United States v. Gloss*, 661 F.3d 317, 319 (6th Cir. 2011) (“If a conviction for facilitation or conspiracy requires the government to prove the elements of the underlying violent felony, such a conviction will itself qualify as a violent felony under the first clause of § 924(e)(2)(B).” (citing *Preston*, 910 F.2d at 86)).

<sup>69</sup> See generally *United States v. Gore*, 636 F.3d 728 (5th Cir. 2011); *United States v. White*, 571 F.3d 365 (4th Cir. 2009); *United States v. Fell*, 511 F.3d 1035 (10th Cir. 2007); *United States v. King*, 979 F.2d 801 (10th Cir. 1992). *But see* *United States v. Brown*, 200 F.3d 700, 706 (10th Cir. 1999) (holding that conspiracy to commit a carjacking was a crime of violence under § 924(c)(3)(B)).

<sup>70</sup> See 18 U.S.C. § 924(e)(2)(B)(i) (2012); *Gore*, 636 F.3d at 731; *White*, 571 F.3d at 369; *Fell*, 511 F.3d at 1037; *King*, 979 F.2d at 803 (“Clearly neither actual nor attempted use of force is required for conviction under conspiracy law . . .”).

<sup>71</sup> *E.g.*, *King*, 979 F.2d at 803.

<sup>72</sup> 511 F.3d 1035.

<sup>73</sup> *Id.* at 1036.

<sup>74</sup> *Id.* at 1037.

in *United States v. Gore*,<sup>75</sup> held that conspiracy was not a violent felony under § 924(e)(2)(B)(i).<sup>76</sup> The applicable Texas conspiracy law required agreement and commission of an overt act in furtherance of that agreement.<sup>77</sup> Thus, in applying this statute, the court in *Gore* “agree[d], that under Texas law, a conviction for conspiracy to commit aggravated robbery does not have ‘as an element the use, attempted use, or threatened use of physical force against the person of another.’”<sup>78</sup> The Fourth Circuit, in *United States v. White*,<sup>79</sup> also applied “a categorical analysis to the Conspiracy Offense,” conspiracy to commit robbery, and held that it was not a violent felony under § 924(e)(2)(B)(i).<sup>80</sup>

The minority asserts that the fact that the underlying crime is related by association to the conspiracy charge does not bring the elements of the underlying crime into the categorical analysis.<sup>81</sup> Even though many conspiracy statutes require that the object crime be explained to the jury in a conspiracy prosecution, elements of the object crime are still not subsumed by the conspiracy crime.<sup>82</sup> Unlike in *Preston*, where the court felt that this requirement meant that the elements of the underlying felony were subsumed into the conspiracy crime, the minority looks primarily to the elements of the conspiracy statute.<sup>83</sup> Where conspiracy involves merely reaching a felonious agreement—the main requirement for many conspiracy statutes—the conspiracy crime is not a violent felony because it does not include the attempted, threatened, or actual use of physical force, regardless of the underlying felony.<sup>84</sup> For the

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<sup>75</sup> 636 F.3d 728.

<sup>76</sup> *Id.* at 731.

<sup>77</sup> *Id.* (stating that, in the Fifth Circuit, courts also conduct analysis of the elements of the target offense of the conspiracy crime, but suggesting that this analysis does not factor into determinations under § 924(e)(2)(B)(i)).

<sup>78</sup> *Id.* at 730 (quoting 18 U.S.C. § 924(e)(2)(B)(i) (2012)).

<sup>79</sup> 571 F.3d 365 (4th Cir. 2009).

<sup>80</sup> *Id.* at 366, 369. While the residual clause portion of this decision has been abrogated by *Johnson v. United States*, *White* still demonstrates that the Fourth Circuit has found that conspiracy crimes are not violent felonies under § 924(e)(2)(B)(i).

<sup>81</sup> See cases cited *supra* note 70.

<sup>82</sup> See cases cited *supra* note 70.

<sup>83</sup> Compare *United States v. Preston*, 910 F.2d 81, 86 (3d Cir. 1990), with *Gore*, 636 F.3d at 731, *White*, 571 F.3d at 369, and *United States v. Fell*, 511 F.3d 1035, 1037 (10th Cir. 2007).

<sup>84</sup> See *United States v. King*, 979 F.2d 801, 802 (10th Cir. 1992).

minority, to determine whether conspiracy to commit a violent felony is a violent felony, the categorical test only allows examination of the elements of the conspiracy offense.<sup>85</sup>

### III. CONSPIRACY CRIMES ARE NOT VIOLENT FELONIES

Conspiracies to commit violent felonies are not themselves violent felonies because conspiracies do not have as an element “the use, attempted use, or threatened use of physical force against the person of another.”<sup>86</sup> Conspiracies are considered to be separate from the object crime.<sup>87</sup> Blending elements of the object crime with the conspiracy conviction for an ACCA violent felony determination is dangerous for defendants and for the integrity of the justice system as a whole.<sup>88</sup> To do so renders § 924(e)(2)(B)(i), a clear provision but for the majority’s interpretation, unconstitutionally vague and impossible to precisely apply.<sup>89</sup> Moreover, under such facts, a conspiracy crime would likely become attempt rather than conspiracy, a different crime altogether.<sup>90</sup> Additionally, the majority’s interpretation is inconsistent with the legislative history, statutory interpretation, and underlying policies of the ACCA.<sup>91</sup> Proper application of the categorical test means that conspiracies to commit violent felonies are not violent felonies under § 924(e)(B)(2)(i).

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<sup>85</sup> See *id.* at 803.

<sup>86</sup> 18 U.S.C. § 924(e)(2)(B)(i) (2012).

<sup>87</sup> BLACK’S LAW DICTIONARY 375 (10th ed. 2014) (“Conspiracy is a separate offense from the crime that is the object of the conspiracy.”).

<sup>88</sup> See *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015) (holding that sentencing someone under a statute that is imprecisely applied by courts violates the Due Process Clause).

<sup>89</sup> Courts cannot accurately apply the ACCA residual clause to other crimes if the clause is interpreted so broadly as to include conspiracies to commit violent felonies as violent felonies. See *infra* Part III.

<sup>90</sup> The Model Penal Code states:

[A] person is guilty of an attempt to commit a crime if . . . he: purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be; or . . . does or omits to do anything with the purpose of causing or with the belief that it will cause [a particular] result without further conduct on his part; or purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step . . . [towards] commission of the crime.

MODEL PENAL CODE § 5.01(1) (2015).

<sup>91</sup> See *supra* Part I.A.

A. *The Purpose of the ACCA's Definition of Violent Felony*

Conspiracy crimes do not fit within the purpose for which the ACCA was created—to target criminals who intentionally and persistently commit the types of crimes that make their communities significantly less safe.<sup>92</sup> Even the Supreme Court has recognized Congress's narrow focus in drafting the ACCA, with Justice Breyer stating that Congress only intended the fifteen-year mandatory minimum to apply when there was an increased chance that the criminal is “the kind of person who might deliberately point the gun and pull the trigger.”<sup>93</sup> The legislative history behind the ACCA indicates that Congress meant for the ACCA's mandatory minimum to serve utilitarian goals, incapacitating the type of criminal who had been proven to be more likely to intentionally harm others, thus protecting society by removing the violent recidivist from the community.<sup>94</sup> Arguably, the provision was also meant to serve retributive goals, with the mandatory minimum for violent felonies reflecting an increased moral desert or need to “bring[] these particularly dangerous criminals to justice.”<sup>95</sup> Under either interpretation, conspiracy crimes are not consistent with Congress's intended meaning for violent felonies.<sup>96</sup>

A conspiracy conviction is not sufficient to indicate that a criminal is capable of deliberate acts of violence or even the attempted or threatened use of physical force.<sup>97</sup> Congress intended to target recidivists who had proven themselves to be capable of deliberate violence,<sup>98</sup> therefore, in 1984, Congress expressly rejected proposed language that would have listed conspiracies to commit robbery or burglary as violent felonies.<sup>99</sup>

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<sup>92</sup> 127 CONG. REC. 22,669 (1981) (statement of Sen. Specter).

<sup>93</sup> *Begay v. United States*, 553 U.S. 137, 146 (2008).

<sup>94</sup> See H.R. REP. NO. 98-1073, at 2 (1984), as reprinted in 1984 U.S.C.C.A.N. 3661, 3662.

<sup>95</sup> 129 CONG. REC. 599 (1983). Here, Senator Specter was referring to recidivists who had been convicted of robberies or burglaries and are “subsequently charged with a third robbery or burglary committed with a firearm.” *Id.*; MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 191 (1997) (stating that retributive theory is based upon moral desert).

<sup>96</sup> See *supra* Part I.A.

<sup>97</sup> Rather, a conspiracy conviction primarily shows that the criminal was willing to agree to commit a violent felony. See *United States v. Whitson*, 597 F.3d 1218, 1222 (11th Cir. 2010).

<sup>98</sup> 127 CONG. REC. 22,669–70 (1981) (statement of Sen. Specter).

<sup>99</sup> S. 52, 98th Cong. § 2 (1984).

Even when Congress, in 1986, broadened the definition of violent felony to include the residual clause, now unconstitutional, it continued to exclude conspiracy in the amendment to the definition of violent felony.<sup>100</sup> This repeated exclusion indicates that the amorphous risks posed by conspiracy crimes are outside the scope of Congress's intended definition of violent felony.<sup>101</sup>

Further examination of the legislative history shows that Congress intended for the ACCA to protect communities by removing recidivists from American streets.<sup>102</sup> Lawmakers' focus was on criminals who repeatedly commit substantive offenses—who essentially make their living off of the commission of violent crimes.<sup>103</sup> In his sponsor statement, Senator Arlen Specter noted that career criminals often commit “scores of offenses” and cited to a study that “showed that only 49 imprisoned robbers admitted committing 10,000 felonies over 20 years.”<sup>104</sup> The congressional records suggest that Senator Specter was referring to individuals who committed the substantive violent felonies, not criminals who agreed to commit violent felonies.<sup>105</sup> When describing the purpose of the ACCA, Senator Specter expressly focused on “a relatively small number of career criminals [who] commit a very large number of robberies and burglaries” and did not mention conspiracy to commit any crime.<sup>106</sup> Further, Senator Specter supported this stated focus with information about substantive offenses, not conspiracies to commit violent felonies.<sup>107</sup> Evidently, the ACCA targets individuals who terrorize their communities through repeated

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<sup>100</sup> Congress's failure to include conspiracy crimes in 1986 is not an express rejection, but it does indicate that conspiracy crimes are not automatically violent felonies under the ACCA, and it suggests that they are still not the type of crimes that Congress intended to address.

<sup>101</sup> 127 CONG. REC. 22,669 (statement of Sen. Specter).

<sup>102</sup> 130 CONG. REC. 29,671, 29,688, 29,695–96 (1984); 129 CONG. REC. 598–99 (1983) (focusing specifically on robbery and burglary).

<sup>103</sup> 127 CONG. REC. 22,670 (statement of Sen. Specter) (“Career criminals often have no lawful employment; their full-time occupation is crime for profit and many commit crimes on a daily basis.”).

<sup>104</sup> H.R. REP. NO. 98-1073, at 3 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3661, 3663.

<sup>105</sup> 127 CONG. REC. 22,670 (statement of Sen. Specter).

<sup>106</sup> *Id.* at 22,669; *see also* H.R. REP. NO. 98-1073, at 3, *as reprinted in* 1984 U.S.C.C.A.N. at 3663.

<sup>107</sup> 127 CONG. REC. 22,669 (statement of Sen. Specter) (“Burglary is now so common it affects 1 household in every 14 each year. That means, on the average, one burglary for every street in America.”).



violent felonies rather than those who only get so far as conspiracy.<sup>108</sup> To extend § 924(e)(B)(2)(i) to conspiracy crimes is to impermissibly reach beyond the purpose of the ACCA.<sup>109</sup>

Additionally, the lawmakers' focus on those criminals responsible for the bulk of substantive violent felonies is evident in subsequent congressional discussion of violent crime. For example, when advocating a bill to disarm "repeat violent criminals," Senator Mike DeWine said, "[T]he vast majority of crimes that hurt people are committed by a small number of the criminals."<sup>110</sup> Senator DeWine specifically mentioned those crimes that "hurt people," suggesting that, in addressing violent crime, he meant those substantive offenses that cause tangible harm to communities as opposed to conspiracy offenses.<sup>111</sup> Moreover, Senator Specter's subsequent remarks about the ACCA reaffirm his apparent rejection of conspiracy crimes as violent felonies.<sup>112</sup> In 2010, Senator Specter proposed an amendment to the ACCA to clarify the definition of violent felony by removing the residual clause and focusing on elements, conduct, and offenses that involve "conduct that presented a serious potential risk of bodily injury to another."<sup>113</sup> Similar to his advocacy for the ACCA in the 1980s, Senator Specter's

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<sup>108</sup> *Id.* at 22,670 ("A high percentage of robberies and burglaries are committed by a limited number of repeat offenders."); *see also* 130 CONG. REC. 31,742 (1984) (statement of Rep. Patterson) ("Just getting this segment of the criminal population off the street will have a major impact on crime."). Since any conspiracy statute that includes an overt act requirement does not require that the overt act itself be illegal, the core act in conspiracy is agreement. *See supra* Part I.B.2.

<sup>109</sup> Congressional intent for the ACCA can be found in the Congressional Record. *See* 130 CONG. REC. 29,671, 29,688 (statement of Sen. Biden); 129 CONG. REC. 599 (1983) (statement of Sen. Specter) (focusing specifically on robbery and burglary).

<sup>110</sup> 142 CONG. REC. 8,234 (1996) (statement of Sen. DeWine). Senator DeWine continued, "One estimate is that 70 percent of all violent crime in this country is committed by less than 6 percent of the criminals, which is a relatively small number of people." *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *See* 156 CONG. REC. 22,586–87 (2010). Congress did not enact Senator Specter's proposed Armed Career Criminal Sentencing Act of 2010. *See generally* 18 U.S.C. § 924(e) (2012).

<sup>113</sup> 156 CONG. REC. 22,587. Senator Specter rejected the Supreme Court's categorical test, stating, "Federal judges are capable of examining and evaluating reliable evidence to determine if a particular conviction or series of convictions merits enhancement and should be entrusted to continue their historic role as sentencing fact finders." *Id.*

proposed amendment did not mention conspiracy crimes.<sup>114</sup> In fact, his focus on elements, conduct, and serious risk of bodily injury to others confirms that “violent felony” refers to substantive offenses—those that necessitate the use, attempted use, or threatened use of physical harm against others—and not conspiracy offenses—those that only raise the probability that a crime will be committed.<sup>115</sup>

*B. Application of the Categorical Test and Statutory Interpretation to the ACCA*

Further analysis of the categorical test, and judicial interpretation of the ACCA as a whole, indicates that conspiracies are not violent felonies under § 924(e)(2)(B)(i). The Supreme Court has consistently stated, “[T]he only plausible interpretation’ of the [ACCA] . . . requires use of the categorical approach.”<sup>116</sup> However, the majority approach distorts the categorical test to the point that it is no longer recognizable. Contrary to the assertion of the majority, the categorical approach does not allow courts to include the elements of the underlying violent felony in the elements of the charged conspiracy.<sup>117</sup> Thus, when determining whether conspiracy to commit a violent felony is a violent felony, courts are limited to considering the elements of the charged conspiracy crime,<sup>118</sup> and those elements typically do not categorically involve the actual, attempted, or threatened use of physical force against another.

1. Proper Application of the Categorical Test Does Not Include Analysis of the Underlying Crime

In *Taylor v. United States*,<sup>119</sup> the Supreme Court stated, “The Courts of Appeals uniformly have held that § 924(e) mandates a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts

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<sup>114</sup> See 156 CONG. REC. 22,586–87; 127 CONG. REC. 22,669 (1981) (statement of Sen. Specter).

<sup>115</sup> See *United States v. Whitson*, 597 F.3d 1218, 1221–22 (11th Cir. 2010).

<sup>116</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015) (first alteration in original).

<sup>117</sup> See *id.* (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)) (noting that Congress intended that the ACCA only target crimes that fell into certain categories, regardless of facts involved in prior convictions).

<sup>118</sup> *Id.* at 2557.

<sup>119</sup> 495 U.S. 575.

underlying those convictions.”<sup>120</sup> Although, as the Third Circuit in *United States v. Preston* noted, a sentencing court may, when necessary, refer to charging documents and the certified record of conviction, it may not consider the conspiracy conviction to subsume all elements of any crime discussed in the charging documents or explained to the jury.<sup>121</sup> The categorical test requires courts to examine only the elements of the prior conviction, not the elements of a crime that might have been.<sup>122</sup> The majority grossly distorts the Supreme Court’s formal categorical approach and goes well beyond looking only to the elements of the prior conviction.<sup>123</sup>

By including the elements of the underlying violent felony as elements of the conspiracy to commit the violent felony, sentencing courts expand the categorical test to the point of uselessness.<sup>124</sup> Factually, a conviction for conspiracy to commit robbery does not mean that the individual must have also been convicted of committing the robbery; thus, it violates common sense and the categorical test to consider the elements of robbery when deciding whether the conspiracy itself is a violent felony.<sup>125</sup> The categorical approach encompasses only the elements of the prior conviction.<sup>126</sup> If the individual was not convicted of robbery, then robbery and its elements should not be considered by the sentencing court.<sup>127</sup> Asserting that the conspiracy conviction subsumes the elements of the underlying violent felony impermissibly mixes two distinct crimes.

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<sup>120</sup> *Id.* at 600.

<sup>121</sup> *United States v. Preston*, 910 F.2d 81, 87 (3d Cir. 1990); *see also Taylor*, 495 U.S. at 602.

<sup>122</sup> *Taylor*, 495 U.S. at 600.

<sup>123</sup> *See supra* Part II.A.

<sup>124</sup> The categorical test is only effective in determining whether a crime is a violent felony for ACCA purposes because the test targets the exact behavior Congress intended to punish through the ACCA and because it is easy for courts to apply. *See Johnson v. United States*, 135 S. Ct. 2551, 2562 (2015).

<sup>125</sup> *Taylor*, 495 U.S. at 600 (noting that the categorical test requires sentencing courts to consider only elements of the prior conviction).

<sup>126</sup> *Id.*

<sup>127</sup> *See id.*

## 2. Properly Applying the Categorical Test To Show That Conspiracies To Commit Violent Felonies Are Not Violent Felonies

If courts properly apply the categorical test, looking only to the elements of the prior conspiracy to commit a violent felony,<sup>128</sup> then they must determine that the conspiracy itself is not a violent felony under § 924(e)(2)(B)(i). Conspiracy statutes generally require only agreement with the intent that the underlying crime be committed.<sup>129</sup> Some states also require commission of any overt act in furtherance of the conspiracy.<sup>130</sup> Neither of these elements categorically involves the actual, attempted, or threatened use of physical force against another.<sup>131</sup> Thus, conspiracy crimes are not violent felonies.

First, agreement merely requires a conversation between at least two individuals and involves no use of force. Black's Law Dictionary defines agreement as "a manifestation of mutual assent by two or more persons."<sup>132</sup> Even if two individuals agree to commit a murder, the actual agreement involves no use of force.<sup>133</sup> One could imagine scenarios in which a form of agreement was secured through the use of force, perhaps through threats of violence, but these scenarios would be fact-specific and could not be considered under the categorical test.<sup>134</sup> Primarily, the act of agreement does not involve the use of force.<sup>135</sup>

Second, even if the conspiracy statute includes an overt act requirement, overt acts do not categorically involve the actual, attempted, or threatened use of physical force.<sup>136</sup> The overt act need not involve any more use of force than the act of agreement.<sup>137</sup> For example, in *United States v. Gore*,<sup>138</sup> the Fifth Circuit interpreted the relevant Texas conspiracy statute that

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<sup>128</sup> *See id.*

<sup>129</sup> *See supra* Part I.B.2.

<sup>130</sup> *See supra* Part I.B.2.

<sup>131</sup> *See* 18 U.S.C. § 924(e)(2)(B)(i) (2012).

<sup>132</sup> BLACK'S LAW DICTIONARY 81 (10th ed. 2014).

<sup>133</sup> Physical force is defined as force that involves a physical act, particularly "a violent act directed against a robbery victim." *Id.*

<sup>134</sup> *See Taylor v. United States*, 495 U.S. 575, 600 (1990).

<sup>135</sup> *See United States v. King*, 979 F.2d 801, 802–03 (10th Cir. 1992).

<sup>136</sup> *Id.* at 803 ("Clearly neither actual nor attempted use of force is required for conviction under conspiracy law . . .").

<sup>137</sup> The overt act itself may be innocent, and an act qualifies as an overt act even if it is only in preparation of a crime. BLACK'S LAW DICTIONARY 1279 (10th ed. 2014).

<sup>138</sup> 636 F.3d 728 (5th Cir. 2011).

included an overt act requirement to mean only that the overt act take “the conspiracy beyond a mere meeting of the minds.”<sup>139</sup> Presumably, if Gore had driven by the anticipated robbery site a week before the agreed-upon date of the robbery to look for a good escape route, he would have committed the necessary overt act without using any force or involving any other individuals.<sup>140</sup> Such an act, like similar overt acts in furtherance of a conspiracy, while sufficient for a conspiracy conviction, does not involve any actual, attempted, or threatened use of force.<sup>141</sup> Moreover, while the committing an overt act could amount to an attempt to use force,<sup>142</sup> if the overt act rises to the level of attempt to commit one of the violent elements of the underlying violent felony, the crime is no longer conspiracy, but a distinct attempt crime. Thus, any overt act element would be insufficient to automatically transform conspiracies to commit violent felonies into violent felonies.

Some may argue that, regardless of any overt act element, conspiracies to commit violent felonies involve the threatened use of physical force. While the participants in conspiracies to commit violent felonies may contemplate using force against others, contemplation alone is not a threat.<sup>143</sup> A threat is “[a] communicated intent to inflict harm or loss on another or on another’s property.”<sup>144</sup> The essence of a conspiracy is that it is an agreement between criminals who presumably do not want to attract any attention from law enforcement or third parties.<sup>145</sup>

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<sup>139</sup> *Id.* at 736.

<sup>140</sup> The court stated:

Gore could not have been convicted under Texas law and his indictment unless he, with intent that a felony be committed, agreed that [his co-conspirator] would commit robbery and threaten or place a disabled person or a person 65 years of age or older in fear of imminent bodily injury or death, and unless [his co-conspirator] committed an overt act in furtherance of this agreement.

*Id.* This analysis appears to misconstrue the overt act requirement and violates the factless spirit of the categorical test.

<sup>141</sup> The mere act of surveying an area in connection with a conspiracy, in addition to not involving any actual or threatened force, is virtually indistinguishable from lawful activity.

<sup>142</sup> See MODEL PENAL CODE § 5.01(1) (2015).

<sup>143</sup> See BLACK’S LAW DICTIONARY 1708 (10th ed. 2014) (definition of threat).

<sup>144</sup> *Id.*

<sup>145</sup> See MODEL PENAL CODE § 5.03(1).

Thus, rather than involving force or the threat of force, conspiracy crimes typically involve the avoidance of force to prevent detection and continue the conspiracy.

Because neither the act of agreement nor commission of an overt act in furtherance of the conspiracy categorically involve the actual, attempted, or threatened use of force against another person, conspiracies to commit violent felonies are not themselves violent felonies under § 924(e)(2)(B)(i).

### 3. Statutory Interpretation of the ACCA's Definition of Violent Felony

In addition to application of the categorical test, an interpretive analysis of the relevant portions of the ACCA indicates that the statute does not include conspiracy crimes in its definition of violent felony. As the language of the statute and the legislative history indicate, the core of the ACCA's definition of violent felony is aggressive and violent conduct.<sup>146</sup> Essentially, the type of criminals targeted by the ACCA make careers out of acting in a way that consistently puts others at risk of physical injury.<sup>147</sup> This type of action exceeds mere agreement; it involves initiative and *actus reus* beyond that generally required in conspiracy statutes.<sup>148</sup>

Even the name of the ACCA, the Armed Career Criminal Act, suggests that conspiracy crimes are not within its scope.<sup>149</sup> As the name suggests, the Act targets criminals who have made careers from systematically committing dangerous crimes in such a way as to suggest that they would be willing to “deliberately point the gun and pull the trigger.”<sup>150</sup> Yet, to be convicted of conspiracy to commit a violent felony, a criminal does not need to have a weapon or even plan to use force against anyone else.<sup>151</sup>

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<sup>146</sup> *Supra* Part I.A.

<sup>147</sup> *See* *Begay v. United States*, 553 U.S. 137, 146 (2008) (noting that “callousness toward risk” alone is not enough; the offender also must be willing to “pull the trigger”); *United States v. White*, 571 F.3d 365, 371 (4th Cir. 2009) (stating that an armed career criminal is someone who displays a “callousness toward risk”).

<sup>148</sup> *See* *United States v. Whitson*, 597 F.3d 1218, 1223 (11th Cir. 2010); *United States v. Fell*, 511 F.3d 1035, 1044 (10th Cir. 2007).

<sup>149</sup> *See supra* note 10 (defining “career criminal”).

<sup>150</sup> *Begay*, 553 U.S. at 146.

<sup>151</sup> *See supra* Part I.B.2.

Further, the ACCA already includes a provision to punish felons who illegally possess guns or ammunition;<sup>152</sup> a criminal with prior conspiracy convictions will not go unpunished even if the conspiracies are not considered violent felonies for sentencing purposes.<sup>153</sup> Section 924(a)(2) provides a sentence of not more than ten years for felons found in possession of a gun, and felons guilty of gun possession under § 922(g) who were previously convicted of conspiracies to commit violent felonies would receive just punishment under this provision.<sup>154</sup> The difference between a ten-year maximum and a fifteen-year mandatory minimum is significant, and there must be a sufficient reason to subject someone to the stricter sentence.<sup>155</sup> Conspiracies do not categorically involve the use of force against others; prior convictions for conspiracies to commit violent felonies should not allow for the imposition of the fifteen-year mandatory minimum. There is no sufficient reason to impose a fifteen-year minimum sentence on a felon in possession of a firearm who was not convicted for three prior crimes that involved the actual, attempted, or threatened use of force against another.<sup>156</sup> After all, these two separate sentencing barriers only make sense if the separation is carefully maintained.<sup>157</sup>

### C. *Applying the ACCA in Accordance with Realities of Social Needs*

Treating conspiracies to commit violent felonies as violent felonies defeats the protective purpose for which the ACCA was drafted.<sup>158</sup> First, the majority's expansive reading of the ACCA and misapplication of the categorical test ignores social changes

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<sup>152</sup> 18 U.S.C. § 924(a)(2) (2012).

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* Such criminals would be punished for illegally possessing firearms without being branded violent felons provided they had not been convicted of the requisite violent felonies.

<sup>155</sup> *Id.* § 924(a)(2), (e)(1); *Sykes v. United States*, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting).

<sup>156</sup> It stands to reason that if a criminal clearly qualifies for punishment under one provision but not another, he should be punished under the first provision.

<sup>157</sup> *See* § 924(a)(2), (e)(1).

<sup>158</sup> The Committee on the Judiciary indicated that the ACCA was meant to protect the public from crimes with substantive effects. H.R. REP. NO. 98-1073, at 1 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3661, 3661 ("Statistics indicate that nearly 25 million American households—3 out of every 10—were affected by crimes involving theft or violence.").

that have occurred since the conception of the ACCA and overlooks the realities involved with applying statutory provisions.<sup>159</sup> Moreover, punishing conspiracy to commit a violent felony as a violent felony is pointless from a utilitarian perspective.<sup>160</sup> Finally, punishing conspiracy crimes as though they are substantive violent felonies is unfair under retributive principles of punishing in accordance with moral desert.<sup>161</sup>

Since the conception of the ACCA in the early 1980s, violent crime rates and public perception have changed.<sup>162</sup> Whereas, in 1984, incarceration and the imposition of mandatory minimums were seen as solutions to America's rampant violent crime problem, these same solutions are now widely perceived as significant problems themselves.<sup>163</sup> There is growing public concern over America's high incarceration rate.<sup>164</sup> In a keynote address, U.S. Attorney General Loretta Lynch noted the Department of Justice's commitment to reexamining the "reliance on incarceration" in the United States.<sup>165</sup> Since one of the original goals of the ACCA was to appease the public, it is time to scrutinize the incarceration system and make sure that mandatory minimum sentences are being imposed as narrowly as possible.<sup>166</sup>

Additionally, including conspiracy crimes as violent felonies under the ACCA makes a precise statutory provision ambiguous and difficult for courts to apply. Unlike the residual clause, § 924(e)(2)(B)(i) is clear; violent crimes include those that have as elements "the use, attempted use, or threatened use of physical

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<sup>159</sup> Matt Ford, *A New Approach to Criminal-Justice Reform*, ATLANTIC (Oct. 22, 2015), <http://www.theatlantic.com/politics/archive/2015/10/police-prosecutors-reform-group/411775/> (discussing law enforcement and legislator commitment to reforming mandatory minimum sentencing to reduce incarceration rates in the United States).

<sup>160</sup> Here, "pointless" means that imposing the mandatory minimum for those convicted of violent felonies will not achieve any good result.

<sup>161</sup> MOORE, *supra* note 95.

<sup>162</sup> *See supra* Part I.A.

<sup>163</sup> *See supra* Part I.A.

<sup>164</sup> The United States has the highest incarceration rate in the world at 716 per 100,000 of the national population. Roy Walmsley, *World Prison Population List*, INTERNATIONAL CENTRE FOR PRISON STUDIES 1 (10th ed. 2013), [http://www.apcca.org/uploads/10th\\_Edition\\_2013.pdf](http://www.apcca.org/uploads/10th_Edition_2013.pdf).

<sup>165</sup> Loretta E. Lynch, Attorney General, Keynote Address at the National Black Prosecutors Association Awards Luncheon (July 22, 2015), *available at* <http://www.justice.gov/opa/speech/attorney-general-loretta-e-lynch-delivers-keynote-address-national-black-prosecutors>.

<sup>166</sup> *See supra* Part I.A.



force against the person of another.”<sup>167</sup> If a crime, like conspiracy to commit a violent felony, does not have elements that involve the actual, attempted, or threatened use of force, that crime cannot be a violent felony under § 924(e)(2)(B)(i).<sup>168</sup> In *Johnson v. United States*,<sup>169</sup> the Supreme Court stated that a law, like the ACCA residual clause, is vague to the point of violating due process when it does not “give ordinary people fair notice of the conduct it punishes,” or when it is so devoid of standard that it is open to arbitrary enforcement.<sup>170</sup> By interpreting conspiracies to commit violent felonies as violent felonies, the majority defies the letter of the statute and makes a clear standard unconstitutionally arbitrary.<sup>171</sup> Simply put, conspiracies do not categorically involve threatened, attempted, or actual use of force.<sup>172</sup> If the Supreme Court adopted the majority’s sweeping approach, the Court would endorse the same vagueness it condemned in its *Johnson* decision, and lower courts would have little concrete guidance for applying § 924(e)(2)(B)(i) of the ACCA to other potentially violent felonies.<sup>173</sup>

Moreover, neither of the utilitarian justifications for punishment—neither deterrence nor incapacitation—is achieved by classifying conspiracy as a violent felony.<sup>174</sup> Conspiracies do not include as elements the use of force against others.<sup>175</sup> If conspiracy is a violent felony, the definition of violent felony under the ACCA becomes too confusing to deter criminals from conspiring to commit violent felonies.<sup>176</sup> If anything, this ambiguous interpretation will encourage violent criminals to be

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<sup>167</sup> 18 U.S.C. § 924(e)(2)(B)(i) (2012).

<sup>168</sup> *See id.*

<sup>169</sup> 135 S. Ct. 2551 (2015).

<sup>170</sup> *Id.* at 2556.

<sup>171</sup> *See supra* Part II.A.

<sup>172</sup> *See supra* Part I.B.2.

<sup>173</sup> *See Johnson*, 135 S. Ct. at 2563.

<sup>174</sup> The deterrence value of punishment for conspiracies, in general, seems weak because any punishment for the substantive offense did not dissuade the offender from entering into an agreement to commit the felony in the first place. Peter Buscemi, Note, *Conspiracy: Statutory Reform Since the Model Penal Code*, 75 COLUM. L. REV. 1122, 1184 (1975).

<sup>175</sup> *See supra* Part I.B.2.

<sup>176</sup> *See* Dawinder S. Sidhu, *Moneyball Sentencing*, 56 B.C. L. REV. 671, 678 (2015).

even more careful about concealing conspiracies until the substantive crime comes to fruition, leading to the successful commission of more substantive violent offenses.<sup>177</sup>

Defining conspiracy to commit a violent felony as a violent felony is also inconsistent with incapacitation, a theory based on isolating high-risk offenders to prevent them from committing future crimes.<sup>178</sup> The mandatory minimum ensures that criminals sentenced under the ACCA will be separated from society for at least fifteen years; but, under the majority's approach, criminals who are not, in reality, violent recidivists are also separated from society for at least fifteen years.<sup>179</sup> Incapacitation is only effective as a utilitarian measure if the benefit of removing the threatening individual from society outweighs the financial and social costs.<sup>180</sup> Isolating a nonviolent offender from society for fifteen years burdens the corrections system and does not make communities significantly safer.<sup>181</sup> Worse, if relatively nonviolent offenders who have prior convictions for drug offenses and conspiracy crimes are subjected to mandatory fifteen-year sentences, they will be living in close quarters with actual violent recidivists and may develop into violent recidivists themselves.<sup>182</sup> If the ACCA mandatory minimum is allowed to apply to those who are not actually

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<sup>177</sup> While most criminals will not think ahead to whether a conviction for a conspiracy crime may lead to a later sentencing enhancement, armed career criminals might.

<sup>178</sup> Sidhu, *supra* note 176, at 710.

<sup>179</sup> The imposition of the mandatory minimum means that criminals who are not actually a danger to their communities as armed career criminals will not be able to contribute to their communities through the workforce or as members of their families.

<sup>180</sup> Sidhu, *supra* note 176, at 678–79.

<sup>181</sup> The Director of the Bureau of Prisons determined that, based on data from 2011, the average cost of incarceration for a federal inmate for 2011 was \$28,893.40. Annual Determination of Average Cost of Incarceration, 78 Fed. Reg. 16,711 (Mar. 18, 2013). In the aggregate, the costs of these additional mandatory years in prison for criminals with prior conspiracy convictions may represent a significant burden on the American taxpayer, and there is little social utility in the enhanced sentence if the criminal is not, in fact, a violent career criminal.

<sup>182</sup> Prison violence is a prevalent problem, and if objectively nonviolent offenders are sentenced to a mandatory fifteen years in this violent environment, it stands to reason that they could become violent themselves to cope with that environment. See Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 915–16 (2009); Robert Weisberg, *Reality-Challenged Philosophies of Punishment*, 95 MARQ. L. REV. 1203, 1245 (2012).

violent career criminals, the punishment may create more criminals instead of incapacitating those who present real threats to society.

Additionally, a person who conspires to commit a violent felony and one who commits the substantive crime commit different wrongs; inflicting the same punishment on each is inconsistent with the principal tenant of retributivism, punishing according to moral desert.<sup>183</sup> For retributivists, punishment should be proportionate to desert, meaning “the more desert, the greater the punishment.”<sup>184</sup> Offenders who do not have three prior convictions for substantive violent felonies do not deserve to be subjected to the ACCA mandatory minimum; such a punishment would not be proportionate to the crime.<sup>185</sup> For example, Darnell Mitchell was sentenced under § 924(e)(2)(B)(i) because the court held that his prior robbery convictions were violent felonies.<sup>186</sup> Jerome Wilkerson was sentenced under the same provision because the court held that his prior conviction for conspiracy to commit a robbery was a violent felony.<sup>187</sup> Mitchell and Wilkerson, convicted of very different crimes, were sentenced under the same statute even though only Mitchell's crime involved the use of force.<sup>188</sup> Congress could not have intended for the ACCA to be applied in such an unequal manner.<sup>189</sup>

Moreover, retributive principles of victim vindication indicate that criminals guilty of conspiracies to commit violent felonies do not deserve the same punishment as criminals guilty

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<sup>183</sup> THOM BROOKS, PUNISHMENT 16 (2013).

<sup>184</sup> *Id.*

<sup>185</sup> Serious drug offenses, either alone or in combination with violent felonies, also qualify for imposition of the fifteen-year mandatory minimum sentence. 18 U.S.C. § 924(e)(1) (2012).

<sup>186</sup> *United States v. Mitchell*, 743 F.3d 1054, 1057–58 (6th Cir. 2014).

<sup>187</sup> *United States v. Wilkerson*, 286 F.3d 1324, 1325–1326 (11th Cir. 2002) (per curiam).

<sup>188</sup> Under Tennessee law, Mitchell's prior robbery conviction involved knowing theft by violence or instilling fear. TENN. CODE ANN. § 39-13-401 (West 2016); *Mitchell*, 743 F.3d at 1057. Conversely, Wilkerson's prior conviction for conspiracy to commit robbery, which Florida recognizes as separate and distinct from the underlying crime, involved only agreement with at least one other person to commit “any offense.” FLA. STAT. ANN. § 777.04 (West 2016); *Blackburn v. State*, 83 So. 2d 694, 695 (Fla. 1955).

<sup>189</sup> When describing the ACCA, Senator Specter stated that burglaries and robberies are some of the “most vicious” forms of common crimes. 129 CONG. REC. 599 (1983).

of substantive violent felonies.<sup>190</sup> In describing victim vindication, Jean Hampton asserts, “What is ‘deserved’ . . . refers to what is perceived as necessary to humble the wrongdoer and thereby vindicate the victim’s value.”<sup>191</sup> A person convicted of a conspiracy crime deserves less punishment than one convicted of a substantive violent felony because the conspirator did not “master” a victim in the way that one who completed an offense might have.<sup>192</sup> In conspiracy crimes, there are usually no victims that need to be vindicated because intended victims are likely not even aware of any conspiracy, much less harmed by one.<sup>193</sup> However, in a substantive offense, a victim is appreciably harmed by either loss of property, physical injury, or fear of imminent injury.<sup>194</sup> Including conspiracy as a violent felony wrongfully implies that both crimes deserve the same level of punishment.

Notably, retributivists “do not punish a criminal for what [they] think she might do tomorrow, but what she has done.”<sup>195</sup> Future risk posed by conspiracies is irrelevant under this analysis.<sup>196</sup> A criminal convicted of an undisputably violent felony, like robbery, committed an aggressive act that put others at risk of injury, whereas the culpable acts of a criminal convicted of conspiracy were mainly agreement and perhaps commission of a potentially harmless overt act.<sup>197</sup> To subject these different criminals to the same punishment would wrongly punish the criminal convicted of conspiracy to commit a violent felony for “what we think she might do tomorrow.”<sup>198</sup>

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<sup>190</sup> See Jean Hampton, *The Retributive Idea*, in FORGIVENESS AND MERCY 111, 128 (Jules Coleman ed., 1988). Hampton contends that retributivism should focus on vindicating the worth of a victim relative to the offender by subjecting the offender to “something comparable” to the harm the offender inflicted on the victim. *Id.*

<sup>191</sup> *Id.* at 158.

<sup>192</sup> See *id.* at 127–28.

<sup>193</sup> Conspiracy does not as a rule create danger of interaction with a victim, meaning there is not even opportunity to use, attempt, or threaten to use physical force against anyone in the categorical conception of conspiracy. See *United States v. King*, 979 F.2d 801, 803 (10th Cir. 1992).

<sup>194</sup> See MODEL PENAL CODE §§ 221.1 (burglary), 222.1 (robbery), 223.4 (extortion) (2015).

<sup>195</sup> BROOKS, *supra* note 183.

<sup>196</sup> See *supra* Part II.A.

<sup>197</sup> See *supra* notes 45–46 and accompanying text.

<sup>198</sup> BROOKS, *supra* note 183.

## CONCLUSION

The ACCA is a very powerful tool that can protect the public from armed career criminals, those recidivists who have demonstrated that they present a substantial danger to their communities. However, if the tool is not used precisely, it becomes completely ineffective; rather than improving communities and dealing out just deserts, the ACCA mandatory minimum becomes an injustice, a way to pile prison years on objectively nonviolent offenders. After all, the difference between categorically including and excluding conspiracy crimes as violent felonies could mean more than a mandatory extra decade in prison for a defendant.<sup>199</sup>

In *Johnson*, the Supreme Court recognized this injustice by finding the ACCA's residual clause to be unconstitutional for just this reason; the residual clause was too vague to serve any social good.<sup>200</sup> While *Johnson* remedied the injustice of sentencing conspiracy crimes as violent felonies under the residual clause, the majority of circuit courts still erroneously sentence conspiracies as violent felonies under § 924(e)(2)(B)(i). Defining prior conspiracies to commit violent felonies as violent felonies impermissibly extends the ACCA beyond congressional intent and the plain meaning of the text. To ensure that the ACCA is properly used against "the kind of person who might deliberately point the gun and pull the trigger," conspiracies to commit violent felonies cannot be considered violent felonies.<sup>201</sup>

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<sup>199</sup> Brief for the United States, *supra* note 1, at 4.

<sup>200</sup> See *Johnson v. United States*, 135 S. Ct. 2551, 2563 (2015).

<sup>201</sup> See *Begay v. United States*, 553 U.S. 137, 146 (2008).