
**FINDING INTENT WITHOUT MENS REA:
A MODIFIED CATEGORICAL APPROACH TO
SENTENCING UNDER THE UNITED STATES
SENTENCING GUIDELINES**

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INTRODUCTION

On March 18, 1999, Vernon Woods placed a 911 call after his five-week-old son, who suffered from cerebral palsy, became unresponsive.¹ The infant died six months later.² One possible explanation for the infant's death, which the deputy medical examiner would have testified to at trial, was that he died from water on the brain as a result of blunt force head trauma.³ Woods claimed, however, that he accidentally dropped the baby and shook him "in an effort to revive him."⁴ Woods pled guilty to involuntary manslaughter in 2001.⁵ Woods already had a 1993 conviction for possession of cocaine with intent to distribute.⁶

On November 16, 2007, Woods was again before the court for two counts of distributing ecstasy and one count of possession of a weapon by a felon.⁷ The district court found Woods to be a career

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¹ *United States v. Woods*, 576 F.3d 400, 402 (7th Cir. 2009).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 401.

⁶ *Id.*

⁷ *Id.*

offender, and sentenced him to 192 months of imprisonment.⁸ On appeal, Woods challenged his sentence, claiming that the involuntary manslaughter conviction was not a “crime of violence” within the meaning of the United States Sentencing Guidelines (“USSG” or “the Guidelines”).⁹ In a surprising result, the Seventh Circuit agreed.¹⁰ Accordingly, the court found that Woods was not a career offender under the Guidelines, and reduced his 192-month sentence to a mere 84 months.¹¹

How can such a result make sense? In other words, as the dissent in *Woods* argued, how can homicide *not* be a violent felony?¹² As this article will demonstrate, the answer lies in the line of sentencing cases the United States Supreme Court has recently decided.¹³ In particular, the Supreme Court stated in *United States v. Begay* that a predicate offense has to be “purposeful, violent, and aggressive” in order to be considered for sentence enhancement (the “*Begay* test”).¹⁴ While each of the elements in the *Begay* test requires its own analysis, such considerations are beyond the scope of this article. Instead, this article will focus on the first requirement, purposefulness.

In looking at the mens rea of Illinois’s involuntary manslaughter statute, the Seventh Circuit came to the conclusion that Woods had not acted purposefully when he caused the death of his son.¹⁵ In other words, the court held that, because Woods was convicted under a statute that only required a mens rea of recklessness, his conduct was not purposeful.¹⁶

The question then becomes whether a defendant who acts under a mens rea of recklessness can ever be considered to have acted

⁸ *Id.* at 402.

⁹ *Id.*

¹⁰ *Id.* at 413.

¹¹ *Id.* at 401.

¹² *Id.* at 414 (Easterbrook, C.J., dissenting).

¹³ See generally *Chambers v. United States*, 129 S. Ct. 687 (2009); *Begay v. United States*, 128 S. Ct. 1581 (2008); *James v. United States*, 550 U.S. 192 (2007); *Shepard v. United States*, 544 U.S. 13 (2005).

¹⁴ 128 S. Ct. at 1586.

¹⁵ *Woods*, 576 F.3d at 411.

¹⁶ *Id.* at 412–413.

purposefully. While the answer may seem obvious at first glance, a review of the existing case law reveals that the question is much more convoluted than one might first surmise.¹⁷ This article explores different approaches courts have taken when analyzing whether a prior conviction was purposeful under the *Begay* test. Ultimately, it concludes that the Seventh Circuit's approach to purposefulness, while grounded in solid legal reasoning, is incompatible with the goals of the Guidelines and should be abandoned.¹⁸

Part I of this article provides the necessary background on sentencing enhancements. First, it considers the legislative history of the Armed Career Criminal Act (the "ACCA") and the USSG to determine the goals of the two provisions.¹⁹ Then, the article reviews the Court's decisions that have interpreted the "violent felony" or "crime of violence" phrase of the ACCA and USSG. Next, it provides an in-depth examination of the Seventh Circuit's decision in *U.S. v. Woods*. Part II compares the Seventh Circuit's approach to analyzing purposefulness to the approaches adopted by the other federal circuits. Finally, Part III argues that a mens rea approach to purposefulness defeats Congress's goals of neutralizing violent, repeat offenders and enhancing uniformity in sentencing. This article concludes that judges should have more discretion to consult the record of conviction during

¹⁷ See discussion *infra* Part II.

¹⁸ See discussion *infra* Part III.

¹⁹ While there are differences between the USSG and the ACCA, the similarity in language between the two provisions led courts to hold that an interpretation of one is also applicable to the other. See, e.g., *James v. United States*, 550 U.S. 192, 206 (2007) (noting that "definition of a predicate 'crime of violence' closely tracks ACCA's definition of 'violent felony.'"); *United States v. Daye*, 571 F.3d 225, 236 (2d Cir. 2009) (court used case law interpreting § 4B.1 to support its interpretation of ACCA); *United States v. Harrison*, 558 F.3d 1280, 1291–92 (11th Cir. 2009) (court used prior decision interpreting a crime of violence under the Guidelines to support interpretation of ACCA); *United States v. Johnson*, 417 F.3d 990, 996–97 (8th Cir. 2005), *abrogated on other grounds by Begay*, 128 S. Ct. 1581 ("The statutory definition of 'violent felony' is viewed as interchangeable with the guidelines definition of 'crime of violence.' Therefore, in determining whether a defendant qualifies as an armed career criminal under the ACCA, we are also bound by case law defining a crime of violence under § 4B1.2.").

sentencing so that they can determine whether the defendant acted purposefully.

I. BACKGROUND

A. *The History of the ACCA and USSG*

Although this article treats the USSG and the ACCA as one and the same for the purposes of statutory interpretation, it is important to note the differences between the two with regard to their creation, functions, and overall purpose. Understanding the goals behind the creation of the USSG and the ACCA will help when determining whether the Seventh Circuit reached the right decision in *Woods*.

1. The Armed Career Criminal Act

The ACCA is a federal statute that requires an automatic 15 year minimum sentence for anyone who violates 18 U.S.C. 922(g)²⁰ and has three prior convictions for violent felonies or serious drug offenses.²¹ As opposed to the Guidelines, the ACCA is specifically concerned with the “special danger” posed by career criminals carrying guns.²²

Congress passed the ACCA in 1984 as part of an overall revamp of federal criminal legislation during the Reagan administration.²³ This movement was inspired by research that had come out of the 1970s and 1980s that demonstrated that a large number of crimes were

²⁰ 18 U.S.C. § 922(g) is the statute that prohibits certain individuals such as convicted felons, illegal aliens, and military personnel discharged under dishonorable conditions from transporting or possessing firearms. 18 U.S.C. § 922(g) (2006).

²¹ 18 U.S.C. § 924(e)(1) (2006).

²² *United States v. Sylvester*, 620 F. Supp. 2d 642, 649 n.3 (M.D. Pa. 2009) (citing *Begay v. United States*, 128 S. Ct. 1581, 1587 (2008)).

²³ See Tracey A. Basler, Note, *Does “Any” Mean “All” or Does “Any” Mean “Some”? An Analysis of the “Any Court” Ambiguity of the Armed Career Criminal Act and Whether Foreign Convictions Count as Predicate Convictions*, 37 NEW ENG. L. REV. 147, 173–74 (2002).

committed by a small group of repeat offenders.²⁴ Thus, the goal behind the ACCA was “[to] incapacitate the truly dangerous criminal.”²⁵

Senator Specter originally introduced the Career Criminal Life Sentence Act, the predecessor to the ACCA, in 1981.²⁶ In its original form, the Career Criminal Life Sentence Act authorized the federal prosecution of a criminal defendant accused of committing a robbery or burglary who had already been convicted twice for robbery or burglary under state law.²⁷ The Career Criminal Life Sentence Act was vetoed in 1983 due to federalism concerns.²⁸

The bill was reintroduced in 1984 and Congressman William Hughes, then-Chairman of the Subcommittee on Crime, proposed an amendment that would allow the bill to be approved:

Congressman Hughes’s amendment significantly changed the legislation. To address the federalism concerns, it eliminated the creation of federal jurisdiction over local robberies and burglaries by repeat offenders. Instead of expanding federal jurisdiction, the amendment created a sentence enhancement for repeat offenders convicted of violating a preexisting federal law. More specifically, the amendment created a mandatory minimum sentence of fifteen years or imprisonment for offenders previously convicted three or more times of robbery or burglary who violate the federal law prohibiting felons from possessing, receiving, or transporting firearms. The subcommittee accepted this amendment, and the amended bill was passed into law as the Armed Career Criminal Act of 1984.²⁹

²⁴ James G. Levine, Note, *The Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency*, 46 HARV. J. ON LEGIS. 537, 545 (2009).

²⁵ 134 CONG. REC. 15, 806–07 (1988) (statement of Sen. Specter).

²⁶ Levine, *supra* note 24, at 546.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 546–47.

Thus, in 1984 the primary concern of Congress was to “incapacitate career criminals” which was done by targeting those individuals who frequently robbed or burglarized.³⁰ The violent felony provision was not added until 1986, which “allowed for incapacitating a wider variety of career criminals than just robbers and burglars” by adding more crimes that would qualify as predicate offenses.³¹ Ultimately, then, it can be concluded that one of the primary purposes behind the ACCA was to keep violent, repeat offenders off the streets.

2. The United States Sentencing Guidelines

The Guidelines are standards set forth by the United States Sentencing Commission (“the Commission”) that district courts use when sentencing offenders.³² Although the Guidelines are advisory, a sentencing court must properly apply the Guidelines before imposing a sentence on the defendant.³³

Under USSG §4B1.1, a defendant can be deemed a career offender if (1) he was 18 at the time he committed the offense for which he is being sentenced (2) the offense for which he is being sentenced is either a crime of violence or a controlled substances offense and (3) he or she has two prior convictions for crimes of violence or controlled substances offenses.³⁴ Thus, the Guidelines differ from the ACCA in that only two prior convictions are needed for sentence enhancement and the crime before the court must be either a crime of violence or a controlled substance offense, as opposed to a violation of the firearm statute.³⁵

³⁰ *Id.* at 547.

³¹ *Id.*

³² See U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A, subpt. 2 (2009).

³³ See *id.*; United States v. Booker, 543 U.S. 220, 264 (2005).

³⁴ U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2009).

³⁵ Compare *id.* with 18 U.S.C. § 924(e)(1) (2006).

Prior to the adoption of the Guidelines, judges had wide discretion with regard to sentencing.³⁶ This was, in part, because sentencing was based on a “medical” model where sentences were supposed to be “individualized,” like medical treatment, so that a criminal defendant’s particular social disability could be treated.³⁷ However, this individualized model fell out of favor as a result of “rising crime, mounting evidence that prisoners were not being rehabilitated, and increasing concern that indeterminate sentencing produced unjust disparities between similarly situated offenders.”³⁸

As opposed to the ACCA, which Congress created, the Commission creates and updates the Guidelines.³⁹ The Commission was created pursuant to the Sentencing Reform Act of 1984 (“the SRA”).⁴⁰ Congress decided to create this agency because “(1) the previously unfettered sentencing discretion accorded federal trial judges needed to be structured; (2) the administration of punishment needed to be more certain; and (3) specific offenders (*e.g.* white collar and violent, repeat offenders) needed to be targeted for more serious penalties.”⁴¹

The Commission is “an independent agency in the judicial branch of government.”⁴² It is charged with:

- (1) establish[ing] sentencing policies and practices for the Federal criminal justice system that—
 - (A) assure the meeting of the purposes of sentencing. . .⁴³

³⁶ See Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83, 89 (1988).

³⁷ Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1321 (2005).

³⁸ *Id.* at 1322.

³⁹ See UNITED STATES SENTENCING COMMISSION, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION, 2–3 <http://www.ussc.gov/general/USSCoverview.pdf> (last visited Oct. 7, 2009).

⁴⁰ *Id.* at 1.

⁴¹ *Id.* at 1–2.

⁴² *Id.* at 1.

⁴³ The goals of sentencing are just punishment, deterrence, incapacitation, and rehabilitation. 18 U.S.C.A. § 3553(a)(2) (2006).

(B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and

(C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.⁴⁴

The first set of sentencing guidelines went into effect November 1, 1987.⁴⁵ The most recent amendments to the guidelines went into effect November 1, 2009.⁴⁶

Overall, then, the purpose of the Guidelines was to increase uniformity in sentencing and, like the ACCA, increase the punishment for repeat offenders. However, in sentencing defendants under the Guidelines, federal courts must also be mindful of the Supreme Court's interpretation of "violent felony" or "crime of violence."

B. The Supreme Court's Interpretation of the "Violent Felony" or "Crime of Violence" Definition

Both the ACCA and the USSG define a "violent felony" or a "crime of violence" as one that "(1) has as an element the use, attempted use, or threatened use of force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious

⁴⁴ 28 U.S.C.A. § 991(b) (West 2008).

⁴⁵ UNITED STATES SENTENCING COMMISSION, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 2, <http://www.ussc.gov/general/USSCoverview.pdf> (last visited Oct. 7, 2009).

⁴⁶ United States Sentencing Commission, Federal Sentencing Guidelines Manuals, <http://www.ussc.gov/guidelin.htm> (last visited Dec. 1, 2009).

potential risk of physical injury to another.”⁴⁷ Because the language of 18 U.S.C. § 924(e)(2)(B) and § 4B1.2(a) is identical, courts have considered case law interpreting one statutory provision to be a persuasive, if not binding, interpretation of the other.⁴⁸

In *United States v. Taylor*, the Court confronted the problem of defining burglary for purposes of sentence enhancement under the ACCA.⁴⁹ In *Taylor*, the Supreme Court held that courts should adopt a “categorical approach” when sentencing a defendant, meaning that courts should not consider the individual facts of a defendant’s crime but should only look at the fact that a conviction occurred and the elements of the offense.⁵⁰ However, the *Taylor* Court modified this categorical approach by recognizing that, in certain cases, a sentencing court would be permitted to consult the record of conviction for purposes of sentence enhancement.⁵¹

Shepard v. United States refined this analysis by limiting the modified categorical approach.⁵² In *Shepard*, the issue was whether a sentencing court could consult police reports and complaint applications for purposes of applying the sentence enhancement under the ACCA.⁵³ The Court held that the sentencing court may only consult “the terms of the charging document, the terms of a plea agreement or transcript of a colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.”⁵⁴ The Court reasoned that to hold otherwise would undermine *Taylor* and would lead collateral trials taking place during the sentencing phase of a trial.⁵⁵

⁴⁷ 18 U.S.C. § 924(e)(2)(B) (2006); U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2009).

⁴⁸ See *supra* note 19 and accompanying text.

⁴⁹ See 495 U.S. 575, 578 (1990).

⁵⁰ *Id.* at 602.

⁵¹ See *id.*

⁵² 544 U.S. 13, 26 (2005).

⁵³ *Id.* at 16.

⁵⁴ *Id.* at 26.

⁵⁵ *Id.* at 23.

In *James v. United States*, the Court specifically focused on the “residual clause” of the ACCA and USSG.⁵⁶ In *James*, the question before the Court was whether attempted burglary presented enough of a serious potential risk of physical injury to qualify as a violent felony under the ACCA.⁵⁷ Using the categorical approach, the Court reasoned that the risk present in a burglary “arises not from the completion of the burglary, but from the possibility that an innocent person might appear while the crime is in progress.”⁵⁸ Thus, attempted burglary presented the same degree of risk as that of a completed burglary.⁵⁹

The defendant in *James* responded by arguing that under the categorical approach, attempted burglary should not count as a predicate offense “unless *all* cases [of attempted burglary] present such a risk.”⁶⁰ While the Court acknowledged that some instances of attempted burglary did not present a risk of physical harm to the innocent victim, such as the burglary of an abandoned building, the Court stressed the “ACCA does not require metaphysical certainty. Rather, §924(e)(2)(B)(ii)’s residual provision speaks in terms of a ‘potential risk.’ These are inherently probabilistic concepts.”⁶¹ Consequently, *James* stood for the proposition that a crime can qualify as a predicate offense under the ACCA’s residual clause if “by its nature” the crime involved serious potential risk to another.⁶²

One year later, the Court decided *Begay v. United States*, where it again considered whether an offense was a violent felony under the residual clause of the ACCA.⁶³ Specifically, the Court determined whether a felony offense for driving under the influence of alcohol

⁵⁶ 550 U.S. 192, 197 (2007). The residual clause is that part of the ACCA and USSG that punishes crimes that “otherwise involves conduct that presents a serious potential risk of physical injury or harm.” *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 203.

⁵⁹ *Id.* at 203–04.

⁶⁰ *Id.* at 207 (emphasis in original).

⁶¹ *Id.*

⁶² *Id.* at 209.

⁶³ 128 S. Ct. 1581, 1584–85 (2008).

(DUI) posed the same degree of physical risk to an individual as burglary, arson, extortion, or the use of explosives.⁶⁴

In reaching its conclusion that a DUI was not a violent felony under the ACCA, the Court acknowledged that there was no doubt that driving under the influence presented a serious physical risk to another.⁶⁵ However, the Court reasoned that the enumerated list of crimes in the statute meant that Congress only intended to include similar crimes in the provision and not every crime that threatened to injure another.⁶⁶ The Court then determined that a conviction for a DUI differed from burglary, arson, etc. because the latter crimes exhibited “purposeful, ‘violent, ‘and ‘aggressive’” behavior while the former did not.⁶⁷ Specifically with regard to the purposeful requirement, the Court emphasized:

In this respect . . . crimes involving intentional or purposeful conduct (as in burglary and arson) are different than DUI, a strict liability crime. In both instances, the offender’s prior crimes reveal a degree of callousness toward risk, but in the former instance they also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger. We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist.⁶⁸

Most recently, the Court decided *United States v. Chambers* in which the Justices considered whether a defendant’s failure to report to a penal institution was a violent felony under the ACCA.⁶⁹ In *Chambers*, the Court dealt with an Illinois statute that criminalized several different behaviors in one statute.⁷⁰ Specifically, the Illinois

⁶⁴ *Id.*

⁶⁵ *Id.* at 1584.

⁶⁶ *Id.* at 1584–85.

⁶⁷ *Id.* at 1586 (citations omitted).

⁶⁸ *Id.* at 1587.

⁶⁹ 129 S. Ct. 687, 690 (2009).

⁷⁰ *Id.* at 691.

statute penalized (1) escape from a penal institution; (2) escape from the custody of an employee of a penal institution; (3) failing to report to a penal institution; (4) failing to report for periodic imprisonment; (5) failing to return from furlough; (6) failing to return from work and day release; and (7) failing to abide by the terms of home confinement.⁷¹

Noting that the categorical approach was not easy to apply in such a situation,⁷² the Court acknowledged that failure to report, as identified in parts 3–6 of the statute, was different than the violent behavior that usually accompanies an escape attempt.⁷³ Consequently, the Justices decided to “treat the statute for ACCA purposes as containing at least two separate crimes, namely escape from custody on the one hand, and a failure to report on the other.”⁷⁴ Once the Court was able to split the statute, it was fairly easy to decide that simply failing to report for confinement was not the type of purposeful, aggressive, and violent behavior that Congress intended to target with the ACCA.⁷⁵

Since *Begay*, lower courts have struggled to define what is “purposeful” under the ACCA or USSG. The easiest cases have been when the predicate offense required a mens rea of either purpose or knowledge. For example, in *United State. v. Smith*, the Third Circuit held that holding a person in involuntary servitude met the *Begay* test because the statute of conviction criminalized “*knowingly . . . hold[ing] another in a condition of involuntary servitude.*”⁷⁶ Similarly, in *United States v. Billups*, the Seventh Circuit found that false imprisonment was a crime of violence because the Wisconsin statute criminalized “*intentionally confin[ing] or restrain[ing] another . . .*

⁷¹ *Id.* (citing 720 ILL. COMP. STAT. ANN. 5/31–6(a) (West 2009)).

⁷² *Id.* at 690.

⁷³ *Id.* at 691.

⁷⁴ *Id.*

⁷⁵ *See id.* at 691–92.

⁷⁶ 284 Fed. App’x 943, 945 (3d Cir. 2008) (emphasis added) (citation omitted).

without the person's consent and with knowledge that he or she had no lawful authority to do so."⁷⁷

The more problematic cases have been when there was a mens rea of recklessness or the statute made no mention of mens rea, making the crime one of strict liability.⁷⁸ While these cases are discussed in more detail below, for now it will suffice to state that courts have either inferred that there was purposeful conduct,⁷⁹ held that there was not purposeful conduct,⁸⁰ or remanded back to the lower court so that the defendant's conduct could be determined.⁸¹

C. *The Seventh Circuit's Interpretation of "Purposeful" in Woods*

In *Woods*, the defendant was convicted of two counts of distributing ecstasy and one count of unlawful possession of a weapon, which were all violations of federal law.⁸² Woods pled guilty, and the Probation Service recommended an enhanced sentence due to (1) Wood's 1993 conviction for possession of cocaine and (2) a 2001 conviction for involuntary manslaughter.⁸³ In his appeal, Woods successfully argued that the involuntary manslaughter conviction was not a crime of violence under the Guidelines.⁸⁴ Importantly, because the opinion departed from the Seventh Circuit's previous approaches to the ACCA and USSG, it was circulated to the full court for approval before being released.⁸⁵

⁷⁷ 536 F.3d 574, 577 (7th Cir. 2008) (citing WIS. STAT. ANN. § 940.30 (West 2008)) (emphasis added).

⁷⁸ See discussion *infra* Part II.

⁷⁹ See, e.g., *United States v. Dates*, No. 06-0083, 2008 WL 2620162, at *5–6 (W.D. Pa. Jun. 30, 2008) (holding that simple assault was a crime of violence because it was similar to the enumerated offenses and “necessarily” involved purposeful conduct).

⁸⁰ See, e.g., *United States v. Archer*, 531 F.3d 1347 (11th Cir. 2008) (holding that because the statute of conviction did not specify a mens rea, purposefulness could not be shown).

⁸¹ See, e.g., *United States v. Roseboro*, 551 F.3d 226, 243 (4th Cir. 2009).

⁸² *United States v. Woods*, 576 F.3d 400, 401 (7th Cir. 2009).

⁸³ *Id.*

⁸⁴ See *id.* at 412–13.

⁸⁵ See *id.* at 407.

Judge Diane Wood, who authored the opinion, began her analysis by stating that, under the categorical approach, the court was precluded from looking into the details of the defendant's guilty plea to determine whether the crime of conviction was a crime of violence under the Guidelines.⁸⁶ Judge Wood emphasized that, while courts were permitted to consult additional materials under *Shepard*, these materials could "be used only to determine *which* crime within a statute the defendant committed, not *how* he committed that crime."⁸⁷

The court then had to determine whether a conviction under Illinois's involuntary manslaughter statute constituted sufficiently purposeful, aggressive, and violent behavior that posed a serious risk of physical harm to another.⁸⁸ Illinois's involuntary manslaughter statute read:

A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly.⁸⁹

In addition, "recklessness" was defined as:

A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.⁹⁰

⁸⁶ *Id.* at 403–06.

⁸⁷ *Id.* at 405.

⁸⁸ *Id.* at 410.

⁸⁹ 720 ILL. COMP. STAT. ANN. 5/9–3(a) (West 2008) (amended 2009).

⁹⁰ 720 ILL. COMP. STAT. ANN. 5/4–6 (West 2009).

Furthermore, the Seventh Circuit had decided *United States v. Smith* only a year before.⁹¹ In *Smith*, the defendant had two convictions for criminal recklessness.⁹² In considering whether a mens rea of recklessness could qualify as a violent felony under *Begay*, the Seventh Circuit focused on the examples the Court used of crimes that were not committed by career criminals.⁹³ Specifically, the Seventh Circuit noted that the Court used reckless tampering of consumer products as an example on an unintentional act.⁹⁴ Looking at this example, the *Smith* court followed *Begay*'s reasoning that while reckless tampering with consumer products was "unquestionably dangerous," it "was 'far removed' from the 'deliberate kind of behavior associated with violent criminal use of firearms.'"⁹⁵ The Seventh Circuit also focused on the fact that the Court said all of the enumerated offenses (i.e. burglary, arson, etc.) were intentional.⁹⁶ Thus, the Seventh Circuit concluded in *Smith* that crimes requiring only a mens rea of recklessness cannot be considered violent felonies under the ACCA.⁹⁷

In response to *Smith*, the Government in *Woods* argued that *Begay* did not require that all crimes of recklessness be considered non-violent.⁹⁸ The Government stated that Woods's involuntary manslaughter conviction should count as a crime of violence because Woods had to consciously disregard the substantial harm that would occur.⁹⁹ The Seventh Circuit explicitly rejected this argument by responding that every reckless act begins with intentional behavior.¹⁰⁰ The court added "when pressed at oral argument to provide an example of a situation where a defendant would be reckless with

⁹¹ *Woods*, 576 F.3d at 411; *United States v. Smith*, 544 F.3d 781, 782 (7th Cir. 2008).

⁹² *Smith*, 544 F.3d at 782.

⁹³ *Id.* at 785.

⁹⁴ *Id.*

⁹⁵ *Id.* (citing *Begay v. United States*, 128 S. Ct. 1581, 1587 (7th Cir. 2008)).

⁹⁶ *Id.*

⁹⁷ *Id.* at 787.

⁹⁸ *United States v. Woods*, 576 F.3d 400, 411 (7th Cir. 2009).

⁹⁹ *Id.*

¹⁰⁰ *Id.*

regard to the outcome and not begin with an intentional act, the Government could not provide one.”¹⁰¹ Accordingly, because Illinois’s involuntary manslaughter conviction only prohibited reckless homicide, the majority held that Wood’s conviction did not count for purposes of sentence enhancement.¹⁰²

In addition, the court explicitly refrained from using a modified categorical approach to sentencing.¹⁰³ The court explained that the modified categorical approach only applies when a statute is divisible,¹⁰⁴ and a statute is only divisible when it “creates several crimes or a single crime with several modes of commission.”¹⁰⁵ “Modes of commission” was specifically limited to conduct that was explicitly identified in the statute.¹⁰⁶ Thus, because Illinois’s involuntary manslaughter statute did not specify modes of commission, the court did not consider the involuntary manslaughter statute to be divisible.¹⁰⁷

Chief Judge Easterbrook, joined by Judges Posner and Tander, wrote a dissent that sharply criticized *Begay* and he urged the Court to create a more concrete list of violent felonies instead of an open-ended test.¹⁰⁸ Chief Judge Easterbrook reminded the Court that “[s]tates did not write their statutes with *Begay* in mind.”¹⁰⁹ He further questioned “[h]ow can it be that burglary is a crime of violence, even though people are rarely injured in burglaries, and homicide is not, even though a person’s death is an element of the offense?”¹¹⁰

The dissent argued that the lower court should have been able to look at the charging documents and consider the defendant’s conduct.¹¹¹ The dissent rationalized this approach in light of the

¹⁰¹ *Id.*

¹⁰² *Id.* at 413.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *See id.* at 413 (Easterbrook, C.J., dissenting).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 414.

¹¹¹ *Id.*

categorical approach by arguing that as long as there is *some* question as to what part of a statute the defendant violated, even if that question is irrelevant to ultimate guilt (such as the difference between burglarizing a house and a boat), the sentencing court should be allowed to look at the documents.¹¹² The dissent's opinion was best summed up by the following:

Woods dropped a five-week-old baby on his head, then shook the comatose child to death. That is purposeful, violent, and aggressive conduct. The possibility that Woods did not intend to drop the child need not detain us; the state statute requires some knowing conduct, a standard satisfied by the shaking if not the dropping. (The state judge did not pin this down, because it was not relevant as a matter of state law.) The *Woods* panel concludes that recklessness does not meet *Begay's* requirement of intentional conduct, but [another case] holds that *criminal* recklessness—the kind involved here—is a *form* of intent, and I think it likely that the Justices will deem it sufficient for recidivism enhancements too.¹¹³

In contrast to the majority, the dissent focused on the defendant's conduct as opposed to his mens rea.¹¹⁴ The dissent saw Woods's activity as falling within the purposeful, violent, and aggressive conduct that the Court meant to target.¹¹⁵

In contrast to the majority, the dissent stated that the statute of conviction did not have to be divisible in order for a modified categorical approach to apply.¹¹⁶ The dissent argued that, under *Taylor*, a court should be allowed to consult the charging papers and

¹¹² *Id.* at 416.

¹¹³ *Id.*

¹¹⁴ *Compare id.* at 410 (majority opinion) *with id.* at 416 (Easterbrook, C.J., dissenting).

¹¹⁵ *See id.* at 416 (“[T]he kind [of intent] involved here . . . is a *form* of intent, and I think it likely that the Justices will deem it sufficient for recidivism enhancements” (Easterbrook, C.J., dissenting) (emphasis in original)).

¹¹⁶ *See id.* at 414.

plea colloquy in order to discover whether a defendant burglarized a house or a barn, even though such a distinction is irrelevant under the generic burglary statute.¹¹⁷ Similarly, *how* Woods killed his son was ultimately irrelevant for conviction under the involuntary manslaughter statute, but it could be relevant for purposes of sentence enhancement.¹¹⁸

Furthermore, the dissent advocated for a more flexible approach to sentencing under the Guidelines because of their advisory nature.¹¹⁹ Because the Guidelines were not mandatory, and a judge could have therefore imposed a heightened sentence regardless of what the Guidelines suggested, the dissent asked: “why employ elaborate rules about ‘divisibility’ and ‘recklessness’ that the district judge may elect to bypass in the end?”¹²⁰

II. CAN A MENS REA OF RECKLESSNESS EVER BE PURPOSEFUL UNDER *BEGAY*?

At first glance, it seems crimes requiring a mens rea of recklessness would never satisfy the *Begay* test because acting recklessly, by definition, is not the same as acting with intent.¹²¹ As explained above, that is the view the Seventh Circuit adopted in *Smith* and reaffirmed in *Woods*.¹²² However, a circuit split has developed with regard to this question. While some circuits have followed reasoning similar to that used in *Woods*, other courts have held that a mens rea of recklessness, or even no mens rea at all, is sufficient to

¹¹⁷ *Id.* at 415 (“[A] third kind of statute provides that ‘any person who enters a building with intent to commit a felony therein’ commits burglary. There’s nothing ‘divisible’ about that law: the word ‘building’ covers barns, ships, and dwellings. Yet *Taylor* says that here, too, the sentencing judge may look at the charging papers or guilty-plea colloquy to see whether the person was convicted of entering a house rather than a barn.”).

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 418.

¹²⁰ *Id.*

¹²¹ Compare 720 ILL. COMP. STAT. ANN. 5/4–6 (West 2009), with 720 ILL. COMP. STAT. ANN. 5/4–4 (West 2009).

¹²² See discussion *supra* Part I.C.

meet the *Begay* test.¹²³ In addition, the Fourth Circuit Court of Appeals adopted a modified categorical approach when confronted with a defendant who may have committed his crime recklessly.¹²⁴

*A. Circuits Holding that Recklessness Can Never Meet the
“Purposeful” Requirement for a Violent Felony Under the ACCA
or USSG*

When considering the Court’s decision in *Begay*, several circuits have held that a predicate offense that has a mens rea of recklessness cannot count as a crime of violence.¹²⁵ For example, in *United States v. Gray*, the Second Circuit Court of Appeals held that a conviction for reckless endangerment under New York state law¹²⁶ did not qualify as the type of purposeful, aggressive, conduct that the Court in *Begay* hoped to target.¹²⁷

While the Second Circuit acknowledged that behavior sufficient to be criminalized as reckless endangerment “com[es] close to crossing the threshold into purposeful conduct,”¹²⁸ the court in *Gray* ultimately concluded that reckless acts could not be considered intentional.¹²⁹ In support of its conclusion, the court stated that “*Begay* places a strong emphasis on intentional-purposeful-conduct as a prerequisite for a crime to be considered similar in kind to [burglary, arson, extortion, and the use of explosives].”¹³⁰ Furthermore, the *Gray* court noted that the Court offered the crime of recklessly tampering

¹²³ Compare discussion *infra* Part II.A with discussion *infra* Part II.B.

¹²⁴ See discussion *infra* Part II.C.

¹²⁵ See *United States v. Gray*, 535 F.3d 128 (2d Cir. 2008); *United States v. Baker*, 559 F.3d 443 (6th Cir. 2009).

¹²⁶ The defendant was convicted under New York Penal Law § 120.25 which stated that “[a] person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person.” N.Y. PENAL LAW § 120.25 (2009).

¹²⁷ 535 F.3d at 131–32.

¹²⁸ *Id.* at 132.

¹²⁹ *Id.*

¹³⁰ *Id.* at 131–32.

with consumer products in violation of 18 U.S.C. 1365(a)¹³¹ as an example of a crime that would *not* be considered purposeful, aggressive, and violent.¹³²

Similarly, the Sixth Circuit held that reckless endangerment was not a violent felony under the ACCA.¹³³ Post-*Begay*, the Sixth Circuit was forced to reconsider its position that reckless endangerment qualified as a violent felony.¹³⁴ A mere year beforehand, but before *Begay*, the Sixth Circuit had decided *United States v. Bailey*, in which it held that reckless endangerment was a violent felony because it posed a serious risk of physical harm to another person.¹³⁵ The *Bailey* court reasoned that a predicate conviction for reckless endangerment should enhance the sentence of a defendant because “no scenario exists in which an individual could commit felony reckless endangerment without creating a serious risk of harm to others”¹³⁶

However, in *United States v. Baker*, the Sixth Circuit reconsidered its holding in light of *Begay* and held that reckless endangerment did not qualify as a violent felony.¹³⁷ The court held that *Begay* stood for the proposition that the residual clause of the ACCA and USSG only applied to crimes that were similar to burglary and arson instead of every crime that presented a serious potential risk of physical injury to another.¹³⁸ Accordingly, while the Sixth Circuit was willing to admit that reckless endangerment posed a serious risk, it ultimately concluded that the crime was not purposeful and thus not a violent felony.¹³⁹ The court stated that “the offense does not involve

¹³¹ A person is guilty of violating this statute if he recklessly “disregard[s] . . . the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk, tampers with any consumer product.” 18 U.S.C. § 1356(a) (2006).

¹³² *Gray*, 535 F.3d at 132 n.3.

¹³³ See *United States v. Baker*, 559 F.3d 443, 452 (6th Cir. 2009).

¹³⁴ *Id.*

¹³⁵ 264 Fed. App’x 480, 482 (6th Cir. 2008).

¹³⁶ *Id.*

¹³⁷ *Baker*, 559 F.3d at 453.

¹³⁸ *Id.* at 452.

¹³⁹ *Id.* at 453.

the type of ‘purposeful, violent, and aggressive’ conduct as burglary, arson, extortion, or the use of explosives Rather, on its face the statute criminalizes *only* reckless behavior.”¹⁴⁰

While neither the Second Circuit nor the Sixth Circuit explicitly stated that a mens rea of recklessness could *never* meet the *Begay* standard, the reasoning utilized above strongly suggested that a criminal statute with only a mens rea of recklessness or negligence was unlikely to count for purposes of sentence enhancement under the ACCA and the USSG in those circuits. Furthermore, courts interpreting these decisions from the Second, Sixth, and Seventh Circuits have recognized the intentional/purposeful mens rea requirement for triggering sentence enhancements under the ACCA and USSG.¹⁴¹ Thus, the mens rea of a statute may be the most defining element when determining whether a statute is a violent felony under the ACCA or USSG.¹⁴²

B. Circuits Holding that a Mens Rea of Recklessness or Strict Liability Crimes Do Satisfy the “Purposeful” Requirement of Begay

At the other end of the spectrum are those circuits holding that a mens rea of recklessness or crimes without a specified mens rea can be sufficiently purposeful to constitute a violent felony under the ACCA and the USSG.¹⁴³ These circuits mainly rely upon the fact that there is

¹⁴⁰ *Id.* (emphasis added) (internal citations omitted).

¹⁴¹ *See, e.g.,* United States v. Jones, 574 F.3d 546, 551 (8th Cir. 2009) (“Jones is correct in asserting that some circuits have interpreted *Begay* to limit the mens rea a crime must have in order to qualify as a violent felony.” (citing United States v. Smith, 544 F.3d 781, 785–86 (7th Cir.2008) (holding that post-*Begay* crimes of recklessness are not violent felonies under the ACCA); United States v. Gray, 535 F.3d 128, 132 (2d Cir.2008) (holding that “reckless endangerment” is not a crime of violence because the statute “on its face does not criminalize intentional or deliberate conduct.”))).

¹⁴² *See id.*

¹⁴³ *See* United States v. Zuniga, 553 F.3d 1330, 1336 (10th Cir. 2009); United States v. Polk, 577 F.3d 515, 519 (3d Cir. 2009).

some intentional or purposeful act that occurs during the commission of the crime.¹⁴⁴

For example, in *United States v. Zuniga*, the Tenth Circuit held that possession of a deadly weapon in prison¹⁴⁵ constituted a violent felony under the ACCA.¹⁴⁶ The Tenth Circuit immediately noticed that the statute criminalized reckless conduct and, as a result, acknowledged that the defendant's possession of a deadly weapon did not have to be deliberate or intentional under the statute.¹⁴⁷ The court then stated that "the *Begay* test specifically requires that the crime in question 'typically' involve purposeful conduct. It is reasonable to surmise that those who possess deadly weapons in a penal institution typically intend to possess them."¹⁴⁸ The *Zuniga* court also examined how the state courts interpreted the Texas statute.¹⁴⁹ Noting that one of the elements the State had to show was that the accused "possessed the weapon knowingly or intentionally," the court had an easier time concluding that a conviction for possessing a deadly weapon in prison qualified as a violent felony.¹⁵⁰

In *Zuniga*, the Tenth Circuit also justified its opinion based on its conclusion that possessing a deadly weapon was more similar to burglary, arson, etc., than driving under the influence.¹⁵¹ The court reasoned that:

¹⁴⁴ *Id.*

¹⁴⁵ See TEX PENAL CODE ANN. § 46.10 (West 2003) ("A person commits an offense if, while in a penal institution, he (1) intentionally, knowingly, or recklessly: (1) carries on or about his person a deadly weapon; or (2) possesses or conceals a deadly weapon in a penal institution.").

¹⁴⁶ 553 F.3d at 1336.

¹⁴⁷ *Id.* at 1334.

¹⁴⁸ *Id.* (internal citations omitted).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 1334–35 (citing *Wilson v. State of Texas*, No. 13-04-00298-CR, 2007 Tex. App. LEXIS 4332, at *6 (Tex. Crim. App. 13th Dist. May 31, 2007) (unpublished)). Of course, while the Tenth Circuit relied on this opinion in its decision, it should be noted that *Wilson* was unpublished and not binding on any state court.

¹⁵¹ *Id.* at 1335.

The Court in *Begay* determined that driving under the influence was not a purposeful crime because it was similar to a strict liability offense, ‘criminalizing conduct in respect to which the offender need not have any criminal intent at all.’ Possession of a deadly weapon in prison is not a strict liability crime, because it requires either intentional or reckless behavior. In terms of purpose, it is therefore not analogous to driving under the influence.¹⁵²

In a very similar case, the Third Circuit also concluded that possession of a deadly weapon was purposeful.¹⁵³ Interestingly, the statute the defendant was convicted under, 18 U.S.C. §1791(a)(2), was a strict liability offense and had no mens rea requirement.¹⁵⁴ Specifically, 18 U.S.C. §1791(a)(2) provided that “[w]hoever . . . being an inmate of a prison, makes, possesses, or obtains, or attempts to make or obtain, a prohibited object shall be punished as provided in subsection (b) of this section.”¹⁵⁵ In other words, one could theoretically be convicted under this statute for negligently or recklessly possessing a prohibited object (not even a necessarily a deadly object, just one that is prohibited).¹⁵⁶ In looking at the “purposeful” component of the *Begay* test, the Third Circuit summarily declared that “[w]hile possessing a weapon in prison is purposeful, in that we may assume one who possesses a shank intends that possession, it cannot properly be characterized as conduct that is itself aggressive or violent.”¹⁵⁷ Thus, while the Tenth and Third Circuits similarly found that possessing a weapon in prison was purposeful, they differ with regard to whether that possession was aggressive and/or violent.¹⁵⁸

¹⁵² *Id.* (internal citations omitted).

¹⁵³ *United States v. Polk*, 577 F.3d 515, 519 (3d Cir. 2009).

¹⁵⁴ *See* 18 U.S.C. § 1791(a)(2) (2006).

¹⁵⁵ *Id.*

¹⁵⁶ *See id.*

¹⁵⁷ *Polk*, 577 F.3d at 519.

¹⁵⁸ *Id.*

*C. Recklessness May Qualify as Purposefulness:
The Modified Categorical Approach*

A frequent problem courts encounter when sentencing a defendant under the ACCA or Guidelines is when a defendant can be convicted under a statute for acting purposefully *or* recklessly.¹⁵⁹ The Fourth Circuit was faced with just such a dilemma in *U.S. v. Roseboro*.¹⁶⁰

In *Roseboro*, the predicate felony at issue was failure to stop for a blue light.¹⁶¹ The statute at issue criminalized the “failure” to stop for a blue light but did not specify a particular mens rea.¹⁶² Specifically, the statute stated:

In the absence of mitigating circumstances, it is unlawful for a motor vehicle driver, while driving on a road, street, or highway of the State, to fail to stop when signaled by a law enforcement vehicle by means of a siren or flashing light. An attempt to increase the speed of a vehicle or in other manner avoid the pursuing law enforcement vehicle when signaled by a siren or flashing light is prima facie evidence of a violation of this section. Failure to see the flashing light or hear the siren does not excuse a failure to stop when the distance between the vehicles and other road conditions are such that it would be reasonable for a driver to hear or see the signals from the law enforcement vehicle.¹⁶³

The Fourth Circuit held that the wording of the statute placed the sentencing court in a dilemma, because a defendant could intentionally or unintentionally violate the statute.¹⁶⁴ Noting that the statute was “categorically overbroad” the court remanded to the district court and

¹⁵⁹ See, e.g., *United States v. Roseboro*, 551 F.3d 226, 235 (4th Cir. 2009).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 228.

¹⁶² *Id.* at 234–35.

¹⁶³ S.C. CODE ANN. § 56-6-750 (West 2009).

¹⁶⁴ *Roseboro*, 551 F.3d at 234–35.

allowed the court to consult additional materials to discover whether the defendant had acted intentionally.¹⁶⁵

Thus, in *Roseboro*, the court took a statute that was “strict-liability like” in nature and, instead of determining that the conduct was not purposeful, remanded the case to allow the district court to determine whether the defendant’s *conduct* was intentional.¹⁶⁶

III. IN ORDER TO FULFILL THE GOALS OF THE ACCA AND THE USSG, JUDGES NEED MORE DISCRETION TO DETERMINE PURPOSEFULNESS

As explained above, one of the major goals of the ACCA was to keep violent, repeat offenders off the streets.¹⁶⁷ The Guidelines have the additional aspiration of trying to maintain uniformity in sentencing.¹⁶⁸ A mens rea approach does not best fulfill these goals. On the other hand, the Tenth and Third Circuit’s approach is insufficient because it potentially allows non-purposeful conduct to be elevated to the level of a violent felony. Instead, judges should be allowed more discretion to look at the record and determine whether the conduct at issue demonstrates that the defendant intended to act in a violent and aggressive manner. Thus, courts should use, and should be allowed to use, the modified categorical approach suggested by the court in *Roseboro* and the dissent in *Woods*.

A. *The Mens Rea Approach is Unsatisfactory*

Limiting violent felonies to only those crimes that require a mens rea of recklessness does not accomplish Congress’s goals of (1) neutralizing violent, repeat offenders and (2) achieving uniformity in sentencing.

¹⁶⁵ *Id.* at 240.

¹⁶⁶ *Id.*

¹⁶⁷ See discussion *supra* Part I.A.

¹⁶⁸ See discussion *supra* Part I.B.

1. Too Many Offenses Are Left Out of the Definition of Violent Felony, Thus Working Against the Goal of Punishing Serial Offenders

Considering that one of the major goals of Congress in enacting the ACCA and creating the Sentencing Commission was to neutralize violent repeat offenders, the mens rea approach is unable to achieve this goal. Specifically, two of the most heinous crimes, manslaughter and sexual assault might not qualify as violent felonies or crimes of violence under the Seventh Circuit's mens rea approach.¹⁶⁹ Thus, an individual who commits any combination of involuntary manslaughter and sexual assault multiple times might still not be considered a career offender under the ACCA or USSG.¹⁷⁰

Looking first at involuntary manslaughter, the Seventh Circuit's holding in *Woods* asserts that involuntary manslaughter is not a violent felony.¹⁷¹ However, such a holding is directly in conflict with the position of the Sentencing Commission, which has included manslaughter on its list of enumerated predicate felonies.¹⁷² As the Commission was created, in part, as a response to Congress's desire to incapacitate serious offenders, the Commission's position on what crimes are violent felonies is persuasive.¹⁷³ The Seventh Circuit's

¹⁶⁹ See *United States v. Woods*, 576 F.3d 400, 412–13 (7th Cir. 2009); 720 ILL. COMP. STAT. ANN. 5/12–13 (West 2009). As explained in Part I.C, the Seventh Circuit held that involuntary manslaughter under Illinois law does not qualify as a violent felony under *Begay*. See discussion *supra* Part I.C. Further, Illinois's criminal sexual assault statute does not specify a mens rea, and thus is a strict liability offense, so a conviction under the statute would not be purposeful under a mens rea approach. See *infra* note 182 and accompanying text.

¹⁷⁰ See *id.*

¹⁷¹ *Woods*, 576 F.3d at 412–13; see discussion *supra* Part I.C.

¹⁷² U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) cmt. n.1 (2009).

¹⁷³ See *United States v. Herrick*, 545 F.3d 53, 60 (1st Cir. 2008) (“We note that the commentary to U.S.S.G. § 4B1.2(a) includes manslaughter as a crime of violence without distinguishing between voluntary and involuntary manslaughter, arguably suggesting that the mens rea for the crime is not determinative.”); see also *United States v. Camilo*, 71 F.3d 984, 988 (1st Cir. 1995) (citing to the Commission's commentary to support its position); *United States v. Wilson*, 993 F.2d 214, 217 (11th Cir. 1993) (citing commentary from the Commission to support its holding that

mens rea approach, in leading to an opposite result, does not fulfill the goals of the ACCA and the USSG.

Arguably, a distinction could be drawn between voluntary and involuntary manslaughter. For example, when considering a bill that would impose mandatory life imprisonment for individuals convicted of three violent felonies, the House of Representatives proposed that the term “serious violent felony” meant “[a] Federal or State offense, by whatever designation and wherever committed, consisting of . . . manslaughter other than involuntary manslaughter.”¹⁷⁴

However, even in taking this definition into account, there are important considerations to keep in mind. First, the Commission did not make the distinction between voluntary and involuntary manslaughter.¹⁷⁵ Second, the definition above is for a “serious violent felony” as opposed to a “violent felony,” and the ACCA only concerns itself with violent felonies.¹⁷⁶ Consequently, there is no indication that Congress meant to remove involuntary manslaughter from the list of violent felonies simply because it was committed recklessly.

Similarly, some sex crimes will likely not be considered “purposeful” under the mens rea approach because these crimes do not specify a mens rea.¹⁷⁷ Criminal Sexual Assault, for example, is defined in Illinois as:

§ 12-13. Criminal Sexual Assault.

- (a) The accused commits criminal sexual assault if he or she:
(1) commits an act of sexual penetration by the use of force or threat of force; or

reasonably foreseeable consequences of fraud can be taken into account when sentencing).

¹⁷⁴ H.R. REP. NO. 103-463, at 2 (1994).

¹⁷⁵ See U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) cmt. n.1 (2009).

¹⁷⁶ See 18 U.S.C. § 924(e)(1) (2006).

¹⁷⁷ See 720 ILL. COMP. STAT. ANN. 5/12-13 (West 2009); 720 ILL. COMP. STAT. ANN. 5/12-14.1 (West 2009). *But see* United States v. Patterson, 576 F.3d 431, 442 (7th Cir. 2009) (holding that knowingly transporting a minor across state lines for prostitution is a crime of violence).

- (2) commits an act of sexual penetration and the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent; or
- (3) commits an act of sexual penetration with a victim who was under 18 years of age when the act was committed and the accused was a family member; or
- (4) commits an act of sexual penetration with a victim who was at least 13 years of age but under 18 years of age when the act was committed and the accused was 17 years of age or over and held a position of trust, authority or supervision in relation to the victim.¹⁷⁸

Of the various definitions, only one, §12-13(a)(2) has a mens rea element to it.¹⁷⁹ According to *Woods*, while a court could engage in a modified categorical approach to discover what offense the defendant committed, the court could not take the facts learned from the record of conviction to determine whether the defendant acted purposefully.¹⁸⁰ Instead, the court would be restricted to the statutory language.¹⁸¹ Thus if a defendant committed (a)(1)—sexual penetration by the use of force or threat of force—the court could not determine whether he had acted purposefully because there is no mens rea element. The statute, in fact, reads like a strict liability statute. As a result, the Seventh Circuit would be precluded from determining that a defendant had acted purposefully, and thus the rapist would not be subjected to an enhanced sentence—even if he was to rape two more times.¹⁸²

¹⁷⁸ 720 ILL. COMP. STAT. ANN. 5/12–13 (West 2009).

¹⁷⁹ 720 ILL. COMP. STAT. ANN. 5/12–13(a)(2) (West 2009) (“the accused knew”).

¹⁸⁰ See *United States v. Woods*, 576 F.3d 400, 405 (7th Cir. 2009).

¹⁸¹ See *id.*

¹⁸² In both *Woods* and *Patterson*, the Seventh Circuit used the strict liability statute at issue in *Begay* to point out that the Supreme Court did not intend to enhance sentences for those crimes where the offender did not act with criminal intent. See *id.* at 409; *Patterson*, 576 F.3d at 441. Thus, while the Seventh Circuit has never explicitly held that strict liability statutes do not meet the *Begay* test, such a holding can be inferred from the court’s reasoning in *Woods* and *Patterson*.

Predatory criminal sexual assault of a child functions in a similar way. The statute reads:

§ 12-14.1. Predatory criminal sexual assault of a child.

(a) The accused commits predatory criminal sexual assault of a child if:

(1) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed; or

(1.1) the accused was 17 years of age or over and, while armed with a firearm, commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed; or

(1.2) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed and, during the commission of the offense, the accused personally discharged a firearm; or

(2) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed and the accused caused great bodily harm to the victim that:

(A) resulted in permanent disability; or

(B) was life threatening; or

(3) the accused was 17 years of age or over and commits an act of sexual penetration with a victim who was under 13 years of age when the act was committed and the accused delivered (by injection, inhalation, ingestion, transfer of possession, or any other means) to the victim without his or her consent, or by threat or deception, and for other than medical purposes, any controlled substance.

Again, a review of the statute finds no mens rea element.¹⁸³ Because no criminal intent is specified in this statute, and any of these offenses could theoretically be committed purposefully, knowingly, or recklessly, the Seventh Circuit would be precluded from finding any of these offenses to be crimes of violence.¹⁸⁴

Accordingly, the mens rea approach fails to impose larger sentences on those individuals who commit some of the more disturbing crimes: homicide (in the form of involuntary manslaughter) and criminal sexual assault. Such a result seems inconsistent with the goals of the ACCA and USSG, and is in direct opposition to the Commission's intent.¹⁸⁵

2. A Mens Rea Approach Creates a Lack of Uniformity

The other articulated goal of Congress in creating the Commission was to achieve uniformity in sentencing.¹⁸⁶ However, under a mens rea approach, defendants with similar levels of culpability end up with widely disparate sentences.

Two cases, *United States v. Woods* and *United States v. Hudson*, illustrate this dilemma. As discussed in Part I, the defendant in *Woods* was convicted of involuntary manslaughter after recklessly shaking his disabled infant son and causing his death.¹⁸⁷ Although irrelevant for our purposes, there was other evidence that the baby had been abused and had died from blunt trauma to the head.¹⁸⁸

In *Hudson*, one of the defendant's predicate offenses was fleeing a police officer.¹⁸⁹ Specifically, Hudson was guilty of fleeing "while

¹⁸³ The Model Penal Code identifies four levels of culpability: purpose, knowledge, recklessness, and negligence. MODEL PENAL CODE § 2.02(2) (2009). None of these levels of culpability are identified in the statute.

¹⁸⁴ See *supra* note 182 and accompanying text; see also MODEL PENAL CODE § 2.02(3) (2009) (stating that if a statute does not specify a mens rea, a defendant is guilty of the offense if he commits it purposely, knowingly, or recklessly).

¹⁸⁵ U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) cmt. n.1 (2009).

¹⁸⁶ See discussion *supra* Part I.B.

¹⁸⁷ See discussion *supra* Part I.C.

¹⁸⁸ *United States v. Woods*, 576 F.3d 400, 402 (7th Cir. 2009).

¹⁸⁹ *United States v. Hudson*, 577 F.3d 883, 884 (8th Cir. 2009).

operating a motor vehicle on city streets ‘at excessive speeds and failing to stop for stop signs.’”¹⁹⁰ Later, the defendant was also convicted of being a felon in possession of a firearm.¹⁹¹ He argued that he was not subject to the sentence enhancement because his prior conviction for fleeing a police officer was not a crime of violence.¹⁹² Specifically, he argued that the statute of conviction did not require an intent to kill or harm, and, as a result, did not require purposefulness.¹⁹³ In other words, Hudson argued that his behavior was not purposeful because he did not intend to expose anyone to harm.¹⁹⁴

The Eighth Circuit disagreed.¹⁹⁵ In looking at the statute of conviction, the court noted that Hudson was charged with knowingly fleeing a police officer.¹⁹⁶ Accordingly, the court concluded that “knowingly fleeing a police officer who is attempting to make an arrest is purposeful conduct that falls within the ‘otherwise involves’ clause of § 4B1.2(a) as construed by *Begay*.”¹⁹⁷ Consequently, by looking only at the mens rea of the statute of conviction, Hudson was given an additional fifteen-year sentence for knowingly fleeing a police officer when his actual conduct may not have presented a “serious potential risk of injury to another.”¹⁹⁸

The differing results in *Woods* and *Hudson* appear anomalous. Both *Woods* and *Hudson* consciously engaged in an act that represented a callous indifference toward human life. Surely, one defendant is not more likely to point a gun and pull a trigger than the other. Yet *Hudson* was sentenced to an additional fifteen years, while *Woods* was not. This is especially alarming in light of the fact that *Woods*’s action actually did claim a human life while *Hudson*’s did not.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 885–86.

¹⁹⁴ *See id.*

¹⁹⁵ *Id.* at 886.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*; U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2009).

The different results in *Hudson* and *Woods* demonstrate that a mens rea approach to purposefulness goes against the goal of uniformity in sentencing. Arguably, uniformity is only a goal with regard to two defendants who are convicted of the same crime, but the goals of the Commission state that the Commission is charged with ensuring certainty in sentencing with regard to *similar* defendants who have a *similar* criminal background.¹⁹⁹ Since the mens rea approach concentrates solely on the mens rea required for conviction without taking into account any of the background facts of a case, such an approach creates severe disparities in sentencing between similarly-situated defendants.

B. The Tenth Circuit's Approach is Inconsistent with Begay

Even as the Seventh Circuit's approach is too narrow, the Tenth Circuit's rule is too broad. As stated above, the Tenth Circuit found purposefulness when the statute of conviction criminalized behavior that was "typically" committed with purpose.²⁰⁰ However, this overlooks the fact that some defendants could be convicted who did not intentionally engage in any aggressive or violent behavior.

A simple hypothetical demonstrates this point. If Joe Inmate believes that someone is waiting for him in the cafeteria, he may bring a sharpened toothbrush with him to defend himself. Nothing, in fact, happens, and Joe means to get rid of the weapon, but he forgets that he has it on his person. Later, during a routine search, guards discover the toothbrush. While Joe did not intend to have the weapon on him at the time he was caught, his offense would still be considered a violent felony under the ACCA.

Of course, it could be argued that the inmate intended to possess the weapon earlier, or that he committed an intentional act that lead to him recklessly committing a crime. However, the Seventh Circuit's response to this argument is sound. In essence, the Seventh Circuit recognized that every unintentional act begins with an intentional

¹⁹⁹ 28 U.S.C.A. § 991(b)(1)(B) (West 2008).

²⁰⁰ *United States v. Zuniga*, 553 F.3d 1330, 1334 (10th Cir. 2009).

act.²⁰¹ The Tenth Circuit’s approach thus impermissibly blurs the line between actus reus and mens rea.²⁰² By finding that the purposefulness requirement is met in one intentional act, such a holding relieves the court of finding purpose with regard to the actual crime of conviction.

In addition, punishing those individuals who do not have the requisite level of intent is contrary to the Court’s holding in *Begay*.²⁰³ Specifically, the Court in *Begay* was concerned about those individuals who might “deliberately point the gun and pull the trigger.”²⁰⁴ Indeed, one of the Court’s problems with New Mexico’s DUI statute in *Begay* was that it would add a 15-year sentence enhancement as a result of a crime where the defendant did not need to have any criminal intent whatsoever.²⁰⁵ Therefore, in cases where a defendant could be convicted without having intentionally committed the offense, the Tenth Circuit’s approach goes against the holding of *Begay*.

C. The Modified Categorical Approach: (Re)Introducing Discretion into Sentencing

On the surface, it is difficult to construe “recklessness” as “purposefulness” because, as the court addressed in *Woods*, every reckless result likely begins with an intentional act.²⁰⁶ Yet, looking solely at the mens rea of a statute creates unjust results that go against the established purposes of sentencing.²⁰⁷ How is one to reconcile these results?

²⁰¹ See *United States v. Woods*, 576 F.3d 400, 410–11 (7th Cir. 2009).

²⁰² See Michael M. O’Hear, *Seventh Circuit Criminal Case of the Week: What Is a Crime of Violence?*, MARQ. U. L. SCH. FACULTY BLOG, Aug. 9, 2009, <http://law.marquette.edu/facultyblog/2009/08/09/seventh-circuit-criminal-case-of-the-week-what-is-a-crime-of-violence>.

²⁰³ See *Begay v. United States*, 128 S. Ct. 1581, 1587 (2008).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 1586–87.

²⁰⁶ See *United States v. Woods*, 476 F.3d 400, 411 (7th Cir. 2009) (“Every crime of recklessness necessarily requires a purposeful, volitional act that sets in motion the later outcome.”).

²⁰⁷ See discussion *supra* Part III.A.

Adherence to the categorical approach causes unjust and disparate results in sentencing. While there are understandable reasons why society does not want judges to be able to comb through a defendant's record when imposing a sentence, by not allowing judges *any* access to the record of conviction it is virtually impossible to separate the violent, career offenders from the "regular" repeat offenders.²⁰⁸

Under current Court precedent, the best approach so far seems to be the Fourth Circuit's approach in *Roseboro*. In *Roseboro*, the Fourth Circuit took a statute that did not specify a mens rea requirement, and remanded the case back to the lower court to determine whether the defendant had acted with purpose. This approach is preferable to either the mens rea approach or the Tenth Circuit's approach. With regard to the sexual assault statutes described above, such an approach would allow a sentencing judge to look at certain documents in the record to determine whether a defendant acted purposefully.²⁰⁹ Instead of simply not allowing these crimes to count as predicate offenses, the modified categorical approach will allow a more just and uniform sentencing because defendants with similar degrees of guilt will receive similar punishments.²¹⁰

The modified categorical approach could have lead to a different result in *Woods*. Although the statute criminalized only reckless intent, Wood's conduct demonstrates an intent to commit a violent and aggressive act.²¹¹ As the dissent explained, "[I]ikewise a person who drops a baby on his head, and intentionally shakes the inert body violently, has committed an aggressive and dangerous act; the person's

²⁰⁸ See *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004) for a discussion of possible Sixth Amendment concerns when judges use discretion in sentencing. However, *Apprendi* and its progeny are not of concern because both of those cases dealt with judicial findings of fact. See *Apprendi*, 530 U.S. at 471; *Blakely*, 542 U.S. at 300. A modified categorical approach to sentencing would only use facts that have already been found by a jury or have been admitted to by a defendant. See *Woods*, 576 F.3d at 415 (Easterbrook, C.J., dissenting) ("*Shepard* blocks using anything other than the charging papers and plea colloquy to establish what the defendant was convicted of.>").

²⁰⁹ See *supra* note 182 and accompanying text.

²¹⁰ See discussion *supra* Part III.A.

²¹¹ See *Woods*, 576 F.3d at 417 (Easterbrook, C.J., dissenting).

indifference to consequences should not prevent counting the conviction.”²¹² Similarly, an individual who recklessly shoots a gun into a crowd, but does not intend to kill anyone, *intentionally* committed a violent and aggressive act even though she was unconcerned about the consequences of her act.²¹³

Arguably, the modified categorical approach represents a return to the “medical” model of sentencing because judges are allowed discretion to determine whether defendants acted purposefully.²¹⁴ Indeed, some have called for a return to some form of wholly discretionary sentencing.²¹⁵ However, this article does not call for a return to unfettered discretion. Instead, implementing a modified categorical approach would alleviate concerns about disparate sentencing while furthering the goals of the ACCA and USSG.

First, the modified categorical approach would not lead to disparate sentencing. The Guidelines would still be in place so that individuals convicted of a certain crimes would receive the original sentence they would normally receive under the Guidelines.²¹⁶ The only provision that would be affected would be the sentence enhancement provision.²¹⁷ To the degree that judges do have more discretion to award sentence enhancements, such discretion is necessary to fulfill the articulated goals of the ACCA and USSG.

Furthermore, Congress never meant to entirely eradicate judicial discretion in sentencing.²¹⁸ In fact, “the drafters of the Guidelines

²¹² *Id.*

²¹³ *Id.*

²¹⁴ See discussion *supra* Part I.B for a discussion on the medical model of sentencing.

²¹⁵ See Adam Lamparello, *Implementing the Heartland Departure in a Post-Booker World*, 32 AM. J. CRIM. L. 133, 137 (2005).

²¹⁶ The Application Instructions instruct district courts to calculate a defendant’s sentence, *then* apply the sentence enhancement. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(f) (2009); *Woods*, 576 F.3d at 411 (“It is worth underscoring . . . that the enhanced sentencing range under the ACCA or the career offender guidelines is imposed *in addition to* any punishment that has already been imposed on a defendant.” (emphasis in original)).

²¹⁷ See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2009).

²¹⁸ See S. REP. No. 98-225, at 77 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3260 (stating that judges were to consider all the purposes of sentencing when

regime envisioned an important role for judges As judges applied the Guidelines, they were supposed to highlight issues and concerns that the Guidelines had not addressed, in effect, to create a common law of sentencing in the interstices of the Guidelines.”²¹⁹ Additionally, the Guidelines themselves allow a sentencing judge to consider any other policies or factors that would allow them to adjust the defendant’s sentence.²²⁰ Therefore, because discretion has always been, and continues to be, an integral part of sentencing, the modified categorical approach should not be rejected simply because it allows more discretion than the mens rea approach.

Second, the modified categorical approach is more in line with Congress’s intent. Congress meant to target repeat, violent offenders.²²¹ Shaking a baby to death is certainly violent.²²² Congress also wanted to achieve greater uniformity in sentencing, and the modified categorical approach, more than a mens rea approach, allows for defendants with similar degrees of culpability to receive similar punishments.²²³ Instead being confined to the mens rea of a statute, courts will be able to reach a common sense decision as to whether the defendant acted purposefully. Thus, instead of two wildly different results for defendants who engaged in equally culpable behavior, courts can determine, for example, that in *this* involuntary manslaughter case, the defendant purposefully committed a violent and aggressive act, although she was reckless with regard to the eventual outcome.

CONCLUSION

Manslaughter, voluntary or involuntary, results in the loss of a human life. Woods admitted to dropping his mentally handicapped

imposing a sentence); *United States v. Jaber*, 362 F. Supp. 2d 365, 372–73 (D. Mass. 2005).

²¹⁹ *Jaber*, 362 F. Supp. 2d at 373.

²²⁰ See U.S. SENTENCING GUIDELINES MANUAL, § 1B1.1(i) (2009).

²²¹ See discussion *supra* Part I.A.

²²² See *United States v. Woods*, 576 F.3d 400, 416 (7th Cir. 2009)

(Easterbrook, C.J., dissenting).

²²³ See discussion *supra* Part II.B; see also discussion *supra* Part III.A.2.

five-week old son and shaking him to death. As the dissent in *Woods* realized, this, by its nature is an intentional, aggressive, and violent act.²²⁴ Ironically, by getting caught up in the mens rea of the actual statute of conviction, courts lose the ability to target repeat offenders who have the same level of mental culpability.

²²⁴ See *Woods*, 576 F.3d at 416 (Easterbrook, C.J., dissenting).