A CIRCUIT SPLIT SURVEY ON VIOLENT FELONIES AND CRIMES OF VIOLENCE: WHERE DOES THE TENTH CIRCUIT STAND?

INTRODUCTION

Criminal recidivism was a buzzword in the media, Congress, and the criminal justice system long before the "crime wave" of the 1980s and the subsequent "War on Drugs." Congress began to target career criminals after social research conducted in the 1970s and 1980s showed a small number of "habitual offenders" were responsible for a large portion of crimes.[1] During the mid-to-late 1980s, Congress and the Federal Sentencing Commission took action to isolate recidivist criminals and ensure their removal from the general public via incarceration. However, it seems that the ambiguity in both Congress's Armed Career Criminal Act (ACCA)[2] and the United States' Sentencing Guidelines (USSG)[3] has largely served to increase litigation and divide the federal court system.

The ACCA increases the mandatory minimum sentence for a felon in possession of a firearm,[4] from 10 years to 15 years if the person has three previous, separate convictions for a "violent felony" or a serious drug offense.[5] Similarly, the USSG increases a person's base offense level depending on previous convictions for a "crime of violence."[6] For example, a person would receive a base offense level of at least 24,[7] if he or she committed the instant offense after having two or more felony

1. 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).

2. Armed Career Criminal Act, 18 U.S.C. § 924(e) (2006) (instituting mandatory prison terms of not less than fifteen years for certain repeat offenders).

3. U.S. SENTENCING GUIDELINES MANUAL §§ 2K2.1, 2L1.2(b)(1)(A) (2010) (defining offense levels for crimes related to firearms and unlawfully entering or remaining in the United States).

4. 18 U.S.C. § 922(g) (2006) (defining the unlawful act of felon in possession of a firearm).

5. 18 U.S.C. § 924(e)(1).

6. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1.

7. Base offense levels are points assigned to defendants based on the offense committed, their prior criminal convictions, and specific circumstances of those crimes, i.e. whether the crimes were committed while serving a criminal justice sentence (probation, parole, work release, etc.), *id.* § 4A1.1(d), or with a weapon, *id.* § 4B1.4. These points are designed to reflect the likelihood of recidivism and future criminal behavior of defendants with prior criminal histories. Courts are to determine the relevant offense guideline section from chapter two of the USSG based on the offense of conviction or the offense to which the defendant stipulated. *Id.* § 1B1.1. The base offense level of a crime is determined in chapter two and may be adjusted based on the criteria listed in chapter three (e.g. adjustments related to the victim, the defendant's role in the offense, and whether the defendant accepted responsibility). *Id.* chs. 2, 3, pts. A, B, E. For example, burglary of a residence is given a base offense level of 17 in chapter two, but may be adjusted to 15 because the defendant "clearly demonstrated acceptance of responsibility for his offense." *Id.* §§ 2B2.1, § 3E1.1. However, criminal history of crime of violence may increase the base level according to sections 2K2.1 and 4A1.1.

convictions for a crime of violence or a controlled substance offense.[8] Predictably, the issues that are most often litigated when dealing with the ACCA, the USSG, or both are the definition and scope of "violent felony" and "crime of violence."

In the Tenth Circuit alone, between September 1, 2009 and August 31, 2010, there were six cases addressing the application of the recidivism sentencing enhancements of the ACCA and the USSG.[9] Other circuits faced many of the same legal issues and published their own opinions, sometimes in harmony with the Tenth Circuit, and other times promulgating a different interpretation of the USSG or ACCA, creating a circuit split.[10] Furthermore, cases in all circuits have relied upon various precedents in their opinions, exhibiting a rich body of USSG and ACCA law.

This Comment surveys recent Tenth Circuit ACCA and USSG case law during the period of September 2009 through August 2010, and highlights some of the critical questions dividing the circuits. First, this Comment provides background on the ACCA and USSG. Next, it gives an overview of the law common to ACCA and USSG interpretations and briefs the relevant cases in recent Tenth Circuit jurisprudence. The third section discusses recent circuit splits regarding the characterization of convictions for fleeing a police officer and the definition of "burglary of a dwelling." And finally, this Comment analyzes the controversy of using juvenile adjudications as predicate offenses under the ACCA and predicts how the Tenth Circuit may rule on the issue.

I. THE STATUTES

A. The Armed Career Criminal Act: Violent Felonies

Passed in 1984, the ACCA is just one federal law aimed at recidivists.[11] The text of the ACCA provides:

> In the case of a person who violates section 922(g) of this title [by being a felon in possession of a firearm] and has three previous convictions . . . for a violent felony or a serious drug offense, or both,

8. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(2).

9. United States v. Silva, 608 F.3d 663 (10th Cir. 2010); United States v. McConnell, 605 F.3d 822 (10th Cir. 2010); United States v. Martinez, 602 F.3d 1166 (10th Cir. 2010); United States v. Wise, 597 F.3d 1141 (10th Cir. 2010); United States v. Darton, 595 F.3d 1191 (10th Cir. 2010); United States v. Rivera-Oros, 590 F.3d 1123 (10th Cir. 2009).

10. *See, e.g.*, United States v. Tyler, 580 F.3d 722, 726 (8th Cir. 2010) (declining to interpret a violation of fleeing a peace officer statute as a "crime of violence" under the USSG in contrast to *Wise* and *McConnell*); United States v. Wenner, 351 F.3d 969, 972–73 (9th Cir. 2003) (interpreting the enumerated felony of "burglary of a dwelling" under the USSG in contrast to *Rivera-Oros*).

11. United States v. Strahl, 958 F.2d 980, 985 (10th Cir. 1992); H.R. REP. NO. 98-1159, at 4 (1984) (Conf. Rep.); *see also, e.g.*, 18 U.S.C. § 3559(c) (2006) (federal "Three Strikes Law").

> committed on occasions different from one another, such person shall be fined . . . and imprisoned not less than fifteen years . . . .[12]

The statute defines "serious drug offense," "violent felony," and "conviction," in subsections (2)(A) through (C), respectively[13]:

> (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment of such term if committed by an adult, that—
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> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
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> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and
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> (C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.[14]

The phrase, "otherwise involves conduct that presents a serious potential risk of physical injury to another," is referred to as the "residual provision" of the ACCA[15] and it is the source of frequent litigation, and the topic of several Supreme Court opinions.[16]

In *Taylor v. United States*,[17] the Supreme Court defined the generic definition of "burglary" under the ACCA as an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[18] When a state statute defines burglary more broadly than this generic definition, a court can look to the charging document and other records to determine if the necessary *Taylor* elements were satisfied.[19]

B. United States Sentencing Guidelines: Crimes of Violence

Three years after the passage of the ACCA, federal sentencing guidelines created a structure for increasing base offense levels[20] accord-

12. Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) (2006).
13. § 924(e)(2)(A)–(C).
14. § 924(e)(2)(B)–(C).
15. *E.g.*, United States v. Martinez, 602 F.3d 1166, 1168–69 (10th Cir. 2010).
16. *E.g.*, Johnson v. United States, 130 S. Ct. 1265 (2010); Chambers v. United States, 129 S. Ct. 687 (2009); Begay v. United States, 553 U.S. 137 (2008); James v. United States, 550 U.S. 192 (2007); Shepard v. United States, 544 U.S. 13 (2005).
17. 495 U.S. 575 (1990).
18. *Id.* at 599.
19. *Id.* at 602.
20. The Introductory Commentary to chapter four of the USSG states that a defendant with prior criminal history is more culpable than a first time offender, and as such, deserves greater punishment. U.S. SENTENCING GUIDELINES MANUAL ch. 4, pt. A, introductory cmt. (2010). In addition, base offense levels can be increased or decreased based on the adjustment categories enumerated in chapter three and within individual offense guidelines in chapter two. *Id.* ch. 3; *see, e.g.*,*id* § 2A1.2.

ing to previous convictions for "crimes of violence" or a "controlled substance offense."[21] The Application Notes for the USSG cross-reference section 4B1.2(a) for the definition of a crime of violence. Section 4B1.2(a) is strikingly similar to the ACCA definition of crime of violence, and in fact, the biggest difference is the ACCA's enumerated felony of "burglary," versus "burglary of a dwelling" in the USSG.[22] The definition reads:

> The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that—
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> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
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> (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[23]

Similar to the ACCA, the "otherwise involves" phrase of the USSG is referred to as the residual clause.[24] As to convictions, the USSG disallows juvenile adjudications as predicate offenses.[25] A crime committed by a person under eighteen does not qualify as a predicate offense unless "it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted."[26]

A key issue of contention among the circuits is whether the ACCA enumerated offense of "burglary" and the USSG enumerated offense of "burglary of a dwelling" are limited to immutable, physical structures. *Taylor*'s general definition of "burglary" is specifically limited to "build-

21. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1.

22. *Compare* 18 U.S.C. § 924(e)(2)(B) (2006), *with* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a). Interestingly, the USSG also provides for increasing base offense levels if the defendant had been deported after "a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; [or] (iv) a child pornography offense." U.S. SENTENCING GUIDELINES MANUAL §2L1.2(b)(1)(A). Not only does the deportation section provide more enumerated offenses for a level increase, but it also lists twelve enumerated offenses that constitute a crime of violence, as opposed to the four for persons who are not subject to deportation. § 2L1.2 cmt. n.1(B)(iii) (enumerated crimes are: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling). This difference is at issue in the Tenth Circuit case of *United States v. Rivera-Oros*, 590 F.3d 1123 (10th Cir. 2009).

23. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a).

24. *E.g.*, United States v. Wise, 597 F.3d 1141, 1144 (10th Cir. 2010).

25. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1 cmt. n.1. A predicate offense in the context of a discussion about the ACCA and USSG is a prior conviction that qualifies as a "violent felony" or "crime of violence" and thus produces a sentencing enhancement under the Act or the Guidelines, or both.

26. *Id.* Thus, in the state of Colorado, a juvenile convicted of a crime in adult criminal court under the direct file statute, COLO. REV. STAT. § 19-2-517 (2010), would likely be subject to future sentencing enhancements under the USSG.

ing[s] or structure[s],"[27] and specifies that state statutes including automobiles, vending machines, and tents as structures are too broad.[28] In interpreting "burglary of a dwelling," the Tenth Circuit holds that conduct constituting such a crime is a subtype of burglary, and therefore, requires a separate general definition.[29] The Tenth Circuit does not limit the *Taylor* definition to buildings or structures used as dwellings, but defines "burglary of a dwelling" as burglary of "any enclosed space that is used or intended for use as a human habitation."[30] The Ninth Circuit disagrees and applies the *Taylor* definition, limiting the definition of dwelling to buildings and structures not including automobiles, vending machines, and tents.[31] The Ninth Circuit concludes that Washington residential burglary is beyond the scope of a "crime of violence" because the statutory definition of "dwelling" includes places that are not structures.[32]

II. THE CASE LAW

When interpreting crimes of violence and violent felonies, the circuit courts deal with several preliminary issues that are noted here to provide background for discussion of the following opinions. First, whether a prior offense is a crime of violence or a violent felony is a question of law that is reviewed *de novo* by the appellate circuits.[33]

Second, because of the similar language in the definitions of "crime of violence" and "violent felony," the Tenth Circuit and other courts generally look to their own precedent for categorizing a crime as a violent felony under the ACCA when dealing with the same crime under the USSG, and vice versa.[34]

Finally, when deciding whether a conviction for an enumerated felony in a given state is a conviction for the offense as intended by Congress or the Sentencing Commission, courts typically use a categorical

27. Taylor v. United States, 495 U.S. 575, 599 (1990).
28. *See id.* at 602.
29. United States v. Rivera-Oros, 590 F.3d 1123, 1129 (10th Cir. 2009).
30. *Id.* at 1132 (internal quotation marks omitted).
31. *See* United States v. Wenner, 351 F.3d 969, 972 (9th Cir. 2003).
32. *Id.* at 972–73.
33. *E.g.*, United States v. McConnell, 605 F.3d 822, 824 (10th Cir. 2010); United States v. Martinez, 602 F.3d 1166, 1168 (10th Cir. 2010); *Rivera-Oros*, 590 F.3d at 1125.
34. *E.g.*, *Martinez*, 602 F.3d at 1173 ("This language is very similar to the ACCA language defining the term *violent felony*. And we have looked to interpretations of the ACCA to guide our reading of § 4B1.2(a)."); United States v. Wise, 597 F.3d 1141, 1145 (10th Cir. 2010) ("The residual clause of the ACCA is worded almost identically to that of § 4B1.2(a), and we have held that in interpreting 'crime of violence' under § 4B1.2, we may look for guidance to cases construing the ACCA's parallel provision."); United States v. Tyler, 580 F.3d 722, 724 n.3 (8th Cir. 2009) ("Although the *Gordon* court was analyzing whether an offense constituted a 'violent felony' under the Armed Career Criminal Act, we employ the same test to decide whether and offense constitutes a 'crime of violence' under the Sentencing Guidelines because the definitions of 'violent felony' and 'crime of violence' are virtually identical.").

approach to analyze the state's criminal statute.[35] This categorical approach requires that courts look at the text of the statute to make its determination and not consider the underlying facts of the defendant's case.[36] However, in instances where the offense could have been committed in a number of ways or where the offense includes both conduct that falls under the ACCA or USSG and conduct that does not, courts will look to the charging documents, plea agreements, and other court records to see with what specific crime the defendant was charged.[37] Courts do not consider the specific conduct of the defendant in this modified approach, but rather, consider the record to determine with which subsection of the statute the defendant was charged, and thus, which subsection the court should examine on its face.[38] This paradigm is called the modified categorical approach.[39]

A. Tenth Circuit Survey

The cases discussed below are seven of the most recent Tenth Circuit cases regarding the application of the ACCA and the USSG.

1. *United States v. Strahl*[40]

In 1988, Mr. Strahl pled guilty to possession of firearms after being convicted of a felony. Accordingly, the court then considered his 1968 California conviction for burglary, his 1975 Utah conviction for attempted burglary, and his 1979 Utah conviction for burglary as predicate offenses and increased his sentence from 5 years to 15 years, as required under the ACCA at the time.[41] The defendant appealed his enhanced sentence, arguing that California's definition of burglary is outside the generic definition of burglary, and attempted burglary is not a predicate offense under the ACCA.[42]

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35. *E.g.*, *Rivera-Oros*, 590 F.3d at 1127.

36. *Id.* ("To determine whether a previous conviction satisfies the generic meaning of the offense, ordinarily we apply 'a formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.'" (quoting Taylor v. United States, 495 U.S. 575, 600 (1990))). This categorical approach is similar to the approach taken by courts in deciding if a felony was "inherently dangerous" under the Felony Murder Rule. In cases where the Felony Murder Rule has been applied to a defendant who did not commit one of the enumerated felonies (burglary, arson, robbery, rape, or kidnapping), the court views the felony statute in the abstract (language only) and does not consider the underlying facts of the case at hand. If the felony *could* be completed in a safe manner, then, similar to when a crime falls outside of a generic definition of an enumerated offense, the Felony Murder Rule (or the ACCA or USSG), does not apply. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 526–27 (5th ed. 2009).

37. *E.g.*, *Wise*, 597 F.3d at 1144 (The modified approach "look[s] to the statutory elements, the defendant's charging documents, plea agreement and colloquy (if any), and uncontested facts found by the district judge to determine whether the particular defendant's conduct violated the portion of the statute that is a crime of violence").

38. *McConnell*, 605 F.3d at 825.

39. *Id.*; *see also Wise*, 597 F.3d at 1144.

40. 958 F.2d 980 (10th Cir. 1992).

41. *Id.* at 982. At the time Mr. Strahl pled guilty to a felon in possession of a firearm charge, the sentence was five years imprisonment. *Id.*

42. *Strahl*, 958 F.2d at 982–83.

The *Strahl* court found that the district court erred in considering both the California and Utah convictions.[43] The court found the California conviction not to be a "violent felony" because the California definition of burglary is outside the generic definition of burglary given by the Supreme Court.[44] In *Taylor*, the Supreme Court defined burglary under the ACCA as an "unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime."[45]

Furthermore, when a state defines burglary more broadly by eliminating the requirement of unlawful entry or including automobiles and vending machines as structures, the court may look to jury instructions and indictment information to determine if the necessary elements of burglary were charged.[46] The *Strahl* court references California case law to show that its definition of burglary is a non-generic definition because it does not require unlawful entry and it includes places other than buildings and structures.[47] Moreover, in reviewing the charging document as per a modified categorical approach, the court found that Strahl's entry into a store with intent to commit a felony or theft did not satisfy the *Taylor* definition because he was not charged with unlawful entry of the store.[48] Therefore, because Strahl's conduct did not fall within the *Taylor* definition of burglary, his prior conviction did not constitute a predicate offense.

As to the issue of attempt, the Tenth Circuit decided that the defendant's attempted burglary conviction was not a predicate offense because Utah's definition of attempt includes attenuated conduct that does not present a "serious potential risk of physical injury to another."[49] After reviewing the legislative history of the ACCA, the court found that Congress included burglary as an enumerated offense primarily because it is a crime that is perpetrated by many repeat offenders and because it poses the serious risk of violent confrontation with investigating officers or occupants of the building.[50] The court noted that a defendant in Utah could be convicted of attempted burglary based on duplicating a key, surveilling the targeted building, or obtaining floor plans, none of which create a "high risk of violent confrontation inherent in a completed burglary."[51] Thus, a conviction for attempted burglary under the Utah statute is not a predicate offense under the ACCA's residual clause.[52]

43. *Id.* at 984, 986.
44. *Id.* at 983–84.
45. Taylor v. United States, 495 U.S. 575, 599 (1990).
46. *See Strahl*, 958 F.2d at 983–84 (quoting *Taylor*, 495 U.S. at 602). This is an example of a modified categorical approach.
47. *Strahl*, 958 F.2d at 983.
48. *Id.* at 984.
49. *Id.* at 986.
50. *Id.* at 985.
51. *Id.* at 986.
52. *Id.*

2. *United States v. Permenter*,[53] *United States v. Fell*,[54] & *United States v. Martinez*[55]

The *Permenter* court used the *Strahl* analysis to reverse an enhanced ACCA sentence based on an Oklahoma attempted burglary charge.[56] The court found that because the Oklahoma attempt statute provided that "any act" directed toward the completion of the substantive offense constituted attempt, it was not a violent felony.[57] The court reasoned that a defendant's conduct would not pose a serious potential risk to others.[58]

The Tenth Circuit reconsidered its inchoate offense analysis in *Fell* and *Martinez* in light of the Supreme Court decision in *James v. United States*.[59] Contrary to the other cases in this section, *James* found attempted burglary to be a violent felony because Florida case law had limited the definition of attempted burglary to a significant step toward entry of a building or structure.[60] This narrowed definition reflected the main risk of burglary: violent confrontation with the building's occupants or law enforcement.[61]

In its opinion, the *James* Court held that courts should only look at the elements of the predicate inchoate offense to determine whether it presents a serious potential risk of injury to another, not at the elements of the underlying substantive offense.[62] The Tenth Circuit in *Fell* stated that, by holding that only elements of the inchoate crimes should be considered, *James* rejected the Circuit's approach in *Strahl* and *Permenter*.[63]

The Tenth Circuit first applied the *James* methodology in *Fell*. The *Fell* court determined that conspiracy to commit second-degree burglary in Colorado is not a violent felony under the ACCA because—in analyzing the statutory elements of conspiracy rather than second-degree burglary—the court held that, in Colorado, conspiracy does not require an act directed toward entry of a building, and therefore, there is no potential risk of serious injury to another.[64]

53. 969 F.2d 911 (10th Cir. 1992).
54. 511 F.3d 1035 (10th Cir. 2007).
55. 602 F.3d 1166 (10th Cir. 2010).
56. *Permenter*, 969 F.2d at 915.
57. *Id.* at 913.
58. *Id.*
59. 550 U.S. 192, 202–09 (2007) (finding Florida attempted burglary a violent felony under the ACCA because Florida law defined attempted burglary as a significant step towards entry of the building or structure, and therefore did not criminalize attenuated conduct. The Florida definition also reflected the main risk of burglary—violent confrontation).
60. *Id.* at 202, 209.
61. *Id.* at 203.
62. *Id.* at 208.
63. *Fell*, 511 F.3d at 1039–40.
64. *Id.* at 1041–43.

When the inchoate issue was again considered in *Martinez*, the Tenth Circuit—employing the reasoning in *James*—focused on the parties' arguments as to whether Arizona law had limited the definition of attempted burglary to a significant step towards entry into a building as the Florida courts had done in *James*.[65] The Tenth Circuit was not persuaded in *Martinez* that Arizona attempt law was narrowed to exclude preparatory conduct; the Tenth Circuit found that the Arizona Supreme Court has never used the "substantial step test," and even if that test had been adopted, a substantial step towards the completion of a burglary can still include the attenuated conduct unaddressed by the *James* court and at issue in the *Strahl* progeny.[66]

In line with the cases proceeding from *Strahl*, the Tenth Circuit found that "[i]f one can commit the offense of attempted burglary in many ways without an act directed toward entry of the building, the risk of physical injury to another is too speculative to satisfy the residual provision of [the ACCA]."[67] Once again, only looking at the elements of the inchoate offense, the Circuit concludes that Arizona has not similarly limited its attempted burglary definition because, like *Strahl* and *Permenter*, attenuated conduct such as "casing" a building qualifies as an attempted burglary.[68] Thus, Martinez's Arizona attempt conviction was not a predicate offense under the ACCA.[69]

Martinez, however, had a second holding. On the basis of his Arizona attempted burglary conviction, the defendant challenged both his sentencing enhancement under the ACCA and his increased base offense level under the USSG.[70] In a split holding, the Tenth Circuit held that while attempted burglary was not a violent felony in Arizona, it is a crime of violence under the USSG.[71] To interpret Sentencing Guideline language, the court looked to the Sentencing Commission's commentary, which "is binding and authoritative unless it violates the Constitution or a federal statute, or is inconsistent with . . . that guideline."[72]

The commentary to section 4B1.2—the section defining crimes of violence—states that crimes of violence include their inchoate counterparts.[73] The court goes further to hypothesize that the Sentencing Commission included inchoate offenses because of empirical evidence showing that attempt crimes often pose a similar risk of injury as completed

65. United States v. Martinez, 602 F.3d 1166, 1170–71 (10th Cir. 2010).
66. *Id.* at 1172.
67. *Id.* at 1170.
68. *Id.* at 1172–73.
69. *Id.* at 1173.
70. *Id.* at 1168.
71. *Id.* at 1173, 1175.
72. *Id.* at 1173–74.
73. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 cmt. n.1. (2010) ("'Crime of violence' . . . include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses.").

offenses.[74] Therefore, the court found that it "cannot invalidate an application note merely because our view of empirical data differs from that of the Sentencing Commission" and found that attempted burglary was a crime of violence under the USSG.[75]

3. *United States v. Rivera-Oros*[76]

In *Rivera-Oros*, the Tenth Circuit addressed the enumerated felony of "burglary of a dwelling" under the USSG definition of crime of violence.[77] The defendant was convicted of second-degree burglary in Arizona, which is defined as "entering or remaining unlawfully in or on a residential structure with the intent to commit any theft or any felony therein."[78] Mr. Rivera-Oros unlawfully entered the home of his girlfriend's mother and was found on the premises by police; the mother told police that jewelry was missing from her home.[79] On appeal, he challenged the sentencing enhancement for this conviction on the basis that it was improperly characterized as "burglary of a dwelling" under USSG section 2L1.2(b).[80]

Unlike *Strahl*, the *Rivera-Oros* court did not use the *Taylor* definition of generic burglary because *Taylor* addressed the enumerated felony of "burglary" under the ACCA, and the definition at issue here was "burglary of a dwelling" under the USSG.[81]

While the courts generally use precedent analyzing the ACCA to inform decisions regarding interpretation of the USSG,[82] and vice versa, the Tenth Circuit explicitly refused to do so in *Rivera-Oros* because the ACCA enumerates "burglary" while the USSG enumerates "burglary of a dwelling"; in deciding if a previous conviction is a crime of violence, the generic meaning of "burglary of a dwelling" must be used, not "bur-

74. *Martinez*, 602 F.3d at 1174–75 (quoting James v. United States, 550 U.S. 192, 206 (2007)).

75. *Martinez*, 602 F.3d at 1175. It is this kind of disparate result that leads some authors to conclude that reforms are desperately needed in the ACCA. Levine, *supra* note 1, at 548–66. Levine argues that because the aims of the both the ACCA and USSG are similar, in fact, almost identical, the ACCA should be reformed to reflect certain aspects of the USSG. *Id.* at 549–50. He puts forth that the ACCA has not been amended in over twenty years while the USSG is frequently amended to take into account trends in recidivism and the motivation and controls of criminal behavior. *Id.* at 550. Levine specifically advocates for the ACCA to conform to the USSG in temporal qualities (i.e. if there is more than fifteen years separating the instant offense and a prior felony conviction that conviction should not count as a predicate offense, and juvenile offenses should not count as predicate offenses) and the scope of predicate offenses (i.e. change "burglary" to "burglary of a dwelling" and escape qualifies only if the conduct expressly charged, by its nature, presented a potential serious risk of physical injury). *Id.* at 551–66. Interestingly, these changes could eliminate the circuit splits outlined in this article.

76. 590 F.3d 1123 (10th Cir. 2009).

77. *Id.* at 1126.

78. *Id.* at 1133 (quoting ARIZ. REV. STAT. ANN. § 13-1507(A) (2010)).

79. *Rivera-Oros*, 590 F.3d at 1125 n.1.

80. *Id.* at 1124–25.

81. *Id.* at 1128.

82. *See* United States v. McConnell, 605 F.3d 822, 825 (10th Cir. 2010); s*ee also* United States v. Wise, 597 F.3d 1141, 1144 (10th Cir. 2010).

glary."[83] Furthermore, the court noted that the defendant was sentenced under section 2L1.2(b), which defines crime of violence differently than the ACCA because of the deportation element.[84]

To form the generic definition of burglary of a dwelling, the court looked to legislative history and the Sentencing Commission's heightened concern for the physical and psychological harms associated with residential burglaries; the historical recognition of those harms date back to Blackstone, and the common understanding of the word "dwelling."[85] The court defined dwelling under section 2L1.2 as "any 'enclosed space that is used or intended for use as a human habitation,'"[86] and noted that its conclusion is in line with the Fifth Circuit in *United States v. Murillo-Lopez*.[87]

The court next considered whether, using the categorical approach, the statute under which the defendant was convicted corresponded to the generic definition.[88] To find that a state statute criminalizes activity outside the generic definition of an enumerated offense "requires a *realistic probability*, not a theoretical possibility, that the state would apply its statute to conduct that falls outside the generic definition of a crime."[89] Arizona case law considers the character and use of a structure in determining if it is a dwelling.[90] Under this analysis, a gift shop in a hotel does not qualify as a dwelling, but a guest room in that same hotel would, in fact, qualify.[91] Thus, the term "residential structure" in the statute in question substantially conformed to the generic definition of dwelling and the *Rivera-Oros* court affirmed the defendant's enhanced sentence.[92]

4. *United States v. Wise*[93] & *United States v. McConnell*[94]

Wise and *McConnell* are concerned with the characterization of failure to stop for, or fleeing from a police officer as a crime of violence under the residual clause of USSG section 4B1.2(a).[95] Both cases were decided within the past year and both considered the characterization in light of the Supreme Court's holding in *Chambers v. United States*[96] that escape crimes are not categorically violent felonies under the ACCA,[97] a

83. *Rivera-Oros*, 590 F.3d at 1128–29.
84. *Id.* at 1129 n.5; *see supra* text accompanying note 21.
85. *Rivera-Oros*, 590 F.3d at 1132.
86. *Id.* (quoting BLACK'S LAW DICTIONARY 582 (9th ed. 2009)).
87. *Rivera-Oros*, 590 F.3d at 1132 (citing United States v. Murillo-Lopez, 444 F.3d 337 (5th Cir. 2006)).
88. *Rivera-Oros*, 590 F.3d at 1126–27.
89. *Id.* at 1133 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).
90. *Rivera-Oros*, 590 F.3d at 1133–34.
91. *Id.* at 1133.
92. *Id.* at 1134.
93. 597 F.3d 1141 (10th Cir. 2010).
94. 605 F.3d 822 (10th Cir. 2010).
95. *Id.* at 823; *Wise*, 597 F.3d at 1142.
96. 129 S. Ct. 687 (2009).
97. *Id.* at 692–93.

holding contrary to Tenth Circuit precedent.[98] Furthermore, both *Wise* and *McConnell* use the test promulgated by the Supreme Court in *Begay v. United States*,[99] which declared DUIs are not predicate offenses[100] to determine whether fleeing falls into the residual clause of USSG section 4B1.2(a).[101] The only differences in analysis for these two cases are the text of the state statutes in question: Utah in *Wise* and Kansas in *McConnell*.[102]

The Tenth Circuit Court begins its analysis in *Wise* and *McConnell* by applying the modified categorical approach[103] to the fleeing statutes to determine if they qualify as a crime of violence.[104] In *Begay*, the Supreme Court elaborated upon the method of determining if an offense is a crime of violence under the residual clauses. The *Begay* test requires not only that the offense present a serious potential risk of physical injury to another, but it must also be "roughly similar, in kind as well as degree of risk posed" to the enumerated offenses.[105] A crime is "roughly similar" to an enumerated offense if it "typically involve[s] purposeful, 'violent,' and 'aggressive' conduct."[106]

The next step the *Wise* and *McConnell* courts took in their analysis was to recount prior Tenth Circuit fleeing precedent.[107] In *United States v. West*[108]—where a defendant fled a traffic stop and accelerated through city streets, disregarding traffic signals and ultimately losing control of his vehicle—the Tenth Circuit applied the *Begay* test to the Utah fleeing statute, and found that both subsections constitute a violent felony under the ACCA.[109] The court analogized the conduct of fleeing to an escape offense because both involve conduct that greatly increases the risk of violent confrontation with law enforcement and third parties.[110] The Utah fleeing statute at issue in *West* was the same as the statute at issue in *Wise*, and defines failure to stop at a signal of a police officer as "operat[ing] the vehicle in willful or wanton disregard of the signal so as to interfere with or endanger the operation of any vehicle or person; or at-

98. *McConnell*, 605 F.3d at 828; *Wise*, 597 F.3d at 1145.
99. 553 U.S. 137 (2008).
100. *Id.* at 148.
101. *McConnell*, 605 F.3d at 826–27; *Wise*, 597 F.3d at 1144–45.
102. *McConnell*, 605 F.3d at 825–26; *Wise*, 597 F.3d at 1143–44.
103. The modified approach was used in these cases because both statutes at issue had multiple subsections that could present different "potential risk[s] of physical injury to another," U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2010), and therefore the courts must determine with which subsection the defendants were charged, *McConnell*, 605 F.3d at 824–29; *Wise*, 597 F.3d at 1143–47.
104. *McConnell*, 605 F.3d at 825–26; *Wise*, 597 F.3d at 1144.
105. Begay v. United States, 553 U.S. 137, 143 (2008).
106. *Id.* at 143–45.
107. *McConnell*, 605 F.3d at 827–30 (discussing United States v. West, 550 F.3d 952 (10th Cir. 2008)); *Wise*, 597 F.3d at 1145–48 (also discussing the *West* opinion).
108. 550 F.3d 952 (10th Cir. 2008).
109. *Id.* at 960–65.
110. *Id.* at 964–65.

tempt to flee or elude a peace officer by vehicle or other means."[111] The question *Wise* posed was: Is *West* good law after the Supreme Court held that not all escape crimes are violent felonies?[112] In other words, does *Chambers* implicitly overrule *West*'s reliance on the Tenth Circuit precedent that categorically defined escape as a violent crime under the USSG and ACCA?[113] In response to these questions, both *Wise* and *McConnell* determined that *West* remains good law because the Supreme Court's holding in *Chambers* is narrow, pertaining only to escape crimes involving inaction and no danger to third parties.[114]

Because the Utah statute requires deliberate action by the defendant (willful or wanton disregard), the violation must necessarily be committed in the presence of a police officer (fleeing or eluding a police officer), the violation is likely to endanger third parties, and the violation poses a threat of direct confrontation between the police officer and the defendant(s), there is an increased risk of serious potential injury.[115]

Similarly, the Kansas stautory subsection under which McConnell was charged requires the conduct to be willful and occur in the presence of a police officer.[116] In addition, McConnell's conviction included the element of a car accident or damage to property, a further risk of serious physical injury.[117] The *McConnell* court also notes that there is a circuit split on this issue, but the Tenth Circuit's findings are in accord with the majority of circuits.[118]

5. *United States v. Silva*[119]

The *Silva* case dealt with two separate crimes and their classification as a violent felony under the ACCA. The Tenth Circuit first addressed whether burglary of a shed under New Mexico law is a violent felony.[120] Second, the court turned to whether apprehension causing aggravated assault under New Mexico law is a violent felony.[121]

111. *Id.* at 961.
112. Chambers v. United States, 129 S. Ct. 687, 689 (2009).
113. United States v. McConnell, 605 F.3d 822, 828 (10th Cir. 2010) (quoting United States v. Springfield, 196 F.3d 1180, 1185 (10th Cir. 1999), for the proposition that all escape crimes are violent crimes under the ACCA and USSG).
114. *McConnell*, 605 F.3d at 829; United States v. Wise, 597 F.3d 1141, 1146 (10th Cir. 2010).
115. *Wise*, 597 F.3d at 1146–47.
116. *McConnell*, 605 F.3d at 828–29. McConnell's charging document stated that he willfully failed to bring his vehicle to a stop at a police officer's command and while fleeing, he was involved in a motor vehicle accident or intentionally caused damage to property. *Id.* at 826.
117. *Id.* at 829.
118. *Id.* at 830 (the Tenth Circuit is in accord with the Fifth, Sixth, and Seventh Circuits, but is in disagreement with the Eighth and Eleventh Circuits).
119. 608 F.3d 663 (10th Cir. 2010).
120. *Id.* at 665–69.
121. *Id.* at 669–75.

a. Burglary of "a Structure, a Shed"[122]

In its analysis, the *Silva* court employed a modified categorical approach because New Mexico's statute—as compared to the *Taylor* definition of burglary[123]—provides for a non-generic definition of burglary.[124] The defendant argued that the shed he burgled did not meet the "building or other structure" element of the *Taylor* definition.[125] Using precedent from the Ninth Circuit, Silva argued that "building or structure" means only those spaces that are permanent and designed for human habitation or business.[126]

The Tenth Circuit rejected Silva's structural permanency argument by finding fault with the Ninth Circuit's reasoning and using Supreme Court precedent to find a broader definition of "building or other structure" as used in *Taylor*.[127] Since the *Taylor* decision, the United States Supreme Court has found that the "building or other structure" component is broader than the Ninth Circuit's requirement of permanency.[128] In *Shepard v. United States*,[129] the Court found that the ACCA makes burglary a violent felony only if committed in a building or enclosed space.[130] In *Silva*, the Tenth Circuit found the Ninth Circuit's analysis, and the defendant's arguments incomplete because they did not discuss *Shepard*.[131] Furthermore, the Tenth Circuit's own precedent in *Rivera-Oros* and *United States v. Cummings*[132] rejected such a narrow reading of "building or other structure" and declined the Ninth Circuit's invitation to find the "or other structure" phrase superfluous.[133] Therefore, the court concluded that the defendant's guilty plea to burglary of "a structure, a shed" under New Mexico law was a violent felony.[134]

122. *Id.* at 666.

123. "[A]n unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 667 (quoting Taylor v. United States, 495 U.S. 575, 598 (1990)).

124. *Silva*, 608 F.3d at 665–66.

125. *Id.* at 666.

126. *Id.* The court notes that the defendant presented evidence that the shed had been moved to various points in the victim's yard. *Id.* at 679.

127. *Id.* at 668.

128. *Compare* Shepard v. United States, 544 U.S. 13, 15–16 (2005), *with* United States v. Grisel, 488 F.3d 844, 848 (9th Cir. 2007) (en banc) ("[A] structure designed for occupancy that is intended for use in one place.").

129. 544 U.S. 13 (2005).

130. *Id.* at 15–16.

131. *Silva*, 608 F.3d at 668.

132. 531 F.3d 1232, 1235 (10th Cir. 2008) (rejecting the Ninth Circuit's holding that found the phrase "or other structure" superfluous because the generic definition of burglary broadly construes the settings for burglary and does not include only buildings).

133. These cases interpret *Grisel* as finding the "or other structure" clause of the *Taylor* definition superfluous. United States v. Rivera-Oros, 590 F.3d 1123, 1128 n.4 (10th Cir. 2009); *Cummings*, 531 F.3d at 1235.

134. *Silva*, 608 F.3d at 669.

b. Apprehension Causing Assault

The second charge used for Silva's ACCA mandatory minimum sentence was a conviction for aggravated assault; the district court determined that this conviction had "as an element the use, attempted use, or threatened use of physical force against the person of another."[135] Once again, the Tenth Circuit employed a categorical approach, looking only to the statutory text.

Recently, in *Johnson v. United States*,[136] the Supreme Court found that "physical force" under the ACCA means "*violent* force—that is, force capable of causing physical pain or injury to another person."[137] Under New Mexico statute, assault is defined as "any unlawful act, threat or menacing conduct which causes another person to reasonably believe that he is in danger of receiving an immediate battery."[138] Aggravated assault adds the element of a deadly weapon.[139]

The *mens rea* for aggravated assault is general criminal intent, which the New Mexico Supreme Court has defined as "conscious wrongdoing or purposeful doing of an act the law declares to be a crime."[140] Thus, the Tenth Circuit framed the issue before them as "whether 'apprehension causing' aggravated assault—which requires proof that a defendant purposefully threatened or engaged in menacing conduct toward a victim, with a weapon 'capable of producing death or great bodily harm'—is a violent felony under the ACCA."[141]

The defendant argued that because apprehension causing aggravated assault "does not require proof of 'any intent with respect to the perceived threat [the defendant] has raised in the mind of the victim,' . . . [it] 'does not have as an element the intentional use, attempted use or threatened use of physical force.'"[142] The Tenth Circuit rejected this argument because the defendant's plea of aggravated assault meant that he pled to a general intent crime whereby he consciously or purposefully committed an illegal act.[143] In contrast to the dissent, the majority argued that apprehension causing aggravated assault required more than a "display of dexterity in handling a weapon; [rather] the crime requires proof that a defendant purposefully threatened or engaged in menacing conduct [with a deadly weapon] *toward* a victim."[144]

135. *Id.* (quoting 18 U.S.C. § 924(e)(2)(B)(i) (2006)).
136. 130 S. Ct. 1265 (2010).
137. *Id.* at 1271.
138. *Silva*, 608 F.3d at 669 (quoting N.M. STAT. ANN. § 30-3-1 (2006)).
139. *Silva*, 608 F.3d at 669 (quoting § 30-3-2(A)).
140. *Silva*, 608 F.3d at 670 (quoting State v. Campos, 921 P.2d 1266, 1277 n.5 (N.M. 1996)).
141. *Silva*, 608 F.3d at 670.
142. *Id.* at 672 (quoting United States v. Zuniga-Soto, 527 F.3d 1110, 1124 (10th Cir. 2008)) (first alteration in original).
143. *Id.* at 673.
144. *Id.* at 674.

c. Dissent in *Silva*

The dissent concurred with the majority as to the defendant's burglary charge, but disagreed with the majority's *reasoning* regarding the apprehension causing assault.[145] Judge Hartz's interpretation of New Mexico law was that one can be guilty of assault "if one causes the victim to reasonably believe that he or she is about to be battered, even if one does not intend to create that belief."[146] The dissent's example was a person who purposefully shows his dexterity with a weapon without the intention of causing fear or apprehension to any bystanders.[147]

This perspective is contrary to Supreme Court and Tenth Circuit precedents that hold an offense does not have as "an element the threatened use of physical force against the person of another" unless it also has as an element that the offender intend that the victim feel threatened.[148] Judge Hartz reasoned that the intent that is important is the intent to use force; one does not accidentally use physical force against something.[149]

Furthermore, Judge Hartz argued that Tenth Circuit precedent states that mere recklessness does not satisfy the physical force requirement. In *United States v. Zuniga-Soto*,[150] the Tenth Circuit held that because the defendant could have been convicted of recklessly assaulting a public servant, the use of physical force was not an element of the crime.[151] Carrying this precedent to the next logical step, Judge Hartz's dissent concluded that the threatened use of physical force requires an intentional threat just as the use of physical force requires the intentional use of force.[152] Thus, because Silva could have been convicted of aggravated assault without the element of an intentional threat, the dissent concluded that his conviction is not a violent felony under the ACCA, and therefore, the mandatory minimum sentence required by that Act does not apply.[153]

145. *Id.* (Hartz, J., dissenting).
146. *Id.* at 675.
147. *Id.*
148. *Id.*
149. *Id.* (citing Leocal v. Ashcroft, 543 U.S. 1, 9 (2004)).
150. 527 F.3d 1110 (10th Cir. 2008).
151. Id. at 1125.
152. *Silva*, 608 F.3d at 676 (Hartz, J., dissenting).
153. *Id.* at 674, 679.

B. Circuit Splits

The below section builds upon the previous case briefs and describes the current legal splits among the circuits regarding crimes of violence and violent felonies.

1. Burglary of a Dwelling

Currently, the circuits are split regarding the application of the *Taylor* definition of generic burglary under the ACCA to the enumerated offense of "burglary of a dwelling" under the USSG.

a. *United States v. Wenner*[154] vs. *Rivera-Oros*

As explained above, much of the *Rivera-Oros* opinion turned on the court's reasoning that although the *Taylor* definition of generic burglary under the ACCA is useful, it is not controlling when defining the USSG enumerated felony of "burglary of a dwelling."[155] The Tenth Circuit made a careful note that while their analysis aligns with an earlier Fifth Circuit case,[156] its approach is the exact opposite of the one taken by the Ninth Circuit in 2003.[157]

In the Ninth Circuit *Wenner* case, Mr. Wenner was convicted under the Washington residential burglary statute, which is defined as "'enter[ing] or remain[ing] unlawfully in a dwelling other than a vehicle' with the intent to commit a crime."[158] Similar to Mr. Rivera-Oros, Mr. Wenner's charging document stated that he "enter[ed] or remain[ed] unlawfully in a dwelling other than a vehicle, the residence of Mike Jewell."[159] In contrast with the Tenth Circuit, the *Wenner* court reasoned that the *Taylor* definition of "burglary" informs the definition of "burglary of a dwelling" under the USSG.[160] "Thus, the most logical and sensible reading of the Guidelines and the reading that is consistent with our cases is to construe 'burglary of a dwelling' as the *Taylor* definition of burglary, with the narrowing qualification that the burglary occur in a dwelling."[161]

The court then considered the face of the Washington statute defining "dwelling" and concluded that because the definition includes a fenced area, a railroad car, or a cargo container, it is broader than *Taylor*,

154. 351 F.3d 969 (9th Cir. 2003).
155. United States v. Rivera-Oros, 590 F.3d 1123, 1128 (10th Cir. 2009).
156. *Id.* at 1132 (analyzing United States v. Murillo-Lopez, 444 F.3d 337 (5th Cir. 2006)).
157. *Rivera-Oros*, 590 F.3d at 1132–33 (analyzing *Wenner*).
158. *Wenner*, 351 F.3d at 972 (quoting WASH. REV. CODE § 9A.52.025(1) (2003)) (alterations in original).
159. *Wenner*, 351 F.3d at 974.
160. *Id.* at 972–73.
161. *Id.* at 973.

which limits burglary to buildings and other structures, and therefore, is not a crime of violence.[162]

Additionally, the Ninth Circuit distinguishes the Third and Eighth Circuit decisions that expansively define dwelling as any enclosed space used or intended for use as a human habitation.[163] Both of these precedents were used in *Rivera-Oros* for support of the court's generic definition of dwelling.[164] The *Wenner* court distinguishes these cases because neither holds that burglary defined as broadly as "residential burglaries" under Washington law would qualify as "burglary of a dwelling" under the USSG; they merely establish that burglary of hotel rooms and shelters used as weekend fishing retreats are crimes of violence.[165]

b. The *Wenner* Dissent

In his dissent, Judge Wallace followed the same reasoning as the Tenth Circuit—that the *Taylor* definition does not apply to the more precise definition of "burglary of a dwelling" under the USSG—and further reasoned that Washington's residential burglary statute falls under the residual clause of the USSG.[166] Therefore, because the *Taylor* definition of burglary does not apply to the more precise offense of "burglary of a dwelling," the court should have determined whether "burglary of fenced areas, railway cars, or cargo containers used for lodging constitutes burglary of a dwelling under the Guidelines."[167] Similar to the Tenth Circuit—and persuaded by the Fifth and Eighth Circuits' decisions—Judge Wallace then created a general definition of "dwelling."[168] The dissent concluded that "dwelling" is any enclosed space, which is used or intended for use as a human habitation; therefore, Washington's statute should not be considered outside the definition of "burglary of a dwelling" under the USSG.[169]

Alternatively, the dissent argued that the defendant's crime of residential burglary falls under the Guideline's residual clause: "conduct that presents a serious potential risk of physical injury to another."[170] Because the classification of a crime as a "crime of violence" is a question of law the court reviews *de novo*, the dissent stated the court has the option of finding this alternative even if it was not raised in the parties' briefs and the district court did not apply the residual clause.[171] Furthermore, the

162. *Id.* (citing § 9A.04.110(5)).
163. *Wenner*, 351 F.3d at 973–74 (distinguishing the holdings in *United States v. McClenton*, 53 F.3d 584, 587 (3d Cir. 1995) and *United States v. Graham*, 982 F.2d 315, 316 (8th Cir. 1992)).
164. United States v. Rivera-Oros, 590 F.3d 1123, 1131–32 (10th Cir. 2009).
165. *Wenner*, 351 F.3d at 973.
166. *Id.* at 977 (Wallace, J., dissenting).
167. *Id.* at 978.
168. *Id.* at 978–79 (citing *McClenton*, 53 F.3d at 587 and *Graham*, 982 F.2d at 316, respectively).
169. *Wenner*, 351 F.3d at 978 (Wallace, J., dissenting).
170. *Id.* at 980 (quoting U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2002)).
171. *Wenner*, 351 F.3d at 980 (Wallace, J., dissenting).

Ninth Circuit's precedent and other sources unanimously concluded that burglarizing a residence is a crime that presents a serious potential risk of injury to another because of the very real possibility of violent confrontation with the owner or with an investigating police officer.[172]

c. Discussion

One of the aims of the USSG is to provide a uniform structure for sentencing. However, when both the Tenth and Ninth Circuits were presented with defendants receiving enhanced sentences for unlawfully entering another's house, the courts followed different methods resulting in different outcomes. The Tenth Circuit defined "burglary of a dwelling" and found the defendant's conduct fit within this newly created generic definition and was consequently a prior conviction for USSG purposes.[173] The Ninth Circuit limited the *Taylor* definition of "burglary" to buildings or structures that are used as dwellings and found the defendant's conduct did not constitute a prior conviction under the USSG because the statutory definition of dwelling was too broad.[174]

The Tenth Circuit appears to have adopted a more thorough and logical legal analysis in *Rivera-Oros* because there is a substantive difference between the USSG and the ACCA in this instance and burglary of a house—the conduct at issue in *Rivera-Oros* and *Wenner*—is the quintessential "burglary of a dwelling" imagined by the Sentencing Commission. Both the *Wenner* and *Rivera-Oros* courts make note of the Sentencing Commission's explicit divergence from the ACCA in the area of burglary,[175] but the *Wenner* court merely mentions the divergence in a footnote and does not address it in its analysis. Furthermore, the *Wenner* court does not consider the text of the guideline in question, or the rationale for the differing language.[176]

Although the Tenth Circuit declines to apply the *Taylor* definition, the circuit does not ignore *Taylor* in its analysis. *Rivera-Oros* is an example of a court applying the *Taylor* methodology in creating a generic definition for the enumerated felony at issue. Thus, *Taylor* is given due deference and the court adheres to its procedure and looks at a wide range of sources to determine the generic definition of an enumerated offense.[177]

In contrast, the *Wenner* court merely uses *Taylor*'s generic definition of a similar, but different, enumerated offense, and applies it *in con-*

172. *Id.* at 981 (relying on United States v. M.C.E., 232 F.3d 1252, 1255 (9th Cir. 2000)).
173. United States v. Rivera-Oros, 590 F.3d 1123, 1132, 1134 (10th Cir. 2009).
174. *Wenner*, 351 F.3d at 972–73, 976.
175. *See Rivera-Oros*, 590 F.3d at 1129; *Wenner*, 351 F.3d at 973 n.2.
176. *But see Rivera-Oros*, 590 F.3d at 1129 ("Our analysis must be attuned to the particular statute or guideline in question.").
177. *See id.* at 1126–27.

junction with Washington's definition of dwelling.[178] In this manner, the court determined that Mr. Wenner's conviction for entering Mr. Jewell's residence falls outside of the enumerated offense and thus is not a crime of violence.[179] Instead of finding a generic definition of "dwelling," the Ninth Circuit used *Taylor*'s limitation to buildings and structures to find Mr. Wenner's conviction of entering or remaining unlawfully in the residence of Mike Jewell outside the scope of burglary of a dwelling.[180]

The Tenth Circuit's approach may mean that the USSG definition of "burglary of a dwelling" encompasses more crimes than the more general ACCA definition of burglary. But, this broader definition emphasizes the increased risk of physical and psychological harm caused by the burglary of one's home, regardless of its architectural form.

In comparison, the Ninth Circuit's approach skips the step of considering what the Sentencing Commission intended by enumerating burglary of a dwelling as opposed to burglary: the physical and psychological harm that befalls victims of a burglary of their living space.[181] Therefore, the Ninth Circuit's approach means that burglarizing a camping tent or motor home, a temporary lodging in Washington, may not be a crime of violence because a tent is not a building or structure under *Taylor*'s burglary definition, and therefore, would not constitute a dwelling.[182]

Furthermore, while the *Wenner* dissent adopted much of the reasoning in *Rivera-Oros*, it did not consider the Supreme Court's ruling that there must be a "*realistic probability*, not a theoretical possibility," that the crime falls outside of the generic definition of an enumerated offense.[183] In *Rivera-Oros*, the Tenth Circuit considered Arizona case law in finding whether the defendant's conviction fell outside the definition of "burglary of a dwelling."[184] Because the state interpreted its statute to necessitate an inquiry into the nature and character of the space burglarized (i.e., was the burgled space a place used for temporary habitation or merely a gift shop in a hotel lobby[185]), the defendant's conviction did not fall outside of the generic definition of "dwelling."[186]

In *Rivera-Oros*, neither the majority nor the dissent made an inquiry into Washington law and whether the state courts consider the "character

178. *Wenner*, 351 F.3d at 973.
179. *Id.* at 976.
180. *Id.* at 972–73, 976.
181. *Rivera-Oros*, 590 F.3d at 1130.
182. *See* Taylor v. United States, 495 U.S. 575, 599 (1990) (citing statutes that were broader than the generic definition because they included places other than buildings, including a Missouri statute that defined burglary as breaking and entering any booth or tent).
183. *Rivera-Oros*, 590 F.3d at 1133 (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).
184. *Rivera-Oros*, 590 F.3d at 1133–34.
185. *Id.* at 1133.
186. *Id.* at 1134.

of the use of the structure actually entered."[187] Because of this missing analysis, even the dissent's reasoning—that closely parallel's the Tenth Circuit's—is problematic. The *Wenner* dissent presented no authority that Washington considers the nature and character of the space when charging a defendant with residential burglary. Thus, under the Ninth Circuit's approach, courts are left with the text of the statute, which defines "dwelling" as any building or structure used for lodging; there is no evidence that, for instance, unlawfully entering shops housed in an apartment building or nursing home would not constitute burglary of a dwelling as the shops are in a building used by a person for lodging or as a residence.

d. Will the Supreme Court Weigh-In?

Because the conflict between the Ninth and Tenth Circuits is one of procedural application of a Supreme Court case, this split will likely be heard by the High Court. The question posed by this conflict is the scope of *Taylor*'s definition and when a court is to engage in the method of defining the "generic, contemporary meaning"[188] of an enumerated offense under the ACCA and USSG. Clarifying these points may help reduce litigation and identify differences between the ACCA and USSG. A Supreme Court decision on the matter would also be particularly helpful in instances where there are more than four enumerated offenses, such as USSG section 2L1.2(b), where crime of violence is defined by twelve enumerated offenses.[189]

2. Fleeing a Police Officer

Analyzing the circuit court decisions regarding the crime of fleeing the police in a motor vehicle leads to unresolved, contradicting issues. Due to a circuit split, either the Eighth Circuit needs to resolve the issue or the Supreme Court should review.

a. *United States v. Tyler*[190] vs. *Wise* and *McConnell*

In *Tyler*, a case involving a defendant who wrecked his vehicle while fleeing the police at excessive speeds and ignoring traffic signals, the Eighth Circuit concluded that the Minnesota "crime of fleeing a peace officer in a motor vehicle" is not a crime of violence under the USSG.[191] Applying the *Begay* test,[192] the court determined that the de-

187. *Id.* at 1133 (quoting State v. Gardella, 751 P.2d 1000, 1002 (Ariz. Ct. App. 1988)).
188. Taylor v. United States, 495 U.S. 575, 598 (1990).
189. U.S. SENTENCING GUIDELINES MANUAL § 2L1.2 cmt. n.1(B)(iii) (2010).
190. 580 F.3d 722 (8th Cir. 2009).
191. *Id.* at 726.
192. *See* Begay v. United States, 553 U.S.137, 1584–86 (2008). The threshold question in determining if the offense falls within the residual clause of the ACCA is whether it presents a serious potential risk of physical injury to another. *Id.* at 1584. Second, the court must determine if the offense is "roughly similar, in kind as well as in degree of risk posed" to the enumerated of-

fendant's conduct—although purposeful—did not typically involve conduct presenting a serious risk of physical injury to another, or conduct that is violent and aggressive.[193] The court concluded that fleeing a police officer does not pose a serious risk of bodily injury because the Minnesota statute does not require high speed or reckless driving.[194] Furthermore, the statute includes a separate subsection that criminalizes the act of fleeing when it causes death or bodily injury, indicating to the *Tyler* court that simply fleeing a police officer is mere disobedience and normally does not rise to the level of posing a serious risk of physical injury.[195]

Similarly, the offense cannot be said to typically involve violent and aggressive conduct. In defining "flee," Minnesota criminalizes conduct that is not violent and aggressive because "flee" includes turning off headlights and taillights and increasing the speed of the vehicle.[196] Such actions do not reveal the propensity of an offender to act violently towards others.[197] Likewise, these actions do not necessarily lead to chase and/or confrontation as the government contends. The statute does not make confrontation an element of the crime, and in fact, requires no "conduct presenting a serious risk of physical injury to another or conduct that is violent and aggressive."[198]

The Eighth Circuit is aware that its reasoning differs from the decisions in the Tenth, Fifth, and Sixth Circuits, but manages to distinguish or disregard each of these opinions. The court distinguishes *West*, and thus the later decisions of *Wise* and *McConnell,* and the Fifth circuit case[199] because the statutes at issue in those cases do not define "flee" so broadly as to include behavior such as increasing speed and extinguishing headlights and taillights.[200] The Sixth Circuit in *United States v. LaCasse*,[201] however, considered a statute similar to the Minnesota statute at issue in *Tyler* and found that the crime was a violent felony under the ACCA.[202] The Eighth Circuit merely states they disagree with the Sixth Circuit and terminates the discussion, with no further elaboration on the ensuing circuit split.[203]

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fenses. *Id.* at 1585. A crime is "roughly similar" if it "typically involve[s] purposeful, violent, and aggressive conduct." *Id.* at 1586 (internal quotation marks omitted).

193. *Tyler*, 580 F.3d at 725.
194. *Id.*
195. *Id.*
196. *Id.*
197. *See id.*
198. *Id.*
199. *Id.* at 726 (referencing United States v. Harrimon, 568 F.3d 531, 537 (5th Cir. 2009)).
200. *Tyler*, 580 F.3d at 726.
201. 567 F.3d 763 (6th Cir. 2009).
202. *Id.* at 765–67.
203. *Tyler*, 580 F.3d at 726.

Expressing profound concern about the majority's decision in *Tyler*, Judge Limbaugh wrote a dissent that critiqued the majority's failure to consider the actual language of the residual clause and its failure to consider the record of the case at issue.[204] First, the dissent accused the majority of misreading the residual clause; Judge Limbaugh argued that the clause calls for a *potential* serious risk of injury as opposed to an actual risk.[205] The potential serious risk is definitely present when a defendant extinguishes headlights or taillights while fleeing an officer; the lack of vehicle lighting means that other drivers and peace officers cannot see the fleeing car, therefore creating the potential serious risk of vehicle accidents.[206]

Furthermore, the dissent argued that the presence of a separate subdivision creating additional penalty for fleeing an officer that results in death or great bodily injury is an argument for classification of the crime as a crime of violence.[207] The separate subdivision in question criminalizes the exact same conduct if death or serious bodily injury occurs; the subdivision does not add extra requirements of reckless driving or confrontation.[208] The dissent reasoned that because the same conduct is more seriously punished in the instance of death or bodily injury, it points to the offense as one that has potential serious risk of injury to another.[209]

The dissent also used the underlying facts of the defendant's conviction to show the typical way the offense occurs and determine the specific elements for which the defendant was charged.[210] The dissent intended to demonstrate that by isolating only one way the offense may be committed—extinguishing headlights or increasing speed—the majority was directly contradicting the Eighth Circuit's holding[211] in *United States v. Gordon*.[212] Tyler was driving at "excessive speeds" while ignoring traffic signals and signs, and lost control of his car, running into a cemetery gate.[213] Furthermore, even if the majority was correct in "cherry-picking"[214] one way the offense can be committed, its reasoning does not hold because the conduct must be coupled with the intent to

204. *See id.* at 727–29 (Limbaugh, J., dissenting). Judge Limbaugh argued that precedent clearly states the court is within its power to use a modified categorical approach. *Id.* at 730.

205. *Id.* at 727.

206. *Id.*

207. *Id.* at 728.

208. *Id.*

209. *Id.* at 727.

210. *Id.* at 727–28.

211. *Id.* at 729.

212. 557 F.3d 623, 625 (8th Cir. 2009) ("[A] statute can be violated in a number of ways, 'we look to the charging papers for the limited purpose of determining the specific elements for which [the defendant] was convicted.'").

213. *Tyler*, 580 F.3d at 728 (Limbaugh, J., dissenting).

214. *Id.* at 729.

elude a police officer,[215] and therefore, increases the potential serious risk for injury to another in the form of a chase or confrontation.[216]

b. Discussion

The Tenth Circuit and the *Tyler* dissent make the more compelling legal and logical argument for several reasons. First, the residual clause of USSG section 4B1.2 reads: "conduct that presents a serious potential risk of physical injury to another."[217] By ignoring the word "potential" in the residual clause, the *Tyler* majority made a crucial mistake because it disregards the firmly held belief by Congress and the courts that certain crimes increase the probability of violent confrontation. Furthermore, the Supreme Court—in the context of a burglary analysis—has stated that "potential risk" expressed congressional intent to "encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty."[218] Some form of burglary has been an enumerated offense in the ACCA and the USSG since their promulgation in the mid-1980s. An examination of legislative history and case law has repeatedly shown the rationale behind enumerating burglary is the potential for violent confrontation with the occupant or investigating officers.[219] Generic burglary, like the Minnesota fleeing statute, does not require confrontation as an element, but it is nevertheless considered conduct that presents a potential serious risk of physical harm because of increased risk of violent confrontation. Simply because the Minnesota statute does not require confrontation does not mean that it is not a potential risk of the proscribed conduct. The majority errs in its reasoning when it looks for conduct that "necessarily . . . present[s] a serious risk of physical injury to another;" rather, the question is whether the *potential* for risk exists.[220]

Second, the Eighth Circuit's analysis of the circuit split is misplaced. Given the opportunity—and following its precedent established in *West*, *Wise*, and *McConnell*—the Tenth Circuit would have likely concluded that fleeing a police officer under the Minnesota statute was a crime of violence for two main reasons: (1) similar to the Eighth Circuit, the Tenth Circuit has justified a modified categorical approach and an examination of the charging documents and plea agreement when there is more than one way in which to commit the offense;[221] and (2) the Tenth Circuit has repeatedly affirmed the notion that statutes criminalizing

215. *Id.*
216. *See id.* at 729–30.
217. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2010).
218. *James*, 550 U.S. at 207–08; *see also* April K. Whitescarver, Chambers v. United States: *Filling the Gaps When Interpreting the Armed Career Criminal Act*, 13 JONES L. REV. 89, 95 (2009).
219. *E.g.*, *James*, 550 U.S. at 209; *Martinez*, 602 F.3d at 1169–70; *Rivera-Oros*, 590 F.3d at 1130.
220. *Tyler*, 580 F.3d at 725.
221. *Wise*, 597 F.3d at 1144.

flight from a police officer are similar to escape in that they create an increased potential for serious injury to others because the crime is committed in the presence of a police officer.[222]

Because the Minnesota statute can be violated by several types of conduct, the Tenth Circuit would have employed a modified categorical approach and looked to the charging documents for the specific violation with which the defendant was charged and would have likely concluded—similar to the *Tyler* dissent—that Mr. Tyler's charging documents indicate the conduct is a crime of violence.[223] Additionally, the Tenth Circuit emphasizes the potential confrontation and presence of third parties in its decisions addressing both fleeing[224] and burglary.[225] The definition of "flee" in the Minnesota statute would have likely concerned the Tenth Circuit, but the potential for the police officer to pursue the driver who extinguishes his headlights and creates the potential for violent confrontation or traffic accidents would have prevailed; the Tenth Circuit, unlike the *Tyler* majority, would have focused on the *potential* aspect of the residual clause because of its precedent[226] emphasizing potential for confrontation during the commission of a burglary.

In the Fifth Circuit case, *United States v. Harrimon*,[227] a modified categorical approach was not employed because the Texas statute did not have multiple subsections and could only be violated in one way.[228] Thus, the charging documents never become became a relevant line of inquiry for the court. Nonetheless, the Fifth Circuit is in line with the other circuits in determining that fleeing a police officer is aggressive and violent in nature because it is a challenge to the officer's authority and typically initiates pursuit, similar to an escape from custody.[229] The definition of "flee" was not at issue in this case.

The only case that agreed with *Tyler*'s assessment that fleeing does not lead to potential serious risk of injury to another came from the Eleventh Circuit, *United States v. Harrison*.[230] Similar to *Tyler*, *Harrison* held that a statute that criminalizes fleeing without the inclusion of a reckless or high-speed element is not the type of career criminal the USSG or the ACCA intended to punish.[231] The court stated that statistics showing the likelihood of physical injury in willful fleeing crimes that do not have the

222. *E.g.*, *id.* at 1146.
223. *See id.* at 1144.
224. *Id.* at 1147.
225. *E.g.*, United States v. Martinez, 602 F.3d 1166, 1169–70 (10th Cir. 2010); United States v. Rivera-Oros, 590 F.3d 1123, 1130 (10th Cir. 2009).
226. *See Martinez*, 602 F.3d at 1169; *Rivera-Oros*, 590 F.3d at 1130.
227. 568 F.3d 531 (5th Cir. 2009).
228. *See id.* at 533 n.2.
229. *Id.* at 534–35.
230. 558 F.3d 1280, 1296 (11th Cir. 2009).
231. *Id.* at 1295–96.

elements of high speed or recklessness would have been helpful and illustrative.[232]

Given these concurrent holdings, why is it, then, that the *Tyler* court did not mention the Eleventh Circuit's reasoning in its analysis? The answer may lie in the fact that the Eleventh Circuit pursued a modified categorical approach, one that was rejected by the court in *Tyler*.[233] Indeed, in *Harrison*, the Eleventh Circuit differentiated between the different subsections to determine with what, exactly, the defendant was charged.[234] The court in *Harrison* noted that the defendant was not charged with the subsection of the statute requiring high speed or reckless driving.[235] As a result, the defendant was found guilty of the less serious conduct of disobeying a peace officer by driving away at a reasonable speed.[236]

Similarly, the majority in *Tyler* misread the *LaCasse* case because the statute at issue was not in fact similar to that in *Tyler*.[237] According to the *Tyler* majority, *LaCasse* analyzed a statute similar to Minnesota's and found that the defendant's conviction constituted a crime of violence.[238] The defendant in *LaCasse* was convicted of third-degree fleeing or eluding, which requires that the fleeing conduct occur in a thirty-five mile per hour zone or that the violation resulted in an accident.[239] The *LaCasse* court used a modified categorical approach to determine the specific crime of which the defendant was convicted.[240] The court concluded that these requirements translated to purposeful and aggressive conduct that had the potential for serious injury to another and was thus a crime of violence, despite the statute's definition of "flee."[241] The definition of "flee" was not addressed by the court, and consequently it did not decide that a defendant convicted of fleeing by extinguishing headlights and taillights was a crime of violence. Therefore, the *Tyler* court incorrectly cited *LaCasse* as a case dealing with a similar definition of "flee."

Finally, the Eighth Circuit has created an intra-circuit split. The *Tyler* opinion was filed in June of 2009 and a decision was rendered in September of 2009.[242] A second Eighth Circuit case addressing a fleeing statute, *United States v. Hudson*,[243] was filed in April of 2009 and a deci-

232. *Id.* at 1295.
233. *Tyler*, 580 F.3d at 724–25.
234. *Harrison*, 558 F.3d at 1284–85.
235. *See id.* at 1290–91.
236. *Id.*
237. *See* United States v. LaCasse, 567 F.3d 763, 765, 767 (2009) (finding that a fleeing offense under Michigan statute is a violent felony).
238. *Id.* at 765.
239. *Id.*
240. *See id.* at 765–66.
241. *Id.* at 766.
242. United States v. Tyler, 580 F.3d 722, 722 (8th Cir. 2009).
243. 577 F.3d 883 (8th Cir. 2009).

sion was rendered in August of 2009.[244] *Hudson* addressed a Missouri statute and found that a conviction for fleeing was a crime of violence.[245] Interestingly, *Tyler* does not discuss *Hudson*. This is especially odd because *Hudson* explicitly found that resisting arrest by fleeing "inevitably invites confrontation,"[246] creating a direct contradiction with the court in *Tyler*.[247]

It is arguable that the Eighth Circuit has not contradicted itself because the statute at issue in *Hudson* expressly stated that resisting arrest or fleeing must be conducted in such a manner that the person fleeing "*creates a substantial risk of serious physical injury or death to any person*."[248] In *Hudson*, the Eighth Circuit did not question the presence of a potential risk of injury because it was an express element of the statute. The question was one of language as opposed to legal substance. Thus, a new question is presented: whether a state can linguistically create a crime of violence or violent felony by merely inserting key phrases from the ACCA or USSG into its statute.

After summarily dispatching the potential injury question, the *Hudson* court found "purposeful conduct" because the defendant knowingly fled a police officer.[249] Additionally the court found "violent and aggressive conduct" because "[r]esisting arrest by fleeing inevitably invites confrontation" and "resisting arrest by fleeing *in a dangerous manner* involves more violent and aggressive conduct."[250] The *Tyler* court would likely respond that there was no indication that the Missouri statute broadly defined "flee," and that by requiring fleeing in a manner physically harmful to others, the definition of "flee" is narrow and can therefore be considered a crime of violence. This is the same way the *Tyler* court distinguished the Tenth and Fifth Circuits and is subject to the same legal and logistical problems discussed above. Furthermore, the *Hudson* court never addressed the definition of "flee" and had no cause to do so.

c. Will the Supreme Court Weigh-In?

The Eighth Circuit *Tyler* case is an anomaly in ACCA and USSG jurisprudence regarding the crime of fleeing the police in a motor vehicle. *Tyler* splits with the Tenth, Fifth, and Sixth Circuits, and in light of *Hudson*, seems to create an intra-circuit split. Because of these splits and considering the Supreme Court's recent attention to recidivist sentencing issues, the Court would likely grant certiorari in order to clarify the usage

244. *Id.* at 883.
245. *Id.* at 886.
246. *Id.*
247. *Tyler*, 580 F.3d at 725.
248. *Hudson*, 577 F.3d at 885 (emphasis added).
249. *Id.* at 886.
250. *Id.*

of categorical and modified categorical approaches and the potential serious risk involved in fleeing a police officer. In addition, the Supreme Court may hear the issue if the Eighth Circuit does not resolve contradicting opinions: Does fleeing invite confrontation, or not?

3. Juvenile Adjudications as Prior Convictions

In another matter, there is a controversial split regarding the use of juvenile adjudications as predicate offenses for the ACCA. The Ninth Circuit is the outlier in this split and reasons that juvenile adjudications should not be predicate offenses in light of the Supreme Court decisions in *Apprendi v. New Jersey*[251] and *Jones v. United States* (*Jones I*),[252] which imply that facts for sentencing enhancements *must* be subject to the safeguards of a jury.[253] The right to a jury trial accorded to criminal defendants by the Sixth Amendment does not apply to juvenile adjudication proceedings, and therefore, adjudications are not prior convictions to be used for sentencing enhancements under the ACCA.[254]

However, all other circuits that have addressed this issue find that a jury trial is not a prerequisite for using a prior conviction as a predicate offense for the ACCA;[255] all that is required is that the defendant receives all the due process required at the time of his conviction.[256] Due process does not demand jury trials for juvenile adjudications, but juveniles are afforded many other procedural safeguards that make the adjudications sufficiently reliable for *Apprendi* purposes.[257] Therefore, these circuits concluded that juvenile adjudications are predicate offenses for purposes of the ACCA.[258]

The Tenth Circuit has not yet considered this issue, but below is an outline of the major cases defining the circuit split. The next section analyzes the reasoning of these cases and predicts where the Tenth Circuit may fall.

a. *United States v. Tighe*[259]: Adjudications are Not Predicate Offenses

In its solitary decision, the *Tighe* court begins by limiting the applicability of its earlier precedent, *United States v. Williams*,[260] which stated

251. 530 U.S. 466 (2000).
252. 526 U.S. 227 (1999).
253. United States v. Tighe, 266 F.3d 1187, 1193–95 (9th Cir. 2001).
254. *Id.* at 1194.
255. *See, e.g.*, United States v. Smalley, 294 F.3d 1030, 1032–33 (8th Cir. 2002).
256. *See id.*
257. *See id.* at 1033.
258. *See id*; *see also* United Stated v. Matthews, 498 F.3d 25, 35–36 (1st Cir. 2007); United States v. Crowell, 493 F.3d 744, 750–51 (6th Cir. 2007); United States v. Burge, 407 F.3d 1183, 1190–91 (11th Cir. 2005); United States v. Jones, 332 F.3d 688, 696 (3d Cir. 2003).
259. 266 F.3d 1187 (9th Cir. 2001).
260. 891 F.2d 212 (9th Cir. 1989).

the use of juvenile adjudications—as predicate offenses for sentencing enhancements—did not violate due process.[261] The court notes that this decision was made "pre-*Apprendi*" and the nature of the sentencing decision was fundamentally different than the ACCA.[262] In the *Williams* case, the defendant's ultimate sentence was within the statutorily mandated maximum for the offense; in contrast, the ACCA goes beyond the statutory maximum and mandates an additional five years, making the sentence at least fifteen years of incarceration.[263] The Ninth Circuit poses an entirely different question in *Tighe*. There, the court considered the use of juvenile adjudications in light of the Supreme Court's decision in *Apprendi*, which defined the due process requirements when a court seeks to sentence a defendant beyond the statutory maximum.[264]

Tighe analyzes the cases leading up to *Apprendi* to find that jury trials and proof beyond a reasonable doubt are due process requirements for increasing a defendant's maximum sentence.[265] The Supreme Court in *Apprendi* stated that the certainty of procedural safeguards was crucial to the decision of *Almendarez-Torres*, finding prior convictions to be sentencing factors that are not required to be charged in an indictment.[266] Later, in *Jones I*, the Court found that a prior conviction is different from other sentence enhancing facts, and therefore, does not have to be submitted to a jury or proven beyond a reasonable doubt, because it must have been established through procedures satisfying fair notice, reasonable doubt, and jury trial guarantees.[267] The *Tighe* majority takes the three safeguards enumerated in *Jones I* and makes them the necessary elements required for all facts increasing a sentence beyond the statutory maximum: (1) fair notice; (2) proof beyond a reasonable doubt; and (3)

261. *Tighe*, 266 F.3d at 1192; *Williams*, 891 F.2d at 215.

262. *Tighe*, 266 F.3d at 1192.

263. *Id.* at 1192 & n.2; *see* Armed Career Criminal Act, 18 U.S.C. § 924(e)(1) (2006).

264. *Tighe*, 266 F.3d at 1193; *see* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

265. First, the court looks at *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), which labeled prior convictions a sentencing factor that was not a separate element of the crime that had to be charged in the indictment. *Tighe*, 266 F.3d at 1193 (discussing *Almendarez-Torres*, 523 U.S. at 243). Next, the *Tighe* court analyzes *Jones I* to show why the fact of a prior conviction is constitutionally distinct from other sentence-enhancing facts (such as use of a deadly weapon, use of explosives, committing an offense with extreme cruelty, etc.). *Tighe*, 266 F.3d at 1193 (discussing *Jones I*, 526 U.S. 227, 249 (1998)). In *Jones I*, the Court finds that a prior conviction must have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees. 526 U.S. at 249. Lastly, the *Tighe* court turns to *Apprendi* where the Supreme Court created an exception for prior convictions in its due process requirement for facts enhancing a sentence beyond the statutory maximum. *Tighe*, 266 F.3d at 1193–94 (discussing *Apprendi*, 530 U.S. at 490). This is referred to as the *Apprendi* exception. *See, e.g.*, *Tighe*, 266 F.3d at 1194. The exception states: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Therefore, the issue becomes the definition of "conviction" under *Apprendi*.

266. *Apprendi*, 530 U.S. at 488; *Almendarez-Torres*, 523 U.S. at 243 (citing Graham v. West Virginia, 224 U.S. 616, 624 (1912)).

267. *Jones I*, 526 U.S. at 249.

the right to a jury trial constitute "the fundamental triumvirate of procedural protections."[268]

Thus, the *Tighe* court reads *Apprendi* as requiring a jury trial in order to satisfy the procedural safeguards necessary to constitute a prior conviction that would enhance a defendant's sentence beyond a statutory maximum.[269] In justifying their decision, the Ninth Circuit quotes *Apprendi*:

> There is a vast difference between accepting the validity of a prior judgment of conviction entered in a proceeding in which the defendant had the right to a jury trial and the right to require the prosecutor to prove guilt beyond a reasonable doubt, and allowing the judge to find the required fact under a lesser standard of proof.[270]

The *Tighe* court reasoned that the *Apprendi* exception for prior convictions must be limited to convictions that were obtained through proceedings that included the right to a jury trial and proof beyond a reasonable doubt.[271] In conclusion, the *Tighe* court found that because the Sixth Amendment right to a jury trial is not afforded in juvenile adjudications, those proceedings are not prior convictions that constitute predicate offenses for the ACCA.[272]

The *Tighe* dissent took the diametrically opposed position. The dissent argued that juvenile adjudications are predicate offenses because the language in *Jones I* and *Apprendi* merely means that prior convictions need not be submitted to a jury and proven beyond a reasonable doubt because they have due process procedural safeguards in place that make this sentencing factor sufficiently reliable.[273] The dissent interpreted *Jones I* as holding that prior convictions are merely sentencing factors that are subject to a lesser standard of proof because the defendant received all the process that was due to him when he was convicted of the earlier crime.[274] In *Tighe*, the defendant was adjudicated delinquent with all the due process due to him at the time, and this did not include a jury trial.[275] The fact that there was not a jury trial does not preclude the delinquent adjudication from being a prior conviction and predicate offense under the ACCA.[276]

Furthermore, the dissent contends that if the prosecution has to prove a prior juvenile adjudication beyond a reasonable doubt—as the

268. *Tighe*, 266 F.3d at 1193.
269. *Id.* at 1194–95.
270. *Id.* at 1194 (quoting *Apprendi*, 530 U.S. at 496).
271. *Tighe*, 266 F.3d at 1194.
272. *Id.*
273. *Id.* at 1200 (Brunetti, J., dissenting).
274. *Id.*
275. *See id.* at 1198–99.
276. *Id.* at 1200.

majority requires—this will allow the jury to hear about prior offenses, a procedure that would be unduly prejudicial.[277] The defendant will have to make a choice: stipulate, or allow the jury to hear.[278]

b. *United States v. Smalley*,[279] *United States v. Jones* (*Jones II*),[280] *United States v. Burge*,[281] *United States v. Matthews*,[282] and *United States v. Crowell*[283]

In chronological order, the Eighth, Third, Eleventh, First, and Sixth Circuits found fault with the *Tighe* majority and adopted the reasoning of the *Tighe* dissent. These courts found that juvenile adjudications were constitutionally sound convictions under *Apprendi* and could therefore be considered prior convictions for sentencing enhancement under the ACCA.

Because the post-*Tighe* opinions have strikingly little variation in their reasoning, the following is a summary of the *Smalley* court's opinion.[284]

The *Smalley* court first recounts *Tighe* and then states that it respectfully disagrees with the Ninth Circuit's reasoning and proceeds with its own.[285] The *Smalley* court adopted the certainty of procedural protections language in *Apprendi* and uses it as the foundation of the opinion:

> We think that while the Court [in *Apprendi*] established what constitutes sufficient procedural safeguards (a right to a jury trial and proof beyond a reasonable doubt), and what does not (judge-made findings under a lesser standard of proof), the Court did not take a position on possibilities that lie in between these two poles.[286]

According to the *Smalley* court, the Ninth Circuit erred when it found that the procedural triumvirate was necessary instead of sufficient because *Jones I* did not intend to define the term "prior conviction" as that which had been established through fair notice, reasonable doubt, and trial by jury guarantees.[287]

Moreover, *Smalley* reasoned that the decision should not turn on the "parsing of words" of Supreme Court opinions, but on the reliability of a prior conviction.[288] Juvenile adjudications are reliable because they are

277. *Id.* at 1201.
278. *Id.* at 1200–01.
279. 294 F.3d 1030 (8th Cir. 2002).
280. 332 F.3d 688 (3d Cir. 2003).
281. 407 F.3d 1183 (11th Cir. 2005).
282. 498 F.3d 25 (1st Cir. 2007).
283. 493 F.3d 744 (6th Cir. 2007).
284. Any differences in the other opinions are noted in the following text.
285. *Smalley*, 294 F.3d at 1032.
286. *Id.*
287. *Id.*
288. *Id.* at 1032–33.

afforded the safeguards of right to notice, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self-incrimination, and guilt beyond a reasonable doubt.[289] The court concluded these guarantees "are more than sufficient to ensure the reliability that *Apprendi* requires."[290] To support its conclusion that these procedures are more than sufficient, the court quoted a Supreme Court case from 1971 that found the use of a jury in a juvenile adjudication would "'not strengthen greatly, if at all, the fact-finding function' and is not constitutionally required."[291]

Jones II and *Burge* have conspicuously added little to this analysis; both merely go through the decisions of *Tighe* and *Smalley* and conclude they agree with the *Tighe* dissent and *Smalley*'s reasoning.[292] *Jones II* primarily uses the *Tighe* dissent to justify its analysis; the court finds that the defendant was afforded all the procedural safeguards that he was constitutionally due at the time of his adjudication.[293] *Burge* analyzes *Jones I* and *Apprendi*, but it is largely an amalgamation of quotes from the *Tighe* dissent and *Smalley*.[294] *Crowell* simply combined *Smalley, Jones II*, and the *Tighe* dissent. The *Crowell* court cites *Jones II* and *Tighe* for the proposition that a defendant need only receive all the process he was due when convicted.[295] It also cites to *Smalley* for the proposition of evaluating the realities and procedural safeguards of juvenile court and the resulting reliability of juvenile adjudications.[296] However, the *Crowell* court did not discuss juvenile court procedures or statistics to illuminate the "reality" to which it refers. *Crowell* "join[s] the Third, Eighth, and Eleventh circuits in finding that the imposition of a sentence enhancement under the ACCA based on a defendant's juvenile adjudication without a jury trial does not violate the defendant's due process right or run afoul of *Apprendi*."[297] The court made no further analysis.[298]

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289. *Id.* at 1033.

290. *Id.*

291. *Id.* (quoting McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (plurality opinion)).

292. United States v. Burge, 407 F.3d 1183, 1189–90 (11th Cir. 2005); *Jones II*, 332 F.3d 688, 694–97 (3d Cir 2003).

293. *Jones II*, 332 F.3d at 695–96, 698; *see* United States v. Tighe, 266 F.3d 1187, 1200–01 (9th Cir. 2001) (Brunetti, J., dissenting).

294. *See Burge*, 407 F.3d at 1188–90.

295. United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007).

296. *Id.*

297. *Id.*

298. *Matthews* is the one case with slight, but insubstantial differences. The defendant in *Matthews* first argued that Massachusetts law did not classify juvenile adjudications as criminal and therefore they could not be predicate offenses under the ACCA. United States v. Matthews, 498 F.3d 25, 33 (1st Cir. 2007). Although the court refused to address this argument because it was not raised and preserved at trial, it gave a succinct insight into what it might have ruled. *Id.* The court noted that: "[The defendant] cites no cases holding that Congress oversteps constitutional bounds by ignoring state law classifications and treating particular juvenile acts as criminal in nature." *Id.* The ACCA only narrowly extended juvenile adjudications into criminal convictions and it saw no basis for denying Congress this prerogative. *Id.* The court in *Matthews* then predictably proceeded to rehash *Tighe,* disagree, and quote *Smalley* for the proposition that the safeguards required in juvenile

c. The Juvenile Adjudication Quandary and the Antiterrorism and Effective Death Penalty Act (AEDPA)[299]

In 2004, the Ninth Circuit heard a case similar to *Tighe*; a defendant appealed his sentence enhancement based on a prior juvenile adjudication.[300] Although the sentencing enhancement in *Boyd v. Newland*[301] was based on California law—as opposed to federal law—and did not involve the ACCA, [302] the Ninth Circuit's reasoning is nonetheless relevant to the juvenile adjudication circuit split.

The *Boyd* court noted that it had previously held that the *Apprendi* exception does not apply to juvenile adjudications, and therefore, such adjudications cannot be prior convictions for sentencing enhancements.[303] However, it then stated, "California courts disagree with *Tighe*. They conclude that *Apprendi* does not preclude the use of nonjury juvenile adjudications to enhance the sentence of an adult offender."[304] The court further noted that the Third and Eighth Circuits also disagree with *Tighe* and found it unpersuasive.[305] In concluding, without overruling *Tighe*, the Ninth Circuit upheld Boyd's enhanced sentence using the procedural situation of the case: a habeas petition under the AEDPA, § 2254(d)(1).[306] The *Boyd* court stated:

> In general, Ninth Circuit precedent remains persuasive authority in determining what is clearly established federal law. But, in the face of authority that is directly contrary to *Tighe*, and in the absence of explicit direction from the Supreme Court, we cannot hold that the California courts' use of Petitioner's juvenile adjudication as a sentencing enhancement was contrary to, or involved an unreasonable application of, Supreme Court precedent.[307]

The phrase "clearly established federal law" and the requirement of a Supreme Court ruling on the issue for a higher court to reverse a lower court's sentencing decision (a habeas matter) is a result of the AEDPA.[308] The relevant provision is § 2254(d)(1), which states:

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adjudications were "more than sufficient" for reliability under *Apprendi* standards. *Id.* at 34–35. The only remaining difference is that the defendant in *Matthews* was offered a jury trial in accordance with Massachusetts law and refused. Thus, the court need not decide the necessity of the jury issue (but strongly implied its decision in dicta). *Id.* at 35.

299. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218–19 (1996) (codified at 28 U.S.C. § 2254).

300. Boyd v. Newland, 393 F.3d 1008, 1016–17 (9th Cir. 2004).

301. 393 F.3d 1008 (9th Cir. 2004).

302. *Id.* at 1016.

303. *Id.* (citing United States v. Tighe, 266 F.3d 1187, 1194 (9th Cir. 2001)).

304. *Boyd*, 393 F.3d at 1017 (citing People v. Bowden, 125 Cal. Rptr. 2d 513, 517 (Cal. Ct. App. 2002), a California case upholding the use of a juvenile adjudication as a predicate offense for the California Three Strikes law).

305. *Boyd*, 393 F.3d at 1017 (discussing *Smalley* and *Jones II*).

306. *Id.* (citing 28 U.S.C. § 2254(d)(1) (2000)).

307. *Boyd*, 393 F.3d at 1017 (citation omitted).

308. § 2254(d)(1).

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted . . . unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States . . . .[309]

Thus, as a result of the AEDPA and its cornerstone habeas provision under § 2254(d)(1), the Ninth Circuit cannot follow its precedent in *Tighe* and reverse sentence enhancements based on juvenile adjudications for defendants in state custody because the Supreme Court has not ruled on the issue as required by § 2254(d)(1).[310] Yet, if a defendant in federal court is merely appealing his federal trial court's sentence, the AEDPA does not apply, and *Tighe* remains applicable.

d. Discussion

When reading the above ACCA cases in succession, the lack of unique and independent analysis is jarring. Once *Tighe* and its dissent were published, the subsequent discussions of the *Apprendi* exception and procedural protections in *Jones I* were mirror images of one another with little, if any, variation in arguments. In fact, some courts merely quoted language from other circuits, coming to conclusions without any further justification or examination.[311]

For example, in *Burge*, the court engaged in a summary of *Tighe*, *Smalley*, and *Jones II* and concluded: "After reviewing the record, we conclude that this application was correct. We base our holding on the reasoning of our sister circuits in *Smalley* and *Jones [II]*."[312] Like "the *Smalley* court, we find nothing in *Apprendi* or *Jones [II]*, two cases relied upon by the *Tighe* court . . . that requires us to hold that prior non-jury juvenile adjudications . . . cannot be used to enhance a sentence under the ACCA."[313] Thus, it would seem that both *Jones II* and *Burge* complacently use the *Smalley* decision without questioning its findings or reasoning. *Matthews* and *Crowell* also adopt the *Smalley* analysis without considering the actual procedure of juvenile adjudications as opposed to their theoretical due process protections.[314]

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309. *Id.*

310. Similarly, in a one-page memorandum from the Ninth Circuit, the court, citing *Boyd*, again decided that using a defendant's juvenile adjudication for a predicate offense under California's Three-Strikes law was not an unreasonable application of clearly established federal law. Solorzano v. Yates, 264 F. App'x 576, 577 (9th Cir. 2008). The court also notes that *certiorari* was denied in the *Boyd* case. *Id.*

311. *E.g.*, United States v. Burge, 407 F.3d 1183, 1190 (11th Cir. 2005).

312. *Id.*

313. *Id.* (citing *Jones II*, 332 F.3d 688, 696 (3d Cir. 2003)).

314. United States v. Matthews, 498 F.3d 25, 35 (1st Cir. 2007) ("[A]ll of the courts to consider the issue have agreed that 'the question of whether juvenile adjudications should be exempt from *Apprendi*'s general rule should [ ] turn on . . . an examination of whether juvenile adjudications, like adult adjudications, are so reliable that due process of law is not offended by such an

The analysis most pertinent to the prior conviction issue is the assumptions made about the practice of due process in juvenile court and the reliability of adjudications because of that process. Although outlined in more detail below in Part II.C.2,[315] the issue of juvenile adjudication reliability bears mentioning here. The *Smalley* court pointed out the extensive due process protections mandated by the Supreme Court in juvenile proceedings and concluded that the adjudications are reliable because of these procedures.[316] *Smalley* pontificates that the decision should not rest on a "narrow parsing of words," but the "reality of the actual juvenile adjudications to determine whether it is sufficiently reliable so as not to offend" the juvenile's due process rights.[317]

Nonetheless, the court never engages in an investigation of juvenile court realities; it merely notes that juveniles are required to receive sufficient due process rights to make them akin to the procedural certainty of adult criminal court.[318] This oversight ignores the original philosophies of informality and rehabilitation underlying the juvenile court system and the increasingly narrow line between juvenile court and adult criminal court.

More specifically, the *Tighe* dissent and its progeny also have problematic legal arguments regarding the application of *Apprendi* to juvenile adjudications. First, in dismissing the *Jones I*'s enumeration of the procedures making a prior conviction constitutionally distinct,[319] the *Tighe* dissent and its progeny do not consider the syntax of the enumeration. Second, the *Tighe* dissent's worry about unduly prejudicing the defendant by forcing the prosecution to prove adjudications beyond a reasonable doubt to a jury is easily alleviated.[320]

The *Jones I* language that the *Tighe* majority emphasized is as follows:

> One basis for that constitutional distinctiveness [of prior convictions] is not hard to see: unlike virtually any other consideration used to en-

exemption.' We share that view of the question." (alterations in original) (citation omitted)); United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007) ("[W]e join the Third, Eighth, and Eleventh circuits in finding that the imposition of a sentence enhancement under the ACCA based on a defendant's juvenile adjudication without a jury trial does not violate the defendant's due process right or run afoul of *Apprendi*.").

315. *See* discussion *infra* Part II.C.3.

316. United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir. 2002). Procedures include the right to notice, the right to counsel, the right to confront and cross-examine witnesses, the privilege against self incrimination, and a finding of guilt beyond a reasonable doubt.

317. *Jones II*, 332 F.3d at 696; *Smalley*, 294 F.3d at 1033.

318. *Smalley*, 294 F.3d at 1033.

319. The Court in Jones I enumerates three characteristics that make a prior conviction distinct from other facts increasing a defendant's sentence. *Jones I*, 526 U.S. 227, 249 (1999) (noting "a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees").

320. *See* United States v. Tighe, 266 F.3d 1187, 1200–01 (9th Cir. 2010) (Brunetti, J., dissenting).

> large the possible penalty for an offense . . . *a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees*.[321]

Tighe also emphasized that *Apprendi* identified trial by jury as a requisite procedural safeguard.[322] Many of the post *Tighe* courts noted that *Jones I* did not intend to establish the criteria for the procedures necessary for a prior conviction,[323] but these opinions do not recognize that the language of *Jones I* is a list of procedures joined by the conjunction "and": "procedures satisfying the fair notice, reasonable doubt, *and* jury trial guarantees."[324] Thus, a linguistic analysis reveals that these procedures are all necessary for a prior conviction. Furthermore, *Jones I* uses a serial comma before the "and," indicating that the procedures are three separate and distinct entities that establish the constitutional distinction of a prior conviction.[325] Interestingly, some courts misquote *Jones I* by leaving out this final comma.[326]

The argument that this language is dicta is strong; however, the only court to make this argument is a California state court;[327] none of the federal opinions relying on the *Tighe* dissent or *Smalley* decision make an argument concerning dicta. Yet, even if the *Jones I* language is dictum, the fact that it is a recent Supreme Court case addressing sentencing enhancements that increase the statutory maximum sentence, the exact effect of the ACCA sentencing enhancement, makes the dicta arguably more persuasive and authoritative.[328]

The dissent in *Tighe* further argues that the majority's opinion presents a procedural issue that will unduly prejudice the defendant by putting his prior crimes before the jury.[329] The dissent underscores the significant prejudice created when prior crimes are introduced, and articulates its fear that "a defendant with a prior juvenile adjudication will be

321. *Id.* at 1193 (majority opinion) (alterations in original) (quoting *Jones I*, 526 U.S. at 249).

322. *Tighe*, 266 F.3d at 1194; *see* Apprendi v. New Jersey, 530 U.S. 466, 496 (2000).

323. *See, e.g.*, *Jones II*, 332 F.3d 688, 696 (3d Cir. 2003); *Smalley*, 294 F.3d at 1032 ("We do not think, moreover, that *Jones* [*I*] meant to define the term 'prior conviction' for constitutional purposes as a conviction 'that has been established through procedures satisfying fair notice, reasonable doubt and jury trial guarantees.'").

324. *Jones I*, 526 U.S. at 249 (emphasis added).

325. *See id.*

326. *See, e.g.*, *Jones II*, 332 F.3d at 695; *Tighe*, 266 F.3d at 1193.

327. *See, e.g.*, People v. Nguyen, 209 P.3d 946, 956 (Cal. 2009), a California Supreme Court decision disagreeing with *Tighe*, puts forth the dicta argument.

328. The Third Circuit, home of the *Jones II* opinion, finds Supreme Court dicta to be highly persuasive. In a recently published opinion, the court states: "The Supreme Court grants certiorari in fewer than 85 cases annually, and thus, provides precedent on very few issues. Accordingly, the Court's dicta is highly persuasive and should be treated as binding unless there are indications to the contrary . . . ." United States v. Dupree, 617 F.3d 724, 735 n.1 (3d Cir. 2010) (Cowen, J., dissenting). The persuasiveness of Supreme Court dicta is well-established in the Third Circuit. *See also* Galli v. N.J. Meadowlands Comm'n, 490 F.3d 265, 274 (3d Cir. 2007); Official Comm. of Unsecured Creditors of Cybergenics Corp. v. Chinery, 330 F.3d 548, 561 (3d Cir. 2003).

329. *Tighe*, 266 F.3d at 1200–01 (Brunetti, J., dissenting).

put to the Hobson's choice of stipulating to the priors or parading them before a jury."[330] However, as the majority makes clear, such a prejudice can be avoided by a separate jury sentencing phase or other procedural protections.[331] The dissent's objection seems to be *pro forma* as other courts have fashioned procedures for minimizing the prejudice of prior convictions when the prior conviction is a sentencing factor.[332]

C. The Tenth Circuit and Juvenile Adjudications

1. How will the Tenth Circuit Rule?

As of April 2011, the Tenth Circuit had not yet considered the question of juvenile adjudications as predicate offenses under the ACCA. This section aims to predict how the Tenth Circuit may rule on the controversial issue. First, the Tenth Circuit seems to have a different interpretation of ACCA and USSG challenges than the Ninth Circuit. Second, there is no indication that the Circuit will engage in any further analysis than *Smalley* and its progeny. And third, the Circuit has considered the application of *Apprendi* to juvenile law issues and has concluded that *Apprendi* does not apply.[333]

As mentioned, the Tenth Circuit parted from the Ninth Circuit in *Rivera-Oros*, on the issue of the meaning and scope of ACCA and USSG. In *Rivera-Oros*, the Tenth Circuit declined to adopt the Ninth Circuit's approach to defining "burglary of a dwelling" under the USSG. The Tenth Circuit applied the *Taylor* procedure for defining the generic definition of an enumerated crime, but found that *Taylor*'s definition of mere "burglary" under the ACCA should not be applied to "burglary of a dwelling" under the USSG. In contrast, the Ninth Circuit applied *Taylor*'s definition. The Ninth Circuit's reasoning reversed the enhanced sentence of the defendant under the USSG, finding that Washington "residential burglary" is outside the generic definition of "burglary of a dwelling." The Tenth Circuit's analysis found that burglary of a "residential structure" under Arizona law was within the definition of "burglary of dwelling" under the USSG and upheld the enhanced sentence. In fact, all of the above cases decided by the Tenth Circuit upheld the sentence enhancement imposed by the District Court, save *Martinez*, which found that only part of the sentence enhancement, the enhancement under the USSG, could be upheld. Thus, when one considers the Tenth Circuit's prevalent rejection of Ninth Circuit reasoning,[334] and its recent

330. *Id.*
331. *Id.* at 1195 n.5 (majority opinion).
332. *Id.*
333. Gonzales v. Tafoya, 515 F.3d 1097, 1117 (10th Cir. 2008).
334. *See, e.g.*, *Rivera-Oros*, 590 F.3d at 1132–33 (rejecting the recent Ninth Circuit decision). For splits between the Ninth and Tenth Circuits on other issues, see Unareroro v. Gonzales, 443 F.3d 1197, 1211 (10th Cir. 2006) (declining to follow the Ninth Circuit's per se rule regarding credibility of an immigrant who has lied to gain entry into the United States to avoid persecution); Admin.

trend upholding sentencing enhancements under the ACCA and USSG, it is likely that the court will uphold the hypothetical use of juvenile adjudications as predicate offenses.

Furthermore, even if the Tenth Circuit's hypothetical analysis of this issue favored the *Tighe* majority, or adopted some of the analysis in Part II.C.2[335] below, the AEDPA means the court can only do so if the defendant is in federal custody. If the defendant is in state custody, the Tenth Circuit may find itself restricted by § 2254 as there is no Supreme Court ruling on the issue of juvenile adjudications as prior convictions or predicate offenses under the ACCA.

Nevertheless, the most concrete evidence of the Tenth Circuit's position on the issue is its 2008 decision in *Gonzales v. Tafoya*.[336] Notably, this decision comes after the *Tighe* and *Smalley* progeny. In *Gonzales*, the court considered whether it was a violation of *Apprendi* to have a judge determine that a juvenile is not amenable to treatment or eligible for commitment to a mental health facility under New Mexico law.[337] Mr. Gonzales was a fourteen-year-old boy who accepted a plea agreement to be sentenced to twenty-two years in an adult prison for the crimes of second-degree murder, aggravated residential burglary, aggravated battery with a firearm, and two counts of aggravated assault.[338] New Mexico does not have any mechanism for the transfer of a juvenile to adult criminal court; instead, all juveniles are heard in the Children's Court, which has the ability to issue juvenile and adult sentences.[339]

The Children's Court, after considering many factors, can sentence a juvenile to time in an adult facility if "(1) the child is not amenable to treatment or rehabilitation as a child in available facilities, *and* [2] the child is not eligible for commitment to an institution for the developmentally disabled or mentally disordered."[340] Despite evidence of and expert testimony regarding Mr. Gonzales's mental illness, the court, in an amenability hearing, found that Mr. Gonzales was not amenable to rehabilita-

Comm. of the Wal-Mart Assocs. Health & Welfare Plan v. Willard, 393 F.3d 1119, 1125 (10th Cir. 2004) (declining to follow "the Ninth Circuit's highly restrictive view of the scope of 'appropriate and equitable relief'"); Yerkovich v. Ashcroft, 381 F.3d 990, 994–95 (10th Cir. 2004) (acknowledging the Ninth Circuit's differing view concerning a federal statute barring judicial review of an immigration judge's discretionary decision, but declining to follow it); United States v. James, 257 F.3d 1173, 1178 (10th Cir. 2001) (declining to use the Ninth Circuit's approach to review selective prosecution discovery orders with an abuse of discretion standard, and instead holding that such orders should be reviewed *de novo*); United States v. Sullivan, 255 F.3d 1256, 1262 (10th Cir. 2001) (agreeing with the reasoning of the Eighth, Eleventh, Fifth, Seventh, First, and Fourth circuits and declining to adopt the position of the Ninth Circuit concerning whether application of certain sentencing guidelines violates the *ex post facto* clause); United States v. La. Pac. Corp., 106 F.3d 345, 348 (10th Cir. 1997) (declining to adopt the Ninth Circuit's discrete basis test).

335. *See* discussion *infra* Part II.C.3.

336. 515 F.3d 1097 (10th Cir. 2008).

337. *Id.* at 1104.

338. *Id.* at 1104, 1106.

339. *Id.* at 1103.

340. *Id.* at 1104 (quoting N.M. STAT. ANN. § 32A-2-20(B) (2010)).

tion and not eligible for commitment in an institution for the developmentally disabled.[341] The defendant appealed this decision, arguing that it was a violation of his due process rights under *Apprendi* to have the amenability findings made by a judge and not a jury.[342] The New Mexico Court of Appeals upheld the adult sentence and the defendant submitted a habeas corpus petition to the federal district court.[343] On appeal, the Tenth Circuit reviewed the district court's denial of the habeas petition.[344]

The Tenth Circuit held that the facts leading to Mr. Gonzales's adult sentence were not "fact[s] that increase[d] the penalty for a crime beyond the prescribed statutory maximum" under *Apprendi*.[345] Instead, the court reasoned that the factors the judge had to weigh were not questions of historical fact, as in *Apprendi*, but value judgments as to the juvenile's amenability to rehabilitation and eligibility for treatment.[346] The Tenth Circuit held that value judgments are typically in the purview of judicial discretion and thus, a defendant's right to a jury is never implicated.[347] Although the Tenth Circuit recognized that many of the factors to be weighed by the judge are questions of historical fact, the court found that these factors were not at issue in the case because of Mr. Gonzales's plea agreement.[348]

The court also applied the *Smalley* holding that juvenile proceedings do not require the procedural protection of a jury trial.[349] The *Gonzales* court cites Supreme Court precedent regarding the due process protections afforded to juveniles in the juvenile court system to show that a jury is not required for juvenile transfer proceedings;[350] the juvenile is merely entitled to a hearing, a statement of the reasons for the decision to transfer, and assistance of counsel.[351] Therefore, the court concludes that because the factors determining Mr. Gonzales's adult sentence and lack of amenability are value judgments—not issues of historical fact—and juveniles are not constitutionally entitled to jury findings, *Apprendi* does not apply because it dealt with the determination of historical facts and

341. *Gonzales*, 515 F.3d at 1107.
342. *Id.* at 1108.
343. *Id.*
344. *Id.*
345. *Id.* at 1101 (quoting Apprendi v. New Jersey, 530 U.S. 466, 490 (2000)).
346. *Gonzales*, 515 F.3d at 1113–14.
347. *Id.* at 1114. Legal scholars have called the distinction between value judgments and historical fact into question. *See* Sam Kamin & Justin Marceau, *The Facts About* Ring v. Arizona *and the Jury's Role in Capital Sentencing* 40–41 (Univ. of Denver Sturm Coll. of Law Legal Research Paper Series, Working Paper No. 10-11, 2010), *available at* http://ssrn.com/abstract=1564465.
348. *Gonzales*, 515 F.3d at 1114.
349. *Id.* at 1114–15.
350. *Id.* (citing McKeiver v. Pennsylvania, 403 U.S. 528, 545–51 (1971) (plurality opinion); *In re* Winship, 397 U.S. 358, 368 (1970); *In re* Gault, 387 U.S. 1, 30–57 (1967); Kent v. United States, 383 U.S. 541, 554–565 (1966)).
351. *Gonzales*, 515 F.3d at 1115.

adult sentences.[352] The Tenth Circuit held that the refusal of the New Mexico Court of Appeals to apply *Apprendi* to juvenile transfer proceedings was not contrary to established federal law.[353]

Because of the Tenth Circuit's interpretation of the applicability of *Apprendi* to juvenile situations, there is little reason to believe that the Tenth Circuit will find that juvenile adjudications are not predicate offenses for sentencing enhancements because of their lack of a jury trial. Similar to the issue in *Tighe* and its progeny, transfer of a juvenile to adult court (or sentencing a juvenile to adult imprisonment) increases the maximum sentence the defendant will endure. The Tenth Circuit has already shown its support for the argument that juvenile adjudications do not constitutionally require trial-by-jury. Nonetheless, the court based its decision on the lack of historical facts found in the amenability hearing and *not* the lack of a jury trial right in juvenile proceedings. Thus, there is still hope that the Tenth Circuit will question Supreme Court precedent from the 1970s because the court's dicta leaves the question open of the importance of the lack of a jury trial right in juvenile proceedings: "[T]he mere fact that juveniles may not have a federal constitutional right to a jury trial in delinquency proceedings does not seem sufficient to distinguish *Apprendi* when the findings at issue authorize an *adult* sentence."[354]

Furthermore, the court seems to ignore the issue of a "constitutional no man's land" in which a juvenile can be denied the benefits of a juvenile justice system and the protections of the adult criminal system.[355] After mentioning this troublesome quandary, the Tenth Circuit distinguished *Apprendi* by stating: "Nevertheless, in our view, the distinction between the kinds of findings made at the amenability hearing and findings traditionally made by juries is a plausible one."[356] The lack of concern for the constitutional no man's land creates little optimism that the Tenth Circuit would be the first court to examine the policies and practices of the juvenile justice system and what they mean regarding the reliability of a juvenile adjudication and its qualification as a prior conviction for ACCA purposes.

2. Juvenile Adjudications Should Not Constitute a Prior Conviction under the *Apprendi* Exception

When taken at face value, the arguments made in both the *Tighe* majority and dissent each have merit and are each based on strong textual interpretations of Supreme Court precedent. The argument seems to largely depend on one's view of the Sixth Amendment right to a jury

352. *Id.* at 1115, 1117.
353. *Id.* at 1117.
354. *Id.* at 1113 (citation omitted).
355. *Id.*
356. *Id.*

trial and the rights afforded to juveniles during adjudications. Unfortunately, it is in this arena that both the majorities and the dissents fail to fully extrapolate the issues. Thorough analysis of the juvenile court system is conspicuously absent from the *Tighe* and *Smalley* progeny. If the courts engaged in such a discussion, the conclusion that juvenile adjudications do not meet the *Apprendi* exception would become obvious simply because they cannot be considered prior convictions.

Juvenile adjudications are not on par with criminal convictions for myriad reasons. This section presents a combined due process and social justice argument for prohibiting juvenile adjudications from constituting prior convictions and predicate offenses under the ACCA. This argument is largely built on the missing analyses in the *Tighe* and *Smalley* progeny: a philosophical and empirical discussion of the differences between juvenile and adult court, and consideration of the rights afforded to juveniles in adjudications versus the "realities" or practices of juvenile court. Moreover, the Supreme Court has indicated in recent decisions that it considers the neurological evidence of juvenile immaturity, underdeveloped sense of responsibility, and poor impulse control as important evidence for tempering the sentences given to juveniles, even those sentenced as adult offenders.[357]

a. The Realities of Juvenile Court

The only "realities" of the juvenile court that the opinions discuss are the supposed reliability of adjudications.[358] Each opinion notes that there are differences between juvenile and criminal courts, but none delve into the philosophy behind those differences or empirical evidence of what the differences actually mean. These courts argue that juveniles are essentially afforded all the due process rights as adults except for the right to a jury trial, which would not enhance the fact-finding function of the court.[359] A judge must still find that the juvenile is delinquent beyond a reasonable doubt.[360] No court, however, addresses what a bench adjudication means to a juvenile.

In 1971, the Supreme Court was optimistic regarding the reliability of judicial fact-finding,[361] but since that time, studies have been published showing that judges are more likely than juries to develop biases favoring police.[362] Studies have also shown that the unique discussion format of jury deliberations enhances reliability, and the diversity of ex-

357. Graham v. Florida, 130 S. Ct. 2011, 2026 (2010); Roper v. Simmons, 543 U.S. 551, 569–71 (2005).

358. *See* United States v. Crowell, 493 F.3d 744, 750 (6th Cir. 2007); *Jones II*, 332 F.3d 688, 696 (3d Cir. 2003); United States v. Smalley, 294 F.3d 1030, 1033 (8th Cir 2002).

359. *See Smalley*, 294 F.3d at 1033.

360. *Id.*

361. *See* McKeiver v. Pennsylvania, 403 U.S. 528, 547 (1971) (plurality opinion).

362. Recent Case, 116 HARV. L. REV. 705, 709 (2002).

periences among a twelve-person jury "increases the fairness of its evaluations as compared to those of a single judge."[363]

Furthermore, seven years after *McKeiver v. Pennsylvania*,[364] the Court recognized empirical evidence—in a plurality opinion authored by the same Justice as the *McKeiver* opinion—that larger groups of fact-finders are more reliable than smaller ones.[365] In juvenile adjudications, the factfinding body is reduced to one, the judge. Moreover, the plurality in *McKeiver* noted that "[t]oo often the juvenile court judge falls far short of that stalwart, protective, and communicating figure the system envisaged."[366] Thus, the reliance on *McKeiver* by *Smalley* and subsequent courts is flawed as it fails to consider the true realities of the juvenile justice system.

In addition to the judicial factfinder issue, the courts do not take into account the considerable evidence that procedural guarantees, although mandated, are not applied with any regularity.[367] Juvenile courts were created at the turn of the twentieth century with a focus on rehabilitation and informality in a *non-criminal* context.[368] However, the line between juvenile and criminal court has become exceedingly gray within the last three decades; juveniles can now be sentenced to a mix of juvenile incarceration and adult imprisonment, juveniles can be charged as adults, avoiding the juvenile justice system altogether, and as the cases above demonstrate, juvenile adjudications now have serious consequences in adulthood.[369] Furthermore, because of the false perception of juvenile courts as lenient entities, juveniles may not dispute a particular accusation because of a lenient judge, inadequate counsel, or because his family thinks treatment—otherwise unaffordable or unattainable—may help the child.[370] Thus, the informal system that promotes discretionary sentencing and creates an atmosphere of factual and procedural laxness, which results in facts that can rarely be classified as undisputed, is the same system that may ultimately lead to a person's sentence of a minimum of fifteen years, or in California's case, an indeterminate life sentence.[371]

363. Id. (citing Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553, 575–79 (1998)).

364. 403 U.S. 528 (1971).

365. Ballew v. Georgia, 435 U.S. 223, 232–39 (1978) (plurality opinion) (holding that five jurors is too few); *see also* Recent Case, *supra* note 361, at 709.

366. *McKeiver*, 403 U.S. at 544.

367. *See* Richard E. Redding, *Using Juvenile Adjudications for Sentence Enhancement Under the Federal Sentencing Guidelines: Is it Sound Policy?*, 10 VA. J. SOC. POL'Y & L. 231, 243–51 (2002) (discussing the lack of full due process and lack of or poor representation accorded to juveniles during adjudication).

368. *See* Jason Abbott, *The Use of Juvenile Adjudications Under the Armed Career Criminal Act*, 85 B.U. L. REV. 263, 265 (2005); Redding, *supra* note 366, at 231.

369. Redding, *supra* note 366, at 231–32.

370. *See* Abbott, *supra* note 367, at 279.

371. *See id.*

Juvenile adjudications are unreliable not only because of questionable factfinding, but also because of the patchwork of due process rights actually afforded in adjudications, including the inconsistent right to effective counsel at adjudication proceedings. Because of the original goals behind juvenile adjudications, such as individualized and rehabilitative dispositions, in practice, the procedural requirements mandated by the Supreme Court[372] are frequently relaxed; juvenile courts often follow evidentiary and procedural rules less rigorously and are characterized by more frequent procedural errors.[373] Furthermore, a study in 1989 that interviewed 100 juvenile court workers found that one-fourth of the respondents felt that juveniles did not receive a fair trial, judges often admitted clearly inadmissible evidence and failed to consider defense motions, and would often enter an adjudication of delinquency with insufficient evidence of guilt.[374]

The underlying philosophy of juvenile court also leads to unpredictable results between the states and even within a state. This "justice by geography" is the result of juvenile court emphasis on individual consideration of the juvenile's particular situation and, often, their need for treatment and mental health services that are otherwise not available.[375] Thus, if a judge wants to get a juvenile into treatment—as per the philosophy of the juvenile justice system—they may declare them delinquent based on insufficient evidence.[376] But that adjudication can come back to haunt the adult when he or she is given an increased sentenced based on "career criminality." The Bureau of Justice Statistics has concluded that sentencing laws that count juvenile adjudications as predicate offenses "assume that there is some substantive meaning to a juvenile adjudication for a particular offense . . . . Because the juvenile justice system is often treatment-oriented, there is no necessary relationship between the adjudicated offense and the 'sentence' imposed by the court."[377]

372. McKeiver v. Pennsylvania, 403 U.S. 528, 547, 550 (1971) (plurality opinion); *In re* Winship, 397 U.S. 358, 368 (1970); *In re* Gault, 387 U.S. 1, 30–31(1967).

373. Redding, *supra* note 366, at 243; *see generally* Caterina Ditraglia, *"The Worst of Both Worlds": Defending Children in Juvenile Court*, 63 MO. L. REV. 477 (1988) (arguing that juvenile courts provide a procedural matrix under which few adults would consent to be tried because of the less rigorous adherence to procedural rules, frequent procedural errors, and the less adversarial setting).

374. *See* Joseph B. Sanborn, Jr., *Remnants of Parens Patriae in the Adjudicatory Hearing: Is a Fair Trial Possible in Juvenile Court?*, 40 CRIME & DELINQ. 599, 603–04 (1994).

375. Redding, *supra* note 366, at 244.

376. *See id.* at 244–45. On December 10, 2010, the Supreme Court granted certiorari in *Tapia v. United States*, 131 S. Ct. 817 (2010), a Ninth Circuit case that considers whether a federal judge can give a convicted defendant a longer sentence in order to give the defendant access to drug treatment.

377. Neal Miller, *National Assessment of Criminal Court Use of Defendants' Juvenile Adjudication Records*, *in* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NATIONAL CONFERENCE ON JUVENILE JUSTICE RECORDS: APPROPRIATE CRIMINAL AND NONCRIMINAL JUSTICE USES 27, 29 (1997), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/NCJJR.PDF.

Another assumption that the court made in *Smalley*—and subsequent courts continue to make—is that juveniles are actually meaningfully provided with an attorney.[378] This is not a reality. Many juveniles waive their right to an attorney, but there is strong evidence that such waivers are not made "voluntarily, knowingly, or intelligently."[379] An ABA study found that 46% of public defenders say a colloquy is given only "sometimes" or "rarely" and 45% responded that when the colloquy is given, it is only "sometimes" or "rarely" as thorough as one given to adult defendants.[380] Furthermore, the waivers "are sometimes induced by suggestions that lawyers are not needed because no serious dispositional consequences are anticipated . . . . These circumstances raise the possibility—perhaps the likelihood—that a substantial number of juvenile waivers are not 'knowing and intelligent.'"[381] The thought that serious dispositional consequences are not possible is patently false with the advent of the ACCA. Additionally, studies conducted in the 1980s show that juveniles often fail to understand or appreciate their rights, including their right to counsel.[382]

Assuming juveniles do not waive their right and are provided with counsel, there is also the concern of effective representation. Juveniles appearing for adjudication hearings are often represented by public defenders who have no training in juvenile law, deal with heavy caseloads, and who are criticized for zealous representation.[383] Moreover, there is an extremely low professional status associated with juvenile law that is part of the systemic problem of poor representation at juvenile adjudications.[384] The same ABA study indicated that:

> In some courts, attorneys are subtly reminded by the court, the prosecutor, and other court personnel that zealous advocacy is considered inappropriate and counter-productive. Lawyers who refuse to temper their advocacy . . . may suffer from subtle disapproval or . . . fee reductions or being excluded from the panel of court-appointed attorneys.[385]

In failing utterly to consider the actual realities of the juvenile justice system, *Smalley* and its progeny committed a disservice to juveniles across the United States. The message is one of hypocrisy. As a govern-

378. *See* Redding, *supra* note 366, at 247 ("Representation rates vary widely within and across states, but in many jurisdictions it is less than 50%, with first-time offenders having the lowest representation rates." (footnote omitted)).

379. *Id.*; *see also* AM. BAR ASS'N, A CALL FOR JUSTICE: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 7 (1995), *available at* http://www.njdc.info/pdf/cfjfull.pdf [hereinafter ABA].

380. ABA, *supra* note 378, at 7.

381. *Id.* at 7–8.

382. Redding, *supra* note 366, at 248.

383. *Id.* at 250–51.

384. *Id.* at 250.

385. ABA, *supra* note 378, at 27.

ment and as a court system we proclaim juveniles are the future leaders of America, who are resilient, amenable to rehabilitation and worth protecting; yet, juvenile offenses, which are characterized by the informality and rehabilitative emphasis of the juvenile court, are historical factors leading to the prolonged imprisonment of the adult juvenile offender.[386]

b. Neuroscience of the Juvenile: *Roper v. Simmons*[387] & *Graham v. Florida*[388]

Recently, the Supreme Court has addressed juvenile sentencing and has categorically prohibited sentencing a juvenile to death or life without the "realistic opportunity" of parole for a non-homicide crime.[389] In the analyses, both opinions refer to the lack of maturity and underdeveloped sense of responsibility of defendants under eighteen and their resulting lesser culpability and greater susceptibility to change.[390] Both opinions also found it telling that it is difficult for psychologists to differentiate between an impulsive youthful offender and a habitual criminal.[391] *Roper* recognizes that mental health professionals are not allowed to diagnose a person under eighteen as having antisocial personality disorder (i.e., psychopathy or sociopathy) because of their developing personalities.[392] Similarly, *Graham* argues that psychology and brain science continue to show that parts of the brain involved in behavior control continue to mature through late adolescence.[393]

These conclusions concerning the developing personality of the juvenile and their diminished culpability serve the argument that adjudications should not be treated as predicate offenses for state or federal sentencing enhancements. If the juvenile is not as culpable when he or she is judged to be delinquent by the court, how can such offenses be deemed violent felonies or crimes of violence on par with adult convictions? The Supreme Court relies on evidence that the juvenile's brain is not fully formed in the area of decision-making and impulse control and thus, their adjudications do not have the equivalent *mens rea* of adult convictions.[394] In *Begay v. United States*, the Court recognized the importance of *mens rea* in finding a "violent felony" under the ACCA and concluded that a DUI is not a violent felony because the offense is one of strict liability.[395]

386. *See generally* Barbara Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771 (2010) (arguing that the widespread nature of ineffective representation in juvenile adjudications and the serious future consequences of adjudications necessitates a form of legal redress for those harmed by substandard legal representation in juvenile proceedings).

387. 543 U.S. 551 (2005).

388. 130 S. Ct. 2011 (2010).

389. *Id.* at 2033–34.

390. *Graham*, 130 S. Ct. at 2026–27; *Roper*, 543 U.S. at 569–71.

391. *Graham*, 130 S. Ct. at 2026; *Roper*, 543 U.S. at 573–74.

392. *Roper*, 543 U.S. at 573.

393. *Graham*, 130 S. Ct. at 2026.

394. *See id.* at 2026–27.

395. Begay v. United States, 553 U.S. 137, 146–48 (2008).

While juvenile offenses do not completely lack a *mens rea* requirement, the scientific evidence used by the Supreme Court indicates that juveniles do not commit offenses with the same "guilty mind"[396] as an adult offender.

However, the applicability of the neurological evidence used in *Roper* and *Graham* should not be assumed. Both courts made their holdings narrow and confined their decisions to sentences that effectively ended the juvenile's life.[397] The issue of juvenile adjudications as predicate offenses is not always as severe. While an offender could face a very tough sentencing enhancement that results in an indeterminate life sentence (i.e., a Three-Strikes law), others may be sentenced to the minimum under the ACCA, fifteen years. Thus the Supreme Court may see an enhanced sentence as a way to give the defendant "separat[ion] from society for some time in order to prevent . . . an escalating pattern of criminal conduct . . . ."[398] But, the appeal to the Supreme Court would not likely proceed on an Eighth Amendment claim, which makes the length and proportionality of the sentence relevant; the claim is likely to proceed under a Fourteenth Amendment violation of due process and thus, the neurological evidence may be used in a new and unique manner.

The *Tighe* dissent and the *Smalley* progeny rely in large part on the similar reliability of a juvenile adjudication to the adult criminal conviction and the "sufficient" due process rights afforded to juveniles that secures this reliability. However, as the above studies and literature show, the reliability of adjudications and protection from due process procedures are highly questionable. Sentences may be imposed in order to place the juvenile in treatment as opposed to the offense having been proven beyond a reasonable doubt; a single fact-finder is less reliable than a jury; colloquies regarding a juvenile's right to counsel are substandard and juvenile waivers may often not be "knowing or intelligent;" when counsel is present in adjudication proceedings, bars to effective counsel abound; etc. Furthermore, the Supreme Court has stated that juveniles are less culpable than adult defendants. It follows that a less culpable defendant should not later be punished for what the Supreme Court has characterized as impulsive actions.

Thus, a juvenile adjudication cannot be considered on par with the reliability of an adult conviction because the due process rights mandated in juvenile proceedings are not "more than sufficient" to ensure that reliability. The lack of a right to a jury trial emphasized in *Apprendi* is just one of the issues with juvenile adjudications that should legally preclude

396. BLACK'S LAW DICTIONARY 1075 (9th ed. 2009).
397. *Graham*, 130 S. Ct. at 2034; *Roper*, 543 U.S. at 574–75.
398. *Graham*, 130 S. Ct. at 2029 (internal quotation marks omitted).

an adjudication from constituting a prior conviction and predicate offense under *Apprendi* and the ACCA.

3. Will the Supreme Court Ever Weigh-In?

As some of the cases above have noted, the Supreme Court has denied multiple opportunities to hear this issue. And, traditionally, the Court is reluctant to hear issues on juvenile matters, reasoning that these issues are better left to the police powers of the states. Indeed, juvenile law rarely becomes a federal issue because juveniles are considered part of family law, an issue reserved to the powers of the states. Each of these factors points to the continued silence from the Supreme Court. Nonetheless, there are several factors that might give the Supreme Court the impetus to grant *certiorari*: there is a circuit split; the Supreme Court has recently taken on several issues concerning the application of the ACCA[399] and sentencing of juveniles;[400] and at least one court has based its decision on the fact that there is no clearly established federal law.[401] Furthermore, after forty years,[402] the Supreme Court may feel that it is time to reevaluate the processes and practices of the juvenile court and the necessary procedural protections.

CONCLUSION

In just one year of litigation, a single federal circuit issued six opinions regarding the interpretation of the ACCA or USSG *and* created two circuit splits. The Supreme Court has noted that the resolution of these splits and others like them "could occupy the Court for years."[403] And while the Tenth Circuit seems to conduct a more thorough analysis of the burglary and eluding cases because of their adherence to *Taylor*'s generic definition methodology and consistent use of the modified categorical approach, the Tenth Circuit has yet to address the issue of juvenile adjudications.

The reluctance of the Supreme Court to address the issue of juvenile adjudications as predicate offenses will most certainly have to end in the near future, but at what costs? Will the Court redefine the juvenile court? Will the goals of the juvenile system be eradicated? Will the reliability

399. *E.g.*, Johnson v. United States, 130 S. Ct. 1265, 1268 (2010) (deciding whether the Florida statutory crime of battery constitutes a "violent felony" under the ACCA); Chambers v. United States, 555 U.S. 122, 129 (2009) (deciding whether failure to report to prison constitutes a "violent felony" under the ACCA); *Begay*, 553 U.S. at 139 (deciding whether DUI is a "violent felony" under the ACCA); James v. United States, 550 U.S. 192, 198 (2007) (finding that attempt crimes may qualify as predicate offenses under the ACCA when they involve conduct that presents a serious potential risk to another).

400. *Graham*, 130 S. Ct. at 2017–18; *Roper*, 543 U.S. at 555–56.

401. Boyd v. Newland, 467 F.3d 1139, 1152 (9th Cir. 2006).

402. *In re* Winship, 397 U.S. 358, 368 (1970). *Winship* is a decision in the middle of a line of Supreme Court cases that mandated the due process rights to be afforded to juveniles in the adjudication process. It was decided in 1970, predating *McKeiver* and following *In re* Gault.

403. *Chambers*, 555 U.S. at 122 (Alito, J., concurring).

and due process protection of juvenile adjudications be examined? Or, will the Court simply decide that, contrary to their previous decisions, the ACCA is too vague to continue and thereby force Congress to reform its Act for the first time since 1986. Regardless, as the survey above shows, the ACCA and USSG recidivist sections have created substantial litigation and resulted in many a judicial quandary and disagreement.

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