UNITED STATES V. MOBLEY: ANOTHER FAILURE IN CRIME OF VIOLENCE ANALYSIS

Samantha Rutsky[*]

I. Introduction 852
II. Background 853
A. The History and Use of the United States Sentencing Guidelines § 4B1.1-1.2 Career Offender Provision 853
1. The Residual Clause Issue 855
2. The Armed Career Criminal Provision and Its Relation to the Sentencing Guidelines 855
B. The Evolution of the ACCA's Influence on the Sentencing Guidelines' Career Criminal Residual Clause 856
1. The Categorical Approach 859
2. The Intermediate / Modified Categorical Approach 860
3. The Conduct-Specific Approach/Fact-Based Approach 861
C. The Current Law on Whether Possession of a Weapon in Prison Is a Crime of Violence 862
1. Majority Ruling 862
2. Minority Ruling 864
III. United States v. Mobley 865
IV. Analysis 869
A. The Mobley Dissent Was Correct 869
1. The Majority Misapplied the *Begay* Two-Part Test 870
2. The Offense of Possession of a Weapon in Prison

[*] Samantha Rutsky, J.D., *magna cum laude*, The University of Akron School of Law, 2013. Assistant Editor, 2012-2013 *Akron Law Review.* Member, Moot Court Honor Society, 2011-2013. B.A., *magna cum laude* in English, The Ohio State University, 2010. The author is currently an attorney residing in Denver, Colorado, and wishes to thank her family for their continued support and Professor Joann Sahl for her guidance throughout law school.

Does Not Typically Involve Purposeful, Violent, and Aggressive Conduct 871
B. The Begay Standard: Raising More Questions Than Answers 875
C. Better Standard: Presumption of Non-Violence, and Application of a Limited Fact-Based Standard to Overcome the Presumption 876
1. Why There Should Be a Presumption of Non-Violence 877
2. To Overcome the Presumption, Courts Should Apply a Limited Fact-Based Standard 880
V. Conclusion 886
Appendix 888

I. INTRODUCTION

Although Jermaine Mobley had never previously been convicted of a violent crime, on December 6, 2010, he was labeled a violent "career offender" based on his conviction of possession of a weapon in prison.[1] As a result of this label, Mobley's sentence was increased by an extra ten plus months—additional time that he would not have been subject to otherwise.[2] To determine that Mobley was a career offender, the sentencing judge found that his crime of possession of a weapon in prison constituted a "crime of violence" under section 4B1.2(a) of the U.S. Sentencing Guidelines.[3] Specifically, the judge held that Mobley's crime was a crime of violence under the guidelines' residual clause, which states that an offense is considered a crime of violence if it "involves conduct that presents a serious potential risk of physical injury to another."[4] Thus, Mobley fell into the trap that many other defendants fall into every year—labeled a career offender and subjected to a harsher sentence based on a vague statute that has produced confusing and conflicting results.

After circuit and district courts released a flood of contradictory opinions on what standard to apply when analyzing whether a crime is considered a crime of violence under the guidelines' residual clause, the

1. United States v. Mobley, 687 F.3d 625, 626 (4th Cir. 2012).
2. *Id*. at 627.
3. *Id*.
4. *Id*. at 628.

Supreme Court established a two-part test in *Begay v. United States*.[5] Under the *Begay* test, first, the court must determine whether the crime creates a serious potential risk of physical injury, and then second, determine whether the crime typically involves purposeful, violent, and aggressive conduct.[6] This note analyzes the Fourth Circuit's decision in *United States v. Mobley*, focusing on how the majority in *Mobley* misapplied the *Begay* test and came to the incorrect holding, and suggests how to remedy residual clause analysis for the crime of possession of a weapon in prison.

Part II gives a background on the career offender provision and residual clause analysis, and the current law on whether possession of a weapon in prison is considered a crime of violence, which has resulted in a circuit split. Part III gives a statement of the case to this note, *United States v. Mobley*. Part IV analyzes how the *Mobley* majority misapplied the *Begay* two-part test and attempts to remedy residual clause analysis for the crime of possession of a weapon in prison. This will include Part IV.A, which explains why the *Mobley* dissent was correct in its opinion, Part IV.B, which examines the inherent problems in applying the *Begay* test, and Part IV.C, which proposes a better standard to apply when doing residual clause analysis for the crime of possession of a weapon in prison.

II. BACKGROUND

A. The History and Use of the United States Sentencing Guidelines § 4B1.1-1.2 Career Offender Provision

In 1987, the U.S. Sentencing Guidelines were created by the Sentencing Commission and introduced to the federal criminal justice system to achieve uniformity in sentencing.[7] The main tool that courts use in the guidelines is a sentencing grid where there are forty-three offense levels on the vertical axis and six criminal history categories on

5. Begay v. United States, 553 U.S. 137 (2008).

6. *Id.* at 144.

7. Timothy W. Castor, *Escaping a Rigid Analysis: The Shift to a Fact-Based Approach for Crime of Violence Inquiries Involving Escape Offenses*, 46 WM. & MARY L. REV. 345, 345 (2004). In making the guidelines, Congress instructed the Commission to focus on two facts when imposing a sentence on a defendant—one, the current offense and characteristics of the defendant, and two, the need for punishment. Neal Eriksen, *Criminal Law—The Meaning of Violence: An Interpretive Analysis on Whether a Prior Conviction for Carrying a Concealed Weapon Is a "Crime of Violence" Under the United States Sentencing Guidelines*, 29 W. NEW ENG. L. REV. 801, 806 (2007).

the horizontal axis.[8] Sentencing ranges vary depending on the criminal category and the offense, and courts must sentence defendants accordingly.[9]

To meet one of the overarching goals of the U.S. Sentencing Guidelines, imposing harsher sentences on repeat offenders, the Sentencing Commission included a career offender provision in the guidelines.[10] The career offender provision is found in section 4B1.1 of the guidelines, and states that a convicted defendant is a career offender if:

> (1) he was at least 18 years old at the time he committed the instant offense;
>
> (2) the instant offense is a felony that is either a crime of violence or a controlled substance offense; and
>
> (3) the defendant has at least 2 prior felony convictions of either a crime of violence or a controlled substance offense.[11]

If the career offender provision applies to a particular defendant, the sentencing court will place the defendant in criminal history category VI, the highest category on the sentencing grid.[12] The court then determines the offense level on the vertical axis of the grid and ascertains the applicable sentencing range.[13] Placing the defendant in the highest category for criminal history will result in a longer prison sentence.[14] Section 4B1.2(a) of the guidelines defines a crime of violence as any offense "punishable by imprisonment for a term exceeding one year," and that

> (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> (2) is burglary of a dwelling, arson, or extortion, involves the use of

8. Castor, *supra* note 7, at 347. *See* Appendix.
9. Castor, *supra* note 7, at 347-48.
10. *Id*. at 348.
11. United States v. Mobley, 687 F.3d 625, 627 (4th Cir. 2012).
12. Castor, *supra* note 7, at 348.
13. *Id*.
14. Amy Baron-Evans, Jennifer Coffin & Sara Silva, *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 47 (2010). For nearly all defendants sentenced using the career offender provision, the statutory maximum time in prison is 20 years or more, and thus, for most defendants, the guideline sentencing range is 210-262 months, 262-327 months, or 360 months to life. The commission didn't look at the average prison time served pre-guidelines as the starting point for the career offender guideline because 28 U.S.C. § 944(h) instructed to set the ranges at or near the maximum term authorized. Therefore, career offenders would have much larger increases in prison time served as compared to their sentences before the provision was applied.

> explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.[15]

Application Note 1, contained in the comments to § 4B1.2, lists crimes, in addition to those enumerated in the statute, that are considered crimes of violence, such as murder, manslaughter, and possession of several weapons including a sawed-off rifle or machine gun.[16] The comment also lists crimes not considered crimes of violence, which includes unlawful possession of a firearm by a felon.[17]

1. The Residual Clause Issue

Under section 4B1.2(a), a crime is considered a crime of violence for career criminal purposes if it "otherwise involves conduct that presents a serious potential risk of physical injury to another."[18] Courts look to this residual clause found in the last sentence of section 4B1.2(a) if the offense does not fall into the enumerated list of crimes in the statute or in Note 1 in the comments. The residual clause causes ambiguity and conflict for courts, as it is often difficult to apply the crime of violence standard to offenses not enumerated in the guidelines.[19] Jurisdictions have developed different approaches and standards used to analyze whether a crime is a crime of violence under the residual clause, leading to conflicting rulings among the circuit courts.[20] To interpret the meaning of the guidelines' residual clause, courts have turned to a similar provision, the Armed Career Criminal Act ("ACCA").[21]

2. The Armed Career Criminal Provision and Its Relation to the Sentencing Guidelines

Congress enacted the ACCA in 1984 to protect society by incarcerating violent repeat offenders and limiting their access to

15. U.S.S.G. § 4B1.2(a) (1987).

16. *Mobley*, 687 F.3d at 629. The complete list of crimes that are considered crimes of violence in Application Note 1 are: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, possession of a sawed-off shotgun or sawed-off rifle, silencer, bomb, or machine gun. *Id.*

17. *Id*.

18. U.S.S.G. § 4B1.2 (1987).

19. Castor, *supra* note 7, at 349.

20. Castor, *supra* note 7, at 349.

21. Hayley A. Montgomery, Comment, *Remedying the Armed Career Criminal Act's Ailing Residual Provision*, 33 SEATTLE U. L. REV. 715, 718 (2010).

firearms.[22] The ACCA imposes a mandatory minimum fifteen-year prison sentence for felons found guilty of unlawfully possessing a firearm and who have been convicted of at least three prior violent felonies or serious drug offenses.[23] The ACCA defines a "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that: (i) has an element the use, attempted use, or threatened use of physical force against the person of another; or (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.[24] The ACCA, like the guidelines, has a residual clause characterizing a violent felony as a crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another."[25]

The guidelines, including the career offender provision, were enacted three years after the ACCA was established.[26] Because the ACCA's residual clause for what is considered a violent felony is essentially identical to the guidelines' residual clause for what is considered a crime of violence, courts have interpreted crime of violence and violent felony as interchangeable terms.[27] Opinions interpreting the ACCA's violent felony residual clause are regularly used to construe the meaning of the guidelines' residual clause for a crime of violence and vice versa.[28] Therefore, the Supreme Court's opinions in regards to the ACCA residual clause also apply and have been considered controlling for interpretation of the guidelines' residual clause.[29]

B. The Evolution of the ACCA's Influence on the Sentencing Guidelines' Career Criminal Residual Clause

The most recent and controlling Supreme Court case on the

22. *Id.* at 716. The ACCA is justified by studies showing that violent crimes were largely being committed by a very small percentage of repeat offenders. *Id.* Congress aimed to curb armed, habitual (career) criminals by limiting their access to firearms. While the original provision subjected any convicted felon found guilty of possession of a firearm, who had three previous convictions of robbery or burglary, to the mandatory fifteen-year minimum prison sentence, Congress revised the statute to include crimes similar to robbery and burglary presenting a risk of injury. *Id*. at 717.

23. *Id*. at 717.

24. *Id*.

25. Montgomery, *supra* note 21, at 717.

26. *Id*. at 718.

27. *Id*.

28. *Id.*

29. Montgomery, *supra* note 21, at 718.

meaning of the ACCA's violent felony residual clause is *Begay v. United States*.[30] Prior to *Begay*, to determine whether a crime fell under either the ACCA or the guidelines' residual clauses, courts simply looked at whether the crime in itself presented any possibility of risk of injury to another.[31] However, in 2008, the Supreme Court in *Begay* narrowed the scope of crimes that can fall under the ACCA's residual clause.[32] The defendant in *Begay* was sentenced to the mandatory fifteen-year prison sentence because he was found guilty of being a felon unlawfully in possession of a firearm, and the sentencing judge determined that Begay had at least three prior felony convictions that presented a serious potential risk of physical injury to another.[33] Begay had a dozen prior DUI convictions, and under New Mexico state law, a DUI becomes a felony the fourth and any subsequent times an individual is charged with such crime.[34] Therefore, the judge determined that Begay's dozens of DUI convictions were violent felonies that involved conduct that presented a serious potential risk of physical injury to another.[35]

In reviewing whether Begay's prior DUI convictions could fall under the ACCA residual clause, the Supreme Court reasoned that while the crime of drunk driving is clearly a dangerous crime, it is dissimilar to the enumerated crimes in the statute.[36] The Court carefully examined the language of the statute and determined that the presence of the enumerated list of crimes—burglary, arson, extortion, or crimes involving the use of explosives—signaled that the statute covered only *similar* crimes, rather than *every* crime that presents a serious potential risk of physical injury to another.[37] The Court held that in order to fall

30. Begay v. United States, 553 U.S. 137 (2008).

31. Evans, Coffin, & Silva *supra* note 14, at 66. *See*, *e.g.*, United States v. Thomas, 183 Fed. Appx. 742 (10th Cir. 2006); United States v. Vahovick, 160 F.3d 395 (7th Cir. 1998); United States v. Young, 990 F.2d 469 (9th Cir. 1993); Taylor v. United States, 495 U.S. 575 (1990). Prior to *Begay*, if there was an abstract possibility of risk of injury, courts interpreted that crime to be a crime of violence. Such crimes included tampering with a motor vehicle, burglary of a non-dwelling, fleeing and eluding, operating a motor vehicle without the owner's consent, possession of a short-barreled shotgun, oral threatening, car theft, and failing to return to a halfway house. Evans, Coffin & Silva *supra* note 14, at 66-67.

32. Evans, Coffin & Silva, *supra* note 14, at 66.

33. Begay v. United States, 553 U.S. 137, 140.

34. *Id*.

35. *Id*.

36. *Id*. at 141.

37. *Id.* at 142. The court explained that if Congress had meant every crime that presents a serious risk of injury to another to fall under the statute, they would not have included the examples (enumerated crimes) at all. *Id.* Furthermore, the court stated that if Congress had meant to include all risky crimes, they would not have included the clause, a crime which has an element "the use,

under the ACCA residual clause, an offense must be roughly similar, in kind as well as in degree of risk posed, to the listed crimes in the statute.[38]

The majority held that a DUI falls outside the scope of the residual clause, as it is too dissimilar to the listed crimes.[39] In coming to this holding, the Court narrowed the test for determining whether a crime falls under the ACCA residual clause. The Court reasoned that the three listed crimes of burglary, arson, and extortion all typically involve "purposeful, violent, and aggressive conduct."[40] Therefore, to determine if a crime is similar in kind as well as in degree of risk posed to the listed crimes, a court should look to how a reasonable person would consider the offense as the law states it and then decide whether the offense typically involves purposeful, violent, and aggressive conduct.[41] *Begay* created a two-step analysis for interpretation of the ACCA's residual clause definition of a violent felony: the court must determine whether the crime 1) creates a serious potential risk of physical injury, and 2) involves purposeful, violent, and aggressive conduct by considering the crime categorically.[42]

Although the Supreme Court in *Begay* attempted to establish a clear test for residual clause analysis, application of the second prong has proven to be difficult, as courts struggle to apply the standard to crimes not enumerated in the statute.[43] *Begay* followed the categorical approach, in which courts look at the crime in the abstract instead of how the particular defendant committed the crime, however some courts resisted and continued to follow past approaches.[44] Before *Begay*, three main approaches to analyzing a crime under both the ACCA and guidelines' residual clauses developed among the courts—the categorical approach, the intermediate or modified categorical approach, and the fact-based approach.[45] While the categorical approach remains

attempted use, or threatened use of physical force" against a person, as a crime that is likely to create "a serious potential risk of physical injury" would seem to fall within the scope of that clause. *Id*.

38. *Id*.

39. *Id.* at 142.

40. *Id*. at 144-45. The court stated that purposeful, violent, and aggressive conduct makes it more likely that an offender, later possessing a gun, will use that gun to intentionally harm another person—this action goes to the core of the statute, which is preventing career criminals from possessing a firearm. *Id.* at 145.

41. *Id*. at 141.

42. Montgomery, *supra* note 21, at 723; United States v. Begay, 553 U.S. 137, 143 (2008).

43. *Id*.

44. *Id*.

45. Jennifer Riley, Note, *Statutory Rape as a Crime of Violence for Purposes of Sentence*

the majority approach after the *Begay* decision,[46] some courts still adhere to previously followed standards because of the difficulty in deciding whether a crime typically is "violent" or "aggressive."[47]

1. The Categorical Approach

The Supreme Court in *Taylor v. United States* formally adopted the categorical approach, which the majority of courts apply when characterizing a crime as a crime of violence or a violent felony.[48] The Court in *Taylor* stated that the language of the ACCA statute supports the categorical approach as opposed to considering the underlying facts of a case, as the statute defines a violent felony as any crime that "has an element" of the use or threat of force, not a crime that *involves* the use or threat of force.[49] The Court also noted that the majority of appeals courts had mandated the categorical approach, looking to the statutory definitions of the offenses and not to the particular facts underlying those convictions.[50] Since *Taylor*, the Supreme Court has endorsed and followed the categorical approach, as the Court reiterated the categorical approach followed in *Taylor* and *Begay* in the 2009 case *Chambers v. United States*.[51] The categorical approach remains the majority

Enhancement Under the United States Sentencing Guidelines: Proposing a Limited Fact-Based Analysis, 34 IND. L. REV. 1507, 1511 (2001).

46. *See* Chambers v. United States, 555 U.S. 122 (2009); United States v. Mobley, 687 F.3d 625, 627 (4th Cir. 2012); United States v. Boyce, 633 F.3d 708, 709 (8th Cir. 2011); United States v. Marquez, 626 F.3d 214, 223 (5th Cir. 2010).

47. United States v. Perez-Jiminez, 654 F.3d 1136, 1141 (10th Cir. 2011).

48. Castor, *supra* note 7, at 350 (citing Taylor v. United States, 495 U.S. 575, 602 (1990)). In *Taylor*, the defendant pled guilty to being a felon unlawfully in possession of a firearm, and because he had four prior felony convictions, including two for second-degree burglary, the sentencing court applied the career criminal sentencing enhancement. *Taylor*, 495 U.S. at 575. However, Taylor appealed the application of the career criminal clause, arguing that his burglary convictions did not present a risk of physical injury to another. *Id.* The Court rejected the defendant's argument that the court should examine his individual conduct when determining if his crime was a crime of violence, as the Court explained that the enhancement provision has always embodied a categorical approach to the designation of predicate offenses. *Id.* at 602.

49. *Taylor*, 495 U.S. at 600. The Court was confident that in drafting the statute, Congress intended courts to apply a categorical approach, as the legislative history shows that Congress generally took a categorical approach to defining offenses, and no member of Congress suggested that a particular crime may count towards enhancement or sometimes may not, depending on the facts of the case. *Id.* at 601. The Court concluded that "if Congress had meant to adopt an approach that would require the sentencing court to engage in an elaborate fact-finding process regarding the defendant's prior offenses, surely this would have been mentioned somewhere in the legislative history." *Id*. at 601.

50. *Id*. at 599.

51. Douglas J. Bench, *What Constitutes a Violent Felony After Begay?*, 67 MO. B. J. 208, 209 (2011) (citing Chambers v. United States, 55 U.S. 122 (2009)). In *Chambers*, the court stated that

approach for courts in residual clause analysis, as it is the approach followed in *Begay*.[52] However, both before and after the *Begay* decision, some courts found that the categorical approach created unjust results, or had difficulty applying the *Begay* test, and therefore suggested different approaches.[53]

2. The Intermediate / Modified Categorical Approach

Some courts have explored an intermediate, or modified categorical approach, in determining whether a crime falls under the ACCA or guidelines residual clause.[54] The Eighth Circuit amended the categorical approach in *Johnson v. United States*, adopting a modified categorical approach, where the sentencing court could examine the trial record, including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions in order to determine whether a crime is a crime of violence.[55] Various pre-*Begay* opinions mandated this approach because courts found it difficult to apply a strict categorical approach when it was not clear from the statute whether a certain crime, such as statutory rape or escape from a penal institution, involved a risk of physical injury.[56] Even after *Begay*, some courts continue to apply the

courts should only look to the language in the statute to determine whether a crime falls under the residual clause, "not [to] the actual conduct of a defendant giving rise to the prior conviction." *Id.*

52. *Id*.

53. *See, e.g.*, United States v. Perez-Jiminez, 654 F.3d 1136, 1141 (10th Cir. 2011); United States v. Robles-Rodriguez, 204 Fed. Appx. 504, 506 (5th Cir. 2006); United States v. Riggans, 254 F.3d 1200, 1204 (10th Cir. 2001); United States v. Young, 990 F.2d 469, 471 (9th Cir. 1993).

54. *Robles-Rodriguez*, 204 Fed. Appx. at 506; *Young*, 990 F.2d at 471.

55. Bench, *supra* note 51, at 209 (citing Johnson v. United States, 130 S. Ct. 1265, 1273 (2010)). The *Johnson* court examined the trial record in order to determine which portion of the statute the defendant was convicted of when a statute includes both violent and non-violent conduct. *Id.* If such a statute exists, the court said they would turn to the modified categorical approach. *Id.*

56. Susan Fleischmann, *Toward a Fact-Based Analysis of Statutory Rape Under the United States Sentencing Guidelines* 1998 U. CHI. LEGAL F. 425 (1998). The Ninth Circuit in *United States v. Young* first looked to the elements of the crime charged, and if the elements of the crime did not include the use, attempted use, or threatened use of physical force, the court then examined whether the actual charged conduct of the defendant in the information or indictment presented a serious risk of physical injury to another. *Young*, 990 F.2d at 471. The court reasoned that while only a statutory definition of a crime may be enough in some crimes of violence analyses, in others, where perhaps a statute is ambiguous, the court might need to examine the actual conduct of the defendant. The court specifically stated that further factual inquiry beyond the information or indictment is inappropriate, as "a sentencing court is not free to make a 'wide ranging inquiry into the specific circumstances surrounding a conviction.'" *Id*. The Fifth Circuit also applied the intermediate approach in *United States v. Robles-Rodriguez*, where the court held that when a statute provides multiple methods of committing a crime, some of which may not involve the use of force or risk of injury, the court may look to the charging papers. *Robles-Rodriguez*, 204 Fed. Appx. 504, 506 (5th

intermediate approach because the circuit courts struggle to analyze whether a crime that can be committed in a multitude of ways typically involves purposeful, violent, and aggressive conduct.[57] Courts that continue to apply this intermediate approach explain that it comports with the commentary to the Sentencing Guidelines, as the comments refer to the conduct "expressly charged," which seemingly refers to information presented in the indictment.[58] Some courts however have gone beyond examining the conduct of the defendant as set forth in the indictment or information and examine any facts surrounding the conviction.[59]

3. The Conduct-Specific Approach/Fact-Based Approach

Under a conduct-specific or fact-based approach, a court can examine any facts relating to a defendant's conviction; may review the entire record of the prior proceeding; and/or hold an evidentiary hearing to determine whether the defendant's conduct which gave rise to the conviction involved the use of force or a risk of physical injury to another.[60] A small minority of courts apply this approach when conducting crime of violence analysis, explaining that it leads to fair results because it bases the determination on the defendant's own conduct instead of the arbitrary determination of whether a statute describes conduct that involves a risk of violence.[61] Post-*Begay*, the Tenth Circuit has continued to follow pre-*Begay* precedent and apply a conduct-specific inquiry.[62] In justifying a conduct-specific approach, the Tenth Circuit states that the concerns related to a sentencing court doing an ad hoc mini-trial do not apply when the court is examining the conduct of the defendant in the instant offense, as the information will be more readily available, avoiding an elaborate fact-finding process.[63]

Cir. 2006).

57. Montgomery, *supra* note 21, at 715. The Eighth Circuit continues to use the intermediate approach, when, as stated in *Robles-Rodriguez*, a statute "is divided into 'several discrete, alternative sets of elements that might be shown as different manners of committing the offense,'" and some manners of committing the offense do not involve the use of force or risk of injury. *See* Bench, *supra* note 51, at 209.

58. Castor, *supra* note 7, at 350.

59. Riley, *supra* note 45, at 1512.

60. *Id*.

61. Riley, *supra* note 45, at 1516.

62. United States v. Perez-Jiminez, 654 F.3d 1136, 1140 (10th Cir. 2011). In *Perez-Jiminez*, the Tenth Circuit noted that *Begay* analyzed only a past offense, and because the Tenth Circuit was analyzing an instant offense, the court cited back to their pre-*Begay* cases as authority to apply a conduct-specific approach when analyzing an instant offense. *Id.*

63. *Id*.

However, the majority of courts have rejected this approach.[64] Courts that apply the categorical approach explain that a conduct-specific approach would require sentencing courts to engage in a time-consuming and burdensome fact-finding process.[65] These courts also point out that applying a conduct-specific approach would allow the court to base its determination on facts that have merely been alleged, instead of the conduct for which the defendant has been convicted, which the amendments to the guidelines emphasize as the primary inquiry.[66] Furthermore, *Begay*, the current governing law on residual clause analysis, mandates that courts should apply the categorical approach.[67] Because the Supreme Court rejected the fact-based approach in *Begay*, most courts decline to look to an individual defendant's conduct on a specific occasion when doing residual clause analysis.

C. The Current Law on Whether Possession of a Weapon in Prison Is a Crime of Violence

Although the Supreme Court in *Begay* intended to create a clear test for residual clause analysis, circuits remain split on whether certain crimes qualify as a crime of violence under the guidelines' residual clause.[68] One such crime is possession of a weapon in prison.[69] While the circuit courts agree that the crime does in fact present a serious risk of physical injury, there is disagreement on whether the second prong of *Begay* is met—whether the crime is similar in kind, as well as in degree of risk posed, to burglary, arson, extortion, or crimes involving explosives, and therefore typically involves purposeful, violent, and aggressive conduct.[70]

1. Majority Ruling

The Fifth, Eighth, and Tenth Circuits currently adopt the majority position that the offense of possession of a weapon in prison constitutes

64. Montgomery, *supra* note 21, at 720.
65. Castor, *supra* note 7, at 351.
66. *Id*.
67. Montgomery, *supra* note 21, at 723.
68. *Id.* at 715.
69. *See* United States v. Boyce, 633 F.3d 708, 709 (8th Cir. 2011); United States v. Perez-Jiminez, 654 F.3d 1136, 1141 (10th Cir. 2011); United States v. Marquez, 626 F.3d 214, 223 (5th Cir. 2010); United States v. Polk, 577 F.3d 515, 517 (3d Cir. 2009).
70. *See Boyce*, 633 F.3d at 709; *Perez-Jiminez*, 654 F.3d at 1141; *Marquez*, 626 F.3d at 223; *Polk*, 577 F.3d at 517.

a crime of violence under the guidelines' residual clause.[71] Using *Begay* to guide its analysis, the Fifth Circuit in *United States v. Marquez* held that because there is clearly a risk of physical injury when an inmate possesses a weapon, and because possession of a weapon in prison is similar in kind and degree of the risk posed to the crime of burglary of a dwelling, the offense is a crime of violence.[72] The court explained that possession of a weapon in prison is similar to the crime of burglary of a dwelling because the main risk of burglary arises from the possibility of a face-to-face confrontation between the burglar and a third party.[73] Similarly, while an inmate may not intend to attack someone, his possession of a weapon signals his willingness to use it.[74] Therefore, like burglary of a dwelling, the main risk of an inmate in possession of a weapon is the possibility of a face-to-face confrontation with another person.[75] The court also stressed that there is no legitimate reason for an inmate to possess a deadly weapon—its only purpose is for violence, as opposed to a felon being in possession of certain firearms, which could be used for recreational purposes.[76]

The Eighth Circuit, in *United States v. Boyce*, also held that a defendant's prior conviction of possession of a weapon in prison constituted a crime of violence under the guidelines' residual clause.[77] In regards to *Begay*'s first prong, the court concluded that possession of a weapon in prison presents a serious potential risk of physical injury to another because there is no lawful purpose for such possession and

71. United States v. Mobley, 687 F.3d 625, 629 (4th Cir. 2012).

72. *Id*. at 630 (citing *Marquez*, 626 F.3d at 222). The Fifth Circuit in *United States v. Marquez* analyzed whether the defendant's prior conviction for possession of a weapon in prison, specifically a club made of dried magazine paper, was a crime of violence under the residual clause. *Id.*

73. *Marquez*, 626 F.3d at 222.

74. *Id*.

75. *Id*.

76. *Id*. The court also relied on their prior ruling in *United States v. Hughes*, where they held that a prisoner's escape from federal custody or confinement was a violent felony under the ACCA residual clause. *Id.* at 228. In *Hughes*, the court stated that when a defendant escapes from jail, there is a serious potential risk that injury will result when officers find the defendant and attempt to place him back in custody; similarly, a prisoner's possession of a deadly weapon presents the same risk that the prisoner's intentional, purposeful actions will result in injuries to another inmate or guard. *Id*. at 224 (citing United States v. Hughes, 602 F.3d 669 (5th Cir. 2010)).

77. United States v. Boyce, 633 F.3d 708, 709 (8th Cir. 2011). The weapon in *Boyce* was homemade and resembled an ice pick. *Id.* Prison officers discovered the weapon wrapped in a bandage on Boyce's arm. *Id.* The pre-sentence report ("PSR") did not characterize this conviction as a violent felony nor recommend that Boyce be sentenced as an armed career criminal. *Id.* at 709-10. The government objected to the PSR and argued that Boyce's possession of a weapon in prison was a violent felony, and therefore he should receive the ACCA mandatory minimum sentence based on his three violent felony convictions. *Id.* at 710.

therefore the possession creates the serious risk of injury to another.[78] The court further held that *Begay*'s second prong was met because the defendant's possession of the weapon was clearly purposeful, and it was also violent and aggressive because "it created the possibility—even likelihood—of a future violent confrontation."[79] Using the same reasoning set forth in *Boyce*, the Tenth Circuit in *United States v. Perez-Jiminez* also held that possession of a weapon in prison constitutes a crime of violence.[80] The Tenth Circuit used much of the same analysis as the Fifth and Eighth Circuits, stating that there is no legitimate purpose for an inmate to possess a deadly weapon in prison, as the weapon could only be used to attack another or deter an attack.[81] The court referred to the ruling in *Boyce*, stating that they were persuaded that the second prong of *Begay* was met, as the inmate's possession of the weapon indicated his readiness to use violence and enter into a conflict.[82] While the Fifth, Eighth, and Tenth Circuits have established the majority rule that the crime of possession of a weapon in prison constitutes a crime of violence under the guidelines residual clause, this majority holding departs from an earlier ruling in the Third Circuit.[83]

2. Minority Ruling

In *United States v. Polk*, the Third Circuit held that possession of a weapon in prison does not constitute a crime of violence under the guidelines residual clause.[84] Like the Fifth, Eighth, and Tenth Circuits,

78. *Id*. at 710.

79. *Id.* at 712 (quoting United States v. Vincent, 575 F.3d 820, 825 (8th Cir. 2009)) (internal quotations omitted). The court turned to their prior ruling in *Vincent*, where they held that the crime of possession of a sawed-off shotgun was a crime of violence. *Id.* The court explained that like the crime of possession of a sawed-off shotgun, which is illegal "precisely because it enables violence or the threat of violence," possession of a weapon in prison indicates that the prisoner is "'prepared to use violence if necessary' and is ready to 'enter into conflict, which in turn creates a danger for those surrounding the armed prisoner.'" *Id.* (quoting United States v. Zuniga, 553 F.3d 1330, 1335-6 (10th Cir. 2009)).

80. United States v. Perez-Jiminez, 654 F.3d 1136, 1138 (10th Cir. 2011). The weapons the defendant possessed in *Perez-Jiminez* were two homemade shanks made from sharpened metal knives. *Id.*

81. *Id*. at 1143.

82. *Id*.

83. United States v. Polk, 577 F.3d 515, 517 (3d Cir. 2009).

84. *Id*. at 517. In *Polk*, the court examined whether the defendant's instant offense of possession of a weapon, specifically a shank, in prison constituted a crime of violence. *Id.* A correctional officer searched Polk's cell, and found a six-inch plastic homemade shank in an envelope containing his personal papers. *Id.* Polk's total offense level was 14, and when combined with his criminal history category of IV (set because the sentencing court determined his offense was a crime of violence), his sentencing guidelines range was 37-46 months. *Id.* Without the

the court explained that *Begay* governed its analysis; however, the court determined that the second prong of *Begay*, that the offense be similar to the enumerated crimes and, therefore, involve purposeful, violent, and aggressive conduct, was not met.[85] In determining whether the crime typically involved purposeful, violent, and aggressive conduct, the court reasoned that, "the distinction between active and passive crimes is vital."[86] While possession of a weapon in prison is purposeful, the court stated that it is neither violent nor aggressive, as only the potential exists for aggressive or violent conduct, and the act of possession does not, without more, involve any aggressive or violent behavior.[87] The court explained that while possessing a weapon in prison does have inherent dangers, "this alone cannot transform a mere possession offense into one that is similar to the crimes listed."[88] The court rejected the Tenth Circuit's earlier holding in *United States v. Zuniga*, saying that "we cannot agree with its reasoning that the likelihood or potential for violent and aggressive behavior to come about as a result of the offense is sufficient for qualifications in light of *Begay*," as *Begay* requires the conduct of the crime itself to involve violent and aggressive conduct, not just present the *risk* of violent and aggressive conduct.[89]

III. UNITED STATES V. MOBLEY

In December 2010, defendant Jermaine Mobley pled guilty to the offense of possession of a prohibited object in prison, violating 18 U.S.C. § 1791(a)(2).[90] While visiting the infirmary because of pain and numbness in his feet, a physical therapist discovered an eight-inch shank concealed in the insole of Mobley's shoe.[91] Mobley was charged with possession of a prohibited object in prison, and the sentencing court found that this crime constituted a crime of violence.[92] The court was

enhancement, his range would have been 27-33 months. *Id.*

85. *Polk*, 577 F.3d at 519.

86. *Id*.

87. *Id*. (citing United States v. Archer, 531 F.3d 1347, 1351 (11th Cir. 2008)).

88. *Id*. at 520.

89. *Polk*, 577 F.3d at 520; United States v. Zuniga, 553 F.3d 1330 (10th Cir. 2009).

90. United States v. Mobley, 687 F.3d 625, 626 (4th Cir. 2012).

91. *Id.* at 626. The prosecutor explained that shanks are "'made by inmates from bits and pieces of metal' and sharpened against concrete." *Id.* n.1. The Fourth Circuit added in a footnote that the court had "previously described a shank as a homemade knife or 'a handmade sharp instrument.'" *Id.* (citing United States v. Caro, 597 F.3d 608, 610 (4th Cir.2010); United States v. Perry, 335 F.3d 316, 318 (4th Cir.2003)).

92. United States v. Mobley, 687 F.3d 625, 627(4th Cir. 2012). "Prohibited object" was defined in the statute to include weapons, controlled substances, currency, and telephones. *Id*. at 627. The punishment for the offense was a fine or imprisonment for not more than five years, or

then able to charge Mobley as a career offender under section 4B1.1 of the guidelines because he had two prior felony convictions for controlled substance offenses.[93] Mobley's base offense level under the guidelines was 13, and after applying the career offender sentencing enhancement, this increased to 17.[94] The level was then reduced by three for Mobley's acceptance of responsibility, coming to a total of 14 for his base offense level.[95] Mobley's criminal history category was VI, and the advisory range for an offense level of 14 with a criminal history category of VI is 37 to 46 months.[96] Mobley was sentenced to 37 months.[97] If the career offender provision had not been applied, Mobley's sentencing range would have been 24 to 30 months.[98]

At the sentencing hearing, Mobley objected to the use of the career offender enhancement, arguing that his conviction for possession of a prohibited object in prison did not qualify as a crime of violence.[99] The court overruled this objection, finding that there is no passive possession of a weapon in a prison setting, and Mobley appealed.[100] At the time of the instant offense, Mobley was serving a 151-month prison sentence for his prior federal convictions of possession with intent to distribute heroin and being a felon in possession of a firearm.[101] On appeal, the Fourth Circuit affirmed the sentencing court's ruling that Mobley's conviction for possession of a prohibited object in prison did constitute a crime of violence.[102] The court turned to *Begay* to guide its analysis and also examined the list of offenses considered crimes of violence in Application Note 1 to section 4B1.2.[103] Relying on the Third Circuit's position in *Polk*, Mobley argued that mere possession of a shank does not involve the active or assaultive conduct required of a crime of violence under the guidelines.[104]

---

both. *Id.*

93. *Id*.

94. *Id*.

95. *Id.*

96. *Id*.

97. United States v. Mobley, 687 F.3d 625, 626 (4th Cir. 2012).

98. *Id.* at 627.

99. *Id.*

100. *Id*.

101. *Id.* at 626.

102. *Id*.

103. United States v. Mobley, 687 F.3d 625, 626 (4th Cir. 2012). The court also cited Sykes v. United States, 131 S. Ct. 2267 (2011), where the Supreme Court held that intentional vehicular flight was comparable in degree of risk to the enumerated offenses in the statute, specifically burglary and arson. *Id*.

104. *Id*. at 628.

The court, however, rejected this argument, citing the majority positions of the Fifth, Eighth, and Tenth Circuits.[105] The court agreed with the Fifth Circuit's analysis in *Marquez* that possession of a weapon in prison is similar in kind and in degree of risk posed to the crime of burglary because of the possibility of a face-to-face confrontation.[106] The court also relied heavily on the rulings in *Boyce* and *Perez-Jiminez*, where the Eighth and Tenth Circuits held that possession of a weapon in prison involves purposeful, violent, and aggressive conduct because such possession creates the likelihood of future violent confrontations.[107] Furthermore, the court noted that there is no innocent purpose for the possession of a weapon by a prison inmate other than to attack or deter an attack, facilitating violence and injury.[108] The court explained that even though possession of a weapon in prison may not involve the same kind of active violence and aggression reflected in some of the enumerated offenses, it does reflect a similar level of violence and aggression involved in possession of a sawed off shotgun, listed in Application Note 1 as a crime of violence.[109] The court also added that possession of a weapon in prison involves a similar level of risk of violence involved in the crime of burglary, another enumerated offense.[110] Therefore, the Fourth Circuit held that Mobley's possession of a weapon in prison was a crime of violence.[111]

However, Circuit Judge Wynn, persuaded by the Third Circuit's minority position in *Polk,* wrote an equally long dissenting opinion.[112] The dissent stated that the mere possession of a weapon in prison is not a crime of violence because it is dissimilar to the enumerated offenses, and that at the very least, whether it is similar is ambiguous and therefore must be construed in the defendant's favor.[113] In analyzing whether possession of a weapon in prison involves purposeful, violent, or aggressive conduct, the dissent turned to *Chambers v. United States*.[114] In *Chambers*, the Supreme Court held that the crime of failure to report for penal confinement did not constitute a violent felony under the

105. *Id.* at 629.

106. *Id*.

107. *Id*. at 630.

108. *Id*. at 630-31.

109. United States v. Mobley, 687 F.3d 625, 630-31 (4th Cir. 2012).

110. *Id*. The court explained that, "like the offense of burglary of a dwelling, the availability of contraband weapons in the prison context obviously facilitates violence and injury." *Id*.

111. *Id*. at 631.

112. *Id*. at 632 (Wynn, J., dissenting).

113. *Id*.

114. *Id.* at 633 (Wynn, J., dissenting) (citing Chambers v. United States, 555 U.S. 122 (2009)).

ACCA.[115] The Court stated that the offense was a form of inaction while the *Mobley* dissent likewise explained that possession of a weapon in prison is a form of inaction.[116] The dissent agreed with the holding in *Polk* that there is a fundamental difference between the enumerated purposeful, violent, and aggressive offenses and a passive crime of mere possession.[117] The Mobley dissent explained that merely the conviction of the offense of possession of a weapon in prison does not require that the prisoner attempt to harm anyone or threaten anyone with harm; a person can be guilty of the offense if the prisoner has a weapon to defend himself or if a weapon is simply discovered in his cell, and these actions do not initiate violence nor exhibit violent or aggressive conduct.[118]

The dissent also criticized the majority's position that because there is no innocent purpose for possession of a weapon in prison, such possession is a crime of violence.[119] As the dissent explained, "the mere fact that an act is categorically unlawful does not necessarily render it a dangerous and provocative act that itself endangers others."[120] The majority's holding was based largely on the idea that because a prisoner has no legitimate purpose to possess a weapon in prison, unlike a felon who may possess a weapon for recreational purposes, such possession is violent conduct.[121] However, the dissent explained that while this conduct is clearly unlawful, its unlawfulness does not make it violent and aggressive.[122]

Finally, the dissent stated that at the very least, the residual clause is ambiguous regarding whether possession of a weapon in prison constitutes a crime of violence.[123] The dissent opined that there is ambiguity in the guidelines career offender provision, as the statute may

115. United States v. Mobley, 687 F.3d 625, 633 (4th Cir. 2012) (Wynn, J., dissenting).

116. *Id*. (citing *Chambers*, 555 U.S. at 128). The *Mobley* court compared failure to report to penal confinement in *Chambers* to possession of a weapon in prison, as both offenses "are a far cry from the purposeful, violent, and aggressive conduct potentially at issue when an offender uses explosives against property, commits arson, or burgles a dwelling." *Id*. (quoting *Chambers*, 555 U.S. at 128-29).

117. *Mobley*, 687 F.3d at 633 (Wynn, J., dissenting).

118. *Id*. at 634 (Wynn, J., dissenting).

119. *Id*. (Wynn, J., dissenting)

120. *Id*. (Wynn, J., dissenting) (quoting *Sykes v. United States*, 131 S. Ct. 2267 (2011)) (internal quotations omitted).

121. *Id.* at 634 (Wynn, J., dissenting).

122. *Id*. (Wynn, J., dissenting). The dissent also pointed out that a shank is not included in the list of narrowly defined weapons in § 4B1.2 comment 1 of the guidelines that Congress determined mere possession of would constitute a crime of violence. *Id*. at 635 (Wynn, J., dissenting).

123. United States v. Mobley, 687 F.3d 625, 634 (4th Cir. 2012) (Wynn, J., dissenting).

be reasonably interpreted in two different ways.[124] When such a statute is ambiguous, courts are required to apply the rule of lenity, which mandates resolving the conflict in the defendant's favor.[125] The dissent purported that the ACCA, which helps dictate the guidelines residual clause analysis, has very little legislative history and that the statute gives little guidance on what crimes it intends to cover.[126] Because application of the ACCA and guidelines residual clauses has resulted in confusion among the courts, inmates may lack sufficient notice on which crimes may be considered crimes of violence.[127] As such, the dissent concluded that such ambiguity and lack of notice obliges the court to apply the rule of lenity and rule in Mobley's favor.[128]

IV. ANALYSIS

A. The Mobley Dissent Was Correct

The *Mobley* majority made a crucial, yet common oversight when applying the *Begay* test to the crime of possession of a weapon in prison—the majority applied only the first prong of the *Begay* test, as it failed to examine whether the crime typically involves purposeful, violent, and aggressive conduct. Other circuit courts, like the *Mobley* majority, have also made this mistake, only examining whether the *risk* involved in possessing a weapon in prison involves purposeful, violent, and aggressive conduct and not whether the conduct of the crime itself is purposeful, violent, and aggressive.[129]

124. *Id*. (Wynn, J., dissenting)

125. *Id.* at 634 (Wynn, J., dissenting). The court explained the rule of lenity as an important safeguard of defendants' constitutional rights by ensuring that they receive notice "in language that the common world will understand, of what the law intends to do if a certain line is passed." *Id*. at 635 (Wynn, J., dissenting) (quoting Babbitt v. Sweet Home Chapter of Cmties. for a Great Or., 515 U.S. 687, 704 n. 18 (1995)). The dissent explained that a statute may not be ambiguous just because it is possible to articulate a construction more narrow than that urged by the government, or because there is a division of judicial scrutiny on its interpretation. However, such circumstances may evidence ambiguity, especially when a statute can be reasonably interpreted in two different ways and the legislative history does not amount to much. *Id*. at 635 (Wynn, J., dissenting) (quoting United States v. Hayes, 555 U.S. 415, 436 (2009) (Roberts, J., dissenting)); Moskal v. United States, 498 U.S. 103, 108 (1990)).

126. *Id*. at 636 (Wynn, J., dissenting). To show the ambiguity present in the residual clause, the dissent pointed out that the four listed example crimes in the statute have very little in common, especially with respect to the level of risk of injury they pose, which has resulted in confusion among the circuit courts when applying the statute. *Id*. (Wynn, J., dissenting) (quoting James v. United States, 550 U.S. 192, 229 (2007) (Scalia, J., dissenting)).

127. *Id*. (Wynn, J., dissenting)

128. *Id*. (Wynn, J., dissenting)

129. *See Mobley*, 687 F.3d at 626; *Perez-Jiminez*, 654 F.3d at 1140; *Boyce*, 633 F.3d at 709;

This section explains how the *Mobley* majority, along with the *Marquez* and *Boyce* majorities, incorrectly applied the *Begay* two-part test by merging the two prongs together, and why the *Polk* majority, the *Marquez* dissent, and the *Mobley* dissent were correct in their opinions. The *Polk* majority, the *Marquez* dissent, and the *Mobley* dissent properly applied the second prong of *Begay* by analyzing whether the *conduct* of possessing a weapon in prison, and not just the *risk* it imposes, typically involves purposeful, violent, and aggressive conduct. The *Polk* majority also further illustrated why the crime of possession of a weapon in prison does not typically involve purposeful, violent, and aggressive conduct by looking to the opinions of other courts that applied the *Begay* test to similar possession crimes.[130]

1. The Majority Misapplied the *Begay* Two-Part Test

The *Mobley* dissent came to the correct conclusion, as the crime of possession of a weapon in prison does not typically involve purposeful, violent, and aggressive conduct as required by *Begay*.[131] The *Mobley* majority came to the incorrect holding because it misapplied the *Begay* two-part test. While the majority properly found that the first prong of *Begay* was met, that the crime creates a serious potential risk of physical injury, it failed to recognize that the second prong, that the crime typically involves purposeful, violent, and aggressive conduct, was not met. The majority essentially lumped the two prongs together, as fulfillment of the first prong seemed to automatically fulfill the second prong. Therefore, the majority ended up reverting back to and applying the pre-*Begay* test by simply analyzing whether the crime creates a risk of physical injury to another.

When the *Mobley* majority explained the *Begay* test, the court stated that *Begay* limits crimes that should fall under the residual clause to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves (the enumerated crimes).[132] While this is a correct statement, the majority failed to state the rest of the test mandated by *Begay*. The test does require a court to determine whether a crime is similar in kind and in degree of risk posed to the enumerated crimes in the statute, however, the test does not end there.[133] *Begay*

Marquez, 626 F.3d at 223.

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

131. United States v. Begay, 553 U.S. 137, 142 (2008).

132. *Mobley*, 687 F.3d at 628.

133. *Begay*, 553 U.S. at 143 (2008).

provided further guidance on how to determine whether an offense is similar to the enumerated crimes: "the listed crimes all typically involve purposeful, violent, and aggressive conduct."[134] It is clear from *Begay* that residual clause analysis is primarily guided by these three adjectives, as the Court stated that crimes involving purposeful, violent, and aggressive conduct are "characteristic of the armed career criminal, the eponym of the statute."[135] Furthermore, the *Begay* court based their holding on the fact that the crime of driving under the influence does not involve such conduct.[136] The precedence that the *Mobley* majority cited also clearly mandates this two-part test.[137] Such precedence explains that the second prong of whether the crime is similar to the enumerated crimes is fulfilled if the crime typically involves purposeful, violent, and aggressive conduct.[138]

However, the second prong of *Begay* is not properly analyzed in *Mobley*, as the majority's analysis of whether possession of a weapon in prison is similar to the enumerated crimes is limited to whether the offense creates a risk of violence.[139] Because possession of a weapon in prison "obviously facilitates violence and injury," the court held that the offense is similar to the enumerated crimes.[140] However, in analyzing whether the offense is similar to the enumerated crimes, they failed to address whether the crime typically involves purposeful, violent, and aggressive conduct.[141] The *Mobley* court analyzed only the first prong of the *Begay* test, explaining that possession of a weapon in prison creates a risk of injury by "creating a likelihood of future violent confrontations."[142]

2. The Offense of Possession of a Weapon in Prison Does Not Typically Involve Purposeful, Violent, and Aggressive Conduct

Polk correctly analyzed whether possession of a weapon in prison constitutes a crime of violence under the *Begay* two-part test by accurately applying the second prong, which the Fifth, Eighth, and Tenth Circuits, along with *Mobley*, failed to do. The Fifth Circuit in *Marquez*

134. *Id*.
135. *Id.* at 145.
136. *Id*.
137. United States v. Boyce, 633 F.3d 708, 711 (8th Cir. 2011).
138. *Id*.
139. United States v. Mobley, 687 F.3d 625, 631 (4th Cir. 2012).
140. *Id*.
141. *Id.* at 630.
142. *Id*.

and the Eighth Circuit in *Boyce* both applied the second prong incorrectly.[143] While the *Marquez* and *Boyce* courts did not ignore the second prong, as the *Mobley* majority did, the courts did not analyze whether the specific *conduct* involved in the crime—the conduct of possession—typically involves purposeful, violent, and aggressive conduct. Instead, these courts only analyzed whether the *risk* of the crime involves such conduct.[144] The *Boyce* court stated that the second prong is met, as the "offense was also both violent and aggressive because it created the possibility—even likelihood—of a future violent confrontation."[145] Similarly, the *Marquez* court held that the crime involves purposeful, violent, and aggressive conduct because a prisoner in possession of a weapon in prison is more likely to attack or physically resist an apprehender, such as a guard or another inmate.[146] These courts confused the analysis called for in the second prong by repeating the analysis of the first prong—looking at the risk imposed by the crime—instead of analyzing the conduct of the crime as described in the statute.

The *Polk* majority, the *Marquez* dissent, and the *Mobley* dissent accurately applied the second prong of the *Begay* test by analyzing the conduct of the crime, and not just the risk it imposes. The *Marquez* dissent recognized the majority's flawed application of the second prong of *Begay*, as the opinion pointed out that "a crime of violence depends on conduct that is at once purposeful, violent, and aggressive, not just purposeful and potentially violent."[147] The *Mobley* dissent also acknowledged that the conduct of possession of a weapon in prison only presents the risk of violence, and does not in itself involve violent or aggressive conduct, as it is a passive crime of mere possession.[148] The Third Circuit in *Polk* efficiently summarized why the second prong of *Begay* is not met: "While possession of a weapon in prison is purposeful, in that we may assume one who possesses a shank intends that possession, it cannot properly be characterized as conduct that is itself aggressive or violent, as only the potential exists for aggressive or violent conduct."[149]

143. *See Boyce*, 633 F.3d 708 (8th Cir. 2011), United States v. Marquez, 626 F.3d 214 (5th Cir. 2010).

144. *See Boyce*, 633 F.3d at 712 (quoting United States v. Vincent, 575 F.3d 820, 827 (8th Cir. 2009)), *Marquez*, 626 F.3d at 221.

145. *Boyce*, 633 F.3d at 712 (quoting United States v. Vincent, 575 F.3d 820, 827 (8th Cir. 2009)).

146. M*arquez*, 626 F.3d at 221 (5th Cir. 2010).

147. *Id.* at 227 (Dennis, J., dissenting).

148. *Mobley*, 687 F.3d at 625 (Wynn, J., dissenting).

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

To analyze whether the conduct involved in the crime of possession of a weapon in prison involves purposeful, violent, and aggressive conduct, the Third Circuit turned to cases where courts analyzed whether the crime of carrying a concealed weapon constituted a crime of violence, as these two crimes involve essentially the same conduct.[150] In *United States v. Archer*, the Eleventh Circuit applied the *Begay* two-part test to the crime of carrying a concealed weapon.[151] *Archer* held that while the crime is purposeful, as the person presumably intends to possess the weapon, carrying a concealed weapon does not involve aggressive or violent conduct.[152] The court explained that the crime is a passive crime consisting of only possession, rather than any overt action such as the acts involved in burglary and arson, which are violent acts aimed at other persons or property.[153] *Polk* and the *Marquez* and *Mobley* dissents explained that possession of a weapon in prison does in fact create the risk of danger; however, the *Archer* court further clarified the difference between a *risk* of danger and an overt act involving violent or aggressive conduct.[154] The *Archer* court stated, "we do not wish to minimize the danger that possession may quickly transform into use, especially when the firearm is readily accessible, however, the act of possession does not, without more, involve any aggressive or violent behavior."[155]

Like the crime of possession of a weapon in prison, appeals courts are split over the issue of whether carrying a concealed weapon is a crime of violence under the guidelines.[156] The analysis and arguments coming from the majority view that possession of a concealed weapon is not a crime of violence are persuasive on why possession of a weapon in prison is not a crime of violence. Scholars have pointed out that the enumerated crimes in the guidelines' provision all require "an affirmative act that produces a primary harm to another," and that the

150. *Id.*

151. United States v. Archer, 531 F.3d 1347, 1351 (11th Cir. 2008).

152. *Id.*

153. *Id*.

154. *Id*.

155. *Id.*

156. Eriksen, *supra* note 7, at 823. The Eleventh Circuit held that possession of a concealed weapon without a license was a crime of violence because such action goes beyond mere possession, as "the person has taken the extra step of having the weapon immediately accessible for use on another." *Id*. at 825 (quoting United States v. Hall, 77 F.3d 398 (11th Cir. 1996)). However, the Eighth and Tenth Circuits have held that carrying a concealed weapon is not a crime of violence, arguing that, "although carrying an illegal weapon may involve a continuing risk to others, the harm is not so immediate as to present a serious potential risk of physical injury to another." *Id*. at 823 (quoting United States v. Whitfield, 907 F.2d 798, 800 (8th Cir. 1990)).

crime of carrying a concealed weapon does not contain such a "primary harm to another."[157] In *United States v. Lane*, Judge Posner explained that carrying a concealed weapon is dissimilar to the enumerated crimes.[158] Judge Posner pointed to "the logical disconnect between what may happen and what has happened, and that while possession of a firearm may lead to violence, no violence has actually occurred."[159] Because no violence has actually occurred, no primary harm to another has occurred, unlike the crimes of burglary, arson, extortion, or the use of explosives. Similarly, when an inmate possesses a weapon in prison, "the opportunity for violence is available, but no overt act with a primary harm has been inflicted upon another."[160] The aim of outlawing concealed weapons without a permit is not to curb a wrong against a person or property, but instead to deter a person from having an instrument to commit such a wrong in the future.[161] The aim of preventing inmates from possessing weapons is the same—to deter violence among inmates in the future.

While Judge Posner's analysis does not consider whether carrying a concealed weapon typically involves purposeful, violent, and aggressive conduct, his analysis is persuasive on why the crimes of possession of a weapon in prison and carrying a concealed weapon, mere possession offenses, are not crimes of violence. The evaluation that the enumerated crimes in the guidelines statute all have 1) an overt act which, 2) produces a primary harm to another, further shows the dissimilarity between the enumerated crimes and crimes of mere possession.[162] Possession crimes do not involve violent or aggressive conduct. The opportunity for violence is insufficient to qualify as a crime of violence under *Begay*; there must also be purposeful, violent, and aggressive

157. Eriksen, *supra* note 7, at 827.

158. *Id*. at 831 (citing United States v. Lane, 252 F.3d 905, 907 (7th Cir. 2001)).

159. *Id*. at 831 (citing United States v. Lane, 252 F.3d 905, 907 (7th Cir. 2001)).

160. *Id*.

161. *Id*. at 818. Eriksen argued that the intent of the drafters of the career criminal act was to treat certain property crimes that create a serious potential risk of physical violence, but that do not actually have physical violence, in a similar manner as if the physical violence actually happened. *Id.* at 828. He pointed out that to be convicted of carrying a concealed weapon, a person must simply have a weapon on or about his person, the weapon must be hidden from common observation, and be readily accessible for use. *Id.* at 829-30. The crime does not require physical injury to a person or damage to another's property. *Id.* at 830. The crime in fact requires concealment; therefore, others do not even know the offender is carrying a weapon, and thus have not been affected. *Id.* Therefore, the crime of carrying a concealed weapon should not be a crime of violence under the statute, because it is too dissimilar from the enumerated crimes, which have an overt act producing a primary harm to another. *Id*.

162. *Id.* at 827.

conduct, and possession of a weapon in prison and possession of a concealed weapon lack violent and aggressive conduct.[163]

B. The Begay Standard: Raising More Questions Than Answers

Application of the ACCA's violent felony residual clause has always been a challenge for courts.[164] The Supreme Court has struggled to develop a standard that will further the purpose of the ACCA—to keep violent criminals from having firearms.[165] As scholars have noted, "confusion reigns in federal courts over whether crimes qualify as violent felonies for the purposes of the Armed Career Criminal Act."[166] Circuits are split over whether several crimes, including escape from a penal institution, carrying a concealed weapon, and possession of a weapon in prison, are crimes of violence.[167] After *Begay*, where the Court attempted to clarify the proper analysis under the ACCA residual clause, the answer is much less clear.[168]

Courts have had trouble applying the second prong of the *Begay* standard, requiring a crime to typically involve purposeful, violent, and aggressive conduct.[169] Many variations to the *Begay* test have been suggested because "with only those three imprecise adjectives to guide them, district and circuit courts released a flurry of misguided and confused decisions in the wake of *Begay*."[170] Specifically, the *Begay* standard has proven unworkable because the terms "violent" and "aggressive," non-legal terms, are not defined in the opinion.[171] Furthermore, while it is simple to identify whether a person's conduct on a specific occasion is violent or aggressive, it is more complicated to determine whether a crime typically entails such conduct, as it is necessary to think through the many varieties of behavior within a

163. United States v. Begay, 553 U.S. 137, 143 (2008).

164. *See generally* Montgomery, *supra* note 21, at 719.

165. *Id.* at 719.

166. David C. Holman, *Violent Crimes and Known Associates: The Residual Clause of the Armed Career Criminal Act*, 43 CONN. L. REV. 209, 210 (2010) (internal quotations omitted).

167. *Id*.

168. Montgomery, *supra* note 21, at 715.

169. *Id*. at 723.

170. *Id.* at 723.

171. *Id*. at 724. Furthermore, Holman noted that the formula of requiring a crime to be purposeful, violent, and aggressive in order to be considered a crime of violence is imprecise and has resulted in the exclusion of some very risky crimes of recklessness and negligence; it is under inclusive. Holman, *supra* note 166, at 210. He further argued that, "the residual clause is problematic because lower federal courts are torn between the text of the ACCA, a complex analysis known as the categorical approach, and the Supreme Court's recent decision in *Begay v. United States*." *Id*. at 213.

criminal statute.[172] Justice Scalia's concurrence in *Begay* identified this problem.[173] He argued that the majority "failed to provide a complete framework that will embrace all future cases," and that the Court continued to take a "piecemeal, suspenseful, Scrabble-like approach" to residual clause analysis.[174] Furthermore, while the ACCA residual clause analysis has always applied to analysis of the guidelines' residual clause, *Begay* created a conflict between the ACCA and the guidelines by requiring that a violent crime be purposeful.[175] Commentary to the guidelines states that manslaughter is a crime of violence; however, manslaughter does not have to be purposeful.[176] Remedying all of the problems associated with residual clause analysis under *Begay* is beyond the scope of this Note. However, it is clear that until the Supreme Court determines a new standard, lower courts have two options: to continue to have conflicting holdings, or to manipulate the standard to create uniformity in regards to the crimes which have resulted in circuit splits, such as the crime of possession of a weapon in prison.

C. Better Standard: Presumption of Non-Violence, and Application of a Limited Fact-Based Standard to Overcome the Presumption

Until the Supreme Court modifies the *Begay* test or establishes a clearer standard, this Note proposes a variation on the *Begay* standard in regards to the crime of possession of a weapon in prison. If courts

172. *Id.* at 225. Holman noted that while the terms "violent" and "purposeful" are often used in state and federal statutes, "aggressive" has no common legal use or definition. Aside from driving provisions, which have a very specific legal use of "aggressive" driving, no other state statutes define the term. Given the varying uses of the word, some could find it is synonymous with the word "violent." However, the Supreme Court chose to use both words in the *Begay* test, making it unclear how the two words differ and what additional elements a crime must require in order to be a violent felony. *Id.*

173. Begay v. United States, 553 U.S. 137, 149 (2008) (Scalia, J., concurring)

174. Montgomery, *supra* note 21, at 724 (quoting Begay v. United States, 553 U.S. 137, 149 (2008) (Scalia, J., concurring)).

175. Holman, *supra* note 166, at 237. Holman identified three other major problems in the implementation of the *Begay* test. *Id.* at 231. First, by requiring that the crimes be purposeful, the test appeared to require specific intent for a crime to fall under the residual clause. *Id.* This would result in crimes with a mens rea of negligence or recklessness to be excluded as violent felonies even if the crimes presented a serious potential risk of injury. *Id.* Lower courts following the *Begay* test have excluded such negligent and reckless crimes from the residual clause, leading to absurd results such as a holding that negligent vehicular homicide is not a violent felony. *Id.* Second, the combination of the *Begay* test requiring that a crime be purposeful, violent, and aggressive and the categorical approach excludes sex crimes against children that present a serious potential risk of physical injury. *Id.* Third, many courts have searched for an "ordinary case" or a "likely shooter" using "little more than their imaginations, intuitions, and varied use of statistics" to determine if a crime is a violent felony. *Id*. at 231.

176. *Id.* at 237.

correctly apply the *Begay* test to the crime of possession of a weapon in prison, courts would find it is not a crime of violence, as it is neither violent nor aggressive. Yet, district and circuit courts have been reaching and confusing the test in order to hold that possession of a weapon *is* a crime of violence.[177] Thus, there are situations where courts feel that a certain prisoner in possession of a weapon in prison is particularly violent.[178] I propose that there be a presumption that the crime of possession of a weapon in prison is *not* a crime of violence under the ACCA and guidelines' residual clauses, since correctly applying the *Begay* test results in that holding.[179] However, courts should have the opportunity to look at certain facts to overcome the presumption, since many courts have disregarded or stretched the *Begay* test to hold that possession of a weapon in prison is a crime of violence.[180] These facts should include the criminal history of the prisoner, what kind of weapon and how many weapons the prisoner had, the past behavior of the prisoner in prison as shown by official records, and the environment of the prison. If the prosecution establishes by a preponderance of the evidence that at least three out of the four facts show that the prisoner is violent, then the presumption is overcome and the crime will be considered a crime of violence. For example, the prisoner may have a violent criminal history, a history of violence in prison as shown by official prison records, or he may have possessed multiple weapons or especially deadly weapons. Finally, the prosecution may also show that the prison is a generally non-violent prison where a prisoner would have no need to have a weapon for self-defense.

1. Why There Should Be a Presumption of Non-Violence

While *Mobley* along with the Fifth, Eighth, and Tenth Circuits held that possession of a weapon in prison constituted a crime of violence under the guidelines' residual clause, these courts have distorted the *Begay* two-part test.[181] Correctly applying the *Begay* standard shows

177. *See generally supra* Part IV.A. United States v. Perez-Jiminez, 654 F.3d 1136, 1140 (10th Cir. 2011); United States v. Boyce, 633 F.3d 708, 709 (8th Cir. 2011); United States v. Marquez, 626 F.3d 214, 223 (5th Cir. 2010).

178. *See Perez-Jiminez*, 654 F.3d at 1140; *Boyce*, 633 F.3d at 709; *Marquez*, 626 F.3d 214, 223 (5th Cir. 2010).

179. *See generally supra* Part IV.A.

180. *See Perez-Jiminez*, 654 F.3d at 1140; *Boyce*, 633 F.3d at 709; *Marquez*, 626 F.3d at 223.

181. *See generally supra* Part IV.A; *Perez Jiminez*, 654 F.3d at 1140; *Boyce*, 633 F.3d at 709; *Marquez*, 626 F.3d at 223.

that possession of a weapon in prison is neither violent nor aggressive.[182] The courts in *Mobley*, *Perez-Jiminez*, *Boyce*, and *Marquez* relied on the assertion that a prisoner in possession of a weapon is more likely to attack someone.[183] The courts also repeatedly stated that the possession creates the possibility or likelihood of a future violent confrontation in order to support the holding that the crime is violent and aggressive.[184] However, as Judge Posner pointed out, "a crime that increases the likelihood of a crime of violence need not itself be a crime of violence."[185]

Courts that held that possession of a weapon in prison is a crime of violence misapplied the *Begay* test, as they merged the first prong of the test, that the crime creates a serious potential risk of physical injury, with the second prong, that the crime typically involves purposeful, violent, and aggressive conduct.[186] Instead of analyzing whether the conduct of the crime as described in the statute typically involves purposeful, violent, and aggressive conduct, the courts analyzed whether the risk of the crime involves such conduct.[187] The conduct of the crime of possession of a weapon in prison as described by the statute is simple to identify—it is possession of that weapon, and nothing more.[188] To be guilty of possession of a weapon in prison, the prisoner need not initiate hostilities or attacks, nor engage in threatening behavior, nor even attempt to harm anyone.[189] The prisoners only need to possess, whether on their person, or in their cell, a weapon. They can even be charged with the crime if a weapon is found in their cell during a search when they are not present.[190] The act of possession alone simply is not violent

182. *See* United States v. Polk, 577 F.3d 515, 517 (3d Cir. 2009).

183. *Marquez*, 626 F.3d at 221; *Boyce*, 633 F.3d at 712.

184. *Marquez*, 626 F.3d at 221; *Boyce*, 633 F.3d at 712.

185. Eriksen, *supra* note 7, at 830 (quoting United States v. Lane, 252 F.3d 905, 907 (7th Cir. 2001)) (internal quotations omitted). In *Lane*, in an opinion holding that felony possession of a firearm is not a crime of violence, Judge Posner explained that while a felon is more likely to make an illegal use of a firearm than a non-felon, there is no evidence that the risk of such is "substantial." *Lane*, 252 F.3d at 906 (7th Cir. 2001). Judge Posner further pointed out that ex-felons "have the same motives as lawful possessors of firearms to possess a firearm—self-defense, hunting, gun collecting, and target practice." *Id*.

186. *See generally supra* Part IV.A.2; United States v. Mobley, 687 F.3d 625, 626 (4th Cir. 2012); *Perez-Jiminez*, 654 F.3d at 1140; *Boyce*, 633 F.3d at 709; *Marquez*, 626 F.3d at 223.

187. *See generally supra* Part IV.A.2; *Mobley*, 687 F.3d at 626; *Perez-Jiminez*, 654 F.3d at 1140; *Boyce*, 633 F.3d at 709; *Marquez*, 626 F.3d at 223.

188. 18 U.S.C. § 1791(a)(2).

189. *Mobley*, 687 F.3d at 634 (Wynn, J., dissenting).

190. *Id*. The dissenting opinion pointed out that the government conceded at oral argument that their reasoning would allow a prosecutor to seek enhanced sentencing of a defendant under the crime of violence statute if a weapon is discovered in the prisoner's cell during a search for which

or aggressive.

Although under the correct application of the *Begay* test, possession of a weapon in prison is not a crime of violence, until the Supreme Court crafts a clearer standard, courts should hold that there is simply a presumption that possession of a weapon in prison is not a crime of violence. There should be a presumption because the Fifth, Eighth, and Tenth Circuits have distorted the *Begay* test, and courts have found ways around the test in order to hold that possession of a weapon in prison is violent, such as the Tenth Circuit in *United States v. Perez-Jiminez*.[191] Because circuit courts have consistently misapplied or ignored the *Begay* test[192] to hold that possession of a weapon in prison is a crime of violence, in some circumstances judges must feel that the possession is in fact violent. Therefore, the holding that possession of a weapon in prison is a crime of violence should merely be a presumption.

Although the *Mobley* majority cited *Perez-Jiminez* as support for holding that possession of a weapon in prison is a crime of violence, the Tenth Circuit in *Perez-Jiminez* didn't even apply the *Begay* test.[193] The Tenth Circuit did not apply the *Begay* test, although it was the controlling precedent, by factually distinguishing the case. The *Begay* standard, which used a categorical approach, was applied to a prior offense in *Begay*, and because the offense in *Perez-Jiminez* was an instant offense, the court stated that the *Begay* test and categorical approach did not apply.[194] To hold that the defendant's possession of a weapon in prison was a crime of violence, the Tenth Circuit looked to the facts of the case—that the weapons were two shanks, about five-and-a-half inches long and sharpened to a point.[195] Although the court apparently did not take into account the defendant's criminal history, it was included in the opinion that the defendant had a prior conviction of possessing a weapon in prison where he stabbed another inmate five times with a converted box cutter.[196] The court also took into account the fact that the prison the defendant was in was an "inherently

he was not even present. *Id.* The dissent argued that "this scenario is particularly troubling because it would allow for enhanced sentencing of a defendant who leaves a shank in his cell, declining to carry it with him where it could arguably endanger others, on the grounds that he has committed a 'crime of violence.'" *Id*.

191. *Perez-Jiminez*, 654 F.3d at 1140; *see also Mobley*, 687 F.3d at 626; *Boyce*, 633 F.3d at 709; *Marquez*, 626 F.3d at 223.

192. *See Mobley*, 687 F.3d at 626; *Boyce*, 633 F.3d at 709; *Marquez*, 626 F.3d at 223.

193. *Perez-Jiminez*, 654 F.3d at 1141.

194. *Id*. at 1142.

195. *Id*.

196. *Id*.

dangerous place."[197] By applying a presumption that possession of a weapon in prison is not a crime of violence, as that is the correct holding under *Begay*, courts would not have to stretch the *Begay* test. Nor would courts need to look for other precedent or facts that allow them to disregard the *Begay* test, as the *Perez-Jiminez* court did. Instead of applying an array of different standards and tests, a court would follow the *Begay* test by holding that there is a presumption that the possession of the weapon is *not* a crime of violence. The prosecution would then have the opportunity to overcome this presumption by looking at some of the same facts that the Tenth Circuit did—the environment the prisoner was in, the weapon itself, and the prisoner's criminal history—without creating a confusing test that is at odds with other tests applied in different courts.[198]

2. To Overcome the Presumption, Courts Should Apply a Limited Fact-Based Standard

When doing residual-clause analysis with the several "problem" crimes that have resulted in circuit splits, several courts and scholars have proposed and applied a limited fact-based standard.[199] These "problem crimes" include statutory rape, felony possession of a firearm, and possession of a weapon in prison.[200] While most courts apply a strict categorical approach in this analysis, scholars have suggested that a limited fact-based approach should apply.[201] Using this approach, courts would limit their inquiry to facts from which a serious risk of physical injury to another could be inferred.[202] A pure fact-based approach has been criticized because of its inefficiency in requiring a sentencing court to examine all the facts surrounding the conviction and because it may force the court to base a determination on facts that have merely been alleged.[203] The categorical approach has been criticized

197. *Id.* at 1142.

198. *Id.* at 1140.

199. *See* Riley, *supra* note 45, at 1507; Fleischmann, *supra* note 56, at 425; Montgomery, *supra* note 21, at 715; Castor, *supra* note 7, at 345; United States v. Lipscomb, 619 F.3d 474 (5th Cir. 2010); United States v. Riggans, 254 F.3d 1200 (10th Cir. 2001).

200. *See* Riley, *supra* note 45, at 1507; Fleischmann, *supra* note 56, at 425; Montgomery, *supra* note 21, at 715; Castor, *supra* note 7, at 345; United States v. Lipscomb, 619 F.3d 474 (5th Cir. 2010); United States v. Riggans, 254 F.3d 1200 (10th Cir. 2001).

201. Riley, *supra* note 45, at 1518.

202. *Id*.

203. *Id*. at 1523. Riley explained that a pure fact-based approach is also unfair because it leads to uncertainty about the sentence that will be imposed, and it allows sentencing courts to retry defendants' prior convictions. *Id.*

because of its unfairness in leading to arbitrary decisions based only on the statutory language instead of the defendant's conduct.[204] Specifically, the *Begay* categorical approach looks at the statutory language and whether the crime as described in the statute typically involves purposeful, violent, and aggressive conduct, which has resulted in unfair and conflicting decisions.[205] A limited fact-based approach would alleviate both the unfairness and inefficiency of the fact-based and categorical approaches.[206] By examining and requiring proof by a preponderance of the evidence of only the specific facts, "the limited fact-based approach conserves the court's time and resources."[207] These facts would include the criminal history of the prisoner, what kind of weapon and how many weapons the prisoner had, the past official behavior record of the prisoner in that prison, and the environment of the prison. If such facts are not available for the court to review, the presumption will not be overcome and the possession will not be considered a crime of violence. However, it is unlikely that the court would not have access to these four facts. The court will easily be able to establish what the weapon was from the charging papers, the past behavior of the inmate in prison from official prison records, the criminal history of the prisoner from court records, and the environment of the prison from statistics showing facts such as the number of violent incidents inside the prison each year.

A limited fact-based approach has been proposed for residual clause analysis of the crime of statutory rape, where the sentencing court would examine only the age of the victim, the age disparity between the defendant and the victim, and the relationship of the parties involved.[208] These facts, like the suggested facts to examine for possession of a weapon in prison, are easy to obtain and unlikely to be contested, therefore, avoiding the unfairness found in basing the determination on facts that are merely alleged.[209] Furthermore, a limited fact-based

204. *Id*.

205. Begay v. United States, 553 U.S. 137, 144 (2008); *see* Montgomery, *supra* note 21, at 723-24.

206. Riley, *supra* note 45, at 1523.

207. *Id*. Riley stated that a limited fact-based approach conserves the court's resources because it limits inquiry to specific facts indicative of conduct that presents a serious potential risk of physical injury to another. *See also* United States v. Lipscomb, 619 F.3d 474, 483 (King, J., concurring). Furthermore, requiring proof of the four facts by a preponderance of the evidence comports with the approach suggested in *United States v. Brien*, in which the concurring opinion stated that sentencing facts can be proved to a judge at a sentencing hearing by a preponderance of the evidence. United States v. Brien, 130 S. Ct. 2169, 2174 (2010).

208. Riley, *supra* note 45, at 1518.

209. *Id*. at 1523. Riley explained that the age of the victim is easily discovered because it is an

standard avoids the arbitrariness present in the categorical approach, as "it allows the sentencing judge to more accurately determine whether a particular defendant truly poses a danger to society," which is the main goal behind the career offender provision.[210]

Various circuits have approved a limited factual inquiry when doing residual clause analysis.[211] The Tenth Circuit in *United States v. Riggans* recognized the difficulty of determining whether a crime was violent when the elements of the crime in the statute, bank larceny, did not include any element of force or violence.[212] While the controlling precedent at time, which was pre-*Begay*, followed the categorical approach, the Tenth Circuit held that examining the facts surrounding the incident was appropriate when examining an instant offense.[213] Post-*Begay*, some circuit judges continued to argue for a limited fact-based approach. The Fifth Circuit in *United States v. Lipscomb*, which cited *Riggans* in the concurring opinion, argued that it was permissible for the sentencing court to inquire as to the length of the firearm in a felony possession of firearm case.[214] The *Lipscomb* concurrence expressed approval for a sentencing court to make a factual finding as to the characteristics of the firearm possessed, as long as those characteristics were charged in the indictment.[215] Such facts would therefore usually be

element of the crime of statutory rape, and is sometimes contained in the charging papers. *Id.* at 1523-24. Furthermore, even if it is not, this fact can be obtained at a very short evidentiary hearing. *Id.* at 1524. The age disparity between the offender and the victim is also easily obtainable because the defendant's age or date of birth is most likely contained in police records. *Id.* Lastly, while the relationship between the parties may require more judicial resources, this fact could be an element under the statute and therefore found in the information or indictment. *Id.* Even if it is not, the court could examine family records or hear testimony to determine this fact. *Id*.

210. Fleischmann, *supra* note 56, at 432. Several courts and scholars have suggested following a limited fact-based approach when doing residual clause analysis with various crimes, as application of a strict categorical approach and the *Begay* test sometimes do not comport with the original goal of the ACCA—to keep violent individuals from possessing guns. Montgomery, *supra* note 21, at 735.

211. *See* United States v. Lipscomb, 619 F.3d 474 (5th Cir. 2010) (King, J., concurring); United States v. Riggans, 254 F.3d 1200 (10th Cir. 2001).

212. *Riggans*, 254 F.3d at 1200.

213. *Id*. at 1203-04.

214. *Lipscomb*, 619 F.3d at 483 (King, J., concurring). The concurring opinion stated that the elements of a crime must be charged in an indictment and proved to a jury beyond a reasonable doubt; however, sentencing facts can be proved to a judge at a sentencing hearing by a preponderance of the evidence. *Id*. (citing United States v. Brien, 130 S. Ct. 2169, 2174 (2010)).

215. *Id*. at 484 (King, J., concurring). The concurrence pointed out that the text of the sentencing guidelines statute refers to the defendant's "conduct" rather than a particular "element" of the crime. *Id.* The concurrence also cited *Shepard v. United States*, where the Court stated that a sentencing court was free to look to the transcript of plea colloquy or a written plea agreement in determining whether the plea had necessarily rested on the fact that qualified the conviction as a predicate offense. *Id*. (citing Shepherd v. United States, 544 U.S. 13, 21 (2005)).

readily obtainable, like the proposed factual inquiries for possession of a weapon in prison.[216]

Some courts have also pointed out the benefits of a limited fact-based approach when doing residual clause analysis for the crime of escape from a penal institution, such as in *United States v. Harris*.[217] Although violence is not always present in escape from a penal institution, courts struggled with residual clause analysis because the potential for violence exists, just as with the charge of possession of weapon in prison.[218] Because not all escape offenses involve violent conduct, scholars argued that courts should apply a limited fact-based approach by inquiring as to the type of custody from which the defendant escaped, and the means by which he escaped.[219] It is unlikely that the parties would disagree as to the nature of these facts at trial; therefore, a court would have access to reasonably accurate information when making its ruling on the crime of violence issue.[220] The same holds true for the factual inquiries for a possession of weapon in prison charge. The facts of the criminal history of the defendant, the kind and number of weapons, the official behavior record of the defendant in prison, and the general environment of the prison, are generally non-contestable, as they are obtainable from records and the indictment. Therefore, courts can avoid making arbitrary decisions based on the

216. *Id*.

217. Castor, *supra* note 7, at 355 (citing United States v. Harris, 165 F.3d 1062 (6th Cir. 1999)). In *United States v. Harris*, the court ultimately held that the escape offense did constitute a crime of violence. The court only considered the indictment in their determination; however, they stated that, "there might be cases in which some other type of limited factual inquiry would be appropriate." *Harris*, 165 F.3d at 1068. The court in *United States v. Thomas* also discussed the possible utility of another approach, besides the categorical approach, in residual clause analysis of escape from a penal institution. *United States v. Thomas*, 333 F.3d 280 (D.C. Cir. 2003). The court suggested that the categorical analysis is flawed, as although the process of detaining an escapee may give rise to a potential risk of harm to others, such a risk is present in the capture of anyone who breaks the law; it therefore follows that all crimes would become crimes of violence. Castor, *supra* note 7, at 356 (citing United States v. Thomas, 333 F.3d 280 (D.C. Cir. 2003)).

218. Castor, *supra* note 7, at 357. Castor stated that there is a risk of violence in escape from a penal institution because an escapee is "likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees." *Id*. (quoting United States v. Gosling, 39 F.3d 1140, 1142 (10th Cir. 1994)) (internal quotations omitted).

219. Castor, *supra* note 7, at 365. Castor explained that not all escape offenses involve violent conduct because whether violence occurs largely depends on the circumstances of the escape. *Id.* This includes the facility from which the defendant escaped from; an individual who escaped from a pre-release program such as a halfway house or community-based residential facility is much less likely to use violence, as he can simply not return to the facility in order to "escape"—the majority of escapes from pre-release programs are "walk-aways" that do not use violence. *Id*. at 359.

220. *Id*. at 366.

wording of a statute.

Looking at the defendant's individual characteristics and criminal history at the sentencing stage is not a new concept, as courts already do so as mandated by the guidelines.[221] Under the guidelines, the offense level will be adjusted up or down depending on several facts, including whether the defendant has a criminal history.[222] Furthermore, some courts have already integrated the defendant's criminal history into their residual clause analysis for possession of a weapon in prison.[223] In a pre-*Begay* case, the Fifth Circuit in *United States v. Robles-Rodriguez* took into account the defendant's criminal history.[224] The fact that the defendant had prior convictions for delivery of cocaine and assault with a deadly weapon aided the Fifth Circuit in its analysis of whether the defendant's possession of a weapon in prison was a crime of violence.[225] A defendant with a violent criminal history, such as the defendant in *Robles-Rodriguez*, could be more dangerous when possessing a weapon in prison, and this fact should be part of the analysis.

The ACCA also recognizes the importance of identifying the criminal history of the defendant at the sentencing stage.[226] *Begay* pointed out that in order to determine who falls within the ACCA, the act looks to past crimes "because an offender's criminal history is relevant to the question of whether he is a career criminal, or, more

221. U.S.S.G § 4A1.1 (1987). Section 1B1.4 of the sentencing guidelines, which governs what information may be used to impose a sentence, states: "In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character and conduct of the defendant, unless otherwise prohibited by law." U.S.S.G § 1B1.4 (1987). Section 4A1.1 of the guidelines, the criminal history category, states:

> The total points from subsections (a) through (e) determine the criminal history category in the Sentencing Table in Chapter Five, Part A. (a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month. (b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a). (c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this subsection. (d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status. (e) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was counted as a single sentence, up to a total of 3 points for this subsection.

U.S.S.G § 4A1.1 (1987).

222. U.S.S.G § 4A1.1 (1987).

223. *See* United States v. Robles-Rodriguez, 204 Fed. Appx. 504, 505 (5th Cir. 2006); United States v. Thomas, 183 Fed. Appx. 742, 743 (10th Cir. 2006).

224. *Robles-Rodriguez*, 204 Fed. Appx. at 505.

225. *Id*.

226. United States v. Zuniga, 553 F.3d 1330, 1336 (10th Cir. 2009).

precisely, to the kind or degree of danger the offender would pose were he to possess a gun."[227] The Tenth Circuit in *United States v. Zuniga* believed that the defendant's criminal history and the purpose of the ACCA were significant in determining whether the defendant's possession of a weapon in prison constituted a crime of violence under the residual clause.[228] The court explained that "Mr. Zuniga's convictions include felony manslaughter, felony assault with a dangerous weapon, and possession of a deadly weapon in prison. His criminal history indicates that he would likely pose significant danger were he to possess a gun."[229] Examining a defendant's criminal history is helpful in crime of violence determinations, as courts have already begun to take this fact into account. If a defendant has an especially violent criminal history involving weapons, this fact would likely help the court determine whether the presumption that the defendant's possession of a weapon in prison is not a crime of violence has been overcome.

Examining how many and what kind of weapons the defendant possessed would also aid the court in determining whether the presumption of non-violence has been overcome. In possession of a weapon in prison cases, many courts describe the weapons possessed, as these are important facts that could show whether the defendant was particularly violent.[230] The court in *Robles-Rodriguez* described the weapon possessed as "a six-inch metal shank—a piece of metal with tape on one end and sharpened to a point on the other, designed and intended to be used as a weapon—concealed in Robles's left sleeve."[231] The Tenth Circuit in *Perez-Jiminez* also described the weapons possessed: "two shanks-homemade, sharpened metal knives-each of which was approximately five-and-a-half inches long and sharpened to a point" were found in the defendant's pockets.[232] While what type of weapon the defendant possessed may not by itself show how violent the defendant is, this fact can be helpful in residual clause analysis. When the weapon is specially designed to be deadly, as in *Robles-Rodriguez* and *Perez-Jiminez*, this fact would weigh in favor of the possession being violent compared to a defendant who perhaps possessed a

227. Begay v. United States, 553 U.S. 137, 146 (2008).

228. *Zuniga,* 553 F.3d at 1337.

229. *Id*.

230. United States v. Perez-Jiminez, 654 F.3d 1136, 1138 (10th Cir. 2011); *Robles-Rodriguez*, 204 Fed. Appx. at 505.

231. United States v. Robles-Rodriguez, 204 Fed. Appx. 504, 505 (5th Cir. 2006).

232. *Perez-Jiminez*, 654 F.3d at 1138.

haphazardly made "weapon." Furthermore, if a prisoner possessed more than one weapon, as in *Perez-Jiminez,* this fact likely weighs in favor of showing that the possession was violent, as it is unlikely that a prisoner would need more than one weapon for self-defense purposes.

Examining the past behavior of a defendant in prison is obviously useful in determining whether the presumption is overcome. A defendant with previous violent infractions in prison, especially previous charges of fighting in prison, is significantly more likely to be a violent person in possession of a weapon, as opposed to a model prisoner who has never been in fights nor committed any infractions while in prison. However, sentencing courts should limit this factual inquiry to official prison records showing any infractions (such as the prisoner being in isolation as punishment for fighting, etc.) as opposed to holding an ad hoc mini-trial. Lastly, while this may fact may not be as useful as the others, inquiring into the particular prison environment the prisoner was in may shed light on whether his possession was a crime of violence. Studies show that "incarceration exposes male inmates to a world of violence where staff cannot or will not protect them from rape, assault, and other forms of victimization," which turns inmates into "non-men" in the view of fellow prisoners.[233] If a model prisoner possesses a shank in a particularly violent prison, this fact may help a court decide that the presumption is not overcome. To establish the environment of the prison, the court can turn to studies showing statistics such as the number of violent incidents that take place at the prison per year and the type of prisoners that the prison holds.

V. CONCLUSION

The majority's holding in *United States v. Mobley* is just one example of the confused and unjust opinions that have followed *Begay*. Because it is difficult to categorically examine whether a crime typically involves purposeful, violent, and aggressive conduct, many courts have

233. James E. Robertson, *"Fight or F. . ." and Constitutional Liberty: An Inmate's Right to Self-Defense When Targeted by Aggressors*, 29 IND. L. REV. 339, 339 (1995) (internal quotations omitted). The U.S. Department of Justice reported that state inmates killed forty of their own and committed 7,397 assaults upon one another in 1993. *Id.* at 341. The prison environment breeds violence because the inmate culture equates manliness and status with displays of toughness and aggression. *Id.* at 343. Conflict resolution in prison is violence. *Id.* Most targeted inmates will refuse protective custody because it results in around-the-clock segregation and they gain a status as a "non-man." *Id.* at 345. Therefore, many inmates will instead choose to arm themselves with "shanks" in order to protect themselves. *Id.* It is well known among inmates that to "make it" in prison, you must embrace intimidation and violence as part of everyday life. *Id*.

distorted the *Begay* test.[234] The Fourth Circuit in *Mobley*, along with the Fifth, Eighth, and Tenth Circuits, merged the first prong of the *Begay* test with the second prong; these circuits analyzed whether the risk of possession of a weapon in prison involves purposeful, violent, and aggressive conduct, and not whether the conduct of the crime itself involves purposeful, violent, and aggressive conduct.[235] While the risk of possessing a weapon in prison is certainly purposeful, violent, and aggressive, as the risk is that the prisoner will injure another inmate or guard, this goes to the essence of the first prong—that the crime creates a serious potential risk of physical injury. The second prong of *Begay* is not met, as the conduct of the crime of possession of a weapon in prison—which is simply possession—is not in itself violent or aggressive.[236]

Despite its problems, the *Begay* two-part test remains the controlling test for residual clause analysis. However, to create uniformity and remedy the confusing current law on whether possession of a weapon in prison is a crime of violence, the *Begay* test should be modified. Applying a presumption that possession of a weapon in prison is not a crime of violence would adhere to the correct application of the *Begay* test and also allow the court to examine an established list of facts, avoiding unfairness, if the prosecution wishes to overcome this presumption. By limiting its inquiry to the listed four facts, and requiring the prosecution to establish that at least three of the four facts show that the prisoner is violent, the sentencing court would avoid both a burdensome fact-finding process and also an arbitrary decision. By examining the criminal history of the defendant, the type of and number of weapons possessed, the official past behavior of the defendant in prison, and the environment of the prison, courts would not have to distort or ignore the *Begay* test to find that a particular defendant's possession of a weapon in prison is a crime of violence. Therefore, the unfairness of the categorical *Begay* test would be remedied, and circuit courts could uniformly follow the same approach in their analysis.

234. *See generally supra* Part IV.A.1; United States v. Mobley, 687 F.3d 625, 626 (4th Cir. 2012); *Perez-Jiminez*, 654 F.3d at 1140; United States v. Boyce, 633 F.3d 708, 709 (8th Cir. 2011); United States v. Marquez, 626 F.3d 214, 223 (5th Cir. 2010).

235. *See Mobley*, 687 F.3d at 626; *Perez-Jiminez*, 654 F.3d at 1140; *Boyce*, 633 F.3d at 709; *Marquez*, 626 F.3d at 223.

236. *See generally supra* Part IV.A.2; *see* United States v. Polk, 577 F.3d 515, 517 (3d Cir. 2009).

APPENDIX: UNITED STATES SENTENCING GUIDELINES SENTENCING TABLE

U.S.S.G. Ch. 5, Part A (18 U.S.C.A. Appx.)
SENTENCING TABLE
(in months of imprisonment)
Criminal History Category (Criminal History Points)

ZONE A

Offense Level	**I (0 or 1)**	**II (2 or 3)**	**III (4, 5, 6)**	**IV (7, 8, 9)**	**V (10, 11, 12)**	**VI (13 or more)**
1	0-6	0-6	0-6	0-6	0-6	0-6
2	0-6	0-6	0-6	0-6	0-6	
3	0-6	0-6	0-6	0-6		
4	0-6	0-6	0-6			
5	0-6	0-6				
6	0-6					
7	0-6					
8	0-6					

ZONE B

Offense Level	**I (0 or 1)**	**II (2 or 3)**	**III (4, 5, 6)**	**IV (7, 8, 9)**	**V (10, 11, 12)**	**VI (13 or more)**
2						1-7
3					2-8	3-9
4				2-8	4-10	6-12
5			1-7	4-10	6-12	9-15
6		1-7	2-8	6-12	9-15	
7		2-8	4-10	8-14		
8		4-10	6-12			
9	4-10	6-12	8-14			
10	6-12	8-14				
11	8-14					

ZONE C

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
6						12-18
7					12-18	
8				10-16		
9				12-18		
10			10-16			
11		10-16	12-18			
12	10-16	12-18				
13	12-18					

ZONE D

Offense Level	I (0 or 1)	II (2 or 3)	III (4, 5, 6)	IV (7, 8, 9)	V (10, 11, 12)	VI (13 or more)
7						15-21
8					15-21	18-24
9					18-24	21-27
10				15-21	21-27	24-30
11				18-24	24-30	27-33
12			15-21	21-27	27-33	30-37
13		15-21	18-24	24-30	30-37	33-41
14	15-21	18-24	21-27	27-33	33-41	37-46
15	18-24	21-27	24-30	30-37	37-46	41-51
16	21-27	24-30	27-33	33-41	41-51	46-57
17	24-30	27-33	30-37	37-46	46-57	51-63
18	27-33	30-37	33-41	41-51	51-63	57-71
19	30-37	33-41	37-46	46-57	57-71	63-78
20	33-41	37-46	41-51	51-63	63-78	70-87
21	37-46	41-51	46-57	57-71	70-87	77-96
22	41-51	46-57	51-63	63-78	77-96	84-105
23	46-57	51-63	57-71	70-87	84-105	92-115
24	51-63	57-71	63-78	77-96	92-115	100-125
25	57-71	63-78	70-87	84-105	100-125	110-137
26	63-78	70-87	78-97	92-115	110-137	120-150

27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	235-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life