STATE OF MINNESOTA

COUNTY OF RAMSEY

DISTRICT COURT

SECOND JUDICIAL DISTRICT
CRIMINAL COURT DIVISION

State of Minnesota,

Plaintiff,

vs.

The Archdiocese of Saint Paul and Minneapolis,
a Minnesota Corporation
226 Summit Avenue
Saint Paul, MN 55102,

Defendant.

Court File No: 62-CR-15-4175

AFFIDAVIT OF JOSEPH T. DIXON SUPPORTING DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Joseph T. Dixon, being first duly sworn upon oath, states as follows:

1. I am one of the attorneys representing the Archdiocese of Saint Paul and Minneapolis (the "Archdiocese Corporation"). I submit this Affidavit in connection with Defendant's Reply Memorandum Supporting Its Motion to Dismiss the Complaint.

2. Attached as Exhibit A are true and accurate copies of certain pleadings filed by counsel for the parishes in the Archdiocese Corporation's bankruptcy matter.

3. Attached as Exhibit B is a true and accurate copy of the Final Jury Instructions used in *State v. Final Exit Network, Inc.*, 19HA-CR-12-1718 (Dakota County, May 14, 2015).

4. Attached as Exhibit C is a true and accurate copy of a January 29, 2014 memorandum created by the Ramsey County Attorney's Office as obtained from a news source website.

5. Attached as Exhibit D are true and accurate copies of all unpublished cases cited in Defendant's Reply Memorandum Supporting Its Motion to Dismiss the Complaint, as required by Minnesota Statute § 480A.08(3).

Joseph T. Dixon

Subscribed and sworn to before me
this 4th day of April 2016.

Notary Public

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DEBORAH L. SYNOWCZYNSKI
NOTARY PUBLIC - MINNESOTA
My Commission Expires
January 31, 2020

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re: Bankruptcy 15-30125

The Archdiocese of Saint Paul and Minneapolis,

Debtor,

NOTICE OF HEARING AND MOTION FOR ORDER APPOINTING A CREDITORS' COMMITTEE OF PARISHES

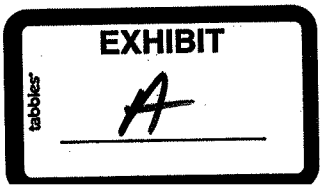
TO: The Court and all parties in interest.

Mary Jo A. Jensen-Carter of the firm of Buckley & Jensen, as counsel for a group of approximately 113 parishes located within the Archdiocese of Saint Paul and Minneapolis, all of which are general unsecured creditors in this Chapter 11 case, (the "Parish Group") respectfully moves the Court for the relief requested below and gives notice of hearing.

1. The Court will hold a hearing on this motion on April 2, 2015 at 10:00 a.m., in Courtroom 8West United States Courthouse, 300 South Fourth Street, Minneapolis, MN 55415.

2. Any response to this motion must be filed and delivered not later than March 28, 2015 which is five (5) days before the time set for the hearing (including Saturdays, Sundays, and holidays). **UNLESS A RESPONSE OPPOSING THE MOTION IS TIMELY FILED, THE COURT MAY GRANT THE MOTION WITHOUT A HEARING.**

3. This court has jurisdiction over this motion pursuant to 28 U.S.C. §§157 and 1334, Fed. R.Bankr.P. 5005 and Local Rule 1070-1. On January 16, 2015, The Archdiocese of Saint Paul and Minneapolis ("Archdiocese" or "Debtor") filed a petition under Chapter 11 of Title 11 of the United States Code, and the case is now pending in this court.



4. This motion arises under 11 U.S.C. §1102(a)(2) and the Parish Group seeks an order of this court appointing an official creditors committee consisting of all of the parishes in the Archdiocese.

5. The factual and legal basis for the Parish Group's motion is set forth in the accompanying Memorandum, and this motion is based on the information contained in such memorandum.

WHEREFORE, the Parish Group moves the court for an order appointing a committee of creditors consisting of the parishes in the Archdiocese of Saint Paul and Minneapolis and directing the United States Trustee's Office to form the committee, and granting such other relief as may be just and equitable.

Dated: March 17, 2015

BUCKLEY & JENSEN

By/e/ Mary Jo A. Jensen-Carter
Mary Jo A. Jensen-Carter (#186041)
1257 Gun Club Road
White Bear Lake, MN 55110
651-486-7475
Attorney for Parish Group

VERIFICATION

I, Virginia A. Dwyer, a Trustee and the Secretary of The Church of Saint Joseph of West Saint Paul, Minnesota, a member of the movant, the Parish Group, certify under penalty of perjury, that I have read the Notice of Hearing and Motion for Order Appointing a Creditors' Committee of Parishes and the accompanying Memorandum in Support of Motion and the factual information contained therein is true and correct to the best of my knowledge, information and belief.

March 18, 2015.

Virginia A Dwyer

VERIFICATION

We, Mary Jo Jensen-Carter of Buckley & Jensen and Margo Brownell of Maslon, LLP, attorneys for the movant, certify under penalty of perjury, that we have read the Notice of Hearing and Motion for Order Appointing a Creditors' Committee of Parishes and the accompanying Memorandum in Support of Motion and the factual information contained therein is true and correct to the best of our knowledge, information and belief.

March 17, 2015.

Mary Jo A. Jensen-Carter

March 17, 2015.

Margo Brownell

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re: Bankruptcy 15-30125

The Archdiocese of Saint Paul and Minneapolis,

Debtor,

MEMORANDUM IN SUPPORT OF MOTION TO APPOINT PARISH CREDITORS' COMMITTEE

FACTUAL BACKGROUND

There are 187 parishes that operate in the Archdiocese of Saint Paul and Minneapolis. Each parish is separately incorporated under Minnesota Statutes Section 315.15 as a parish corporation and is a legally distinct entity from the Archdiocese. The parishes are subject to the requirements, and have the rights, powers, and privileges, of a religious corporation. As such, the parishes own and manage their own property and assets, and have responsibility for their own corporate activities and debts.

Each parish is governed by a five member board of directors. The board consists of the Archbishop, the Vicar General, the parish pastor, and two lay trustees. Although the Archbishop and the Vicar General are members of the board, they generally do not participate in the day to day operations of the parish. Moreover, they have specifically agreed that they will not participate in any of the parishes' decisions related to the Chapter 11 case. As a result, the parish pastor and lay trustees are making all decisions related to the Chapter 11 case.

All of the parishes are creditors in the Chapter 11 case. Their creditor status stems from

several different factors. First, all the parishes participate in the Archdiocese's General Insurance Fund ("GIF") and the Archdiocese Medical and Dental Benefit Plan ("AMBP"). The parishes have contributed to these funds through payment of insurance premiums. According to Archdiocese estimates, these insurance funds currently hold approximately $17.5 million in excess funds, as a result of overpayment of premiums during the past several years. The Archdiocese has acknowledged that only approximately 5-7% of the excess insurance funds were generated by Archdiocese contributions. The remaining excess funds were generated by the parishes and other entities that paid premiums into the plans. Consequently, the parishes have claims against the Archdiocese for their overpayment of premiums. In addition, several parishes have additional claims against the Archdiocese for return of funds they contributed to the Archdiocese Inter Parish Loan Fund or though other ordinary course of business financial transactions with the Archdiocese.

Also, a significant number of the parishes have indemnification claims against the Archdiocese as a result of the claims of the clergy abuse creditors. These claims arise from the fact that the Archdiocese has the sole authority to assign its priests to the parishes. The priests are employed by the parishes and the parishes pay their salaries and benefits out of their own operations. Many of the alleged clergy abuse claims arose while the priests were working in the parishes, thereby submitting the parishes to potential liability for the claims. While no separate lawsuits have been served or filed against the parishes at this time, many parishes have received Notices of Claim, which indicate that the clergy abuse creditors intend to sue the parishes for damages resulting from the abuse that allegedly occurred in their parishes. At the present time there are in excess of 83 claims asserted against various parishes, and additional claims are expected. To the extent that the parishes are ultimately held liable for any abuse, they will have

substantial indemnity and contribution claims against the Archdiocese.

The parishes will assert these indemnity claims against the Archdiocese. Parishes which are represented by counsel are certainly aware of their right to file their claims. The parishes have also been advised by their attorneys that because they face independent liability for these claims, they must tender them to their own insurance companies.

Since 1980, most of the Archdiocese parishes were insured for their liability through the Bishop's plan, which is administered by the Archdiocese. As a result, the insurance policies related to the claims that arose during that time period have been easily identified and the parishes are covered under the same policies as the Archdiocese. However, prior to 1980, the timer period when most of the alleged abuse occurred, the parishes each had their own independent insurance policies. The Archdiocese has no contractual connection to the policies the parishes held prior to 1980 and has no way of identifying the policies or getting access to them without the cooperation of the parishes. The attorneys for the parishes have been assisting the parishes in identifying their insurance coverage and tendering claims to their insurers.

This court has previously ordered the debtor, the unsecured creditors committee and the debtor's insurers to participate in mediation in an effort to come to a consensual agreement to resolve the Chapter 11 case. Understanding the complexity of the situation and the important contribution the parishes and their insurers can make to the success of a Chapter 11 plan, the mediator has asked the parishes to participate in the mediation process. The goal of the parishes' participation is to identify insurance companies who are responsible for insuring the parishes against claims which could be brought by the clergy abuse creditors directly against the parishes. The expectation is that the parishes' insurers will participate in the settlement of claims against

the parishes to avoid defending direct lawsuits against the parishes. Any funds which can be generated through the parishes' insurers could be contributed to the Archdiocese's Chapter 11 plan in exchange for the insurers receiving channeling injunctions and the parishes receiving a complete release for all potential clergy abuse claims. If this outcome can be achieved through the mediation process, all of the clergy abuse claims against the Archdiocese and the parishes will be resolved through the Chapter 11 plan and the clergy abuse litigation will end. In addition, the parishes' indemnity claims against the Archdiocese will be reduced, if not completely eliminated. If the parishes cannot resolve their own potential liability through the mediation process, it is likely that a second phase of direct litigation against parishes will result and the parishes' indemnity and contribution claims will be magnified.

In an effort to facilitate this broad settlement, the Parish Group retained Mary Jo Jensen-Carter of Buckley & Jensen to represent the group in the Chapter 11 case. Upon learning of the complexities of the insurance coverage issues, the Parish Group also retained Margo Brownell of Maslon, LLP as insurance coverage counsel. As requested by the mediator, the Parish Group has authorized both Jensen-Carter and Brownell to participate in the mediation process. The work involved in participating in the mediation and providing insurance coverage representation for the parishes which have claims is substantial. There are currently approximately 40 parishes in the Parish Group who have claims against them, all of which require day to day management of communications with the parish staff and dozens of different insurance claims representatives and attorneys, investigation and research regarding missing policies from the 1960 and 1970s, analysis of evidence, aggressive advocacy to overcome insurers' defenses to coverage, and high level strategic planning for a multi-party, multi-insurer mediation process in an effort to

maximize total insurer contribution. To date, counsel for the Parish Group has confirmed coverage under at least 15 policies of insurance, some of which are multi-year policies and cover multiple Notices of Claims.

While significant progress has been made, as the mediation continues to move forward, it has become apparent that the cost of the parishes' participation in the mediation is more than the Parish Group can financially bear. If the parishes cannot afford to continue to participate in the process, the overall goal of completely resolving all of the clergy abuse claims is not feasible. Appointment of a parish creditors' committee will not only provide representation for all of the parishes, but will also allow the parishes to continue to participate in the mediation process. Their participation should result in the availability of additional monies to fund the Chapter 11 plan, and that additional funding will increase the probability that the Archdiocese will be able to confirm a feasible plan of reorganization. Acknowledging the benefit of having the parishes involved in the process, the Archdiocese has advised the Parish Group that it supports this motion.

ARGUMENT

The appointment of an additional committee of creditors is governed by 11 U.S.C. §1102(a), which provides that:

> *On request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders.*

The statute itself does not specifically set forth a definition of "*adequate representation*", and most courts confronted with a motion for the appointment of a separate committee have acknowledged that there is no bright line for determining if the committee should be appointed. As

a result, the bankruptcy court must exercise its discretion to examine the facts in each case and determine if additional committees are warranted. *In re Beker Indus. Corp.* 55 B.R. 945, 948 (Bankr. S.D.N.Y 1985)

In analyzing the need for an additional committee, the court should bear in mind that the Bankruptcy Code requires "that conflicting groups of creditors have a voice through adequate representation on a committee" and that "the ultimate aim is to strike a proper balance between the parties such that an effective and viable reorganization of the debtor may be accomplished." *In re Hills Stores Co,* 137 B.R. 4, 7 (Bankr.S.D.N.Y 1992). As long as the diverse interests of various creditors groups can be adequately represented by one committee, there is no need to appoint additional committees. However, in the event that the interests of various creditor groups cannot be adequately represented by one committee, the court has discretion to appoint any committees necessary to provide adequate representation. *Hills Stores,* 137 B.R. at 5.

Although slight variation is found in existing case law, the following non-exclusive factors appear to be the most relevant in the inquiry into the appointment of an additional committee: the nature of the case; identification of the various groups of creditors and their interests; the composition of the committee; the standing and desires of the various constituencies; and the ability of the committee to properly function. *In re Dow Corning Corporation,* 194 B.R. 121, 142 (Bankr.E.D.Mich 1996); *Hills Stores,* 137 B.R. 5-6; *In re McLean Ind., Inc.,* 70 B.R. 852, 860 (Bankr.S.D.N.Y. 1987). The potential for added costs and complexity, as well as the timing of the motion seeking the appointment of the committee, are also relevant to the analysis. *Ad Hoc Bondholders Group v. Interco, Inc. (In re Interco),* 141 B.R. 422, 424 (Bankr.E.D.Mo. 1992).

The Parish Group asserts that, even though the appointment of a second committee is

generally considered an exception rather than the rule in a Chapter 11 case, in this case, the appointment of a parish committee is necessary to adequately represent the interests of all parishes. The parishes are in a unique position. They are creditors having claims against the health insurance fund, the liability insurance fund and indemnity and contribution for any payments to the clergy abuse creditors. The parishes, through the contributions of their parishioners, also provide financial support to the debtor through their assessments. As a result, the parishes have a significant stake in the ultimate structure of the debtor's Chapter 11 plan.

When Congress enacted the Bankruptcy Code in 1978, it recognized that in some large and complex cases, a single creditors committee may not be sufficient. While this Chapter 11 case might not be classified as a large case, it is a unique case with complex relationships between the interested parties. Although there have been other similar Catholic diocese Chapter 11 cases, it does not appear that any have included an official parish creditors' committee. That is because, in most of those dioceses, the parishes were part of a corporation sole. As a result, there was no need for a parish committee, since the parishes were not separate entities. That is not the case here. Each parish is a separate and distinct legal entity with its own assets and liabilities. The parishes' interests are distinctly different from those of the debtor. Notwithstanding that fact, the parishes have a complex relationship with the Archdiocese in that they participate in various insurance plans operated by the Archdiocese and their assessments fund a large portion of the Archdiocese's operations. Their participation in the Chapter 11 case will allow the case to resolve a myriad of issues, including the clergy abuse issues, that will not be resolved if they do not participate. Appointing a parish creditors' committee will give all the parishes the ability to participate in the case in a meaningful way and assure that the interests of the parishes are adequately represented.

Accordingly, a parish creditors' committee is appropriate in this particular case.

One of the major issues confronting the parishes is that the existing unsecured creditors' committee is unable to adequately represent their interests. "For a particular group of creditors to be adequately represented by an existing committee, it is not necessary for a creditors committee to be an exact reflection of that committee's designated constituents." *In re Dow Corning Corporation,* 194 B.R. at 141. "[A]dequate representation exists as long as the diverse interest of the various creditor groups are represented on and have participated in that committee." *In re Sharon Steel Corp,* 100 B.R. 767, 777-778 (Bankr.W.D.Pa. 1989) In this case, the composition of the unsecured creditors' committee consists of solely of five clergy abuse creditors. Although the committee theoretically represents all of the unsecured creditors, no other class or category of creditor serves as a member of the committee. As a result, no other class or category of unsecured creditors has a voice on the committee. The attorneys hired to represent the committee have been chosen by a vote of only clergy abuse creditors. Under the circumstances, it is almost certain that the existing committee will take positions which favor the clergy abuse creditors. This becomes a significant issue because the interests of the clergy abuse creditors are adverse to the interests of the parishes. The existence of the conflict is abundantly clear by virtue of the Notices of Claims which have been served upon many of the parishes. These notices assert that the clergy abuse creditors intend to sue the parishes individually for the alleged abuses that may have occurred in their parishes. Based upon this obvious conflict of interest between the members of the existing unsecured creditors' committee and the parishes, it is impossible for the existing committee to adequately represent the interests of the parishes.

This conflict of interest also makes it impossible for the existing committee to function as a

true unsecured creditors committee in the Chapter 11 proceeding. In reality, this committee may function well, in that it will be able to reach consensus on issues, but that does not mean that it will function for the purposes of representing the parishes. A creditors committee is not functional "if the committee is so dominated by one group of creditors that a separate group has virtually no say in the decision-making process." *In re Dow Corning Corporation,* 194 B.R. at 142. Consequently, the court must "look to see whether conflicts of interest on the committee effectively disenfranchise particular groups of creditors." *In re Sharon Steel,* 100 B.R. at 779. The rationale of the court in *Sharon Steel* is clearly applicable in this case. The interests of the current members of the existing unsecured creditors' committee are in direct conflict with the interests of the parishes. As a result, expecting the parishes to be represented by the existing committee effectively disenfranchises them.

Although it is clear that the parishes will not be adequately represented by the existing unsecured creditors' committee, most courts suggest that several other discretionary factors should be considered before appointing a separate committee. Those factors include the cost associated with the appointment, the time of the application, the potential for added complexity, and the presence of other avenues for creditor participation. *Hills Stores,* 137 B.R. at 7-8; *Interco,* 14 B.R. at 424.

In light of the fact that the case is in its infancy and the existing unsecured creditors committee was very recently appointed, the appointment of a parish committee at this time will not cause any disruption in the case. As a result, there is no problem with the timing of the Parish Group's request for the appointment of a separate committee.

Neither is the appointment of a parish committee likely to add complexity to the case. As noted earlier, the mediator specifically requested that the parishes participate in the mediation

process, and the Parish Group has already begun to participate. The debtor, the mediator, and the existing unsecured creditors' committee have welcomed the parishes' participation in the mediation process. In fact, the general consensus is that enlisting the parishes and their insurers in the mediation process will result in the best outcome for everyone involved. Accordingly, there is no indication that the appointment of a parish committee will do anything other than enhance the mediation process, and in turn, the Chapter 11 reorganization.

The final two considerations which must be addressed are the cost associated with the appointment of a committee and the presence of other avenues for creditor participation. There is no doubt that there will be costs associated with appointing a parish committee. It is likely that the parish creditors' committee would seek to employ both Chapter 11 bankruptcy counsel and special counsel to handle insurance coverage issues. Chapter 11 bankruptcy counsel is necessary to advise the committee on ongoing Chapter 11 issues and represent the interests of the parishes during the negotiation of the Chapter 11 plan. Separate insurance coverage counsel is also needed because the insurance coverage issues are complex and require expertise that is not available from a bankruptcy attorney. However, to the extent that insurance counsel is successful in bringing the parishes' insurers and insurance coverage to the mediation process, substantial additional funds will be generated for the estate. Those funds will be of significant importance not only in funding the debtor's Chapter 11 plan and thereby adequately compensating the clergy abuse survivors, but also in assuring that the parishes will be able to continue to operate their churches after the plan is confirmed. The diverse nature of the issues that the attorneys will be working on should result in little or no duplication of services.

While additional costs will be incurred by the estate if a parish committee is established, the

parishes' lack of adequate representation on the existing committee outweighs those costs. All interested parties agree that the parishes need to participate in the case. However, the cost of doing so is beyond their means. The Archdiocese was forced to file Chapter 11 case because of the clergy abuse claims. That same issue has also negatively impacted the finances of all of the parishes. The operations of both the Archdiocese and the parishes who support it, depend on the goodwill and financial support of the parishioners of the parishes. The clergy abuse issues have resulted in many parishioners withholding funds from the parishes. As a result, most, if not all, the parishes are struggling to meet their daily operating expenses. They are simply not in a position to expend large sums of money on attorneys' fees. If they cannot obtain committee status and assistance with those fees, their involvement in the process will be significantly limited. As a result, the parishes have no other avenue to effectively participate in the case.

CONCLUSION

The 187 parishes operating in the Archdiocese of Saint Paul and Minneapolis are creditors holding significant claims against the Archdiocese. As such, they are entitled to adequate representation on a creditors' committee. The existing unsecured creditors' committee, whose composition consists solely of clergy abuse creditors, cannot adequate represent the parishes because their interests conflict with those of the parishes. The parishes have the opportunity to make a significant contribution to the debtor's Chapter 11 plan through the use of their individual insurance policies and can likely assist the parties in obtaining a successful outcome in the pending mediation process. Due to the impact of the clergy abuse issues on the parishes, they do not have the financial means to participate in the mediation process outside of a parish committee. In light of the benefits that will be derived from the participation of the parishes in the Chapter 11 process, the

costs associated with appointment of a parish committee are justified, and the Parish Group requests the court appoint a parish creditors' committee.

Respectfully submitted,

Dated: March 17, 2015

BUCKLEY & JENSEN

By/e/ Mary Jo A. Jensen-Carter
Mary Jo A. Jensen-Carter (#186041)
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651-486-7475
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re: Chapter 11

The Archdiocese of Saint Paul and Minneapolis, Bankruptcy No. 15-30125

Debtor

UNSWORN CERTIFICATE OF SERVICE

I, Ann M. Gagner, declare under penalty of perjury that on March 18, 2015, I served copies of the attached **Notice of Hearing and Motion for Order Appointing a Creditors' Committee of Parishes, Memorandum in Support of Motion to Appoint Parish Creditors' Committee and a proposed Order** by first class U.S. Mail, to the following parties:

JOHN PHILIP BORGER on behalf of Interested Party Star Tribune Media Company LLC FAEGRE & BENSON 90 S 7TH ST MINNEAPOLIS, MN 55402-3901	Eric E. Caugh on behalf of 21st Century Centennial Insurance Company Zelle Hoffman Voelbel & Mason LLP 500 Washington Avenue South, Suite 4000 Minneapolis, MN 55415
Joseph Egan c/o Patrick Noaker Noaker Law Firm LLC 333 Washington Ave N STE 329 Minneapolis, MN 55401	GE INFORMATION TECHNOLOGY SOLUTIONS INC 1738 BASS RD PO BOX 13708 MACON, GA 13708
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Dakota County 1590 Highway 55 Hastings, MN 55033	MN Department of Labor and Industry PO Box 64219 Saint Paul, MN 55164
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The following parties were served by email by the Court:

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Gerald H Bren on behalf of Cross Defendant Certain Underwriters at Lloyd's London subscribing to Policies S3721, SL3722, SL3723, ISL3115, ISL3116, ISL3117, ISL3675 ISL3613, ISL3614, and ISL3615
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Gerald H Bren on behalf of Defendant CX Reinsurance Company Ltd.
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Gerald H Bren on behalf of Defendant Certain Underwriters at Lloyd's London subscribing to Policies S3721, SL3722, SL3723, ISL3115, ISL3116, ISL3117, ISL3675 ISL3613, ISL3614, and ISL3615
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Dated: March 18, 2015

Signed: /e/ Ann M. Gagner
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1257 Gun Club Road
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MINNESOTA

In Re:

Archdiocese of Saint Paul and Minneapolis,

Debtor,

Bankruptcy 15-30125
Chapter 11 Case

At Minneapolis, Minnesota, April __, 2015.

A hearing on the Parish Group's motion for the appointment of a Parish Creditors' Committee was held on April 2, 2015. Appearances are noted in the court record.

Based upon the motion papers and the arguments of counsel,

IT IS HEREBY ORDERED:

1. The appointment of a separate unsecured creditors' committee for the parishes is necessary to provide the parishes with adequate representation in this case; and

2. The United States Trustee is hereby ordered to appoint a parish creditors' committee.

Dated:

Robert J. Kressel
United States Bankruptcy Judge

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF DAKOTA FIRST JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Final Exit Network, Inc.,

Defendant.

FINAL INSTRUCTIONS

Court File No.: 19HA-CR-12-1718

The evidence has now concluded. It is your duty to decide the questions of fact in this case. It is my duty to give you the rules of law you must apply in arriving at your verdict.

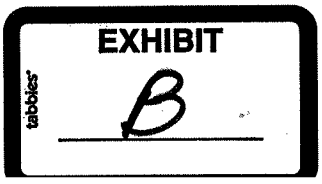
I have not by these instructions, nor by any ruling or expression I may have made during the trial, intended to indicate my opinion regarding the facts or the outcome of this case. If I said or did anything which would seem to indicate such an opinion, you are to disregard it.

PRESUMPTION OF INNOCENCE

The Defendant is presumed innocent of the charges brought against it, and that presumption abides with it unless and until the Defendant has been proved guilty beyond a reasonable doubt. That the Defendant is on trial and has been brought before the court by the ordinary processes of the law should not be considered by you as in any way suggesting guilt. The burden of proving guilt beyond a reasonable doubt is on the State. The Defendant does not have to prove its innocence.

PROOF BEYOND A REASONABLE DOUBT

Proof beyond a reasonable doubt is such proof as ordinarily prudent men and women would act upon in their most important affairs. A reasonable doubt is a doubt based upon reason and common sense. It does not mean a fanciful or capricious doubt, nor does it mean beyond all possibility of doubt.



DIRECT AND CIRCUMSTANTIAL EVIDENCE

A fact may be proved by either direct or circumstantial evidence, or by both. The law does not prefer one form of evidence over the other.

A fact is proved by direct evidence when, for example, it is proved by witnesses who testify to what they saw, heard, or experienced, or by physical evidence of the fact itself. A fact is proved by circumstantial evidence when its existence can be reasonably inferred from other facts proved in the case.

RULINGS ON OBJECTIONS TO EVIDENCE

During this trial I may rule on objections to certain testimony and/or exhibits. You must not concern yourself with the reasons for the rulings since they are controlled by rules of law.

By receiving evidence to which objection was made, I do not intend to indicate the weight to be given such evidence. You are not to speculate as to possible answers to questions, which I do not require to be answered. You are to disregard all evidence which I may order stricken or have told you to disregard.

INSTRUCTIONS TO BE CONSIDERED AS A WHOLE

You must consider these instructions as a whole and regard each instruction in light of all the others. The order in which the instructions are given is of no significance. You are free to consider the issues in any order you wish.

NOTES TAKEN BY JURORS

You have been allowed to take notes during the trial. You may take those notes with you to the jury room. You should not consider these notes binding or conclusive, whether they are your notes or those of another juror. The notes should be used as an aid to your memory and not as a substitute for it. It is your recollection of the evidence that should control. You should disregard anything contrary to your recollection that may appear from your own notes or those of another juror. You should not give greater weight to a particular piece of evidence solely because it is referred to in a note taken by a juror.

STATEMENTS OF JUDGE AND ATTORNEYS

Attorneys are officers of the Court. It is their duty to make such objections as they deem proper and to argue their client's cause. However, the arguments or other remarks of an attorney are not evidence.

If the attorneys or I have made or should make any statement as to what the evidence is, which differs from your recollection of the evidence, then you should disregard the statement and rely solely on your own memory. If an attorney's argument contains any statement of the law that differs from the law I give you, disregard the statement.

EVALUATION OF TESTIMONY – BELIEVABILITY OF WITNESSES

You are the sole judges of whether a witness is to be believed and of the weight to be given to a witness's testimony. There are no hard and fast rules to guide you in this respect. In determining believability and weight of testimony, you may take into consideration the witness's:

1. Interest or lack of interest in the outcome of the case,
2. Relationship to the parties,
3. Ability and opportunity to know, remember, and relate the facts,
4. Manner,
5. Age and experience,
6. Frankness and sincerity, or lack thereof,
7. Reasonableness or unreasonableness of their testimony in the light of all the other evidence in the case,
8. And any other factors that bear on believability and weight.

In the last analysis, you should rely upon your own experience, good judgment, and common sense.

EXPERT TESTIMONY

A witness who has special training, education, or experience in a particular science, occupation, or calling, is allowed to express an opinion as to certain facts. In determining the believability and weight to be given such opinion evidence, you may consider:

(1) The education, training, experience, knowledge, and ability of the witness;

(2) The reasons given for the opinion;

(3) The sources of the information; and

(4) Factors already given you for evaluating the testimony of any witness.

Such opinion evidence is entitled to neither more nor less consideration by you than any other evidence.

MULTIPLE OFFENSES CONSIDERED SEPARATELY

In this case, the Defendant has been charged with multiple offenses. You should consider each offense, and the evidence pertaining to it, separately. The fact that you may find the Defendant guilty or not guilty as to one of the charged offenses should not control your verdict as to any other offense.

JUROR'S RESPONSIBILITY

You must not allow sympathy, prejudice, or emotion to influence your verdict. The quality of your service will be reflected in the verdict you return to this court. A just and proper verdict contributes to the administration of justice.

CRIMINAL LIABILITY OF A CORPORATION

Defendant Final Exit Network Inc. is a corporation. A corporation can be held criminally liable, but only for the acts of its agents. An "agent" is an officer, director, employee, or other person authorized by the corporation to act on its behalf.

COUNT I:

ASSISTING SUICIDE – DEFINED

The statutes of Minnesota provide that whoever intentionally assists another in taking the other's own life is guilty of a crime.

ASSISTING SUICIDE – ELEMENTS

The elements of assisting suicide are:

First, that Doreen Dunn took her own life.

Second, the Defendant's agent(s) intentionally assisted Doreen Dunn in taking her own life.

> An "agent" is an officer, director, employee, or other person authorized by the corporation to act on its behalf.
>
> "Intentionally" means that the Defendant's agent(s) either acted with the purpose of assisting Doreen Dunn in taking her own life, or believed that its act(s), if successful, would assist Doreen Dunn in taking her own life. In addition, the Defendant's agent(s) must have had knowledge of those facts that are necessary to make its conduct criminal.
>
> To "assist" means that the Defendant's agent(s) enabled Doreen Dunn through either physical conduct or words that were specifically directed at Doreen Dunn and that the conduct or words enabled Doreen Dunn to take her own life. One has not "assisted" where one has only expressed a moral viewpoint on suicide or provided mere comfort or support.

Third, that all of the above acts took place on or about February 1, 2007 through May 30, 2007 in Dakota County, Minnesota.

If you find that each of these elements has been proven beyond a reasonable doubt, there are additional elements you must consider. The State must additionally prove beyond a reasonable doubt that:

Fourth, the agent(s) were acting within the course and scope of his or her employment, having the authority to act for the corporation with respect to the particular corporate business that was conducted criminally;

Fifth, the agent(s) were acting, at least in part, in furtherance of the corporation's business interests; and

Sixth, the criminal acts were authorized, tolerated, or ratified by corporate management. An act is ratified if, after it is performed, another agent of the corporation, having knowledge of the act and acting within the scope of employment and with intent to benefit the corporation, approved the act by words or conduct.

If you find that each of these six elements has been proven beyond a reasonable doubt, the Defendant is guilty of assisting suicide.

If you find that any element has not been proven beyond a reasonable doubt, the Defendant is not guilty of assisting suicide.

COUNT II:

INTERFERENCE WITH DEAD BODY OR SCENE OF DEATH – DEFINED

The statutes of Minnesota provide that whoever interferes with the body or scene of death with intent to mislead the medical examiner or conceal evidence is guilty of a crime.

INTERFERENCE WITH DEAD BODY OR SCENE OF DEATH – ELEMENTS

The elements of interference with dead body or scene of death are:

First, that Doreen Dunn died.

Second, that the Defendant's agent(s) interfered with Doreen Dunn's body or scene of her death. A defendant's agent(s) interferes with a body or scene of death if they perform a physical act which changes the position of the deceased body or physical surroundings in which the death took place.

> An "agent" is an officer, director, employee, or other person authorized by the corporation to act on its behalf.

Third, that the Defendant's agent(s) interfered with Doreen Dunn's body or scene of her death with the intent to mislead the medical examiner or conceal evidence.

Fourth, that all the above acts took place on or about May 30, 2007 in Dakota County, Minnesota.

If you find that each of these elements has been proven beyond a reasonable doubt, there are additional elements you must consider. The State must additionally prove beyond a reasonable doubt that:

Fifth, the agent(s) were acting within the course and scope of his or her employment, having the authority to act for the corporation with respect to the particular corporate business that was conducted criminally;

Sixth, the agent(s) were acting, at least in part, in furtherance of the corporation's business interests; and

Seventh, the criminal acts were authorized, tolerated, or ratified by corporate management. An act is ratified if, after it is performed, another agent of the corporation, having knowledge of the act and acting within the scope of employment and with intent to benefit the corporation, approved the act by words or conduct.

If you find that each of these seven elements has been proven beyond a reasonable doubt, the Defendant is guilty of interference with dead body or scene of death.

If you find that any element has not been proven beyond a reasonable doubt, the Defendant is not guilty of interference with dead body or scene of death.

CONSEQUENCES OF VERDICTS

Now, perhaps you have noticed that nothing has been mentioned about penalties to Final Exit Network, Inc. in this case. That was intentional. There is a reason for that. You are instructed that you are not to be concerned with the consequences of your verdicts. Punishment, in the event the Defendant is convicted of any offense, is not your concern. It is the sole concern of the Court. You are not to speculate upon, nor consider it in deliberations upon or arriving at your verdicts.

UNANIMOUS VERDICT – DUTY OF JURORS TO DISCUSS

When you return to the jury room to discuss this case you must select a jury member to be foreperson. That person will lead your deliberations.

In order for you to return a verdict, whether guilty or not guilty, each juror must agree with that verdict. Your verdict must be unanimous.

You should discuss the case with one another, and deliberate with a view toward reaching agreement, if you can do so without violating your individual judgment. You should decide the case for yourself, but only after you have discussed the case with your fellow jurors and have carefully considered their views. You should not hesitate to reexamine your views and change your opinion if you become convinced they are erroneous, but you should not surrender your honest opinion simply because other jurors disagree or merely to reach a verdict.

After you have retired for your deliberation, if the Jury should have any question or request, you are instructed to write this down on a piece of paper and have it dated with the time noted and have the foreperson sign it and give it to the jury attendant. The jury attendant will then give it to the Court for its due consideration and response.

You will be given a verdict form. The verdict form is self-explanatory.

If you find that the State has proved beyond a reasonable doubt that the defendant is guilty of assisting suicide, you will circle guilty on the verdict form. If you find that the State has failed to prove beyond a reasonable doubt that the defendant is guilty of assisting suicide, you will circle not guilty on the verdict form.

If you find that the State has proved beyond a reasonable doubt that the defendant is guilty of interference with dead body or scene of death, you will circle guilty on the verdict form. If you

find that the State has failed to prove beyond a reasonable doubt that the defendant is guilty of interference with dead body or scene of death, you will circle not guilty on the verdict form.

Upon retiring to the jury room you will select one of your members to act as your foreperson who will preside over your deliberations. You may choose a foreperson in any manner that you see fit. Your foreperson must sign and date the verdict form that reflects your unanimous decision. After you have all agreed upon the verdict that reflects your unanimous decision, the verdict form must be signed and dated by your foreperson. You should then notify the bailiff so that you can return to court with your verdict, at which point your verdict will be read aloud in open court. You will be asked if this is your true verdict, after which you will be discharged from any further duty with respect to this case.

Determine what the facts are. Accept what you believe to be true. Reject anything you believe to be untrue. Once you determine what happened, apply the law as I have given it to you, and render a decision in this case. You must set aside sympathy, emotion, and prejudice in making your decision.

Remember, you are not advocates; you are judges – judges of the facts. The final test of the quality of your service will lie in the verdict that you return to the Court, and not in the opinions any of you may have as you retire from this case. Bear in mind that you will make a definite contribution to efficient judicial administration if you arrive at a just and proper verdict. To that end, the Court reminds you that in your deliberations in the jury room, there can be no triumph except the ascertainment and declaration of the truth. Remember that this case is important to both sides. It is important in that a corporation who is guilty of committing a crime should be brought to justice. It is equally important that a corporation who is not guilty of committing a crime should not be punished for something the corporation did not do. The Court has every confidence that you will fairly, objectively, and dispassionately carry out your duties.

OFFICE OF THE RAMSEY COUNTY ATTORNEY
John J. Choi, County Attorney

345 Wabasha Street North, Suite 120 • St. Paul, Minnesota 55102-1432
Telephone (651) 266-3222 • Fax (651) 266-3010
Criminal Division

Date: January 28, 2014

To: John J. Choi
Ramsey County Attorney

From: Richard Dusterhoft
Criminal Division Director

Re: Potential Failure to Report Related to
State v. Curtis Wehmeyer
Court Files 62-CR-23-7664 and 62-CR-12-8120

As a result of the prosecution of the above-cases, questions were raised regarding how soon the abuse of the juvenile victim was reported to police by the Archdiocese of Saint Paul and Minneapolis after the archdiocese learned of the abuse. According to the Reporting of Maltreatment of Minors Act, Minnesota Statute section 626.556, a person mandated to report, "who knows or has reason to believe" that a child is sexually abused or has been sexually abused within the preceding 3 years, and fails to report is guilty of a gross misdemeanor. A member of the clergy, who received information while engaged in ministerial duties, is mandated to report unless the information about the abuse is a privileged communication under Minnesota Statute section 595.02, subd. 1 (c) (information received during confession or communicated by a person seeking religious or spiritual advice, aid or comfort), and shall "immediately" report (*as soon as possible, but not longer than 24 hours*).

On October 16, 2013, as you requested, I asked the Saint Paul Police Department to investigate the timeline of the report by the Archdiocese to police. Following that investigation, the police investigator reported that on May 31, 2012, the parent of Children A, B and C reported that Child C, had been touching Children A and B inappropriately. On June 5, 2012, the parent spoke with her priest, *in confession,* and revealed the possible abuse by Child C. The priest advised the parent to report the suspected abuse to police. On the same day, a family member of the parent, who is a retired law enforcement officer, spoke with Child C. During that conversation, Child C disclosed abuse perpetrated on the child by Curtis Wehmeyer.

Subsequently the parent, again *in confession*, spoke to the parent's priest but (according to the parent) used "confession" to protect that priest. At that time, the parent gave the priest permission to contact the Archdiocese with this information. Subsequently, the parent contacted Greta Sawyer, a church victim advocate, and made an appointment for Child C to be interviewed by Sawyer.

EXHIBIT
C
1

The parent believed that she contacted Sawyer on June 18, 2012 and that the meeting between Child C and Sawyer occurred on June 19, 2012. Sawyer believed she was contacted by the parent on June 19, 2012 and the meeting took place on June 20, 2012. Sawyer's report of that meeting is dated June 20, 2012 and indicates that her meeting with Child C occurred that same day. During that interview with Sawyer, Child C directly disclosed abuse by Wehmeyer.

An email, dated June 20, 2012 at 5:58pm, between Deacon John Vomastek and a police commander assigned to the Family and Sexual Violence Unit, referenced earlier discussions between the two about the allegation by Child C against Wehmeyer. The email indicated that Wehmeyer would be relieved of duties the following day. On June 21, 2012, Wehmeyer was told by Deacon Vomastek to leave church property and is also the date of the official written report by the Saint Paul Police.

The above time line, gathered by the police investigator, supports a conclusion that members of the Archdiocese did not fail to comply with the legal mandates of the Reporting of Maltreatment of Minors Act. It is uncertain exactly when the priest received the information about the abuse by Wehmeyer, but it is clear that he received that information during confession, which would render it privileged. The priest did receive permission from the parent to inform the Archdiocese about what he had learned, second-hand, from the parent. It does not appear that the priest violated any mandatory reporting obligations.

The parent contacted Sawyer to arrange a meeting between Sawyer and Child C on either June 18 or 19, 2012. That meeting took place either on June 19 or June 20, 2012, and Sawyer received first-hand information, directly from Child C, about the abuse, at that time. There is no evidence to conclude that Sawyer had information that would rise to the level of the "knowing or having reason to believe" standard required to trigger the reporting requirement prior to that meeting. That information was provided by Deacon Vomastek to the police commander on June 20, 2012 via email. That email referenced earlier discussions between the two about the matter. Although the official report was typed on June 21, 2012, it is clear that the Archdiocese reported the abuse within 24 hours of receiving the abuse information directly from Child C.

From the above information, an experienced Assistant County Attorney in this office concluded that we cannot prove beyond a reasonable doubt that a member of the Archdiocese violated the Reporting of Maltreatment of Minors Act. Assistant Director Jill Gerber and I have also reviewed the police reports and the information provided by the police investigator and we agree with that conclusion.

2009 WL 2015416
Only the Westlaw citation is currently available.

Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
John J. BUSSMANN, Appellant.

No. A08-0858.
|
July 14, 2009.
|
Review Denied Sept. 29, 2009.

West KeySummary

1 **Criminal Law**
Letters and telegrams
Rape
Personal relations of parties
110 Criminal Law
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k433 Letters and telegrams
321 Rape
321II Prosecution
321II(B) Evidence
321k37 Admissibility
321k44 Personal relations of parties
Love letters written by a woman to a priest were not relevant to the issue being tried. The priest was convicted of third degree sexual conduct because he intentionally sexually penetrated the woman while he was a member of the clergy and they were not married. While the letters showed that the two had a consensual sexual relationship, they were not relevant to any other fact of consequence or element of the charge being tried. It was undisputed that the two had a sexual relationship, and the letters did nothing to prove or disprove that sexual penetration occurred.
Cases that cite this headnote

Hennepin County District Court, File No. 27-CR-04-011306.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN and Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, Minneapolis, MN, for respondent.

John G. Westrick, Westrick & McDowall-Nix, St. Paul, MN, for appellant.

Considered and decided by MINGE, Presiding Judge; WORKE, Judge; and COLLINS, Judge.

UNPUBLISHED OPINION

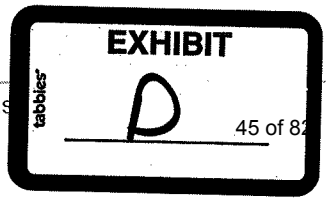
COLLINS, Judge. *

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

***1** Appellant challenges his conviction of third-degree criminal sexual conduct, arguing that the district court abused its discretion by (1) permitting testimony that unnecessarily entangled church doctrine with civil law; (2) excluding letters written by the complainant to appellant; and (3) denying appellant's proposed modifications and supplements to 10 *Minnesota Practice,* CRIMJIG 12.35 (1999) when instructing the jury on the elements of the offense. Appellant also challenges the sufficiency of the evidence to support his conviction and asserts that the prosecutor committed misconduct by impermissibly shifting the burden of proof on an element of the offense to appellant. We affirm.

FACTS

In the fall of 2001, then-Father John Bussmann (appellant) was assigned as the pastor of St. Walburga's Catholic Church in Hassan and St. Martin's Catholic Church in Rogers. [1] Appellant's responsibilities included sacramental duties at both churches and counseling parishioners. It was by virtue of



his counseling role that appellant met and began a relationship with D.I.

1 In 2002, the two churches were consolidated to become St. Mary Queen of Peace Catholic Church at the Rogers location.

In early 2002, after returning from a spiritual retreat, D.I. discussed with appellant what she believed was her calling from God to teach. Appellant encouraged D.I. to pursue this calling, and shortly thereafter he employed D.I. as the director of youth ministries at St. Martin's even though she had no training, education, or experience in youth ministries. Although D.I. and appellant worked together in close proximity, initially they had minimal interaction. But after her mother became ill, D.I. consulted with appellant more frequently.

D.I. sought counsel from appellant when, after her mother's death, she became very lonely, depressed, and scared. D.I. testified that she went to appellant because a friend suggested that she speak with a "spiritual director." Between November 2002 and March 2003, D.I. and appellant met regularly to discuss D.I.'s emotional well-being and her mother's death. Over time, appellant and D.I.'s relationship intensified and included sexual activities. It was not until March 2004 that D.I. reported the sexual incidents.

On March 18, 2004, the state charged appellant with multiple counts of offenses. The original complaint was amended several times, and appellant moved to sever the counts for separate trials. The district court granted appellant's motion in part, and in May 2005, appellant was tried for and convicted of theft by swindle over $500, theft over $500, and fifth-degree criminal sexual conduct. In July 2005, appellant was tried for and convicted of the remaining two counts of third-degree criminal sexual conduct.

Appealing his convictions from the July 2005 trial, appellant argued in part that the district court abused its discretion by admitting evidence that entangled religious doctrine with civil law. In September 2006, this court affirmed appellant's conviction. *State v. Bussmann,* A05-1752, 2006 WL 2673294 (Minn.App.2006), *review granted* (Dec. 12, 2006). On review, the Minnesota Supreme Court held that the clergy criminal sexual conduct statute, as applied, violated the Establishment Clause, reversed appellant's convictions, and remanded the case to the district court for a new trial. *State v. Bussmann,* 741 N.W.2d 79, 94-95 (Minn.2007) (*Bussmann I*). In February 2008, appellant was retried and convicted of one count of third-degree criminal sexual conduct.[2] Appellant was sentenced to 48 months of imprisonment, and he appeals.

2 Appellant was acquitted on the charge of third-degree criminal sexual conduct stemming from his relationship with another individual.

DECISION

I.

***2** The Minnesota Supreme Court reversed appellant's first conviction because the state introduced excessive testimony relating directly to Catholic Church doctrine, Roman Catholic duties, and Archiodicesan procedure, which violated the Establishment Clause. *Bussmann I,* 741 N.W.2d at 94. On remand, the district court was conscious of the supreme court's excessive-entanglement ruling and made a diligent effort to avoid permitting the introduction of any evidence that may run afoul of that ruling.

Father Kevin McDonough from the St. Paul Archdiocese of the Roman Catholic Church had testified as a state's witness in *Bussmann I.* In response to appellant's pretrial motion in limine to exclude "any and all religious or non-secular evidence and testimony from being presented [on retrial]," the district court stated:

> Reading the Supreme Court Opinion, they are very, very, cautious about having anything of a religious nature seem[ing] to impinge into the secular question of the guilt or innocence under Minnesota statute. Pretty clearly Father McDonough can testify ... as to whether or not [appellant] was a member of the clergy at the time, [and] what his assignment was.... Once he starts getting into, as he did, as I understand in the first trial, of the religious nature, how the Church ... reviews the relationships, the actions that the diocese took at the time, their investigation, their concerns and their conclusion pretty clearly that would not be allowed.

At trial, the district court significantly limited the scope of Father McDonough's testimony, allowing him to only testify about his role and responsibilities within the church, the process of assigning priests to parishes, appellant's employment with the church, and generally about the confidential nature of clergy-parishioner counseling, the formalities and locations of counseling sessions, and the process by which parishioners can report problems, concerns, or believed abuses. Despite the significantly reduced scope of religion-related testimony, appellant contends that the district court erred by permitting evidence of "Catholic beliefs, including the relationship ... between a priest and parishioner in the view of the Catholic Church."

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion[.]" U.S. Const. amend. I. Whether a government action violates the Establishment Clause is controlled by the three factors set out in *Lemon v. Kurtzman,* 403 U.S. 602, 612-13, 91 S.Ct. 2105, 2111, 29 L.Ed.2d 745 (1971). The state action must have a secular purpose, must neither inhibit nor advance religion in its primary effect, and "must not foster excessive governmental entanglement with religion." *Odenthal v. Minn. Conference of Seventh Day Adventists,* 649 N.W.2d 426, 435 (Minn.2002).

Unlike the first trial, on retrial there was no testimony regarding Catholic Church doctrine, the power that priests have traditionally had over parishioners, or internal church procedures regarding allegations of abuse. Because the charging statute requires proof of certain elements that directly touch and concern religious practices, it is impossible to prove the charged offense without some religion-related testimony. After reviewing the limited religion-related testimony from Father McDonough, we are satisfied that the district court carefully adhered to the *Bussmann I* admonitions and admitted only such religion-related testimony as was necessary for the state to prove the charged offense. We conclude that the religion-related testimony did not excessively entangle church doctrine with civil law.

II.

*3 Appellant next asserts that the district court erred by excluding love letters written by D.I. to appellant, arguing that the letters were relevant to show the jury "the true nature of their relationship" and the "depth of emotion, intimacy and passion" in their "deeply personal sexual affair."

We will not reverse an evidentiary ruling absent a clear abuse of discretion, and the appellant has the burden to show that he was prejudiced by such an abuse of discretion. *State v. Amos,* 658 N.W.2d 201, 203 (Minn.2003). Under this standard, "[r]eversal is warranted only when the error substantially influences the jury's decision." *State v. Nunn,* 561 N.W.2d 902, 907 (Minn.1997). We will reverse when there is a reasonable possibility that, had the erroneously excluded evidence been admitted, the verdict might have been more favorable to the defendant. *State v. Post,* 512 N.W.2d 99, 102 (Minn.1994). The harmless-error analysis, however, applies when evidence is excluded in violation of a defendant's constitutional right to present a defense. *State v. Blom,* 682 N.W.2d 578, 622 (Minn.2004); *see also Post,* 512 N.W.2d at 102 (holding that in determining whether district court's exclusion of defense evidence constituted prejudicial error, this court must evaluate whether error was harmless beyond a reasonable doubt). We will affirm the conviction if there is no reasonable possibility that the evidence would have changed the verdict. *Blom,* 682 N.W.2d at 623.

Evidence must be relevant to be admissible. *State v. Quick,* 659 N.W.2d 701, 713 (Minn.2003). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. However, otherwise relevant evidence may be excluded by other rules or statutes. Minn. R. Evid. 402; *see also, e.g,* Minn. R. Evid. 403 (stating that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

To convict appellant of third-degree criminal sexual conduct, it was the state's burden to prove beyond a reasonable doubt that (1) appellant intentionally sexually penetrated D.I.; (2) at the time of the sexual penetration, appellant was a member of the clergy; (3) at the time of the sexual penetration, appellant and D.I. were not married; and (4) the sexual penetration occurred during a period of time in which D.I. was meeting with appellant on an ongoing basis for the primary purpose of seeking or receiving religious or spiritual advice, aid or comfort, in private. Minn.Stat. 609.344(l) (2002). Consent is not a defense. *Id.* Therefore, relevant evidence must address,

directly or indirectly, one of these elements. And because it is undisputed that appellant and D.I. had a sexual relationship while appellant was a member of the clergy and that the two were not married, the issue before us is whether the district court abused its discretion by ruling that the letters were not relevant to prove or disprove that sexual penetration occurred during a time in which D.I. was meeting with appellant on an ongoing basis for the primary purpose of seeking or receiving religious or spiritual advice, aid or comfort, in private.

*4 The letters written by D.I. during the course of her relationship with appellant clearly establish that a sexual relationship existed and that the relationship was consensual. But it is undisputed that a sexual relationship existed and, as a matter of law, consent is not a defense. The letters are not relevant to any other fact of consequence or element of the charge being tried; thus, the district court did not abuse its discretion by excluding them.

III.

Appellant proposed jury instructions on the elements of third-degree criminal sexual conduct, modifying and supplementing CRIMJIG 12.35 with language drawn from *Bussmann I.* The state opposed the proposed instructions, and the district court ultimately rejected them and instructed the jury on the elements of the offense strictly pursuant to CRIMJIG 12.35. Appellant contends that the district court thereby abused its discretion.

The district court has broad discretion in crafting jury instructions. *State v. Broulik,* 606 N.W.2d 64, 68 (Minn.2000). The instructions must define the elements of the crime charged, and "it is desirable for the court to explain the elements of the offense rather than simply to read statutes." *State v. Kuhnau,* 622 N.W.2d 552, 556 (Minn.2001). A jury instruction is erroneous if it materially misstates the law. *State v. Moore,* 699 N.W.2d 733, 736 (Minn.2005); *see also State v. Peou,* 579 N.W.2d 471, 475 (Minn.1998) (holding that if jury instructions correctly state the law in language that can be understood by the jury, there is no reversible error). Jury instructions are viewed in their entirety to determine whether they fairly and adequately informed the jury on the law of the case. *State v. Flores,* 418 N.W.2d 150, 155 (Minn.1988).

"We evaluate the erroneous omission of a jury instruction under a harmless error analysis." *State v. Lee,* 683 N.W.2d 309, 316 (Minn.2004). In doing so, we "examine all relevant factors to determine whether, beyond a reasonable doubt, the error did not have a significant impact on the verdict." *State v. Shoop,* 441 N.W.2d 475, 481 (Minn.1989). If the error might have prompted the jury to reach a harsher verdict than it might otherwise have reached, the defendant is entitled to a new trial. *Id.*

The jury instruction at issue was the same instruction on the elements of the offense given at the first trial, and the law has not changed. While the modifying and supplemental language proposed by appellant was drawn from *Bussmann I,* the supreme court did not disapprove of CRIMJIG 12.35 or change the law in any way in relation to the pattern instruction. *See Bussmann,* 741 N.W.2d at 90-92. Therefore, we conclude that the district court did not abuse its discretion by relying on CRIMJIG 12.35 when it instructed the jury on the elements of the offense.

IV.

Although appellant concedes that he had a sexual relationship with D.I., he contends that there is insufficient evidence to establish criminal liability, arguing:

> *5 This sexual penetration did not take place either during a session where the primary purpose of the session was religious or spiritual aid, advice or comfort. Nor did the penetration take place while he was providing continuing religious or spiritual counseling.... [And] many of the alleged counseling sessions took place in public places, and do not fall within the purview of the statute's "private" requirement.

When we review a claim of insufficiency of the evidence, our review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, was sufficient to permit the jury to reach its verdict. *State v. Webb,* 440 N.W.2d 426, 430 (Minn.1989). On appeal, we assume that the jury believed the evidence supporting the verdict and disbelieved any contrary evidence. *State v. Moore,* 438 N.W.2d 101, 108 (Minn.1989). The jury determines the credibility of the witnesses and the weight of their testimony, and we assume that the jury believed the state's witnesses and disbelieved the

defendant's witnesses. *State v. Bolstad,* 686 N.W.2d 531, 539 (Minn.2004). The verdict will not be overturned if, giving due regard to the presumption of innocence and the prosecution's burden of proving guilt beyond a reasonable doubt, the jury reasonably could have found the defendant guilty of the charged offense. *Id.*

Appellant appears to argue that in order to violate the statute, sexual penetration must occur during or immediately following a private meeting in which the primary purpose was religious or spiritual aid, advice or comfort. However, the statute does not impose such a constrained requirement. The statute proscribes a sexual relationship between a member of the clergy and a parishioner if "the sexual penetration occurred *during a period of time* " in which the parishioner and the member of the clergy were meeting on an ongoing basis and the parishioner was seeking or receiving religious or spiritual advice, aid or comfort. Minn.Stat. § 609.344, subd. 1(*l*) (ii) (2002) (emphasis added). Moreover, if the purpose of the statute is to protect vulnerable parishioners, allowing a sexual relationship to occur during the same period in time, even if not at the same moment in time, as counseling, is contrary to that purpose. Even if not every contact between a clergymember and a parishioner involves counseling, it is up to the jury to decide whether the facts in this case support finding an ongoing clergy-counselee relationship. *Bussmann I,* 741 N.W.2d at 83 ("Whether a clergy-counselee relationship was established, whether an established clergy-counselee relationship actually continued, and whether the proscribed sexual conduct occurred during that ongoing clergy-counselee relationship are factual matters for the jury to decide....").

On this record, there is abundant evidence from which a reasonable jury could conclude that D.I. and appellant had an ongoing clergy-counselee relationship. The two often discussed how she was dealing with her mother's death, her fear of death, and the stresses of her new job within the church. D.I. relied on appellant when she needed comfort and support and when she had questions about her faith and her new calling to teach. Even if, as appellant contends, the statute requires each meeting to have some counseling aspect, a reasonable jury could find that each time D.I. and appellant were together, he provided comfort and guidance, which is the very cornerstone of the clergy-counselee relationship.

*6 Appellant also argues that there is insufficient evidence to prove that any clergy-counselee relationship was in private. *Bussmann I* does not define "in private." But the dictionary defines "private" as "[o]f or confined to the individual; personal.... Undertaken on an individual basis." *The American Heritage Dictionary* 1442 (3d ed.1992). Therefore, the "in private" requirement is intended to ensure the confidentiality or privacy of conduct or communications; "in private" is not synonymous with "in secret."

Here, D.I. testified that her first meeting with appellant after her mother's death was in private at the church and then the two of them, privately, went to her mother's gravesite. D.I. testified that after that first meeting, the two continued to meet privately to discuss the grieving process and how she was coping. The first time appellant kissed D.I. was as she was leaving his private quarters after she had consulted with him because she was having a bad day. Other sexual contact occurred in a private room at the church, in appellant's private home, and in his private living quarters in the church rectory. This is sufficient for a reasonable jury to conclude that the "in private" element of the statute was satisfied.

V.

Although appellant did not object at trial, he now contends that the prosecutor committed misconduct by impermissibly shifting the burden of proof to him on the issue of whether the clergy-counselee relationship had been terminated prior to the occurrence of any sexual activity.

Unobjected-to prosecutorial misconduct is waived, but we may review an alleged error according to the plain-error standard. *State v. Ramey,* 721 N.W.2d 294, 797, 299 (Minn.2006). Plain error exists if there is an error that is plain and that affects the defendant's substantial rights. *State v. Washington,* 725 N.W.2d 125, 133 (Minn.App.2006), *review denied* (Minn. Mar. 20, 2007). An error is plain if it is clear or obvious under current law. *Johnson v. United States,* 520 U.S. 461, 467, 117 S.Ct. 1544, 1549, 137 L.Ed.2d 718 (1997). An error is clear or obvious if it "contravenes case law, a rule, or a standard of conduct." *Ramey,* 721 N.W.2d at 302. An alleged error does not contravene caselaw unless the issue is "conclusively resolved." *State v. Jones,* 753 N.W.2d 677, 689 (Minn.2008).

If misconduct is found, a conviction will be reversed only if the misconduct impaired the defendant's right to a fair trial. *State v. Powers,* 654 N.W.2d 667, 678 (Minn.2003). The defendant bears the initial burden of demonstrating plain error, but upon satisfying this obligation, the burden shifts to

the state to show that the error did not affect the defendant's substantial rights. *Ramey,* 721 N.W.2d at 302. If the defendant satisfies his burden of proving that "the prosecutor's actions constitute plain error, and the state is unable to meet the burden of showing that there is no reasonable likelihood of a significant effect, the appellate courts then assess whether the error should be addressed to ensure fairness and the integrity of the judicial proceedings." *Washington,* 725 N.W.2d at 133-34 (quotation omitted).

***7** "The prosecutor is an officer of the court charged with the affirmative obligation to achieve justice and fair adjudication, not merely convictions." *State v. Fields,* 730 N.W.2d 777, 782 (Minn.2007). A prosecutor commits misconduct when he or she engages in acts that "undermin[e] the fairness of a trial," or "violat[e] ... clear or established standards of conduct, e.g., rules, laws, orders by a district court, or clear commands in this state's case law." *Id.* Throughout a criminal trial, the state has the burden to prove all elements of the crime beyond a reasonable doubt, and the burden of proving innocence cannot be shifted to an accused. *State v. Race,* 383 N.W.2d 656, 664 (Minn.1986); *see also, e.g ., State v. Coleman,* 373 N.W.2d 777, 782 (Minn.1985) (stating that "misstatements of the burden of proof are highly improper and constitute prosecutorial misconduct"); *State v. Thomas,* 307 Minn. 229, 231, 239 N.W.2d 455, 457 (1976) (condemning prosecutor's suggestion that burden of proof is meant to protect the innocent, not shield the guilty); *State v. Trimble,* 371 N.W.2d 921, 926 (Minn.App.1985) (holding that prosecutor's argument suggesting that presumption of innocence disappears when large amount of evidence of guilt exists is improper), *review denied* (Minn. Oct. 11, 1985). But in the context of comments made during closing argument that may operate to shift the burden of proof, courts will also consider any mitigating statements that correctly lay the burden on the prosecution. *State v. Tate,* 682 N.W.2d 169, 178-79 (Minn.App.2004), *review denied* (Minn. Sept. 29, 2004). For example, when the district court properly instructs the jury after the prosecution misstates the burden of proof, the misconduct will typically not require reversal. *See id.; State v. McDonough,* 631 N.W.2d 373, 389 n. 2 (Minn.2001); *Race,* 383 N.W.2d at 664; *Coleman,* 373 N.W.2d at 782-83.

Here, the first two instances of alleged misconduct are similar. First, the prosecutor argued: "If the victim was meeting on an ongoing basis with the defendant to seek or receive religious or spiritual advice ... unless and until that pastoral counseling relationship ended, it was a crime for the defendant to have sex with the victim[ ]." Second, the prosecutor argued: "When a parishioner has met with a member of the clergy and a pastoral [counseling] relationship has been established, then that relationship, that pastoral counseling relationship, must be terminated. It must be terminated before a sexual relationship can begin." Neither of these statements misstates the law. *See* Minn.Stat. § 609.344, subd. 1(e) (requiring that sexual conduct occur during "period of time" when counseling meetings were occurring "on an ongoing basis").

Appellant next contends that the prosecutor committed misconduct when she asserted that

> [t]he [counseling] relationship that [D.I.] established with the defendant was never terminated. [D.I.] continued to seek and receive pastoral [counseling] from the defendant with regard to these issues all during the time period the defendant was having sex with her. This relationship was never terminated. The defendant never told [D.I.] that he had to terminate their [counseling] relationship because he wanted to have sex with her. The defendant never told [D.I.] she should seek or receive spiritual [counseling] from another priest since he was having sexual relations with her and the defendant never told [D.I.] that he could no longer hear her confession because he wanted to have a sexual relationship with her and she never did. She never went to anyone else. That [counseling] relationship was never terminated. [D.I.] continued to meet with the defendant on an ongoing basis to seek or receive religious spiritual advice aid or comfort from her priest, her counselor. The defendant.

***8** This argument does not shift any burden of proof to appellant, it simply reiterates the state's theory of the case that (1) a clergy-counselee relationship existed, (2) the relationship needs to be terminated before a sexual relationship can legally occur, and (3) the relationship was never terminated. The prosecutor made a similar plea during her rebuttal argument, stating: "[W]e submit that we have proven that there was [a clergy-counselee relationship] ..., [and] if there was, that relationship has to be terminated. That

has to end before there can be a sexual relationship under the law and it simply did not terminate." A prosecutor must be allowed reasonable latitude in arguing the state's case before the jury.

Finally, appellant complains of another part of the prosecutor's rebuttal argument in which she stated:

> And once that relationship was set up ... he is [counseling] her with regard to her mother's death with regard to her fear of death, regard to heaven, regard to hell.... Once that relationship was set up, when did it terminate? It did not....
>
> That relationship never terminated and for that reason, it was illegal.

Again, this statement does not argue that it is appellant's burden to prove that the clergy-parishioner relationship had been timely terminated, the argument is simply that it had not. Nothing in this record leads us to conclude that the prosecutor impermissibly shifted any burden of proof from the state to appellant.

Affirmed.

All Citations

Not Reported in N.W.2d, 2009 WL 2015416

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135 S.Ct. 2551
Supreme Court of the United States

Samuel James JOHNSON, Petitioner
v.
UNITED STATES.

No. 13–7120.
|
Argued Nov. 5, 2014.
|
Reargued April 20, 2015.
|
Decided June 26, 2015.

Synopsis
Background: Defendant pleaded guilty, pursuant to a plea agreement in the United States District Court for the District of Minnesota, Richard H. Kyle, J., to being an armed career criminal in possession of a firearm. He appealed his sentence. The United States Court of Appeals for the Eighth Circuit, 526 Fed.Appx. 708, affirmed. Certiorari was granted.

[Holding:] The Supreme Court, Justice Scalia, held that imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA) violates the Constitution's guarantee of due process, overruling *James v. U.S.*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532, and *Sykes v. U.S.*, —— U.S. ——, 131 S.Ct. 2267, 180 L.Ed.2d 60, and abrogating *U.S. v. White*, 571 F.3d 365, *U.S. v. Daye*, 571 F.3d 225, and *U.S. v. Johnson*, 616 F.3d 85.

Reversed and remanded.

Justice Kennedy filed an opinion concurring in the judgment.

Justice Thomas filed an opinion concurring in the judgment.

Justice Alito filed a dissenting opinion.

West Headnotes (17)

[1] **Weapons**
Possession After Conviction of Crime
Weapons
Possession by chemically dependent or mentally disabled persons
Weapons
Other individuals prohibited from possession
406 Weapons
406IV Offenses
406IV(C) Possession, Use, Carrying, or Personal Transport
406k173 Possession After Conviction of Crime
406k174 In general
406 Weapons
406IV Offenses
406IV(C) Possession, Use, Carrying, or Personal Transport
406k183 Possession by chemically dependent or mentally disabled persons
406 Weapons
406IV Offenses
406IV(C) Possession, Use, Carrying, or Personal Transport
406k184 Other individuals prohibited from possession
Federal law forbids certain people, such as convicted felons, persons committed to mental institutions, and drug users, to ship, possess, and receive firearms. 18 U.S.C.A. § 922(g).

2 Cases that cite this headnote

[2] **Sentencing and Punishment**
Weapons and explosives
Weapons
Possession, use, carrying, or transportation
Weapons
Possession after conviction of crime
350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(L) Punishment
350Hk1424 Weapons and explosives
406 Weapons
406V Prosecution

406V(H) Sentence and Punishment
406k342 Possession, use, carrying, or transportation
406 Weapons
406V Prosecution
406V(H) Sentence and Punishment
406k343 Possession after conviction of crime

Although violation of the ban on the shipment, possession, and receipt of firearms by convicted felons, persons committed to mental institutions, and drug users generally is punished by up to 10 years' imprisonment, if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," the Armed Career Criminal Act (ACCA) increases his prison term to a minimum of 15 years and a maximum of life. 18 U.S.C.A. §§ 922(g), 924(a)(2), (e)(1).

25 Cases that cite this headnote

[3] Constitutional Law
Vagueness

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4506 Vagueness

The government violates the Due Process Clause by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. U.S.C.A. Const.Amend. 5.

30 Cases that cite this headnote

[4] Constitutional Law
Vagueness

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)2 Nature and Elements of Crime
92k4502 Creation and Definition of Offense
92k4506 Vagueness

Due Process Clause's prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates the first essential of due process. U.S.C.A. Const.Amend. 5.

8 Cases that cite this headnote

[5] Constitutional Law
Judgment and Sentence

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)6 Judgment and Sentence
92k4700 In general

Due Process Clause's prohibition of vagueness in criminal statutes applies not only to statutes defining elements of crimes, but also to statutes fixing sentences. U.S.C.A. Const.Amend. 5.

6 Cases that cite this headnote

[6] Sentencing and Punishment
Violent or Nonviolent Character of Offense

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)1 In General
350Hk1261 Violent or Nonviolent Character of Offense
350Hk1262 In general

Armed Career Criminal Act (ACCA) requires courts to use a framework known as the categorical approach when deciding whether an offense is a "violent felony," that is, is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another. 18 U.S.C.A. § 924(e)(2)(B).

258 Cases that cite this headnote

[7] Sentencing and Punishment
Violent or Nonviolent Character of Offense

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)1 In General
350Hk1261 Violent or Nonviolent Character of Offense
350Hk1262 In general

Under the categorical approach, a court assesses whether a crime qualifies as a violent felony under the Armed Career Criminal Act (ACCA) in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion. 18 U.S.C.A. § 924(e)(2)(B).

107 Cases that cite this headnote

[8] Sentencing and Punishment

Violent or Nonviolent Character of Offense

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)1 In General
350Hk1261 Violent or Nonviolent Character of Offense
350Hk1262 In general

Deciding whether a crime is covered by the residual clause of the Armed Career Criminal Act (ACCA), which provides that a felony that "involves conduct that presents a serious potential risk of physical injury to another" should be treated as a "violent felony," requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury; court's task goes beyond deciding whether creation of risk is an element of the crime, and beyond evaluating the chances that the physical acts that make up the crime will injure someone. 18 U.S.C.A. § 924(e)(2)(B).

223 Cases that cite this headnote

[9] Constitutional Law

Habitual and career offenders

Sentencing and Punishment

Validity of statute or regulatory provision

92 Constitutional Law
92XXVII Due Process
92XXVII(H) Criminal Law
92XXVII(H)6 Judgment and Sentence
92k4729 Habitual and career offenders
350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(A) In General
350Hk1210 Validity of statute or regulatory provision

Imposing an increased sentence under the residual clause of the Armed Career Criminal Act (ACCA), which provides that a felony that "involves conduct that presents a serious potential risk of physical injury to another" should be treated as a "violent felony," violates the Constitution's guarantee of due process; overruling *James v. U.S.*, 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532, and *Sykes v. U.S.*, —— U.S. ——, 131 S.Ct. 2267, 180 L.Ed.2d 60, and abrogating *U.S. v. White*, 571 F.3d 365, *U.S. v. Daye*, 571 F.3d 225, and *U.S. v. Johnson*, 616 F.3d 85. U.S.C.A. Const.Amend. 5; 18 U.S.C.A. § 924(e)(2)(B).

241 Cases that cite this headnote

[10] Constitutional Law

Statutes

92 Constitutional Law
92VIII Vagueness in General
92k1130.7 Vagueness as to Covered Conduct or Standards of Enforcement; Offenses and Penalties
92k1130.10 Statutes

Failure of courts' persistent efforts to establish a standard may provide evidence of unconstitutional statutory vagueness.

1 Cases that cite this headnote

[11] Constitutional Law

Statutes

92 Constitutional Law
92VIII Vagueness in General
92k1130.7 Vagueness as to Covered Conduct or Standards of Enforcement; Offenses and Penalties
92k1130.10 Statutes

Vague statutory provision is not constitutional merely because there is some conduct that clearly falls within the provision's grasp.

6 Cases that cite this headnote

[12] Constitutional Law

Vagueness as to Covered Conduct or Standards of Enforcement; Offenses and Penalties

92 Constitutional Law
92VIII Vagueness in General
92k1130.7 Vagueness as to Covered Conduct or Standards of Enforcement; Offenses and Penalties
92k1130.8 In general

Laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct generally are not void for vagueness; the law is full of instances where a man's fate depends on his estimating rightly some matter of degree.

12 Cases that cite this headnote

[13] Sentencing and Punishment
Offenses Usable for Enhancement

350H Sentencing and Punishment
350HVI Habitual and Career Offenders
350HVI(C) Offenses Usable for Enhancement
350HVI(C)1 In General
350Hk1250 In general

Armed Career Criminal Act's (ACCA) emphasis on convictions indicates that Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions. 18 U.S.C.A. § 924(e)(1).

32 Cases that cite this headnote

[14] Courts
Erroneous or injudicious decisions

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k90 Decisions of Same Court or Co-Ordinate Court
106k90(6) Erroneous or injudicious decisions

Doctrine of stare decisis allows the Supreme Court to revisit an earlier decision where experience with its application reveals that it is unworkable.

1 Cases that cite this headnote

[15] Courts
Previous Decisions as Controlling or as Precedents

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 In general

Pursuant to the doctrine of stare decisis, even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience.

1 Cases that cite this headnote

[16] Courts
Decisions of Same Court or Co-Ordinate Court

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k90 Decisions of Same Court or Co-Ordinate Court
106k90(1) In general

When prior decisions of the Supreme Court have opined about a particular issue without full briefing or argument on that issue, the Court is less constrained to follow precedent.

Cases that cite this headnote

[17] Courts
Previous Decisions as Controlling or as Precedents

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k89 In general

Although it is a vital rule of judicial self-government, stare decisis does not matter for its own sake; rather, it matters because it promotes the evenhanded, predictable, and consistent development of legal principles.

1 Cases that cite this headnote

West Codenotes

Held Unconstitutional
18 U.S.C.A. § 924(e)(2)(B)(ii)

***2553** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

****1** After petitioner Johnson pleaded guilty to being a felon in possession of a firearm, see 18 U.S.C. § 922(g), the Government sought an enhanced sentence under the Armed Career Criminal Act, which imposes an increased prison term upon a defendant with three prior convictions for ***2554** a "violent felony," § 924(e)(1), a term defined by § 924(e)(2)(B)'s residual clause to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." The Government argued that Johnson's prior conviction for unlawful possession of a short-barreled shotgun met this definition, making the third conviction of a violent felony. This Court had previously pronounced upon the meaning of the residual clause in *James v. United States,* 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532; *Begay v. United States,* 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490; *Chambers v. United States,* 555 U.S. 122, 129 S.Ct. 687, 172 L.Ed.2d 484; and *Sykes v. United States,* 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60, and had rejected suggestions by dissenting Justices in both *James* and *Sykes* that the clause is void for vagueness. Here, the District Court held that the residual clause does cover unlawful possession of a short-barreled shotgun, and imposed a 15–year sentence under ACCA. The Eighth Circuit affirmed.

Held: Imposing an increased sentence under ACCA's residual clause violates due process. Pp. 2555 - 2563.

(a) The Government violates the Due Process Clause when it takes away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson,* 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903. Courts must use the "categorical approach" when deciding whether an offense is a violent felony, looking "only to the fact that the defendant has been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Taylor v. United States,* 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607. Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. *James, supra,* at 208, 127 S.Ct. 1586. Pp. 2555 – 2557.

(b) Two features of the residual clause conspire to make it unconstitutionally vague. By tying the judicial assessment of risk to a judicially imagined "ordinary case" of a crime rather than to real-world facts or statutory elements, the clause leaves grave uncertainty about how to estimate the risk posed by a crime. See *James, supra,* at 211, 127 S.Ct. 1586. At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. Taken together, these uncertainties produce more unpredictability and arbitrariness than the Due Process Clause tolerates. This Court's repeated failure to craft a principled standard out of the residual clause and the lower courts' persistent inability to apply the clause in a consistent way confirm its hopeless indeterminacy. Pp. 2557 – 2560.

(c) This Court's cases squarely contradict the theory that the residual clause is constitutional merely because some underlying crimes may clearly pose a serious potential risk of physical injury to another. See, *e.g., United States v. L. Cohen Grocery Co.,* 255 U.S. 81, 89, 41 S.Ct. 298, 65 L.Ed. 516. Holding the residual clause void for vagueness does not put other criminal laws that use terms such as "substantial risk" in doubt, because those laws generally require gauging the riskiness of an individual's conduct on a particular occasion, not the riskiness of an idealized ordinary case of the crime. Pp. 2560 – 2562.

****2** (d) The doctrine of *stare decisis* does not require continued adherence to *James* ***2555** and *Sykes*. Experience leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. *James* and *Sykes* opined about vagueness without full briefing or argument. And continued adherence to those decisions would undermine, rather than promote, the goals of evenhandedness, predictability, and consistency served by *stare decisis*. Pp. 2561 – 2563.

526 Fed.Appx. 708, reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which ROBERTS, C.J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. KENNEDY, J., and THOMAS, J., filed opinions concurring in the judgment. ALITO, J., filed a dissenting opinion.

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Opinion

Justice SCALIA delivered the opinion of the Court.

Under the Armed Career Criminal Act of 1984, a defendant convicted of being a felon in possession of a firearm faces more severe punishment if he has three or more previous convictions for a "violent felony," a term defined to include any felony that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). We must decide whether this part of the definition of a violent felony survives the Constitution's prohibition of vague criminal laws.

I

****3** **[1]** **[2]** Federal law forbids certain people—such as convicted felons, persons committed to mental institutions, and drug users—to ship, possess, and receive firearms. § 922(g). In general, the law punishes violation of this ban by up to 10 years' imprisonment. § 924(a)(2). But if the violator has three or more earlier convictions for a "serious drug offense" or a "violent felony," the Armed Career Criminal Act increases his prison term to a minimum of 15 years and a maximum of life. § 924(e)(1); *Johnson v. United States,* 559 U.S. 133, 136, 130 S.Ct. 1265, 176 L.Ed.2d 1 (2010). The Act defines "violent felony" as follows:

> "any crime punishable by imprisonment for a term exceeding one year ... that—
>
> "(i) has as 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* ***2556** *potential risk of physical injury to another.*" § 924(e)(2)(B) (emphasis added).

The closing words of this definition, italicized above, have come to be known as the Act's residual clause. Since 2007, this Court has decided four cases attempting to discern its meaning. We have held that the residual clause (1) covers Florida's offense of attempted burglary, *James v. United States,* 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007); (2) does *not* cover New Mexico's offense of driving under the influence, *Begay v. United States,* 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008); (3) does *not* cover Illinois' offense of failure to report to a penal institution, *Chambers v. United States,* 555 U.S. 122, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009); and (4) does cover Indiana's offense of vehicular flight from a law-enforcement officer, *Sykes v. United States,* 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011). In both *James* and *Sykes*, the Court rejected suggestions by dissenting Justices that the residual clause violates the Constitution's prohibition of vague criminal laws. Compare *James,* 550 U.S., at 210, n. 6, 127 S.Ct. 1586, with *id.,* at 230, 127 S.Ct. 1586 (SCALIA, J., dissenting); compare *Sykes,* 564 U.S., at ——, 131 S.Ct., at 2276–2277, with *id.,* at ——, 131 S.Ct., at 2286–2288 (SCALIA, J., dissenting).

This case involves the application of the residual clause to another crime, Minnesota's offense of unlawful possession of a short-barreled shotgun. Petitioner Samuel Johnson is a felon with a long criminal record. In 2010, the Federal Bureau of Investigation began to monitor him because of his involvement in a white-supremacist organization that the Bureau suspected was planning to commit acts of terrorism. During the investigation, Johnson disclosed to undercover agents that he had manufactured explosives and that he planned to attack "the Mexican consulate" in Minnesota, "progressive bookstores," and " 'liberals.' " Revised Presentence Investigation in No. 0:12CR00104–001 (D. Minn.), p. 15, ¶ 16. Johnson showed the agents his AK–47

rifle, several semiautomatic firearms, and over 1,000 rounds of ammunition.

After his eventual arrest, Johnson pleaded guilty to being a felon in possession of a firearm in violation of § 922(g). The Government requested an enhanced sentence under the Armed Career Criminal Act. It argued that three of Johnson's previous offenses—including unlawful possession of a short-barreled shotgun, see Minn.Stat. § 609.67 (2006)—qualified as violent felonies. The District Court agreed and sentenced Johnson to a 15–year prison term under the Act. The Court of Appeals affirmed. 526 Fed.Appx. 708 (C.A.8 2013) (*per curiam*). We granted certiorari to decide whether Minnesota's offense of unlawful possession of a short-barreled shotgun ranks as a violent felony under the residual clause. 572 U.S. ——, 134 S.Ct. 1871, 188 L.Ed.2d 910 (2014). We later asked the parties to present reargument addressing the compatibility of the residual clause with the Constitution's prohibition of vague criminal laws. 574 U.S. ——, 135 S.Ct. 939, 190 L.Ed.2d 718 (2015).

II

4 [3] [4] [5] The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement. *Kolender v. Lawson,* 461 U.S. 352, 357–358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). The prohibition of vagueness ***2557 in criminal statutes "is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law," and a statute that flouts it "violates the first essential of due process." *Connally v. General Constr. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). These principles apply not only to statutes defining elements of crimes, but also to statutes fixing sentences. *United States v. Batchelder,* 442 U.S. 114, 123, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).

[6] [7] In *Taylor v. United States,* 495 U.S. 575, 600, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990), this Court held that the Armed Career Criminal Act requires courts to use a framework known as the categorical approach when deciding whether an offense "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Under the categorical approach, a court assesses whether a crime qualifies as a violent felony "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay, supra,* at 141, 128 S.Ct. 1581.

[8] Deciding whether the residual clause covers a crime thus requires a court to picture the kind of conduct that the crime involves in "the ordinary case," and to judge whether that abstraction presents a serious potential risk of physical injury. *James, supra,* at 208, 127 S.Ct. 1586. The court's task goes beyond deciding whether creation of risk is an element of the crime. That is so because, unlike the part of the definition of a violent felony that asks whether the crime "has *as an element* the use ... of physical force," the residual clause asks whether the crime "*involves conduct*" that presents too much risk of physical injury. What is more, the inclusion of burglary and extortion among the enumerated offenses preceding the residual clause confirms that the court's task also goes beyond evaluating the chances that the physical acts that make up the crime will injure someone. The act of making an extortionate demand or breaking and entering into someone's home does not, in and of itself, normally cause physical injury. Rather, risk of injury arises because the extortionist might engage in violence *after* making his demand or because the burglar might confront a resident in the home *after* breaking and entering.

[9] We are convinced that the indeterminacy of the wide-ranging inquiry required by the residual clause both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant's sentence under the clause denies due process of law.

A

**5 Two features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined "ordinary case" of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the "ordinary case" of a crime involves? "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?" *United States v. Mayer,* 560 F.3d 948, 952 (C.A.9 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc). To take an example, does

the ordinary instance of witness tampering involve offering a witness a bribe? Or threatening a witness with violence? Critically, picturing the criminal's behavior is not enough; as we have already discussed, assessing "potential risk" seemingly requires the judge to imagine how the idealized ordinary ***2558** case of the crime subsequently plays out. *James* illustrates how speculative (and how detached from statutory elements) this enterprise can become. Explaining why attempted burglary poses a serious potential risk of physical injury, the Court said: "An armed would-be burglar may be spotted by a police officer, a private security guard, or a participant in a neighborhood watch program. Or a homeowner ... may give chase, and a violent encounter may ensue." 550 U.S., at 211, 127 S.Ct. 1586. The dissent, by contrast, asserted that any confrontation that occurs during an attempted burglary "is likely to consist of nothing more than the occupant's yelling 'Who's there?' from his window, and the burglar's running away." *Id.,* at 226, 127 S.Ct. 1586 (opinion of SCALIA, J.). The residual clause offers no reliable way to choose between these competing accounts of what "ordinary" attempted burglary involves.

At the same time, the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony. It is one thing to apply an imprecise "serious potential risk" standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction. By asking whether the crime "*otherwise* involves conduct that presents a serious potential risk," moreover, the residual clause forces courts to interpret "serious potential risk" in light of the four enumerated crimes —burglary, arson, extortion, and crimes involving the use of explosives. These offenses are "far from clear in respect to the degree of risk each poses." *Begay,* 553 U.S., at 143, 128 S.Ct. 1581. Does the ordinary burglar invade an occupied home by night or an unoccupied home by day? Does the typical extortionist threaten his victim in person with the use of force, or does he threaten his victim by mail with the revelation of embarrassing personal information? By combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates.

[10] This Court has acknowledged that the failure of "persistent efforts ... to establish a standard" can provide evidence of vagueness. *United States v. L. Cohen Grocery Co.,* 255 U.S. 81, 91, 41 S.Ct. 298, 65 L.Ed. 516 (1921). Here, this Court's repeated attempts and repeated failures to craft a principled and objective standard out of the residual clause confirm its hopeless indeterminacy. Three of the Court's previous four decisions about the clause concentrated on the level of risk posed by the crime in question, though in each case we found it necessary to resort to a different ad hoc test to guide our inquiry. In *James,* we asked whether "the risk posed by attempted burglary is comparable to that posed by its closest analog among the enumerated offenses," namely completed burglary; we concluded that it was. 550 U.S., at 203, 127 S.Ct. 1586. That rule takes care of attempted burglary, but offers no help at all with respect to the vast majority of offenses, which have no apparent analog among the enumerated crimes. "Is, for example, driving under the influence of alcohol more analogous to burglary, arson, extortion, or a crime involving use of explosives?" *Id.,* at 215, 127 S.Ct. 1586 (SCALIA, J., dissenting).

****6** *Chambers,* our next case to focus on risk, relied principally on a statistical report prepared by the Sentencing Commission to conclude that an offender who fails to report to prison is not "significantly more likely than others to attack, or physically to resist, an apprehender, thereby producing a 'serious potential risk of physical ***2559** injury.' " 555 U.S., at 128–129, 129 S.Ct. 687. So much for failure to report to prison, but what about the tens of thousands of federal and state crimes for which no comparable reports exist? And even those studies that are available might suffer from methodological flaws, be skewed toward rarer forms of the crime, or paint widely divergent pictures of the riskiness of the conduct that the crime involves. See *Sykes,* 564 U.S., at —— – ——, 131 S.Ct., at 2285–2287 (SCALIA, J., dissenting); *id.,* at ——, n. 4, 131 S.Ct., at 2291, n. 4 (KAGAN, J., dissenting).

Our most recent case, *Sykes,* also relied on statistics, though only to "confirm the commonsense conclusion that Indiana's vehicular flight crime is a violent felony." *Id.,* at ——, 131 S.Ct., at 2274 (majority opinion). But common sense is a much less useful criterion than it sounds—as *Sykes* itself illustrates. The Indiana statute involved in that case covered everything from provoking a high-speed car chase to merely failing to stop immediately after seeing a police officer's signal. See *id.,* at ——, 131 S.Ct., at 2289–2290 (KAGAN, J., dissenting). How does common sense help a federal court discern where the "ordinary case" of vehicular flight in Indiana lies along this spectrum? Common sense has not even produced a consistent conception of the degree of risk posed by each of the four enumerated crimes; there is no reason to expect it to fare any better with respect to thousands

of unenumerated crimes. All in all, *James, Chambers,* and *Sykes* failed to establish any generally applicable test that prevents the risk comparison required by the residual clause from devolving into guesswork and intuition.

The remaining case, *Begay,* which preceded *Chambers* and *Sykes*, took an entirely different approach. The Court held that in order to qualify as a violent felony under the residual clause, a crime must resemble the enumerated offenses "in kind as well as in degree of risk posed." 553 U.S., at 143, 128 S.Ct. 1581. The Court deemed drunk driving insufficiently similar to the listed crimes, because it typically does not involve "purposeful, violent, and aggressive conduct." *Id.,* at 144–145, 128 S.Ct. 1581 (internal quotation marks omitted). Alas, *Begay* did not succeed in bringing clarity to the meaning of the residual clause. It did not (and could not) eliminate the need to imagine the kind of conduct typically involved in a crime. In addition, the enumerated crimes are not much more similar to one another in kind than in degree of risk posed, and the concept of "aggressive conduct" is far from clear. *Sykes* criticized the "purposeful, violent, and aggressive" test as an "addition to the statutory text," explained that "levels of risk" would normally be dispositive, and confined *Begay* to "strict liability, negligence, and recklessness crimes." 564 U.S., at ——— – ———, 131 S.Ct., at 2275–2276.

****7** The present case, our fifth about the meaning of the residual clause, opens a new front of uncertainty. When deciding whether unlawful possession of a short-barreled shotgun is a violent felony, do we confine our attention to the risk that the shotgun will go off by accident while in someone's possession? Or do we also consider the possibility that the person possessing the shotgun will later use it to commit a crime? The inclusion of burglary and extortion among the enumerated offenses suggests that a crime may qualify under the residual clause even if the physical injury is remote from the criminal act. But how remote is too remote? Once again, the residual clause yields no answers.

This Court is not the only one that has had trouble making sense of the residual ***2560** clause. The clause has "created numerous splits among the lower federal courts," where it has proved "nearly impossible to apply consistently." *Chambers,* 555 U.S., at 133, 129 S.Ct. 687 (ALITO, J., concurring in judgment). The most telling feature of the lower courts' decisions is not division about whether the residual clause covers this or that crime (even clear laws produce close cases); it is, rather, pervasive disagreement about the nature of the inquiry one is supposed to conduct and the kinds of factors one is supposed to consider. Some judges have concluded that deciding whether conspiracy is a violent felony requires evaluating only the dangers posed by the "simple act of agreeing [to commit a crime]," *United States v. Whitson,* 597 F.3d 1218, 1222 (C.A.11 2010) (*per curiam*); others have also considered the probability that the agreement will be carried out, *United States v. White,* 571 F.3d 365, 370–371 (C.A.4 2009). Some judges have assumed that the battery of a police officer (defined to include the slightest touching) could "explode into violence and result in physical injury," *United States v. Williams,* 559 F.3d 1143, 1149 (C.A.10 2009); others have felt that it "do[es] a great disservice to law enforcement officers" to assume that they would "explod[e] into violence" rather than "rely on their training and experience to determine the best method of responding," *United States v. Carthorne,* 726 F.3d 503, 514 (C.A.4 2013). Some judges considering whether statutory rape qualifies as a violent felony have concentrated on cases involving a perpetrator much older than the victim, *United States v. Daye,* 571 F.3d 225, 230–231 (C.A.2 2009); others have tried to account for the possibility that "the perpetrator and the victim [might be] close in age," *United States v. McDonald,* 592 F.3d 808, 815 (C.A.7 2010). Disagreements like these go well beyond disputes over matters of degree.

It has been said that the life of the law is experience. Nine years' experience trying to derive meaning from the residual clause convinces us that we have embarked upon a failed enterprise. Each of the uncertainties in the residual clause may be tolerable in isolation, but "their sum makes a task for us which at best could be only guesswork." *United States v. Evans,* 333 U.S. 483, 495, 68 S.Ct. 634, 92 L.Ed. 823 (1948). Invoking so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.

B

****8** The Government and the dissent claim that there will be straightforward cases under the residual clause, because some crimes clearly pose a serious potential risk of physical injury to another. See *post,* at 2562 – 2563 (opinion of ALITO, J.). True enough, though we think many of the cases the Government and the dissent deem easy turn out not to be so easy after all. Consider just one of the Government's examples, Connecticut's offense of "rioting at a correctional institution." See *United States v. Johnson,* 616 F.3d 85 (C.A.2 2010). That certainly sounds like a violent felony—until

one realizes that Connecticut defines this offense to include taking part in "any disorder, disturbance, strike, riot or other organized disobedience to the rules and regulations" of the prison. Conn. Gen.Stat. § 53a–179b(a) (2012). Who is to say which the ordinary "disorder" most closely resembles—a full-fledged prison riot, a food-fight in the prison cafeteria, or a "passive and nonviolent [act] such as disregarding an order to move," *Johnson,* 616 F.3d, at 95 (Parker, J., dissenting)?

[11] In all events, although statements in some of our opinions could be read to ***2561** suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp. For instance, we have deemed a law prohibiting grocers from charging an "unjust or unreasonable rate" void for vagueness—even though charging someone a thousand dollars for a pound of sugar would surely be unjust and unreasonable. *L. Cohen Grocery Co.,* 255 U.S., at 89, 41 S.Ct. 298. We have similarly deemed void for vagueness a law prohibiting people on sidewalks from "conduct[ing] themselves in a manner annoying to persons passing by"—even though spitting in someone's face would surely be annoying. *Coates v. Cincinnati,* 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). These decisions refute any suggestion that the existence of *some* obviously risky crimes establishes the residual clause's constitutionality.

Resisting the force of these decisions, the dissent insists that "a statute is void for vagueness only if it is vague in all its applications." *Post,* at 2574. It claims that the prohibition of unjust or unreasonable rates in *L. Cohen Grocery* was "vague in all applications," even though one can easily envision rates so high that they are unreasonable by any measure. *Post,* at 2582. It seems to us that the dissent's supposed requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications (and never mind the reality). If the existence of some clearly unreasonable rates would not save the law in *L. Cohen Grocery,* why should the existence of some clearly risky crimes save the residual clause?

[12] The Government and the dissent next point out that dozens of federal and state criminal laws use terms like "substantial risk," "grave risk," and "unreasonable risk," suggesting that to hold the residual clause unconstitutional is to place these provisions in constitutional doubt. See *post,* at 2558 – 2559. Not at all. Almost none of the cited laws links a phrase such as "substantial risk" to a confusing list of examples. "The phrase 'shades of red,' standing alone, does not generate confusion or unpredictability; but the phrase 'fire-engine red, light pink, maroon, *navy blue,* or colors that otherwise involve shades of red' assuredly does so." *James,* 550 U.S., at 230, n. 7, 127 S.Ct. 1586 (SCALIA, J., dissenting). More importantly, almost all of the cited laws require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion.* As a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as "substantial risk" to real-world conduct; "the law is full of instances where a man's fate depends on his estimating rightly ... some matter of degree," *Nash v. United States,* 229 U.S. 373, 377, 33 S.Ct. 780, 57 L.Ed. 1232 (1913). The residual clause, however, requires application of the "serious potential risk" standard to an idealized ordinary case of the crime. Because "the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect," this abstract inquiry offers significantly less predictability than one "[t]hat deals with the actual, not with an imaginary condition other than the facts." *International Harvester Co. of America v. Kentucky,* 234 U.S. 216, 223, 34 S.Ct. 853, 58 L.Ed. 1284 (1914).

****9** **[13]** Finally, the dissent urges us to save the residual clause from vagueness by interpreting it to refer to the risk posed by the particular conduct in which the defendant engaged, not the risk posed by the ordinary case of the defendant's crime. ***2562** See *post,* at 2578 – 2580. In other words, the dissent suggests that we jettison for the residual clause (though not for the enumerated crimes) the categorical approach adopted in *Taylor,* see 495 U.S., at 599–602, 110 S.Ct. 2143, and reaffirmed in each of our four residual-clause cases, see *James,* 550 U.S., at 202, 127 S.Ct. 1586; *Begay,* 553 U.S., at 141, 128 S.Ct. 1581; *Chambers,* 555 U.S., at 125, 129 S.Ct. 687; *Sykes,* 564 U.S., ——, 131 S.Ct., at 2272–2273. We decline the dissent's invitation. In the first place, the Government has not asked us to abandon the categorical approach in residual-clause cases. In addition, *Taylor* had good reasons to adopt the categorical approach, reasons that apply no less to the residual clause than to the enumerated crimes. *Taylor* explained that the relevant part of the Armed Career Criminal Act "refers to 'a person who ... has three previous convictions' for—not a person who has committed —three previous violent felonies or drug offenses." 495 U.S., at 600, 110 S.Ct. 2143. This emphasis on convictions indicates that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts

underlying the prior convictions." *Ibid. Taylor* also pointed out the utter impracticability of requiring a sentencing court to reconstruct, long after the original conviction, the conduct underlying that conviction. For example, if the original conviction rested on a guilty plea, no record of the underlying facts may be available. "[T]he only plausible interpretation" of the law, therefore, requires use of the categorical approach. *Id.*, at 602, 110 S.Ct. 2143.

C

**10 That brings us to *stare decisis*. This is the first case in which the Court has received briefing and heard argument from the parties about whether the residual clause is void for vagueness. In *James*, however, the Court stated in a footnote that it was "not persuaded by [the principal dissent's] suggestion ... that the residual provision is unconstitutionally vague." 550 U.S., at 210, n. 6, 127 S.Ct. 1586. In *Sykes*, the Court again rejected a dissenting opinion's claim of vagueness. 564 U.S., at ———, 131 S.Ct., at 2276–2277.

[14] The doctrine of *stare decisis* allows us to revisit an earlier decision where experience with its application reveals that it is unworkable. *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). Experience is all the more instructive when the decision in question rejected a claim of unconstitutional vagueness. Unlike other judicial mistakes that need correction, the error of having rejected a vagueness challenge manifests itself precisely in subsequent judicial decisions: the inability of later opinions to impart the predictability that the earlier opinion forecast. Here, the experience of the federal courts leaves no doubt about the unavoidable uncertainty and arbitrariness of adjudication under the residual clause. Even after *Sykes* tried to clarify the residual clause's meaning, the provision remains a "judicial morass that defies systemic solution," "a black hole of confusion and uncertainty" that frustrates any effort to impart "some sense of order and direction." *United States v. Vann*, 660 F.3d 771, 787 (C.A.4 2011) (Agee, J., concurring).

[15] [16] This Court's cases make plain that even decisions rendered after full adversarial presentation may have to yield to the lessons of subsequent experience. See, *e.g., United States v. Dixon*, 509 U.S. 688, 711, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993); *Payne*, 501 U.S., at 828–830, 111 S.Ct. 2597 (1991). But *James* and *Sykes* opined about vagueness without full briefing **2563** or argument on that issue—a circumstance that leaves us "less constrained to follow precedent," *Hohn v. United States*, 524 U.S. 236, 251, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998). The brief discussions of vagueness in *James* and *Sykes* homed in on the imprecision of the phrase "serious potential risk"; neither opinion evaluated the uncertainty introduced by the need to evaluate the riskiness of an abstract ordinary case of a crime. 550 U.S., at 210, n. 6, 127 S.Ct. 1586, 564 U.S., at ——, 131 S.Ct., at 2276–2277. And departing from those decisions does not raise any concerns about upsetting private reliance interests.

[17] Although it is a vital rule of judicial self-government, *stare decisis* does not matter for its own sake. It matters because it "promotes the evenhanded, predictable, and consistent development of legal principles." *Payne, supra*, at 827, 111 S.Ct. 2597. Decisions under the residual clause have proved to be anything but evenhanded, predictable, or consistent. Standing by *James* and *Sykes* would undermine, rather than promote, the goals that *stare decisis* is meant to serve.

* * *

**11 We hold that imposing an increased sentence under the residual clause of the Armed Career Criminal Act violates the Constitution's guarantee of due process. Our contrary holdings in *James* and *Sykes* are overruled. Today's decision does not call into question application of the Act to the four enumerated offenses, or the remainder of the Act's definition of a violent felony.

We reverse the judgment of the Court of Appeals for the Eighth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Justice KENNEDY, concurring in the judgment.
In my view, and for the reasons well stated by Justice ALITO in dissent, the residual clause of the Armed Career Criminal Act is not unconstitutionally vague under the categorical approach or a record-based approach. On the assumption that the categorical approach ought to still control, and for the reasons given by Justice THOMAS in Part I of his opinion concurring in the judgment, Johnson's conviction for possession of a short-barreled shotgun does not qualify as a violent felony.

For these reasons, I concur in the judgment.

Justice THOMAS, concurring in the judgment.

I agree with the Court that Johnson's sentence cannot stand. But rather than use the Fifth Amendment's Due Process Clause to nullify an Act of Congress, I would resolve this case on more ordinary grounds. Under conventional principles of interpretation and our precedents, the offense of unlawfully possessing a short-barreled shotgun does not constitute a "violent felony" under the residual clause of the Armed Career Criminal Act (ACCA).

The majority wants more. Not content to engage in the usual business of interpreting statutes, it holds this clause to be unconstitutionally vague, notwithstanding the fact that on four previous occasions we found it determinate enough for judicial application. As Justice ALITO explains, that decision cannot be reconciled with our precedents concerning the vagueness doctrine. See *post,* at 2580 – 2581 (dissenting opinion). But even if it were a closer case under those decisions, I would be wary of holding the residual clause to be unconstitutionally vague. Although I have joined the Court in applying our modern vagueness ***2564** doctrine in the past, see *FCC v. Fox Television Stations, Inc.,* 567 U.S. ——, ———–, 132 S.Ct. 2307, 2319–2320, 183 L.Ed.2d 234 (2012), I have become increasingly concerned about its origins and application. Simply put, our vagueness doctrine shares an uncomfortably similar history with substantive due process, a judicially created doctrine lacking any basis in the Constitution.

I

****12** We could have easily disposed of this case without nullifying ACCA's residual clause. Under ordinary principles of statutory interpretation, the crime of unlawfully possessing a short-barreled shotgun does not constitute a "violent felony" under ACCA. In relevant part, that Act defines a "violent felony" as a "crime punishable by imprisonment for a term exceeding one year" that either

> "(i) has as 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." 18 U.S.C. § 924(e)(2)(B).

The offense of unlawfully possessing a short-barreled shotgun neither satisfies the first clause of this definition nor falls within the enumerated offenses in the second. It therefore can constitute a violent felony only if it falls within ACCA's so-called "residual clause"—*i.e.,* if it "involves conduct that presents a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii).

To determine whether an offense falls within the residual clause, we consider "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James v. United States,* 550 U.S. 192, 208, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007). The specific crimes listed in § 924(e)(2)(B)(ii)—arson, extortion, burglary, and an offense involving the use of explosives—offer a "baseline against which to measure the degree of risk" a crime must present to fall within that clause. *Id.,* at 208, 127 S.Ct. 1586. Those offenses do not provide a high threshold, see *id.,* at 203, 207–208, 127 S.Ct. 1586, but the crime in question must still present a " 'serious' "—a " 'significant' or 'important' "—risk of physical injury to be deemed a violent felony, *Begay v. United States,* 553 U.S. 137, 156, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008) (ALITO, J., dissenting); accord, *Chambers v. United States,* 555 U.S. 122, 128, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009).

To qualify as serious, the risk of injury generally must be closely related to the offense itself. Our precedents provide useful examples of the close relationship that must exist between the conduct of the offense and the risk presented. In *Sykes v. United States,* 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011), for instance, we held that the offense of intentional vehicular flight constitutes a violent felony because that conduct always triggers a dangerous confrontation, *id.,* at ——, 131 S.Ct., at 2274. As we explained, vehicular flights "by definitional necessity occur when police are present" and are done "in defiance of their instructions ... with a vehicle that can be used in a way to cause serious potential risk of physical injury to another." *Ibid.* In *James,* we likewise held that attempted burglary offenses "requir[ing] an overt act directed toward the entry of a structure" are violent felonies because the underlying conduct often results in a dangerous confrontation. 550 U.S., at 204, 206, 127 S.Ct. 1586. But we distinguished those crimes from "the more ***2565** attenuated conduct encompassed by" attempt offenses "that c[an] be satisfied by preparatory conduct that does not pose the same risk of violent confrontation," such as " 'possessing burglary tools.' " *Id.,* at 205, 206, and n. 4, 127 S.Ct. 1586. At some point, in other

words, the risk of injury from the crime may be too attenuated for the conviction to fall within the residual clause, such as when an additional, voluntary act (*e.g.*, the *use* of burglary tools to enter a structure) is necessary to bring about the risk of physical injury to another.

In light of the elements of and reported convictions for the unlawful possession of a short-barreled shotgun, this crime does not "involv[e] conduct that presents a serious potential risk of physical injury to another," § 924(e)(2)(B)(ii). The acts that form the basis of this offense are simply too remote from a risk of physical injury to fall within the residual clause.

****13** Standing alone, the elements of this offense—(1) unlawfully (2) possessing (3) a short-barreled shotgun—do not describe inherently dangerous conduct. As a conceptual matter, "simple possession [of a firearm], even by a felon, takes place in a variety of ways (*e.g.*, in a closet, in a storeroom, in a car, in a pocket) many, perhaps most, of which do not involve likely accompanying violence." *United States v. Doe,* 960 F.2d 221, 225 (C.A.1 1992). These weapons also can be stored in a manner posing a danger to no one, such as unloaded, disassembled, or locked away. By themselves, the elements of this offense indicate that the ordinary commission of this crime is far less risky than ACCA's enumerated offenses.

Reported convictions support the conclusion that mere possession of a short-barreled shotgun does not, in the ordinary case, pose a serious risk of injury to others. A few examples suffice. In one case, officers found the sawed-off shotgun locked inside a gun cabinet in an empty home. *State v. Salyers,* 858 N.W.2d 156, 157–158 (Minn.2015). In another, the firearm was retrieved from the trunk of the defendant's car. *State v. Ellenberger,* 543 N.W.2d 673, 674 (Minn.App.1996). In still another, the weapon was found missing a firing pin. *State v. Johnson,* 171 Wis.2d 175, 178, 491 N.W.2d 110, 111 (App.1992). In these instances and others, the offense threatened no one.

The Government's theory for why this crime should nonetheless qualify as a "violent felony" is unpersuasive. Although it does not dispute that the unlawful possession of a short-barreled shotgun can occur in a nondangerous manner, the Government contends that this offense poses a serious risk of physical injury due to the connection between short-barreled shotguns and other serious crimes. As the Government explains, these firearms are "weapons not typically possessed by law-abiding citizens for lawful purposes," *District of Columbia v. Heller,* 554 U.S. 570, 625, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), but are instead primarily intended for use in criminal activity. In light of that intended use, the Government reasons that the ordinary case of this possession offense will involve the *use* of a short-barreled shotgun in a serious crime, a scenario obviously posing a serious risk of physical injury.

But even assuming that those who unlawfully possess these weapons typically intend to use them in a serious crime, the risk that the Government identifies arises not from the act of possessing the weapon, but from the act of using it. Unlike attempted burglary (at least of the type at issue in *James*) or intentional vehicular flight—conduct that by itself often or always invites a dangerous confrontation—possession of a short-barreled shotgun poses a threat *only* when an offender decides ***2566** to engage in additional, voluntary conduct that is not included in the elements of the crime. Until this weapon is assembled, loaded, or used, for example, it poses no risk of injury to others in and of itself. The risk of injury to others from mere possession of this firearm is too attenuated to treat this offense as a violent felony. I would reverse the Court of Appeals on that basis.

II

****14** As the foregoing analysis demonstrates, ACCA's residual clause can be applied in a principled manner. One would have thought this proposition well established given that we have already decided four cases addressing this clause. The majority nonetheless concludes that the operation of this provision violates the Fifth Amendment's Due Process Clause.

Justice ALITO shows why that analysis is wrong under our precedents. See *post,* at 2580 – 2583 (dissenting opinion). But I have some concerns about our modern vagueness doctrine itself. Whether that doctrine is defensible under the original meaning of "due process of law" is a difficult question I leave for the another day, but the doctrine's history should prompt us at least to examine its constitutional underpinnings more closely before we use it to nullify yet another duly enacted law.

A

We have become accustomed to using the Due Process Clauses to invalidate laws on the ground of "vagueness." The doctrine we have developed is quite sweeping: "A statute can be impermissibly vague ... if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado,* 530 U.S. 703, 732, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000). Using this framework, we have nullified a wide range of enactments. We have struck down laws ranging from city ordinances, *Papachristou v. Jacksonville,* 405 U.S. 156, 165–171, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), to Acts of Congress, *United States v. L. Cohen Grocery Co.,* 255 U.S. 81, 89–93, 41 S.Ct. 298, 65 L.Ed. 516 (1921). We have struck down laws whether they are penal, *Lanzetta v. New Jersey,* 306 U.S. 451, 452, 458, 59 S.Ct. 618, 83 L.Ed. 888 (1939), or not, *Keyishian v. Board of Regents of Univ. of State of N. Y.,* 385 U.S. 589, 597–604, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967). [1] We have struck down laws addressing subjects ranging from abortion, *Colautti v. Franklin,* 439 U.S. 379, 390, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), and obscenity, *Winters v. New York,* 333 U.S. 507, 517–520, 68 S.Ct. 665, 92 L.Ed. 840 (1948), to the minimum wage, *Connally v. General Constr. Co.,* 269 U.S. 385, 390–395, 46 S.Ct. 126, 70 L.Ed. 322 (1926), and antitrust, *Cline v. Frink Dairy Co.,* 274 U.S. 445, 453–465, 47 S.Ct. 681, 71 L.Ed. 1146 (1927). We have even struck down a ***2567** law using a term that has been used to describe criminal conduct in this country since before the Constitution was ratified. *Chicago v. Morales,* 527 U.S. 41, 51, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (invalidating a "loitering" law); see *id.,* at 113, and n. 10, 119 S.Ct. 1849 (THOMAS, J., dissenting) (discussing a 1764 Georgia law requiring the apprehension of "all able bodied persons ... who shall be found loitering").

1 By "penal," I mean laws "authoriz[ing] criminal punishment" as well as those "authorizing fines or forfeitures ... [that] are enforced through civil rather than criminal process." Cf. C. Nelson, Statutory Interpretation 108 (2011) (discussing definition of "penal" for purposes of rule of lenity). A law requiring termination of employment from public institutions, for instance, is not penal. See *Keyishian,* 385 U.S., at 597–604, 87 S.Ct. 675. Nor is a law creating an "obligation to pay taxes." *Milwaukee County v. M.E. White Co.,* 296 U.S. 268, 271, 56 S.Ct. 229, 80 L.Ed. 220 (1935). Conversely, a law imposing a monetary exaction as a punishment for noncompliance with a regulatory mandate is penal. See *National Federation of Independent Business v. Sebelius,* 567 U.S. ——, ——– – ——, 132 S.Ct. 2566, 2650–2656, 183 L.Ed.2d 450 (2012) (SCALIA, KENNEDY, THOMAS, and ALITO, JJ., dissenting).

That we have repeatedly used a doctrine to invalidate laws does not make it legitimate. Cf., *e.g., Dred Scott v. Sandford,* 19 How. 393, 450–452, 15 L.Ed. 691 (1857) (stating that an Act of Congress prohibiting slavery in certain Federal Territories violated the substantive due process rights of slaveowners and was therefore void). This Court has a history of wielding doctrines purportedly rooted in "due process of law" to achieve its own policy goals, substantive due process being the poster child. See *McDonald v. Chicago,* 561 U.S. 742, 811, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010) (THOMAS, J., concurring in part and concurring in judgment) ("The one theme that links the Court's substantive due process precedents together is their lack of a guiding principle to distinguish 'fundamental' rights that warrant protection from nonfundamental rights that do not"). Although our vagueness doctrine is distinct from substantive due process, their histories have disquieting parallels.

1

****15** The problem of vague penal statutes is nothing new. The notion that such laws may be void under the Constitution's Due Process Clauses, however, is a more recent development.

Before the end of the 19th century, courts addressed vagueness through a rule of strict construction of penal statutes, not a rule of constitutional law. This rule of construction—better known today as the rule of lenity—first emerged in 16th-century England in reaction to Parliament's practice of making large swaths of crimes capital offenses, though it did not gain broad acceptance until the following century. See Hall, Strict or Liberal Construction of Penal Statutes, 48 Harv. L. Rev. 748, 749–751 (1935); see also 1 L. Radzinowicz, A History of English Criminal Law and Its Administration From 1750, pp. 10–11 (1948) (noting that some of the following crimes triggered the death penalty: "marking the edges of any current coin of the kingdom," "maliciously cutting any hop-binds growing on poles in any plantation of hops," and "being in the company of gypsies"). Courts relied on this rule of construction in refusing to apply vague capital-offense statutes to prosecutions before them. As an example of this rule, William Blackstone described a notable instance in which an English statute imposing the death penalty on anyone convicted of "stealing sheep,

or other cattle " was "held to extend to nothing but mere sheep" as "th[e] general words, 'or other cattle,' [were] looked upon as much too loose to create a capital offence." 1 Commentaries on the Laws of England 88 (1765).[2]

2 At the time, the ordinary meaning of the word "cattle" was not limited to cows, but instead encompassed all "[b]easts of pasture; not wild nor domestick." 1 S. Johnson, A Dictionary of the English Language (4th ed. 1773). Parliament responded to the judicial refusal to apply the provision to "cattle" by passing "another statute, 15 Geo. II. c. 34, extending the [law] to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs, by name." 1 Blackstone, Commentaries on the Laws of England, at 88.

Vague statutes surfaced on this side of the Atlantic as well. Shortly after the First Congress proposed the Bill of Rights, for instance, it passed a law providing ***2568** "[t]hat every person who shall attempt to trade with the Indian tribes, or be found in the Indian country with such merchandise in his possession as are usually vended to the Indians, without a license," must forfeit the offending goods. Act of July 22, 1790, ch. 33, § 3, 1 Stat. 137–138. At first glance, punishing the unlicensed possession of "merchandise ... usually vended to the Indians," *ibid.,* would seem far more likely to "invit [e] arbitrary enforcement," *ante,* at 2557, than does the residual clause.

But rather than strike down arguably vague laws under the Fifth Amendment Due Process Clause, antebellum American courts—like their English predecessors—simply refused to apply them in individual cases under the rule that penal statutes should be construed strictly. See, *e.g., United States v. Sharp,* 27 F.Cas. 1041 (No. 16,264) (C.C.Pa. 1815) (Washington, J.). In *Sharp,* for instance, several defendants charged with violating an Act rendering it a capital offense for "any seaman" to "make a revolt in [a] ship," Act of Apr. 30, 1790, § 8, 1 Stat. 114, objected that "the offence of making a revolt, [wa]s not sufficiently defined by this law, or by any other standard, to which reference could be safely made; to warrant the court in passing a sentence upon [them]." 27 F.Cas., at 1043. Justice Washington, riding circuit, apparently agreed, observing that the common definitions for the phrase "make a revolt" were "so multifarious, and so different" that he could not "avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature." *Ibid.* Remarking that "[l]aws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid," he refused to "recommend to the jury, to find the prisoners guilty of making, or endeavouring to make a revolt, however strong the evidence may be." *Ibid.*

****16** Such analysis does not mean that federal courts believed they had the power to invalidate vague penal laws as unconstitutional. Indeed, there is good evidence that courts at the time understood judicial review to consist "of a refusal to give a statute effect as operative law in resolving a case," a notion quite distinct from our modern practice of " 'strik[ing] down' legislation." Walsh, Partial Unconstitutionality, 85 N.Y.U. L. Rev. 738, 756 (2010). The process of refusing to apply such laws appeared to occur on a case-by-case basis. For instance, notwithstanding his doubts expressed in *Sharp,* Justice Washington, writing for this Court, later rejected the argument that lower courts could arrest a judgment under the same ship-revolt statute because it "does not define the offence of endeavouring to make a revolt." *United States v. Kelly,* 11 Wheat. 417, 418, 6 L.Ed. 508 (1826). The Court explained that "it is ... competent to the Court to give a judicial definition" of "the offence of endeavouring to make a revolt," and that such definition "consists in the endeavour of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person." *Id.,* at 418–419. In dealing with statutory indeterminacy, federal courts saw themselves engaged in construction, not judicial review as it is now understood.[3]

3 Early American state courts also sometimes refused to apply a law they found completely unintelligible, even outside of the penal context. In one antebellum decision, the Pennsylvania Supreme Court did not even attempt to apply a statute that gave the Pennsylvania state treasurer " 'as many votes' " in state bank elections as " 'were held by *individuals* ' " without providing guidance as to which individuals it was referring. *Commonwealth v. Bank of Pennsylvania,* 3 Watts & Serg. 173, 177 (1842). Concluding that it had "seldom, if ever, found the language of legislation so devoid of certainty," the court withdrew the case. *Ibid.*; see also *Drake v. Drake,* 15 N.C. 110, 115 (1833) ("Whether a statute be a public or a private one, if the terms in which it is couched be so vague as to convey no definite meaning to those whose duty it is to execute it, either ministerially or judicially, it is necessarily inoperative"). This practice is distinct from

our modern vagueness doctrine, which applies to laws that are intelligible but vague.

***2569** 2

****17** Although vagueness concerns played a role in the strict construction of penal statutes from early on, there is little indication that anyone before the late 19th century believed that courts had the power under the Due Process Clauses to nullify statutes on that ground. Instead, our modern vagueness doctrine materialized after the rise of substantive due process. Following the ratification of the Fourteenth Amendment, corporations began to use that Amendment's Due Process Clause to challenge state laws that attached penalties to unauthorized commercial conduct. In addition to claiming that these laws violated their substantive due process rights, these litigants began—with some success—to contend that such laws were unconstitutionally indefinite. In one case, a railroad company challenged a Tennessee law authorizing penalties against any railroad that demanded "more than a just and reasonable compensation" or engaged in "unjust and unreasonable discrimination" in setting its rates. *Louisville & Nashville R. Co. v. Railroad Comm'n of Tenn.*, 19 F. 679, 690 (C.C.M.D.Tenn.1884) (internal quotation marks deleted). Without specifying the constitutional authority for its holding, the Circuit Court concluded that "[n]o citizen ... can be constitutionally subjected to penalties and despoiled of his property, in a criminal or quasi criminal proceeding, under and by force of such indefinite legislation." *Id.*, at 693 (emphasis deleted).

Justice Brewer—widely recognized as "a leading spokesman for 'substantized' due process," Gamer, Justice Brewer and Substantive Due Process: A Conservative Court Revisited, 18 Vand. L. Rev. 615, 627 (1965)—employed similar reasoning while riding circuit, though he did not identify the constitutional source of judicial authority to nullify vague laws. In reviewing an Iowa law authorizing fines against railroads for charging more than a "reasonable and just" rate, Justice Brewer mentioned in dictum that "no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it." *Chicago & N.W.R. Co. v. Dey*, 35 F. 866, 876 (C.C.S.D.Iowa 1888).

Constitutional vagueness challenges in this Court initially met with some resistance. Although the Court appeared to acknowledge the possibility of unconstitutionally indefinite enactments, it repeatedly rejected vagueness challenges to penal laws addressing railroad rates, *Railroad Comm'n Cases*, 116 U.S. 307, 336–337, 6 S.Ct. 1191, 29 L.Ed. 636 (1886), liquor sales, *Ohio ex rel. Lloyd v. Dollison*, 194 U.S. 445, 450–451, 24 S.Ct. 703, 48 L.Ed. 1062 (1904), and anticompetitive conduct, *Nash v. United States*, 229 U.S. 373, 376–378, 33 S.Ct. 780, 57 L.Ed. 1232 (1913); *Waters–Pierce Oil Co. v. Texas (No. 1)*, 212 U.S. 86, 108–111, 29 S.Ct. 220, 53 L.Ed. 417 (1909).

***2570** In 1914, however, the Court nullified a law on vagueness grounds under the Due Process Clause for the first time. In *International Harvester Co. of America v. Kentucky*, 234 U.S. 216, 34 S.Ct. 853, 58 L.Ed. 1284 (1914), a tobacco company brought a Fourteenth Amendment challenge against several Kentucky antitrust laws that had been construed to render unlawful "any combination [made] ... for the purpose or with the effect of fixing a price that was greater or less than the real value of the article," *id.*, at 221, 34 S.Ct. 853. The company argued that by referring to "real value," the laws provided "no standard of conduct that it is possible to know." *Ibid.* The Court agreed. *Id.*, at 223–224, 34 S.Ct. 853. Although it did not specify in that case which portion of the Fourteenth Amendment served as the basis for its holding, *ibid.*, it explained in a related case that the lack of a knowable standard of conduct in the Kentucky statutes "violated the fundamental principles of justice embraced in the conception of due process of law." *Collins v. Kentucky*, 234 U.S. 634, 638, 34 S.Ct. 924, 58 L.Ed. 1510 (1914).

3

****18** Since that time, the Court's application of its vagueness doctrine has largely mirrored its application of substantive due process. During the *Lochner* era, a period marked by the use of substantive due process to strike down economic regulations, *e.g.*, *Lochner v. New York*, 198 U.S. 45, 57, 25 S.Ct. 539, 49 L.Ed. 937 (1905), the Court frequently used the vagueness doctrine to invalidate economic regulations penalizing commercial activity.[4] Among the penal laws it found to be impermissibly vague were a state law regulating the production of crude oil, *Champlin Refining Co. v. Corporation Comm'n of Okla.*, 286 U.S. 210, 242–243, 52 S.Ct. 559, 76 L.Ed. 1062 (1932), a state antitrust law, *Cline*, 274 U.S., at 453–465, 47 S.Ct. 681, a state minimum-wage law, *Connally*, 269 U.S., at 390–395, 46 S.Ct. 126, and a federal price-control statute, *L. Cohen Grocery Co.*, 255 U.S., at 89–93, 41 S.Ct. 298.[5]

4 During this time, the Court would apply its new vagueness doctrine outside of the penal context as well. In *A.B. Small Co. v. American Sugar Refining Co.,* 267 U.S. 233, 45 S.Ct. 295, 69 L.Ed. 589 (1925), a sugar dealer raised a defense to a breach-of-contract suit that the contracts themselves were unlawful under several provisions of the Lever Act, including one making it " 'unlawful for any person ... to make any unjust or unreasonable ... charge in ... dealing in or with any necessaries,' or to agree with another 'to exact excessive prices for any necessaries,' " *id.,* at 238, 45 S.Ct. 295. Applying *United States v. L. Cohen Grocery Co.,* 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 (1921), which had held that provision to be unconstitutionally vague, the Court rejected the dealer's argument. 267 U.S., at 238–239, 45 S.Ct. 295. The Court explained that "[i]t was not the criminal penalty that was held invalid, but the exaction of obedience to a rule or standard which was so vague and indefinite as really to be no rule or standard at all." *Id.,* at 239, 45 S.Ct. 295. That doctrine thus applied to penalties as well as "[a]ny other means of exaction, such as declaring the transaction unlawful or stripping a participant of his rights under it." *Ibid.*

5 Vagueness challenges to laws regulating speech during this period were less successful. Among the laws the Court found to be sufficiently definite included a state law making it a misdemeanor to publish, among other things, materials " 'which shall tend to encourage or advocate disrespect for law or for any court or courts of justice,' " *Fox v. Washington,* 236 U.S. 273, 275–277, 35 S.Ct. 383, 59 L.Ed. 573 (1915), a federal statute criminalizing candidate solicitation of contributions for " 'any political purpose whatever,' " *United States v. Wurzbach,* 280 U.S. 396, 398–399, 50 S.Ct. 167, 74 L.Ed. 508 (1930), and a state prohibition on becoming a member of any organization that advocates using unlawful violence to effect " 'any political change,' " *Whitney v. California,* 274 U.S. 357, 359–360, 368–369, 47 S.Ct. 641, 71 L.Ed. 1095 (1927). But see *Stromberg v. California,* 283 U.S. 359, 369–370, 51 S.Ct. 532, 75 L.Ed. 1117 (1931) (holding state statute punishing the use of any symbol " 'of opposition to organized government' " to be impermissibly vague).

***2571** Around the time the Court began shifting the focus of its substantive due process (and equal protection) jurisprudence from economic interests to "discrete and insular minorities," see *United States v. Carolene Products Co.,* 304 U.S. 144, 153, n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938), the target of its vagueness doctrine changed as well. The Court began to use the vagueness doctrine to invalidate noneconomic regulations, such as state statutes penalizing obscenity, *Winters,* 333 U.S., at 517–520, 68 S.Ct. 665, and membership in a gang, *Lanzetta,* 306 U.S., at 458, 59 S.Ct. 618.

Successful vagueness challenges to regulations penalizing commercial conduct, by contrast, largely fell by the wayside. The Court, for instance, upheld a federal regulation punishing the knowing violation of an order instructing drivers transporting dangerous chemicals to " 'avoid, so far as practicable ... driving into or through congested thoroughfares, places where crowds are assembled, street car tracks, tunnels, viaducts, and dangerous crossings,' " *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 338–339, 343, 72 S.Ct. 329, 96 L.Ed. 367 (1952). And notwithstanding its earlier conclusion that an Oklahoma law requiring state employees and contractors to be paid " 'not less than the current rate of per diem wages in the locality where the work is performed' " was unconstitutionally vague, *Connally, supra,* at 393, 46 S.Ct. 126, the Court found sufficiently definite a federal law forbidding radio broadcasting companies from attempting to compel by threat or duress a licensee to hire " 'persons in excess of the number of employees needed by such licensee to perform actual services,' " *United States v. Petrillo,* 332 U.S. 1, 3, 6–7, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947).

****19** In more recent times, the Court's substantive due process jurisprudence has focused on abortions, and our vagueness doctrine has played a correspondingly significant role. In fact, our vagueness doctrine served as the basis for the first draft of the majority opinion in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), on the theory that laws prohibiting all abortions save for those done "for the purpose of saving the life of the mother" forced abortionists to guess when this exception would apply on penalty of conviction. See B. Schwartz, The Unpublished Opinions of the Burger Court 116–118 (1988) (reprinting first draft of *Roe*). *Roe,* of course, turned out as a substantive due process opinion. See 410 U.S., at 164, 93 S.Ct. 705. But since then, the Court has repeatedly deployed the vagueness doctrine to nullify even mild regulations of the abortion industry. See *Akron v. Akron Center for Reproductive Health, Inc.,* 462 U.S. 416, 451–452, 103 S.Ct. 2481, 76 L.Ed.2d 687 (1983) (nullifying law requiring " 'that the remains of the unborn child [be] disposed of in a humane and sanitary manner' "); *Colautti,* 439 U.S., at 381, 99 S.Ct. 675 (nullifying law mandating abortionists adhere to a prescribed standard of care if "there is 'sufficient reason to believe that the fetus may be viable' "). [6]

6 All the while, however, the Court has rejected vagueness challenges to laws punishing those on the other side of the abortion debate. When it comes to restricting the speech of abortion opponents, the Court has dismissed concerns about vagueness with the observation that " 'we can never expect mathematical certainty from our language,' " *Hill v. Colorado,* 530 U.S. 703, 733, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), even though such restrictions are arguably "at least as imprecise as criminal prohibitions on speech the Court has declared void for vagueness in past decades," *id.,* at 774, 120 S.Ct. 2480 (KENNEDY, J., dissenting).

***2572** In one of our most recent decisions nullifying a law on vagueness grounds, substantive due process was again lurking in the background. In *Morales,* a plurality of this Court insisted that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment," 527 U.S., at 53, 119 S.Ct. 1849, a conclusion that colored its analysis that an ordinance prohibiting loitering was unconstitutionally indeterminate, see *id.,* at 55, 119 S.Ct. 1849 ("When vagueness permeates the text of" a penal law "infring[ing] on constitutionally protected rights," "it is subject to facial attack").

I find this history unsettling. It has long been understood that one of the problems with holding a statute "void for 'indefiniteness' " is that " 'indefiniteness' ... is itself an indefinite concept," *Winters, supra,* at 524, 68 S.Ct. 665 (Frankfurter, J., dissenting), and we as a Court have a bad habit of using indefinite concepts—especially ones rooted in "due process"—to invalidate democratically enacted laws.

B

****20** It is also not clear that our vagueness doctrine can be reconciled with the original understanding of the term "due process of law." Our traditional justification for this doctrine has been the need for notice: "A conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited." *United States v. Williams,* 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008); accord, *ante,* at 2564. Presumably, that justification rests on the view expressed in *Murray's Lessee v. Hoboken Land & Improvement Co.,* 18 How. 272, 15 L.Ed. 372 (1856), that "due process of law" constrains the legislative branch by guaranteeing "usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country," *id.,* at 277. That justification assumes further that providing "a person of ordinary intelligence [with] fair notice of what is prohibited," *Williams, supra,* at 304, 128 S.Ct. 1830, is one such usage or mode. [7]

7 As a general matter, we should be cautious about relying on general theories of "fair notice" in our due process jurisprudence, as they have been exploited to achieve particular ends. In *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996), for instance, the Court held that the Due Process Clause imposed limits on punitive damages because the Clause guaranteed "that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose," *id.,* at 574, 116 S.Ct. 1589. That was true even though "when the Fourteenth Amendment was adopted, punitive damages were undoubtedly an established part of the American common law of torts," and "no particular procedures were deemed necessary to circumscribe a jury's discretion regarding the award of such damages, or their amount." *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 26–27, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991) (SCALIA, J., concurring in judgment). Even under the view of the Due Process Clause articulated in *Murray's Lessee,* then, we should not allow nebulous principles to supplant more specific, historically grounded rules. See 499 U.S., at 37–38, 111 S.Ct. 1032 (opinion of SCALIA, J.).

To accept the vagueness doctrine as founded in our Constitution, then, one must reject the possibility "that the Due Process Clause requires only that our Government must proceed according to the 'law of the land'—that is, according to ***2573** written constitutional and statutory provisions," which may be all that the original meaning of this provision demands. *Hamdi v. Rumsfeld,* 542 U.S. 507, 589, 124 S.Ct. 2633, 159 L.Ed.2d 578 (2004) (THOMAS, J., dissenting) (some internal quotation marks omitted); accord, *Turner v. Rogers,* 564 U.S. ——, ——, 131 S.Ct. 2507, 2521, 180 L.Ed.2d 452 (2011) (THOMAS, J., dissenting). Although *Murray's Lessee* stated the contrary, 18 How., at 276, a number of scholars and jurists have concluded that "considerable historical evidence supports the position that 'due process of law' was a separation-of-powers concept designed as a safeguard against unlicensed executive action,

forbidding only deprivations not authorized by legislation or common law." D. Currie, The Constitution in the Supreme Court: The First Hundred Years 1789–1888, p. 272 (1985); see also, *e.g., In re Winship,* 397 U.S. 358, 378–382, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Black, J., dissenting). Others have disagreed. See, *e.g.,* Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L.J. 1672, 1679 (2012) (arguing that, as originally understood, "the principle of due process" required, among other things, that "statutes that purported to empower the other branches to deprive persons of rights without adequate procedural guarantees [be] subject to judicial review").

I need not choose between these two understandings of "due process of law" in this case. Justice ALITO explains why the majority's decision is wrong even under our precedents. See *post,* at 2580 – 2583 (dissenting opinion). And more generally, I adhere to the view that " '[i]f any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face,' " *Morales, supra,* at 112, 119 S.Ct. 1849 (THOMAS, J., dissenting), and there is no question that ACCA's residual clause meets that description, see *ante,* at 2568 (agreeing with the Government that "there will be straightforward cases under the residual clause").

* * *

****21** I have no love for our residual clause jurisprudence: As I observed when we first got into this business, the Sixth Amendment problem with allowing district courts to conduct factfinding to determine whether an offense is a "violent felony" made our attempt to construe the residual clause " 'an unnecessary exercise.' " *James,* 550 U.S., at 231, 127 S.Ct. 1586 (THOMAS, J., dissenting). But the Court rejected my argument, choosing instead to begin that unnecessary exercise. I see no principled way that, four cases later, the Court can now declare that the residual clause has become too indeterminate to apply. Having damaged the residual clause through our misguided jurisprudence, we have no right to send this provision back to Congress and ask for a new one. I cannot join the Court in using the Due Process Clause to nullify an Act of Congress that contains an unmistakable core of forbidden conduct, and I concur only in its judgment.

Justice ALITO, dissenting.

****21** The Court is tired of the Armed Career Criminal Act of 1984 (ACCA) and in particular its residual clause. Anxious to rid our docket of bothersome residual clause cases, the Court is willing to do what it takes to get the job done. So brushing aside *stare decisis,* the Court holds that the residual clause is unconstitutionally vague even though we have twice rejected that very argument within the last eight years. The canons of interpretation get no greater respect. Inverting the canon that ***2574** a statute should be construed if possible to avoid unconstitutionality, the Court rejects a reasonable construction of the residual clause that would avoid any vagueness problems, preferring an alternative that the Court finds to be unconstitutionally vague. And the Court is not stopped by the well-established rule that a statute is void for vagueness only if it is vague in all its applications. While conceding that some applications of the residual clause are straightforward, the Court holds that the clause is now void in its entirety. The Court's determination to be done with residual clause cases, if not its fidelity to legal principles, is impressive.

I

A

****22** Petitioner Samuel Johnson (unlike his famous namesake) has led a life of crime and violence. His presentence investigation report sets out a résumé of petty and serious crimes, beginning when he was 12 years old. Johnson's adult record includes convictions for, among other things, robbery, attempted robbery, illegal possession of a sawed-off shotgun, and a drug offense.

In 2010, the Federal Bureau of Investigation (FBI) began monitoring Johnson because of his involvement with the National Socialist Movement, a white-supremacist organization suspected of plotting acts of terrorism. In June of that year, Johnson left the group and formed his own radical organization, the Aryan Liberation Movement, which he planned to finance by counterfeiting United States currency. In the course of the Government's investigation, Johnson "disclosed to undercover FBI agents that he manufactured napalm, silencers, and other explosives for" his new organization. 526 Fed.Appx. 708, 709 (C.A.8 2013) (*per curiam*). He also showed the agents an AK–47 rifle, a semiautomatic rifle, a semiautomatic pistol, and a cache of approximately 1,100 rounds of ammunition. Later, Johnson told an undercover agent: "You know I'd love to assassinate

some ... hoodrats as much as the next guy, but I think we really got to stick with high priority targets." Revised Presentence Investigation Report (PSR) ¶ 15. Among the top targets that he mentioned were "the Mexican consulate," "progressive bookstores," and individuals he viewed as "liberals." PSR ¶ 16.

In April 2012, Johnson was arrested, and he was subsequently indicted on four counts of possession of a firearm by a felon and two counts of possession of ammunition by a felon, in violation of 18 U.S.C. §§ 922(g) and § 924(e). He pleaded guilty to one of the firearms counts, and the District Court sentenced him to the statutory minimum of 15 years' imprisonment under ACCA, based on his prior felony convictions for robbery, attempted robbery, and illegal possession of a sawed-off shotgun.

B

ACCA provides a mandatory minimum sentence for certain violations of § 922(g), which prohibits the shipment, transportation, or possession of firearms or ammunition by convicted felons, persons previously committed to a mental institution, and certain others. Federal law normally provides a maximum sentence of 10 years' imprisonment for such crimes. See § 924(a)(2). Under ACCA, however, if a defendant convicted under § 922(g) has three prior convictions "for a violent felony or a serious drug offense," the sentencing court must impose a sentence of at least 15 years' imprisonment. § 924(e)(1).

ACCA's definition of a "violent felony" has three parts. First, a felony qualifies if it "has as an element the use, attempted use, or threatened use of physical force ***2575** against the person of another." § 924(e)(2)(B)(i). Second, the Act specifically names four categories of qualifying felonies: burglary, arson, extortion, and offenses involving the use of explosives. See § 924(e)(2)(B)(ii). Third, the Act contains what we have called a "residual clause," which reaches any felony that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Ibid.*

The present case concerns the residual clause. The sole question raised in Johnson's certiorari petition was whether possession of a sawed-off shotgun under Minnesota law qualifies as a violent felony under that clause. Although Johnson argued in the lower courts that the residual clause is unconstitutionally vague, he did not renew that argument here. Nevertheless, after oral argument, the Court raised the question of vagueness on its own. The Court now holds that the residual clause is unconstitutionally vague in all its applications. I cannot agree.

II

****23** I begin with *stare decisis*. Eight years ago in *James v. United States,* 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), Justice SCALIA, the author of today's opinion for the Court, fired an opening shot at the residual clause. In dissent, he suggested that the residual clause is void for vagueness. *Id.*, at 230, 127 S.Ct. 1586. The Court held otherwise, explaining that the standard in the residual clause "is not so indefinite as to prevent an ordinary person from understanding" its scope. *Id.*, at 210, n. 6, 127 S.Ct. 1586.

Four years later, in *Sykes v. United States,* 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011), Justice SCALIA fired another round. Dissenting once again, he argued that the residual clause is void for vagueness and rehearsed the same basic arguments that the Court now adopts. See *id.*, at ——— – ———, 131 S.Ct., at 2273–2274; see also *Derby v. United States,* 564 U.S. ———, ——— – ———, 131 S.Ct. 2858, 2859–2860, 180 L.Ed.2d 904 (2011) (SCALIA, J., dissenting from denial of certiorari). As in *James,* the Court rejected his arguments. See *Sykes,* 564 U.S., at ———, 131 S.Ct., at 2276–2277. In fact, Justice SCALIA was the *only* Member of the *Sykes* Court who took the position that the residual clause could not be intelligibly applied to the offense at issue. The opinion of the Court, which five Justices joined, expressly held that the residual clause "states an intelligible principle and provides guidance that allows a person to 'conform his or her conduct to the law.' " *Id.*, at ——— – ———, 131 S.Ct., at 2277 (quoting *Chicago v. Morales,* 527 U.S. 41, 58, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (plurality opinion)). Justice THOMAS's concurrence, while disagreeing in part with the Court's interpretation of the residual clause, did not question its constitutionality. See *Sykes,* 564 U.S., at ———, 131 S.Ct., at ——— (opinion concurring in judgment). And Justice KAGAN's dissent, which Justice GINSBURG joined, argued that a proper application of the provision required a different result. See *id.*, at ———, 131 S.Ct., at ———. Thus, eight Members of the Court found the statute capable of principled application.

It is, of course, true that "[*s*]*tare decisis* is not an inexorable command." *Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct.

2597, 115 L.Ed.2d 720 (1991). But neither is it an empty Latin phrase. There must be good reasons for overruling a precedent, and there is none here. Nothing has changed since our decisions in *James* and *Sykes*—nothing, that is, except the Court's weariness with ACCA cases.

****24** Reprising an argument that Justice SCALIA made to no avail in ***2576** *Sykes, supra,* at ——, 131 S.Ct., at 2287 (dissenting opinion), the Court reasons that the residual clause must be unconstitutionally vague because we have had trouble settling on an interpretation. See *ante,* at 2558 – 2559. But disagreement about the meaning and application of the clause is not new. We were divided in *James* and in *Sykes* and in our intervening decisions in *Begay v. United States,* 553 U.S. 137, 128 S.Ct. 1581, 170 L.Ed.2d 490 (2008), and *Chambers v. United States,* 555 U.S. 122, 129 S.Ct. 687, 172 L.Ed.2d 484 (2009). And that pattern is not unique to ACCA; we have been unable to come to an agreement on many recurring legal questions. The Confrontation Clause is one example that comes readily to mind. See, *e.g., Williams v. Illinois,* 567 U.S. ——, 132 S.Ct. 2221, 183 L.Ed.2d 89 (2012); *Bullcoming v. New Mexico,* 564 U.S. ——, 131 S.Ct. 2705, 180 L.Ed.2d 610 (2011); *Melendez–Diaz v. Massachusetts,* 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009). Our disagreements about the meaning of that provision do not prove that the Confrontation Clause has no ascertainable meaning. Likewise, our disagreements on the residual clause do not prove that it is unconstitutionally vague.

The Court also points to conflicts in the decisions of the lower courts as proof that the statute is unconstitutional. See *ante,* at 2559 – 2560. The Court overstates the degree of disagreement below. For many crimes, there is no dispute that the residual clause applies. And our certiorari docket provides a skewed picture because the decisions that we are asked to review are usually those involving issues on which there is at least an arguable circuit conflict. But in any event, it has never been thought that conflicting interpretations of a statute justify judicial elimination of the statute. One of our chief responsibilities is to resolve those disagreements, see Supreme Court Rule 10, not to strike down the laws that create this work.

The Court may not relish the task of resolving residual clause questions on which the Circuits disagree, but the provision has not placed a crushing burden on our docket. In the eight years since *James,* we have decided all of three cases involving the residual clause. See *Begay, supra* ; *Chambers, supra* ; *Sykes, supra.* Nevertheless, faced with the unappealing prospect of resolving more circuit splits on various residual clause issues, see *ante,* at 2559, six Members of the Court have thrown in the towel. That is not responsible.

III

****25** Even if we put *stare decisis* aside, the Court's decision remains indefensible. The residual clause is not unconstitutionally vague.

A

The Fifth Amendment prohibits the enforcement of vague criminal laws, but the threshold for declaring a law void for vagueness is high. "The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States v. National Dairy Products Corp.,* 372 U.S. 29, 32, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). Rather, it is sufficient if a statute sets out an "ascertainable standard." *United States v. L. Cohen Grocery Co.,* 255 U.S. 81, 89, 41 S.Ct. 298, 65 L.Ed. 516 (1921). A statute is thus void for vagueness only if it wholly "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." ***2577** *United States v. Williams,* 553 U.S. 285, 304, 128 S.Ct. 1830, 170 L.Ed.2d 650 (2008).

The bar is even higher for sentencing provisions. The fair notice concerns that inform our vagueness doctrine are aimed at ensuring that a " 'person of ordinary intelligence [has] a reasonable opportunity to know what is prohibited, so that he may act accordingly.' " *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 498, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (quoting *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972)). The fear is that vague laws will " 'trap the innocent.' " 455 U.S., at 498, 102 S.Ct. 1186. These concerns have less force when it comes to sentencing provisions, which come into play only after the defendant has been found guilty of the crime in question. Due process does not require, as Johnson oddly suggests, that a "prospective criminal" be able to calculate the precise penalty that a conviction would bring. Supp. Brief for Petitioner 5; see *Chapman v. United States,* 500 U.S. 453, 467–468, 111 S.Ct.

1919, 114 L.Ed.2d 524 (1991) (concluding that a vagueness challenge was "particularly" weak "since whatever debate there is would center around the appropriate sentence and not the criminality of the conduct").

B

ACCA's residual clause unquestionably provides an ascertainable standard. It defines "violent felony" to include any offense that "involves conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B)(ii). That language is by no means incomprehensible. Nor is it unusual. There are scores of federal and state laws that employ similar standards. The Solicitor General's brief contains a 99–page appendix setting out some of these laws. See App. to Supp. Brief for United States; see also *James, supra,* at 210, n. 6, 127 S.Ct. 1586. If all these laws are unconstitutionally vague, today's decision is not a blast from a sawed-off shotgun; it is a nuclear explosion.

Attempting to avoid such devastation, the Court distinguishes these laws primarily on the ground that almost all of them "require gauging the riskiness of conduct in which an individual defendant engages *on a particular occasion.*" *Ante,* at 2561 (emphasis in original). The Court thus admits that, "[a]s a general matter, we do not doubt the constitutionality of laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct." *Ibid.* Its complaint is that the residual clause "requires application of the 'serious potential risk' standard to an *idealized ordinary case of the crime.*" *Ibid.* (emphasis added). Thus, according to the Court, ACCA's residual clause is unconstitutionally vague because its standard must be applied to "an idealized ordinary case of the crime" and not, like the vast majority of the laws in the Solicitor General's appendix, to "real-world conduct."

****26** ACCA, however, makes no reference to "an idealized ordinary case of the crime." That requirement was the handiwork of this Court in *Taylor v. United States,* 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990). And as I will show, the residual clause can reasonably be interpreted to refer to "real-world conduct." [1]

1 The Court also says that the residual clause's reference to the enumerated offenses is "confusing." *Ante,* at 2561. But this is another argument we rejected in *James v. United States,* 550 U.S. 192, 127 S.Ct. 1586, 167 L.Ed.2d 532 (2007), and *Sykes v. United States,* 564 U.S. 1, 131 S.Ct. 2267, 180 L.Ed.2d 60 (2011), and it is no more persuasive now. Although the risk level varies among the enumerated offenses, all four categories of offenses involve conduct that presents a serious potential risk of harm to others. If the Court's concern is that some of the enumerated offenses do not seem especially risky, all that means is that the statute "sets a low baseline level for risk." *Id.,* at ——, 131 S.Ct., at 2278 (THOMAS, J., concurring in judgment).

***2578** C

When a statute's constitutionality is in doubt, we have an obligation to interpret the law, if possible, to avoid the constitutional problem. See, *e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council,* 485 U.S. 568, 575, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988). As one treatise puts it, "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts § 38, p. 247 (2012). This canon applies fully when considering vagueness challenges. In cases like this one, "our task is not to destroy the Act if we can, but to construe it, if consistent with the will of Congress, so as to comport with constitutional limitations." *Civil Service Comm'n v. Letter Carriers,* 413 U.S. 548, 571, 93 S.Ct. 2880, 37 L.Ed.2d 796 (1973); see also *Skilling v. United States,* 561 U.S. 358, 403, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010). Indeed, " '[t]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.' " *Id.,* at 406, 130 S.Ct. 2896 (quoting *Hooper v. California,* 155 U.S. 648, 657, 15 S.Ct. 207, 39 L.Ed. 297 (1895); emphasis deleted); see also *Ex parte Randolph,* 20 F.Cas. 242, 254 (No. 11,558) (C.C.Va.1833) (Marshall, C.J.).

The Court all but concedes that the residual clause would be constitutional if it applied to "real-world conduct." Whether that is the *best* interpretation of the residual clause is beside the point. What matters is whether it is a reasonable interpretation of the statute. And it surely is that.

First, this interpretation heeds the pointed distinction that ACCA draws between the "element[s]" of an offense and "conduct." Under § 924(e)(2)(B)(i), a crime qualifies as a "violent felony" if one of its "element [s]" involves "the use, attempted use, or threatened use of physical force against the person of another." But the residual clause, which appears in the very next subsection, § 924(e)(2)(B)(ii), focuses on "conduct"—specifically, "conduct that presents a serious

potential risk of physical injury to another." The use of these two different terms in § 924(e) indicates that "conduct" refers to things done during the commission of an offense that are not part of the elements needed for conviction. Because those extra actions vary from case to case, it is natural to interpret "conduct" to mean real-world conduct, not the conduct involved in some Platonic ideal of the offense.

****27** Second, as the Court points out, standards like the one in the residual clause almost always appear in laws that call for application by a trier of fact. This strongly suggests that the residual clause calls for the same sort of application.

Third, if the Court is correct that the residual clause is nearly incomprehensible when interpreted as applying to an "idealized ordinary case of the crime," then that is telling evidence that this is not what Congress intended. When another interpretation is ready at hand, why should we assume that Congress gave the clause a meaning that is impossible—or even, exceedingly difficult—to apply?

D

Not only does the "real-world conduct" interpretation fit the terms of the residual ***2579** clause, but the reasons that persuaded the Court to adopt the categorical approach in *Taylor* either do not apply or have much less force in residual clause cases.

In *Taylor,* the question before the Court concerned the meaning of "burglary," one of ACCA's enumerated offenses. The Court gave three reasons for holding that a judge making an ACCA determination should generally look only at the elements of the offense of conviction and not to other things that the defendant did during the commission of the offense. First, the Court thought that ACCA's use of the term "convictions" pointed to the categorical approach. The Court wrote: "Section 924(e)(1) refers to 'a person who ... has three previous convictions' for—not a person who has committed—three previous violent felonies or drug offenses." 495 U.S., at 600, 110 S.Ct. 2143. Second, the Court relied on legislative history, noting that ACCA had previously contained a generic definition of burglary and that "the deletion of [this] definition ... may have been an inadvertent casualty of a complex drafting process." *Id.,* at 589–590, 601, 110 S.Ct. 2143. Third, the Court felt that "the practical difficulties and potential unfairness of a factual approach [were] daunting." *Id.,* at 601, 110 S.Ct. 2143.

None of these three grounds dictates that the categorical approach must be used in residual clause cases. The second ground, which concerned the deletion of a generic definition of burglary, obviously has no application to the residual clause. And the first ground has much less force in residual clause cases. In *Taylor,* the Court reasoned that a defendant has a "conviction" for burglary only if burglary is the offense set out in the judgment of conviction. For instance, if a defendant commits a burglary but pleads guilty, under a plea bargain, to possession of burglar's tools, the *Taylor* Court thought that it would be unnatural to say that the defendant had a *conviction* for burglary. Now consider a case in which a gang member is convicted of illegal possession of a sawed-off shotgun and the evidence shows that he concealed the weapon under his coat, while searching for a rival gang member who had just killed his brother. In that situation, it is not at all unnatural to say that the defendant had a conviction for a crime that "involve[d] *conduct* that present[ed] a serious potential risk of physical injury to another." § 924(e)(2)(B)(ii) (emphasis added). At the very least, it would be a reasonable way to describe the defendant's conviction.

****28** The *Taylor* Court's remaining reasons for adopting the categorical approach cannot justify an interpretation that renders the residual clause unconstitutional. While the *Taylor* Court feared that a conduct-specific approach would unduly burden the courts, experience has shown that application of the categorical approach has not always been easy. Indeed, the Court's main argument for overturning the statute is that this approach is unmanageable in residual clause cases.

As for the notion that the categorical approach is more forgiving to defendants, there is a strong argument that the opposite is true, at least with respect to the residual clause. Consider two criminal laws: Injury occurs in 10% of cases involving the violation of statute A, but in 90% of cases involving the violation of statute B. Under the categorical approach, a truly dangerous crime under statute A might not qualify as a violent felony, while a crime with no measurable risk of harm under statute B would count against the defendant. Under a conduct-specific inquiry, on the other hand, a defendant's actual conduct would determine whether ACCA's mandatory penalty applies.

***2580** It is also significant that the allocation of the burden of proof protects defendants. The prosecution bears the burden of proving that a defendant has convictions that qualify for sentencing under ACCA. If evidentiary

deficiencies, poor recordkeeping, or anything else prevents the prosecution from discharging that burden under the conduct-specific approach, a defendant would not receive an ACCA sentence.

Nor would a conduct-specific inquiry raise constitutional problems of its own. It is questionable whether the Sixth Amendment creates a right to a jury trial in this situation. See *Almendarez–Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998). But if it does, the issue could be tried to a jury, and the prosecution could bear the burden of proving beyond a reasonable doubt that a defendant's prior crimes involved conduct that presented a serious potential risk of injury to another. I would adopt this alternative interpretation and hold that the residual clause requires an examination of real-world conduct.

The Court's only reason for refusing to consider this interpretation is that "the Government has not asked us to abandon the categorical approach in residual-clause cases." *Ante,* at 2562. But the Court cites no case in which we have suggested that a saving interpretation may be adopted only if it is proposed by one of the parties. Nor does the Court cite any secondary authorities advocating this rule. Cf. Scalia, Reading Law § 38 (stating the canon with no such limitation). On the contrary, we have long recognized that it is "our plain duty to adopt that construction which will save [a] statute from constitutional infirmity," where fairly possible. *United States ex rel. Attorney General v. Delaware & Hudson Co.,* 213 U.S. 366, 407, 29 S.Ct. 527, 53 L.Ed. 836 (1909). It would be strange if we could fulfill that "plain duty" only when a party asks us to do so. And the Court's refusal to consider a saving interpretation not advocated by the Government is hard to square with the Court's adoption of an argument that petitioner chose not to raise. As noted, Johnson did not ask us to hold that the residual clause is unconstitutionally vague, but the Court interjected that issue into the case, requested supplemental briefing on the question, and heard reargument. The Court's refusal to look beyond the arguments of the parties apparently applies only to arguments that the Court does not want to hear.

E

****29** Even if the categorical approach is used in residual clause cases, however, the clause is still not void for vagueness. "It is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined" on an as-applied basis. *United States v. Mazurie,* 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975). "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk." *Maynard v. Cartwright,* 486 U.S. 356, 361, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). Thus, in a due process vagueness case, we will hold that a law is facially invalid "only if the enactment is impermissibly vague in *all* of its applications." *Hoffman Estates,* 455 U.S., at 494–495, 102 S.Ct. 1186 (emphasis added); see also *Chapman,* 500 U.S., at 467, 111 S.Ct. 1919.[2]

2 This rule is simply an application of the broader rule that, except in First Amendment cases, we will hold that a statute is facially unconstitutional only if "no set of circumstances exists under which the Act would be valid." *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). A void-for-vagueness challenge is a facial challenge. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494–495, and nn. 5, 6, 7, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *Chicago v. Morales,* 527 U.S. 41, 79, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999) (SCALIA, J., dissenting). Consequently, there is no reason why the no-set-of-circumstances rule should not apply in this context. I assume that the Court does not mean to abrogate the no-set-of-circumstances rule in its entirety, but the Court provides no justification for its refusal to apply that rule here. Perhaps the Court has concluded, for some undisclosed reason, that void-for-vagueness claims are different from all other facial challenges not based on the First Amendment. Or perhaps the Court has simply created an ACCA exception.

In concluding that the residual clause is facially void for vagueness, the Court flatly ***2581** contravenes this rule. The Court admits "that there will be straightforward cases under the residual clause." *Ante,* at 2560. But rather than exercising the restraint that our vagueness cases prescribe, the Court holds that the residual clause is unconstitutionally vague even when its application is clear.

The Court's treatment of this issue is startling. Its facial invalidation precludes a sentencing court that is applying ACCA from counting convictions for even those specific offenses that this Court previously found to fall within the residual clause. See *James,* 550 U.S., at 203–209, 127 S.Ct. 1586 (attempted burglary); *Sykes,* 564 U.S., at ——, 131 S.Ct., at 2272–2275 (flight from law enforcement in a vehicle). Still worse, the Court holds that vagueness

bars the use of the residual clause in other cases in which its applicability can hardly be questioned. Attempted rape is an example. See, *e.g., Dawson v. United States,* 702 F.3d 347, 351–352 (C.A.6 2012). Can there be any doubt that "an idealized ordinary case of th[is] crime" "involves conduct that presents a serious potential risk of physical injury to another"? How about attempted arson,[3] attempted kidnapping,[4] solicitation to commit aggravated assault,[5] possession of a loaded weapon with the intent to use it unlawfully against another person,[6] possession of a weapon in prison,[7] or compelling a person to act as a prostitute?[8] Is there much doubt that those offenses "involve conduct that presents a serious potential risk of physical injury to another"?

3 *United States v. Rainey,* 362 F.3d 733, 735–736 (C.A.11) (*per curiam*), cert. denied, 541 U.S. 1081, 124 S.Ct. 2433, 158 L.Ed.2d 996 (2004).

4 *United States v. Kaplansky,* 42 F.3d 320, 323–324 (C.A.6 1994) (en banc).

5 *United States v. Benton,* 639 F.3d 723, 731–732 (C.A.6), cert. denied, 565 U.S. ——, 132 S.Ct. 599, 181 L.Ed.2d 439 (2011).

6 *United States v. Lynch,* 518 F.3d 164, 172–173 (C.A.2 2008), cert. denied, 555 U.S. 1177, 129 S.Ct. 1316, 173 L.Ed.2d 595 (2009).

7 *United States v. Boyce,* 633 F.3d 708, 711–712 (C.A.8 2011), cert. denied, 565 U.S. ——, 132 S.Ct. 1002, 181 L.Ed.2d 744 (2012).

8 *United States v. Brown,* 273 F.3d 747, 749–751 (C.A.7 2001).

Transforming vagueness doctrine, the Court claims that we have never actually *held* that a statute may be voided for vagueness only when it is vague in all its applications. But that is simply wrong. In *Hoffman Estates,* we reversed a Seventh Circuit decision that voided an ordinance prohibiting the sale of certain items. See 455 U.S., at 491, 102 S.Ct. 1186. The Seventh Circuit struck down the ordinance because it was "unclear in *some* of its applications," but we reversed and emphasized that a law is void for vagueness "only if [it] is impermissibly vague in all of its applications." *Id.,* at 494–495, 102 S.Ct. 1186; see also *id.,* at 495, n. 7, 102 S.Ct. 1186 (collecting cases). Applying that principle, we held that the "facial challenge [wa]s unavailing" because "at least some of the items sold ... [we]re covered" by the ***2582** ordinance. *Id.,* at 500, 102 S.Ct. 1186. These statements were not dicta. They were the holding of the case. Yet the Court does not even mention this binding precedent.

****30** Instead, the Court says that the facts of two *earlier* cases support a broader application of the vagueness doctrine. See *ante,* at 2560 – 2561. That, too, is incorrect. Neither case remotely suggested that mere overbreadth is enough for facial invalidation under the Fifth Amendment.

In *Coates v. Cincinnati,* 402 U.S. 611, 612, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), we addressed an ordinance that restricted free assembly and association rights by prohibiting "annoying" conduct. Our analysis turned in large part on those First Amendment concerns. In fact, we specifically explained that the "vice of the ordinance lies not alone in its violation of the due process standard of vagueness." *Id.,* at 615, 91 S.Ct. 1686. In the present case, by contrast, no First Amendment rights are at issue. Thus, *Coates* cannot support the Court's rejection of our repeated statements that "vagueness challenges to statutes which *do not involve First Amendment freedoms* must be examined in light of the facts ... at hand." *Mazurie, supra,* at 550, 95 S.Ct. 710 (emphasis added).

Likewise, *L. Cohen Grocery Co.,* 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, proves precisely the opposite of what the Court claims. In that case, we struck down a statute prohibiting " 'unjust or unreasonable rate[s]' " because it provided no "ascertainable standard of guilt" and left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.,* at 89, 41 S.Ct. 298. The clear import of this language is that the law at issue was impermissibly vague in all applications. And in the years since, we have never adopted the majority's contradictory interpretation. On the contrary, we have characterized the case as involving a statute that could "not constitutionally be applied to any set of facts." *United States v. Powell,* 423 U.S. 87, 92, 96 S.Ct. 316, 46 L.Ed.2d 228 (1975). Thus, our holdings and our dicta prohibit the Court's expansion of the vagueness doctrine. The Constitution does not allow us to hold a statute void for vagueness unless it is vague in all its applications.

IV

****31** Because I would not strike down ACCA's residual clause, it is necessary for me to address whether Johnson's conviction for possessing a sawed-off shotgun qualifies as

a violent felony. Under either the categorical approach or a conduct-specific inquiry, it does.

A

The categorical approach requires us to determine whether "the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *James,* 550 U.S., at 208, 127 S.Ct. 1586. This is an "inherently probabilistic" determination that considers the circumstances and conduct that ordinarily attend the offense. *Id.,* at 207, 127 S.Ct. 1586. The mere fact that a crime *could* be committed without a risk of physical harm does not exclude it from the statute's reach. See *id.,* at 207–208, 127 S.Ct. 1586. Instead, the residual clause speaks of "potential risk[s]," § 924(e)(2)(B)(ii), a term suggesting "that Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,' much less a certainty." *James, supra,* at 207–208, 127 S.Ct. 1586.

Under these principles, unlawful possession of a sawed-off shotgun qualifies as a violent felony. As we recognized in *District of Columbia v. Heller,* 554 U.S. 570, 625, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008), sawed-off shotguns are "not typically possessed by law-abiding citizens for ***2583** lawful purposes." Instead, they are uniquely attractive to violent criminals. Much easier to conceal than long-barreled shotguns used for hunting and other lawful purposes, short-barreled shotguns can be hidden under a coat, tucked into a bag, or stowed under a car seat. And like a handgun, they can be fired with one hand—except to more lethal effect. These weapons thus combine the deadly characteristics of conventional shotguns with the more convenient handling of handguns. Unlike those common firearms, however, they are not typically possessed for lawful purposes. And when a person illegally possesses a sawed-off shotgun during the commission of a crime, the risk of violence is seriously increased. The ordinary case of unlawful possession of a sawed-off shotgun therefore "presents a serious potential risk of physical injury to another." § 922(e)(2)(B)(ii).

Congress' treatment of sawed-off shotguns confirms this judgment. As the Government's initial brief colorfully recounts, sawed-off shotguns were a weapon of choice for gangsters and bank robbers during the Prohibition Era. See Brief for United States 4.[9] In response, Congress enacted the National Firearms Act of 1934, which required individuals possessing certain especially dangerous weapons —including sawed-off shotguns—to register with the Federal Government and pay a special tax. 26 U.S.C. §§ 5845(a)(1)-(2). The Act was passed on the understanding that "while there is justification for permitting the citizen to keep a pistol or revolver for his own protection without any restriction, there is no reason why anyone except a law officer should have a ... sawed-off shotgun." H.R.Rep. No. 1780, 73d Cong., 2d Sess., 1 (1934). As amended, the Act imposes strict registration requirements for any individual wishing to possess a covered shotgun, see, *e.g.,* §§ 5822, 5841(b), and illegal possession of such a weapon is punishable by imprisonment for up to 10 years. See §§ 5861(b)-(d), 5871. It is telling that this penalty exceeds that prescribed by federal law for quintessential violent felonies.[10] It thus seems perfectly clear that Congress has long regarded the illegal possession of a sawed-off shotgun as a crime that poses a serious risk of harm to others.

9 Al Capone's south-side Chicago henchmen used sawed-off shotguns when they executed their rivals from Bugs Moran's north-side gang during the infamous Saint Valentine's Day Massacre of 1929. See 7 Chicago Gangsters Slain by Firing Squad of Rivals, Some in Police Uniforms, N.Y. Times, Feb. 15, 1929, p. A1. Wild Bill Rooney was gunned down in Chicago by a "sawed-off shotgun [that] was pointed through a rear window" of a passing automobile. Union Boss Slain by Gang in Chicago, N.Y. Times, Mar. 20, 1931, p. 52. And when the infamous outlaws Bonnie and Clyde were killed by the police in 1934, Clyde was found "clutching a sawed-off shotgun in one hand." Barrow and Woman are Slain by Police in Louisiana Trap, N.Y. Times, May 24, 1934, p. A1.

10 See, *e.g.,* 18 U.S.C. § 111(a) (physical assault on federal officer punishable by not more than eight years' imprisonment); § 113(a)(7) (assault within maritime or territorial jurisdiction resulting in substantial bodily injury to an individual under the age of 16 punishable by up to five years' imprisonment); § 117(a) ("assault, sexual abuse, or serious violent felony against a spouse or intimate partner" by a habitual offender within maritime or territorial jurisdiction punishable by up to five years' imprisonment, except in cases of "substantial bodily injury").

The majority of States agree. The Government informs the Court, and Johnson does not dispute, that 28 States have followed Congress' lead by making it a crime to possess an unregistered sawed-off shotgun, and 11 other States and the District of Columbia prohibit private possession of sawed-off shotguns entirely. See Brief for United States

8–9 (collecting statutes). Minnesota, where petitioner was convicted, ***2584** has adopted a blanket ban, based on its judgment that "[t]he sawed-off shotgun has no legitimate use in the society whatsoever." *State v. Ellenberger,* 543 N.W.2d 673, 676 (Minn.App.1996) (internal quotation marks and citation omitted). Possession of a sawed-off shotgun in Minnesota is thus an inherently criminal act. It is fanciful to assume that a person who chooses to break the law and risk the heavy criminal penalty incurred by possessing a notoriously dangerous weapon is unlikely to use that weapon in violent ways.

B

****32** If we were to abandon the categorical approach, the facts of Johnson's offense would satisfy the residual clause as well. According to the record in this case, Johnson possessed his sawed-off shotgun while dealing drugs. When police responded to reports of drug activity in a parking lot, they were told by two people that "Johnson and another individual had approached them and offered to sell drugs." PSR ¶ 45. The police then searched the vehicle where Johnson was seated as a passenger, and they found a sawed-off shotgun and five bags of marijuana. Johnson admitted that the gun was his.

Understood in this context, Johnson's conduct posed an acute risk of physical injury to another. Drugs and guns are never a safe combination. If one of his drug deals had gone bad or if a rival dealer had arrived on the scene, Johnson's deadly weapon was close at hand. The sawed-off nature of the gun elevated the risk of collateral damage beyond any intended targets. And the location of the crime—a public parking lot —significantly increased the chance that innocent bystanders might be caught up in the carnage. This is not a case of "mere possession" as Johnson suggests. Brief for Petitioner i. He was not storing the gun in a safe, nor was it a family heirloom or collector's item. He illegally possessed the weapon in case he needed to use it during another crime. A judge or jury could thus conclude that Johnson's offense qualified as a violent felony.

There should be no doubt that Samuel Johnson was an armed career criminal. His record includes a number of serious felonies. And he has been caught with dangerous weapons on numerous occasions. That this case has led to the residual clause's demise is confounding. I only hope that Congress can take the Court at its word that either amending the list of enumerated offenses or abandoning the categorical approach would solve the problem that the Court perceives.

All Citations

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Obuey Abella THOWL, Appellant.

No. A13–1978.
|
June 16, 2014.

Mower County District Court, File No. 50–CR–13–823.

Attorneys and Law Firms

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Considered and decided by PETERSON, Presiding Judge; SCHELLHAS, Judge; and CONNOLLY, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge.

*1 Appellant challenges his conviction of fifth-degree controlled-substance crime, arguing that (1) the district court erred by (a) denying his motion for judgment of acquittal and (b) instructing the jury on willful blindness, and (2) the evidence is insufficient to support his conviction. Because the district court erred by instructing the jury on willful blindness, we reverse appellant's conviction.

FACTS

While on his way home from work, an officer from the Austin Police Department stopped appellant Obuey Thowl because he was not wearing a seatbelt. Thowl identified himself with his Minnesota driver's license and told the officer that he was from Ethiopia. When Thowl opened his glove compartment to retrieve his proof of insurance, the officer noticed a sandwich-sized plastic bag filled with what he believed to be either marijuana or khat. Khat is a plant native to Ethiopia and the Arabian peninsula that contains cathinone. Although khat is used legally and widely in Ethiopia by chewing it or placing it in a drink, cathinone is a schedule I controlled substance under Minnesota law.

When the officer arrested Thowl and told him that he was under arrest for possession of khat, Thowl immediately said that the bag contained khat from Ethiopia, not marijuana. In a statement recorded in the officer's squad car, Thowl said that the substance in the bag was "a medicine drug" that he uses "for fun"; he denied that he knew the English name of the substance but called it "chat"; and said that the substance was "not a drug." A chemical analysis of the substance in the bag revealed it to be 76.6 grams of plant product containing cathinone.

Respondent State of Minnesota charged Thowl with fifth-degree controlled-substance possession under Minn.Stat. § 152.025, subd. 2(a)(1) (2012). The district court conducted a jury trial at which Thowl's defense was that he did not know that khat contained an illegal substance. After the state rested its case, Thowl moved for a judgment of acquittal, arguing that the state had not proved beyond a reasonable doubt that Thowl knew that he possessed an illegal substance. The district court denied the motion. Relying on *United States v. Florez,* 368 F.3d 1042 (8th Cir.2004), the state requested a willful-blindness jury instruction.[1] Over Thowl's objection, the district court gave the jury a modified version of the willful-blindness instruction, as given in *United States v. Woodard,* 315 F.3d 1000, 1004 (8th Cir.2003). The district court submitted two questions to the jury on a special-verdict form. The jury answered no to the question, "Did the State prove, beyond a reasonable doubt, that the defendant had actual knowledge that he possessed a controlled substance?" And the jury answered yes to the question, "Did the State prove, beyond a reasonable doubt, that the defendant deliberately ignored that he possessed a controlled substance?" The district court sentenced Thowl for fifth-degree possession of a controlled substance.

1 The state refers to the instruction in its brief as a "deliberate ignorance instruction." Federal courts use the terms "willful blindness" and "deliberate ignorance" interchangeably.

*2 This appeal follows.

DECISION

I.

Thowl argues that the district court erred by denying his motion for judgment of acquittal at the close of the state's case-in-chief. He argues that the only mens rea standard before the district court was actual knowledge of possession of a controlled substance and that the state presented no evidence or testimony that would lead a rational fact-finder to conclude that Thowl possessed actual knowledge. Minnesota Rule of Criminal Procedure 26.03, subdivision 18(1)(a), provides that a "defendant may move for, or the court on its own may order, a judgment of acquittal on one or more of the charges if the evidence is insufficient to sustain a conviction." "A motion for acquittal is procedurally equivalent to a motion for a directed verdict." *State v. Slaughter,* 691 N.W.2d 70, 74 (Minn.2005). "A motion for a directed verdict presents the district court with a question of law." *M.W. Ettinger Transfer & Leasing Co. v. Schaper Mfg., Inc.,* 494 N.W.2d 29, 34 (Minn.1992). We therefore review a denial of a judgment of acquittal de novo. *State v. McCormick,* 835 N.W.2d 498, 506 (Minn.App.2013), *review denied* (Minn. Oct. 15, 2013).

"The test for granting a motion for a directed verdict is whether the evidence is sufficient to present a fact question for the jury's determination, after viewing the evidence and all resulting inferences in favor of the state." *Slaughter,* 691 N.W.2d at 7475. Here, the jury concluded that the state did not prove beyond a reasonable doubt that Thowl "had actual knowledge that he possessed a controlled substance." We conclude that, when viewed in the light most favorable to the state, the evidence was sufficient to sustain a conviction of fifth-degree controlled-substance crime depending on the jury's weighing of the credibility of witnesses. We therefore conclude that the district court did not err by denying Thowl's motion for judgment of acquittal.

II.

Thowl argues that the district court erred by instructing the jury on willful blindness. "We review a district court's decision to give a requested jury instruction for an abuse of discretion." *State v. Koppi,* 798 N.W.2d 358, 361 (Minn.2011).

Minnesota law provides that "[a] person is guilty of controlled substance crime in the fifth degree ... if (1) the person unlawfully possesses one or more mixtures containing a controlled substance classified in Schedule I...." Minn.Stat. § 152.025, subd. 2(a)(1) (2012). Cathinone is a schedule I controlled substance. Minn.Stat. § 152.02, subd. 2(g)(2) (2012). "[T]o convict a defendant of unlawful possession of a controlled substance, the state must prove that defendant consciously possessed, either physically or constructively, the substance *and that the defendant had actual knowledge of the nature of the substance.*" *State v. Florine,* 303 Minn. 103, 104, 226 N.W.2d 609, 610 (1975) (emphasis added). Consistent with "precedent from other states and the overwhelming majority of federal circuits," this court has held that "when a defendant is prosecuted for possessing cathinone-containing khat, proof that the defendant was aware that he possessed a controlled substance satisfies the statute's actual-knowledge requirement." *State v. Ali,* 775 N.W.2d 914, 919 (Minn.App.2009), *review denied* (Minn. Feb. 16, 2010); *see United States v. Ali,* 735 F.3d 176, 18687 (4th Cir.2013) ("Because khat is not listed on the controlled substance schedules, the mens rea requirement of § 841(a) cannot be satisfied merely by proving that the defendant knowingly possessed khat. Instead, ... the government must prove that the defendant knew he or she possessed *some regulated substance.*" (quotation omitted)), *cert. denied,* 134 S.Ct. 1357 (2014).

*3 Here, as the mens rea element of the crime, the district court instructed the jury as follows:

> the Defendant knew or believed that the substance he possessed was cathinone. In order to find a defendant knew or believed that the substance he possessed was cathinone, it is not necessary for the State to prove the Defendant knew the exact nature or precise chemical name of the substance. It is enough for the State to prove that the Defendant was aware that he possessed a controlled substance.

Then the court instructed the jury on willful blindness, as follows:

> The State may prove that the Defendant acted knowingly by proving beyond a reasonable doubt that this Defendant deliberately closed his eyes to what would otherwise have been obvious to him.
>
> No one can avoid responsibility for a crime by deliberately ignoring what is obvious. A finding beyond a reasonable doubt of intent of the Defendant to avoid knowledge or enlightenment would permit a jury to find knowledge.
>
> Stated another way, a person's knowledge of a particular fact may be shown from a deliberate or intentional ignorance or deliberate or intentional blindness to the existence of that fact.
>
> It is, of course, entirely up to you as to whether you find any deliberate ignorance or deliberate closing of the eyes and any inferences to be drawn from any such evidence if you find it.
>
> You may not find the Defendant acted knowingly, however, if you find that the Defendant actually believed that he did not possess a controlled substance.

Thowl argues that the district court erred by instructing the jury on willful blindness. Jury instructions must be reviewed in their entirety and must "fairly and adequately explain the law of the case." *Koppi,* 798 N.W.2d at 362. "A jury instruction is erroneous if it materially misstates the applicable law." *Id.* "A defendant who claims that the district court erred bears the burden of showing the error and any resulting prejudice." *State v. Kuhnau,* 622 N.W.2d 552, 556 (Minn.2001) (citing *State v. Shoop,* 441 N.W.2d 475, 480–81 (Minn.1989)). Thowl objected to the district court instructing the jury on willful blindness. "Alleged errors in jury instructions are reviewed under the harmless error test." *State v. Gatson,* 801 N.W.2d 134, 147–48 (Minn.2011). "An erroneous jury instruction is not harmless if it cannot be said beyond a reasonable doubt that the error had no significant impact on the verdict." *Id.* at 148; *cf. United States v. Barnhart,* 979 F.2d 647, 652 (8th Cir.1992) ("The improper use of the willful blindness instruction *does affect* constitutional rights because it creates a risk that the defendant will be convicted because he acted negligently or recklessly thereby relieving the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt." (emphasis added) (citations omitted)).

We must address whether the trial court erred by instructing the jury on willful blindness. Minnesota appellate courts have not addressed the use of a willful-blindness instruction, but federal courts have permitted their use. *See United States v. Hernandez–Mendoza,* 600 F.3d 971, 979 (8th Cir.2010) ("A deliberate ignorance instruction is appropriate when the evidence is sufficient to support a jury's conclusion that the defendants had either actual knowledge of the illegal activity or deliberately failed to inquire about it before taking action to support the activity." (quotation omitted)); *United States v. Hiland,* 909 F .2d 1114, 1130–31 (8th Cir.1990) ("[E]ven when there is evidence of actual knowledge, ... a willful blindness instruction is proper if there is sufficient evidence to support an inference of deliberate ignorance."); *see also United States v. Zayyad,* 741 F.3d 452, 463 (4th Cir.2014) ("A jury may rely upon willful blindness when the defendant asserts a lack of guilty knowledge but the evidence supports an inference of deliberate ignorance." (quotation omitted)); *Ali,* 735 F.3d at 187 ("It is well established that where a defendant asserts that he did not have the requisite *mens rea* to meet the elements of the crime but evidence supports an inference of deliberate ignorance, a willful blindness instruction to the jury is appropriate.... To be sure, caution must be exercised in giving a willful blindness instruction, and therefore it is appropriate only in rare circumstances."); *United States v. Sanchez–Robles,* 927 F.2d 1070, 1073 (9th Cir.1991) (referring to willful-blindness instruction as *Jewell* instruction and stating that it "should not be given in every case where a defendant claims a lack of knowledge, but only in those comparatively rare cases where, in addition, there are facts that point in the direction of deliberate ignorance" (quotation omitted)).

*4 We are concerned that a willful-blindness instruction is inconsistent with Minnesota law because it appears to constitute a permissive-inference instruction, which should be avoided. *See State v. Litzau,* 650 N.W.2d 177, 18586 (Minn.2002) ("[A]s a general rule, jury instructions advising that a particular fact may be inferred from other particular facts, if proved, should be avoided."). Permissive-inference instructions "are undesirable in that they tend to inject argument into the judge's charge and lengthen it unnecessarily," *State v. Olson,* 482 N.W.2d 212, 215 (Minn.1992) (citation omitted), and can "improperly influence the jury ... by giving a particular step of logic the official legal imprimatur of the state," *Litzau,* 650 N.W.2d at 186 (quotation omitted).

Under the law developed in the federal courts, particularly the Eighth Circuit, "[a] deliberate ignorance instruction should not be given ... if the evidence in a case points solely to either actual knowledge or no knowledge of the facts in question." *Hernandez–Mendoza,* 600 F.3d at 979 (quotation omitted); *see United States v. Whitehill,* 532 F.3d 746, 751 (8th Cir.2008) ("A willful blindness instruction is not appropriate if the evidence implies defendants could only have had 'either actual knowledge or no knowledge of the facts in question.' " (quoting *United States v. Parker,* 364 F.3d 934, 946 (8th Cir.2004))); *Barnhart,* 979 F .2d at 651 ("[I]f the evidence in the case demonstrates only that the defendant either possessed or lacked actual knowledge of the facts in question—and did not also demonstrate some deliberate efforts on his part to avoid obtaining actual knowledge—a willful blindness instruction should not be given."). The record evidence shows that Thowl *either* possessed actual knowledge that khat is a controlled substance under Minnesota law *or* lacked actual knowledge. The jury found that Thowl did not have actual knowledge that khat is a controlled substance, and the state offered no evidence that Thowl made a deliberate effort to avoid learning that khat is a controlled substance in Minnesota.

Regardless of whether a willful-blindness instruction is permitted under Minnesota law, we conclude that the district court erred by using it in this case. But Thowl is not entitled to a new trial unless the error affected the verdict. *See* Minn. R.Crim. P. 31.01 ("Any error that does not affect substantial rights must be disregarded.") When a defendant alleges an error that does not implicate a constitutional right, we will grant a new trial if the defendant shows that a "reasonable possibility" exists that the error "significantly affected the verdict." *State v. Matthews,* 800 N.W.2d 629, 633 (Minn.2011) (quotations omitted). But, if a defendant alleges error implicating a constitutional right, we will grant a new trial unless we can say that "beyond a reasonable doubt ... the error had no significant effect on the verdict." *State v. Watkins,* 840 N.W.2d 21, 27 n. 3 (Minn.2013) (quoting *Koppi,* 798 N.W.2d at 364). Under federal caselaw, "[t]he improper use of the willful blindness instruction *does affect* constitutional rights because it creates a risk that the defendant will be convicted because he acted negligently or recklessly thereby relieving the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt." *Barnhart,* 979 F.2d at 652 (emphasis added) (citations omitted). "In determining whether the [improper use of the jury instruction] was harmless, we endeavor to determine whether, absent the error, it is clear beyond a reasonable doubt that the jury would have returned a verdict of guilty." *Id.* (quotation omitted).

***5** The state argues that any error in giving the willful-blindness jury instruction does not implicate a constitutional right, although the state concedes in its brief that "if giving the deliberate ignorance instruction was error, said error significantly affected the verdict." We do not determine whether the erroneous use of the willful-blindness instruction implicates a constitutional right because we conclude, as the state concedes, that, because the district court erred by using the willful-blindness instruction, Thowl has shown that a reasonable possibility exists that the error significantly affected the verdict. Indeed, the jury found that Thowl did not have actual knowledge that he possessed a controlled substance. Because the error was not harmless, we reverse Thowl's conviction. We therefore do not address Thowl's remaining arguments.

Reversed.

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