CRIMINAL LAW — SENTENCING GUIDELINES — SEVENTH CIRCUIT HOLDS THAT INVOLUNTARY MANSLAUGHTER IS NOT A CRIME OF VIOLENCE FOR SENTENCING GUIDELINES' RECIDIVISM ENHANCEMENT. — *United States v. Woods*, 576 F.3d 400 (7th Cir. 2009).

The U.S. Sentencing Guidelines provide for stiff sentencing enhancements for "career offenders" — adult defendants who are convicted of a felony that is a controlled substance offense or a crime of violence and who have two or more previous felony convictions for either of the same.[1] The Guidelines define "crime of violence" as, in pertinent part, "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[2] Recently, in *United States v. Woods*,[3] the Seventh Circuit held that involuntary manslaughter as defined by Illinois law is categorically not a crime of violence under the Guidelines.

This result seems to contradict the plain language of the Guidelines: How could a homicide *not* be a crime of violence? How could involuntary manslaughter, a crime committed by a person who "consciously disregards a substantial and unjustifiable risk"[4] that his actions are "likely to cause death or great bodily harm,"[5] *not* "involve[] conduct that presents a serious potential risk of physical injury to another"?[6] The answer lies in the Supreme Court's interpretation of the catch-all "otherwise involves" clause, also known as the "residual clause,"[7] which requires that predicate crimes be purposefully committed. Although the Court claimed that Congress intended this reading, the Court's interpretation was in fact an act of lawmaking necessitated by an ambiguous and inconsistently applied statute devoid of sufficient indicia of Congress's intent. The incongruous outcome in *Woods* is an example of what happens when Congress drafts a vague statute and a court is less than candid about the basis for clarifying it.

Vernon Woods pleaded guilty in the United States District Court for the Northern District of Illinois to two counts of distributing ecstasy and one count of possession of a weapon by a felon.[8] The presen-

---

1 U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (2008).
2 *Id.* § 4B1.2(a).
3 576 F.3d 400 (7th Cir. 2009).
4 720 ILL. COMP. STAT. 5/4-6 (2008) (defining recklessness).
5 *Id.* 5/9-3(a) (defining involuntary manslaughter).
6 U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2).
7 *See* Chambers v. United States, 129 S. Ct. 687, 689 (2009).
8 *Woods*, 576 F.3d at 401.

tence report calculated that Woods was a career offender under section 4B1.1 of the U.S. Sentencing Guidelines based on a 1993 conviction for possession of cocaine with intent to deliver and a 2001 conviction for involuntary manslaughter.[9] Woods conceded that the drug possession conviction was a controlled substance offense under section 4B1.1, but he argued that the involuntary manslaughter conviction did not fall under the definition of crime of violence in section 4B1.2.[10] The facts underlying the involuntary manslaughter conviction were disputed,[11] although both parties agreed that Woods was babysitting his five-month-old son when the infant became unresponsive, that Woods called 911, and that the baby died six months later.[12] The defense claimed that the infant lost consciousness when Woods accidentally dropped him and that Woods then shook the baby in an attempt to revive him.[13] The State contended that there were signs of "wanton cruelty" and that the infant's death was the result of violent abuse.[14] The sentencing court held that Woods's previous conviction for involuntary manslaughter as defined by Illinois statute[15] was analogous to the Illinois offense of reckless discharge of a firearm, which the Seventh Circuit had previously held to be a crime of violence under section 4B1.2.[16] The district court therefore applied the sentencing enhancement called for by section 4B1.1 and sentenced Woods to 192 months in prison, a significant increase over the 84–105 months he would have received absent the enhancement.[17]

The Seventh Circuit vacated Woods's sentence and remanded the case.[18] Writing for the panel, Judge Wood[19] held that crimes with a mens rea of recklessness fall outside the scope of section 4B1.2 and thus the district court should not have classified involuntary man-

---

[9] *Id.*

[10] *Id.* at 402.

[11] *Id.* at 401.

[12] *Id.* at 402.

[13] *Id.*

[14] *Id.*

[15] *See* 720 ILL. COMP. STAT. 5/9-3(a) (2008) ("A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly . . . ."); *id.* 5/4-6 ("A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.").

[16] *See Woods*, 576 F.3d at 402 (citing United States v. Newbern, 479 F.3d 506, 510–11 (7th Cir. 2007)).

[17] *Id.* at 401.

[18] *Id.* at 413.

[19] Judges Kanne and Sykes joined Judge Wood's opinion.

slaughter as a crime of violence.[20] The court referred to the Supreme Court's interpretations of the Armed Career Criminal Act of 1984[21] (ACCA) for guidance because the Act defines "violent felony" with wording identical to that used in section 4B1.2's definition of "crime of violence."[22] The court first explained the "categorical approach" articulated in *Taylor v. United States*[23] and its progeny, which requires courts to base their determination of whether a crime falls within the ACCA on the elements of the crime as statutorily confined and not the facts underlying the defendant's conviction.[24] The *Woods* court recognized that language in a recent Seventh Circuit case, *United States v. Templeton*,[25] could be construed to stand for the contrasting proposition that courts could look to charging documents in order to ascertain the dangerousness of the defendant's actual crime,[26] which would conflict with Supreme Court and Seventh Circuit precedent.[27] The *Woods* court therefore rejected *Templeton*'s analysis.[28]

The court went on to address whether the residual clause of section 4B1.2 of the Guidelines encompassed the crime of involuntary manslaughter. In *Begay v. United States*,[29] which was decided after Woods appealed his sentence but before the Seventh Circuit heard his appeal, the Supreme Court held that for a crime to fall within the residual clause, it must be "roughly similar, in kind as well as in degree of risk posed," to the crimes enumerated in the ACCA.[30] The *Begay* Court concluded that the enumerated crimes — burglary, arson, extortion, and crimes involving the use of explosives[31] — "all typically involve purposeful, 'violent,' and 'aggressive' conduct"[32] and applied that standard to the case before it.[33] The *Woods* court noted that the Seventh Circuit had previously held in *United States v. Smith*[34] that, under the *Begay* rule that predicate crimes must involve purposeful conduct, "those crimes with a *mens rea* of negligence or recklessness do

---

20 *Woods*, 576 F.3d at 412–13.

21 18 U.S.C. § 924(e) (2006).

22 *Woods*, 576 F.3d at 403–04.

23 495 U.S. 575 (1990).

24 *See Woods*, 576 F.3d at 403–04.

25 543 F.3d 378 (7th Cir. 2008).

26 *Woods*, 576 F.3d at 406–07.

27 *See id.* at 405 (citing United States v. Smith, 544 F.3d 781 (7th Cir. 2008)).

28 *Id.* at 406–07.

29 128 S. Ct. 1581 (2008).

30 *Id.* at 1585.

31 *See* 18 U.S.C. § 924(e)(2)(B)(ii) (2006); U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2008).

32 *Begay*, 128 S. Ct. at 1586 (quoting United States v. Begay, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part), *rev'd*, 128 S. Ct. 1581 (2008)).

33 *See id.* at 1586–87.

34 544 F.3d 781 (7th Cir. 2008).

not trigger the enhanced penalties mandated by the ACCA [or § 4B1.1]."[35] The *Woods* court therefore held that involuntary manslaughter as defined by Illinois law is not a crime of violence under section 4B1.1.[36]

Because the *Woods* court's rejection of *Templeton* "ha[d] the effect of changing the approach [the Seventh Circuit] ha[d] taken to the application of the ACCA and [section 4B1.1 of the Guidelines]," the panel circulated its opinion to the full court according to Seventh Circuit Rule 40(e).[37] A majority of the court's active members voted against rehearing the case en banc and approved the panel's opinion,[38] so *Woods* became the law of the circuit.[39]

Chief Judge Easterbrook and Judges Posner and Tinder dissented from the *Woods* panel's opinion[40] and voted to rehear the case en banc.[41] The dissent argued for giving judges the discretion to look to charging documents, plea colloquies, and similar documents in circumstances in which a defendant has been convicted under a criminal statute that appears to encompass multiple crimes, some crimes of violence and some not.[42] Furthermore, because the Supreme Court had previously held that criminal recklessness is a form of intent[43] and the Seventh Circuit itself had held that "recklessness equates to intent when danger is so obvious that a reasonable person must be aware of it,"[44] "reckless indifference to the danger caused by one's deliberate acts" should be enough to satisfy the *Begay* standard.[45]

Given the rule from *Begay* that the residual clause only includes crimes that involve purposeful conduct, Woods's case appears to be an easy one: a crime with a mens rea of recklessness does not involve purposeful conduct; therefore, involuntary manslaughter falls outside of the residual clause. But, as Chief Judge Easterbrook's strong dissent asked, "How can it be that burglary is a crime of violence, even though people rarely are injured in burglaries, and homicide is not, even though a person's death is an element of the offense?"[46] Although the dissent focused its attacks on the panel's use of the categor-

---

[35] *Woods*, 576 F.3d at 408 (alteration in original) (quoting *Smith*, 544 F.3d at 786) (internal quotation marks omitted).

[36] *See id.* at 412–13.

[37] *Id.* at 407.

[38] *Id.*

[39] *See id.* at 413 (Easterbrook, C.J., dissenting).

[40] Chief Judge Easterbrook wrote the dissent, which Judges Posner and Tinder joined.

[41] *Woods*, 576 F.3d at 407 (majority opinion).

[42] *Id.* at 414 (Easterbrook, C.J., dissenting).

[43] *Id.* at 413 (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

[44] *Id.* at 416 (citing Sundstrand Corp. v. Sun Chem. Corp., 553 F.2d 1033, 1044–45 (7th Cir. 1977)).

[45] *Id.* at 417.

[46] *Id.* at 414.

ical approach, its question exposes a tension between the plain language of the ACCA and its interpretation by the Supreme Court. Indeed, before *Begay*, courts had widely held that manslaughter *was* covered by the ACCA[47] and the identically worded section of the U.S. Sentencing Guidelines.[48] While judicial interpretation of the ACCA's residual clause led to the incongruous outcome in *Woods*, the blame for this outcome does not rest with the courts alone; the vague residual clause that Congress drafted was both in need of clarification and lacking sufficient indicia of what, if anything, Congress intended its meaning to be.

The divergence of the ACCA's plain language from its post-*Begay* interpretation in *Woods* arose from the Court's having to fix the Act. Before *Begay*, courts had interpreted the vague residual clause inconsistently[49] and broadly,[50] resulting in a criminal law that was both unpredictable and overinclusive. The Supreme Court has therefore taken a series of ACCA cases in an attempt to mitigate these problems. In *Begay*, the case most directly relevant to *Woods*, the Court considered whether felony convictions for driving while intoxicated are violent felonies under the residual clause.[51] The Court relied on the Act's text and legislative history to support its conclusion that Congress intended the clause to cover only crimes "roughly similar, in kind as well as in degree of risk posed,"[52] to those enumerated in the ACCA.[53] However, an examination of the Act's legislative history[54] demonstrates that it is entirely unclear what Congress intended the meaning of the residual clause to be.

---

47 *See, e.g.*, United States v. Walter, 434 F.3d 30, 40 (1st Cir. 2006); United States v. Sanders, 97 F.3d 856, 860 (6th Cir. 1996); United States v. Lujan, 9 F.3d 890, 891–92 (10th Cir. 1993); United States v. Sherbondy, 865 F.2d 996, 1009 (9th Cir. 1988).

48 *See, e.g.*, United States v. Fry, 51 F.3d 543, 546 (5th Cir. 1995); United States v. Payton, 28 F.3d 17, 19 (4th Cir. 1994).

49 *See* Chambers v. United States, 129 S. Ct. 687, 694 n.2 (2009) (Alito, J., concurring) ("[T]he lower courts have split over whether it is a 'violent felony' under ACCA's residual clause to commit rape, retaliate against a government officer, attempt or conspire to commit burglary, carry a concealed weapon, and possess a sawed-off shotgun as a felon." (emphasis omitted) (citations omitted)).

50 Before *Begay*, circuit courts had held that the ACCA included relatively minor crimes like tampering with a motor vehicle, United States v. Bockes, 447 F.3d 1090, 1093 (8th Cir. 2006), failing to stop when signaled by a law enforcement vehicle's siren or flashing light, United States v. James, 337 F.3d 387, 390–91 (4th Cir. 2003), and failing to return to a halfway house, United States v. Bryant, 310 F.3d 550, 553–54 (7th Cir. 2002).

51 Begay v. United States, 128 S. Ct. 1581, 1583 (2008).

52 *Id.* at 1585.

53 *See id.* at 1586.

54 The ACCA's legislative history is described in some detail in *Taylor v. United States*, 495 U.S. 575, 581–90 (1990).

The current version of the ACCA is the result of a compromise between a broad Senate bill[55] and a far narrower House bill.[56] The compromise bill looked exactly like the current ACCA, except that it lacked any enumerated crimes.[57] The report of the House Judiciary Committee accompanying the compromise bill *described* the bill as "add[ing] all State and Federal felonies against property such as burglary, arson, extortion, use of explosives, and similar crimes as predicate offenses where the conduct involved presents a serious risk of injury to a person,"[58] but the *language* of the bill itself did not include any enumerated crimes.[59] Why Congress at the last moment added enumerated offenses to the final version[60] of the ACCA is nowhere explained in the legislative history. But this ambiguity did not stop the Court from claiming to have found that Congress intended that the enumerated crimes should limit the scope of the residual clause.[61]

The Court's assertions that the ACCA's text and legislative history indicated Congress's intent regarding the meaning of the residual clause is further called into doubt by the decisions of courts that had interpreted the same sources but come to the opposite conclusion. For instance, in *United States v. McCall*,[62] the Eighth Circuit stated that "[g]iven [the ACCA's] drafting sequence, it is wrong to infer that Congress intended to limit the 'otherwise involves' provision to offenses that are similar to the enumerated add-ons."[63] Other courts concluded that the Act was clear on its face. The Fourth Circuit in *United States v. Mobley*[64] stated that "a plain reading of the words [of the ACCA] suggests that it covers any crime of various enumerated types, and also

---

[55] S. 2312, 99th Cong. (1986) (as reported with amendments, Sept. 24, 1986). The Senate bill included any felony that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense," *id.*, and was criticized for its breadth. *See Armed Career Criminal Legislation: Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. 33 (1986) [hereinafter *Hearing*] (statement of Bruce M. Lyons, President-Elect, Nat'l Ass'n of Criminal Def. Lawyers).

[56] Career Criminal Amendments Act of 1986, H.R. 4768, 99th Cong. § 2 (1986). The House bill only included felonies "that ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another," *id.*, and was criticized for not including property crimes like burglary. *See Hearing*, *supra* note 55, at 9 (statement of Rep. Ron Wyden).

[57] *See* Career Criminal Amendments Act of 1986, H.R. 4885, 99th Cong. § 2 (1986).

[58] H.R. REP. NO. 99-849, at 5 (1986).

[59] *See* H.R. 4885 § 2.

[60] Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207, 3207–39 (codified at 18 U.S.C. § 924(e) (2006)).

[61] *See* Begay v. United States, 128 S. Ct. 1581, 1585 (2008).

[62] 439 F.3d 967 (8th Cir. 2006).

[63] *Id.* at 971; *see also* United States v. King, 979 F.2d 801, 803 (10th Cir. 1992) ("An examination of the history of [the residual clause] . . . illustrates that . . . the primary purpose of the subsection was to expand the predicate offenses that could support an enhanced sentence.").

[64] 40 F.3d 688 (4th Cir. 1994).

those crimes of whatever variety that involve conduct that presents a serious potential risk of physical injury to another."[65] However, neither side of the argument can legitimately claim anything close to firm authority for its position, given the vagueness of the residual clause's text and the absence of any explanation for Congress's last-minute addition of the enumerated crimes.[66]

There is simply no principled basis for saying exactly what Congress intended the meaning of the residual clause to be; thus the Court was wrong to claim that there was any such basis and to ground its new reading of the residual clause in Congress's supposed intent. Congress may have intended the residual clause to have its broad pre-*Begay* meaning, its narrow post-*Begay* meaning, or some other meaning. It is equally likely that the members of Congress negotiating the combination of the House and Senate bills failed to come to an agreement and passed a compromise bill that was intentionally unclear regarding the residual clause's meaning.[67] Indeed, Professor Dan Kahan has argued that "in criminal lawmaking no less than civil lawmaking, Congress has every incentive to avail itself of the 'virtue of vagueness,' resorting to highly general language that facilitates legislative consensus by deferring resolution of controversial points to the moment of judicial application."[68] According to his account, such vaguely or broadly drafted criminal statutes are actually delegations of lawmaking authority by Congress to the courts.[69] Such common law–type adjudication is supposedly absent from the jurisprudence of federal criminal law,[70] but, as commentators have observed, federal judges frequently must and do make federal criminal law.[71] The ACCA's ju-

---

[65] *Id.* at 696.

[66] *See* United States v. Begay, 470 F.3d 964, 974 (10th Cir. 2006) ("This ambiguous [legislative] history is not particularly persuasive either way."), *rev'd*, 128 S. Ct. 1581 (2008). Of course, inquiries into Congress's intent are not the only means of interpreting a statute; for instance, in *Begay* the Court made reference to canons of construction. *See Begay*, 128 S. Ct. at 1585. The merits of the Court's textual interpretation of the ACCA aside, the Court erred when it claimed that evidence of Congress's intent supported its reading of the Act.

[67] *Cf.* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1695 (1975) ("Individual politicians often find far more to be lost than gained in taking a readily identifiable stand on a controversial issue of social or economic policy.").

[68] Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 369–70 (quoting CHARLES R. WISE, THE DYNAMICS OF LEGISLATION 178 (1991)) (internal quotation marks omitted).

[69] *See id.* at 367–70 (presenting an account of the "hidden rule of delegated criminal lawmaking," *id.* at 367).

[70] *See, e.g.*, United States v. Oakland Cannabis Buyers' Coop., 532 U.S. 483, 490 (2001) ("[U]nder our constitutional system, . . . federal crimes are defined by statute rather than by common law . . . ." (citing United States v. Hudson, 11 U.S. (7 Cranch) 32, 34 (1812))).

[71] *See, e.g.*, Kahan, *supra* note 68, at 347 ("[A]ny close examination reveals that federal criminal law . . . is dominated by judge-made law crafted to fill the interstices of open-textured statutory provisions."); Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM.

risprudence is but one example. By rewriting the ACCA's residual clause, the Supreme Court could be said to have accepted Congress's delegation of lawmaking power.

The result of the Court's exercising this lawmaking power is, however, a case like *Woods*. The arguments of the dissent notwithstanding, a crime with a mens rea of recklessness simply cannot be fit into the residual clause after the Supreme Court held in *Begay* that the clause only includes crimes involving purposeful conduct. But an application of the new purposefulness standard to Woods's involuntary manslaughter conviction results in an outcome that is at odds with the ACCA's plain language: how could an involuntary manslaughter, which by definition is committed by a person who "consciously disregards a substantial and unjustifiable risk"[72] that his actions are "likely to cause death or great bodily harm,"[73] *not* "involve[] conduct that presents a serious potential risk of physical injury to another"?[74] Whatever Congress may have intended the residual clause to mean, that now-lost meaning almost certainly included a violent crime like the involuntary manslaughter for which Woods was convicted.

The incongruity of the outcome in *Woods* is the result of the Supreme Court's attempt to give a clear meaning to the residual clause while failing to be candid about its basis for doing so. By claiming to rely on congressional intent, the Court bound itself to whatever rule it could construct from language taken out of context or from scant legislative history, which resulted in a rule that is divorced from the plain language of the ACCA. In order to avoid more results like that in *Woods*, courts should be more candid when they exercise the lawmaking power that Congress implicitly delegates when it drafts vague statutes. Such openness would make it more likely that a court would give to a statute a meaning closer in line with whatever degree of plain language, apparent purpose, and congressional intent may be present. Of course, Congress could always write clearer statutes, but given Congress's demonstrated reluctance to do so, that scenario seems unlikely.

---

L. 193, 202 (2002) ("[T]he shibboleth that there is no federal criminal common law . . . is simply wrong. There are federal common law crimes.").

[72] 720 ILL. COMP. STAT. 5/4-6 (2008) (defining recklessness).

[73] *Id.* 5/9-3(a) (defining involuntary manslaughter).

[74] U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(2) (2008).