

# Seventh Circuit Review

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Volume 2 | Issue 1

Article 7

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9-1-2006

## The Sobering Truth: The Seventh Circuit Categorizes Drunk Driving as a Violent Felony

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### Recommended Citation

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**THE SOBERING TRUTH:  
THE SEVENTH CIRCUIT CATEGORIZES DRUNK  
DRIVING AS A VIOLENT FELONY**

JENNIFER CHOW\*

Cite as: Jennifer Chow, *The Sobering Truth: The Seventh Circuit Categorizes Drunk Driving as a Violent Felony*, 2 SEVENTH CIRCUIT REV. 170 (2006), at <http://www.kentlaw.edu/7cr/v2-1/chow.pdf>.

INTRODUCTION

For over the past two decades, Congress has been extending federal jurisdiction over crime control to encourage states to work more aggressively to attack the problem of violent crimes committed by repeat offenders and criminals serving shortened sentences.<sup>1</sup> Congress enacted the Armed Career Criminal Act (“ACCA”) in 1984 to promote this important federal sentencing principle of more severely punishing violent repeat offenders.<sup>2</sup> The ACCA is a recidivist statute, or a “three strikes law,” that substantially raises the penalty for

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<sup>1</sup> H.R. REP. NO. 105-157; JOANNE O’BRYANT, DOMESTIC SOCIAL POLICY DIVISION, ISSUE BRIEF FOR CONGRESS, CRIME CONTROL: THE FEDERAL RESPONSE, 3 (2003), <http://usinfo.state.gov/usa/infousa/society/crime/crimegun1.pdf>.

<sup>2</sup> See *United States v. Taylor*, 495 U.S. 575, 581 (1990); *United States v. McCall*, 439 F.3d 967, 969 (8th Cir. 2006); H.R. Rep. No. 98-1073, at 1 (1984), *reprinted in* 1984 U.S.C.A.N. 3661.

possession of a firearm if a defendant has three previous convictions for a violent felony.<sup>3</sup> In the two decades after the ACCA's enactment, the Federal Circuit Courts of Appeals consistently interpreted the ACCA's term "violent felony" to encompass intentional violent acts that present a serious potential risk of physical injury to others.<sup>4</sup> In 2004, the United States Supreme Court in *Leocal v. Ashcroft* held that drunk driving offenses are not crimes of violence<sup>5</sup> under the Comprehensive Crime Control Act ("CCCA"), provided that the offenses either do not have an intent component or require only a showing of negligence.<sup>6</sup> Nonetheless, in 2005, the Court of Appeals for the Seventh Circuit misapplied precedent and misinterpreted the ACCA's statutory text by expanding the ACCA's predicate violent acts to include negligent drunk driving.<sup>7</sup>

<sup>3</sup> 18 U.S.C. § 924(e); *United States v. Caldwell*, No. 97-5252, 2000 WL 331950, at \*8 n.3 (6th Cir. Mar. 23, 2000). Along with violent felonies, a serious drug offense also qualifies as a predicate act under the ACCA. This Comment, however, will focus strictly on violent felony convictions as the case at issue, *United States v. Sperberg*, focuses on a violent felony conviction as predicate act.

<sup>4</sup> See *United States v. Sacko*, 178 F.3d 1 (1st Cir. 1999) (sexual assault); *United States v. Altzman*, 89 Fed. App. Appx. 357 (3d Cir. 2004) (attempted kidnapping); *United States v. Wardick*, 350 F.3d 446 (4th Cir. 2003) (assault); *United States v. Matthews*, 278 F.3d 560 (6th Cir. 2002) (reckless aggravated assault); *United States v. Coles*, 97 Fed. Appx. 665 (7th Cir. 2004) (armed robbery); *United States v. McKinney*, 328 F.3d 993 (8th Cir. 2003) (attempted burglary); *United States v. Greenberg*, 104 Fed. Appx. 34 (9th Cir. 2004) (robbery); *United States v. Maddox*, 388 F.3d 1356 (10th Cir. 2004) (escape); *United States v. Lee*, 208 F.3d 1306 (11th Cir. 2000) (robbery and burglary). This list of cases is not meant to be an exhaustive list of violent felonies, but is meant to illustrate the type of intentionally, violent acts Courts of Appeals have considered a predicate violent felony under the ACCA.

<sup>5</sup> The Seventh Circuit, in *United States v. Bell*, 187 Fed. Appx. 610, 613 (7th Cir. 2006), has stated that the terms "crime of violence" and "violent felony" are interchangeable. Thus, for the purposes of this Comment, these terms are also interchangeable and reference to a statute referring to a "violent felony" or one to a "crime of violence" is distinction without a difference.

<sup>6</sup> *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

<sup>7</sup> This Comment focuses on drunk driving offenses that lack injury or death but are made felonious by state recidivist laws. Normally, charges of driving under the influence which lack any injury or death are misdemeanors, but many states have

The Seventh Circuit in *United States v. Sperberg* categorized the offense of drunk driving as a violent crime thereby qualifying drunk driving as a predicate violent felony subject to recidivist sentence enhancement under the ACCA.<sup>8</sup> In expanding the ACCA's predicate violent acts, the Seventh Circuit relied on its decision in *United States v. Rutherford* where it held that drunk driving is a crime of violence under § 4B1.2(a)(2) of the United States Sentencing Guidelines.<sup>9</sup> The court noted that although *Rutherford* dealt with the Sentencing Guidelines, the language of § 4B1.2(a)(2) is identical to that of § 924(e) of the ACCA, and, thus, there is "no basis for reading the provisions differently."<sup>10</sup> Despite the Supreme Court's holding in *Leocal* that drunk driving is not a crime of violence under the CCCA,<sup>11</sup> the Seventh Circuit distinguished *Sperberg* from *Leocal* concluding that the CCCA employed operatively different language.<sup>12</sup>

The Seventh Circuit erred in relying on *Rutherford* and categorizing drunk driving as a violent felony under the ACCA.<sup>13</sup> In light of drunk driving's non-violent nature, the Seventh Circuit's expansion of the ACCA's predicate acts blurs the distinction between crimes of violence and crimes of neglect and allows excessive penalties for crimes that Congress did not intend for heightened punishment.<sup>14</sup> Part I of this Comment will trace the relevant judicial and legislative history necessary to analyze the *Sperberg* decision. Part II will set out the factual background to the issues raised in *Sperberg* and detail the reasoning of the court. Lastly, Part III will discuss why *Sperberg* was incorrectly decided: first, the Seventh Circuit should have followed the Supreme Court's suggestion in *Leocal* that the

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recidivist statutes, or "three strikes laws," which make a repeat DUI charge a felony.  
16B David Kramer, *Am. Jur. Constitutional Law*, § 656 (2d ed. 2006).

<sup>8</sup> *United States v. Sperberg*, 432 F.3d 706 (7th Cir. 2005).

<sup>9</sup> *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995).

<sup>10</sup> *Sperberg* 432 F.3d at 709.

<sup>11</sup> *Leocal*, 543 U.S. 1.

<sup>12</sup> *Sperberg* 432 F.3d at 709.

<sup>13</sup> *See id.*

<sup>14</sup> *See Leocal*, 543 U.S. at 11 (referring to the consequences of interpreting § 16 of the CCCA to include accidental or negligent conduct).

predicate acts under the ACCA should not be enlarged to include crimes of neglect; second, the Seventh Circuit should have interpreted the ACCA under a *ejusdem generis* analysis rather than interpreting the ACCA's pertinent clause in isolation; and finally, drunk driving should not be considered a violent felony considering Congress' legislative intent in enacting the ACCA.

## I. BACKGROUND

### A. *The State of the Law Prior to United States v. Sperberg*

#### 1. The Armed Career Criminal Act

In 1984, Congress observed that nearly 25 million American households, or three out of every ten, were affected by crimes involving theft and violence.<sup>15</sup> Congress explained that it had become apparent that a large number of these crimes were committed by a very small number of chronic offenders.<sup>16</sup> As a response to protect the public from the continuing crimes of these habitual offenders, Congress enacted the ACCA to supplement the states' law enforcements efforts against armed "career" criminals whose livelihood is "crime for profit."<sup>17</sup> The ACCA raises the penalty for possession of a firearm by a felon from a maximum of ten years in prison to a mandatory minimum of fifteen years and a maximum of life in prison without parole, probation, or suspension of sentence allowed, if the defendant has three previous convictions for a violent felony or a serious drug offense.<sup>18</sup> Section 924(e)(2)(B) of the ACCA defined the term "violent felony" to mean:

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<sup>15</sup> H.R. Rep. No. 98-1073, at 1 (1984), *reprinted in* 1984 U.S.C.A.N. 3661.

<sup>16</sup> *Id.*

<sup>17</sup> *See* *United States v. Taylor*, 495 U.S. 575, 581 (1990); Brief of Appellant at 12, *United States v. Ivan Excel Mason*, No. 05-3879 (8th Cir. Dec., 2005); H.R. Rep. No. 98-1073, at 3.

<sup>18</sup> 18 U.S.C. § 924(e); *United States v. Caldwell*, No. 97-5252, 2000 WL 331950, at \*8 n.3 (6th Cir. Mar. 23, 2000).

any crime punishable by imprisonment for a term exceeding one year . . . that

(i) has an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, *or otherwise involves conduct that presents a serious potential risk of physical injury to another.*<sup>19</sup>

The Supreme Court has made it easier for courts to determine which crimes constitute a “violent felony” by instructing that state convictions for the felonies listed in the § 924(e) can be used as predicate violent felonies to raise the defendant’s sentence if the court finds that the state statute defining the defendant’s prior offenses corresponds to the generic meaning of those crimes listed in § 924(e) as predicate offenses.<sup>20</sup> Determining which crimes fall under the “otherwise involves” clause, however, has not been so simple since the Supreme Court has left the question solely for its lower courts to determine.<sup>21</sup>

## 2. The ACCA and *United States v. Doe*

Since the ACCA’s enactment, the federal courts of appeals have repeatedly been presented with the question of what types of offenses

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<sup>19</sup> 18 U.S.C. § 924(e)(2)(B)(i)-(ii) (emphasis added). The “otherwise involves” clause is the operative clause in which this Comment focuses on.

<sup>20</sup> *Taylor*, 495 U.S. at 602. State convictions may also be used as predicate violent felonies if the charging paper and jury instructions actually required the jury to find all the elements of the generic meaning of the offense to convict the defendants.

<sup>21</sup> See Jondavid S. DeLong, *What Constitutes “violent felony” for the Purpose of Sentence Enhancement Under the Armed Career Criminal Act (18 U.S.C.A. § 924(e)(1))*, 119 A.L.R. FED. 319 (1994).

constitute violent felonies under the ACCA.<sup>22</sup> In 1992, the First Circuit in *United States v. Doe* held that a felon in possession of a firearm is not itself a “violent felony” under § 924(e) of the ACCA.<sup>23</sup> Writing for the court, then Chief Judge Breyer observed that the statute gives several specific examples such as burglary, arson, extortion, use of explosives and then adds “or otherwise involves *conduct* that presents a serious potential risk of physical injury to another,” and stated that simple possession of a firearm did not fit within the literal language of the ACCA.<sup>24</sup> Judge Breyer explained that simple firearm possession usually does not involve violence, and the same risk of physical harm that accompanies burglary or arson cannot easily be imagined to accompany conduct that normally constitutes simple firearm possession.<sup>25</sup> Judge Breyer specifically provided the example of drunk driving and explained that Congress did not intend to enhance sentences based on such non-violent convictions because § 924(e) of the ACCA “calls to mind a tradition of crimes that involve the possibility of more closely related, active violence.”<sup>26</sup> Although Judge Breyer recognized a strong argument that a previously convicted felon who possesses a gun reveals a willingness to break the law again, he stressed that the legislature expressed this concern in the context of criminalizing the conduct and not on whether the felony was “violent” for sentence enhancement purposes.<sup>27</sup> Additionally, Judge Breyer

<sup>22</sup> See *United States v. Sacko*, 178 F.3d 1 (1st Cir. 1999) (sexual assault); *United States v. Altsman*, 89 Fed. Appx. 357 (3d Cir. 2004) (attempted kidnapping); *United States v. Wardick*, 350 F.3d 446 (4th Cir. 2003) (assault); *United States v. Matthews*, 278 F.3d 560 (6th Cir. 2002) (reckless aggravated assault); *United States v. Coles*, 97 Fed. Appx. 665 (7th Cir. 2004) (armed robbery); *United States v. McKinney*, 328 F.3d 993 (8th Cir. 2003) (attempted burglary); *United States v. Greenberg*, 104 Fed. Appx. 34 (9th Cir. 2004) (robbery); *United States v. Maddox*, 388 F.3d 1356 (10th Cir. 2004) (escape); *United States v. Lee*, 208 F.3d 1306 (11th Cir. 2000) (robbery and burglary).

<sup>23</sup> *United States v. Doe*, 960 F.2d 221 (1st Cir. 1992).

<sup>24</sup> *Id.* at 224 (emphasis in original) (referring to 18 U.S.C. § 924(e)).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 225.

<sup>27</sup> *Id.* at 226.

noted that there is no legislative evidence that Congress' use of the words "serious potential risk," instead of the more traditional language "substantial risk,"<sup>28</sup> was thereby intended to include gun possession crimes or drunk driving.<sup>29</sup>

### 3. The United States Sentencing Guidelines

The concern over the problem of violent crimes committed by repeat offenders which prompted Congress to enact the ACCA was the same concern which prompted it to enact the Sentencing Reform Act of 1984 ("SRA").<sup>30</sup> While the ACCA's purpose is mainly to be "tough on crime," however, the SRA was enacted to serve multiple purposes: first, ensuring that defendants serve their complete sentences; second, establishing a uniform sentencing scheme by narrowing the wide disparity in sentences imposed across federal jurisdictions; and third, creating a proportional system that "imposes appropriately different sentences of criminal conduct of different severity."<sup>31</sup>

As part of the SRA, Congress created the United States Sentencing Commission ("Commission"), an independent body within the judicial branch, and charged it with "establish[ing] sentencing policies and practices for the Federal criminal justice system."<sup>32</sup> Congress set general goals for federal sentencing and imposed upon the Commission a variety of responsibilities.<sup>33</sup> Among those responsibilities, Congress directed the Commission to establish maximum and minimum sentences for certain offenses based on the characteristics of a crime.<sup>34</sup> The Commission implemented this

<sup>28</sup> *Id.* (referring to the language in 18 U.S.C §§ 16, 3142(f), 3156(a)(4)).

<sup>29</sup> *United States v. Doe*, 960 F.2d 221, 226 (1st Cir. 1992).

<sup>30</sup> U.S. Sentencing Guidelines Manual § 1A1.1.

<sup>31</sup> *Id.*

<sup>32</sup> *United States v. LaBonte*, 520 U.S. 751, 753 (1997).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*; see Gilles R. Bissonnette, "Consulting" the Federal Sentencing Guidelines After Booker, 52 UCLA L. REV. 1497, 1506-07 (2006) (citing to 28 U.S.C. § 944(b)(1) (2000) ("The Commission...shall, for each category of offense involving each category of defendant, establish a sentencing range").



directive by promulgating the Federal Sentencing Guidelines (“Guidelines”) in 1987.<sup>35</sup>

Like the ACCA, the Guidelines also contain a career offender provision which specifies a sentence enhancement for repeat offenders who have been convicted of at least three “crimes of violence.”<sup>36</sup> Section 4B1.2(a) of the Guidelines defines the term “crime of violence” with language precisely identical to that of § 924(e) of the ACCA.<sup>37</sup> Section 4B1.2 provides that the:

term “crime of violence” means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.<sup>38</sup>

The language of § 924(e) and the language of § 4B1.2 were not always identical, however.<sup>39</sup> Initially, the language of § 4B1.2(1)(ii) was identical to 18 U.S.C. § 16(b) of the CCCA.<sup>40</sup> The change did not occur until 1989 when the Sentencing Commission amended §4B1.2(1) to language identical to § 924(e)(2)(B)(i)-(ii) of the

<sup>35</sup> See *LaBonte*, 520 U.S. at 753.

<sup>36</sup> U.S.S.G §4B1.1.

<sup>37</sup> U.S.S.G. §4B1.2.

<sup>38</sup> U.S.S.G. §4B1.2

<sup>39</sup> *Bazan-Reyes v. INS*, 256 F.3d 600, 608 (7th Cir. 2001).

<sup>40</sup> 18 U.S.C. §16(b) provides that a crime of violence includes “any . . . offense that is a felony and 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.” See also *Bazan-Reyes*, 256 F.3d at 608.

ACCA.<sup>41</sup> In amending the original § 4B1.2(1), the Sentencing Commission specifically noted that the amendment was not intended to change the substance of the guideline, but only to clarify its meaning.<sup>42</sup> The Commission intended to clarify that courts must be guided by actual conduct when determining a “violent felony,” and that mere possession of a firearm is not a crime of violence under § 4B1.2(1)(ii),<sup>43</sup> just as it is not a crime of violence under the ACCA.<sup>44</sup>

Unlike the ACCA, however, the Guidelines are advisory and do not require a judge to impose mandatory minimum.<sup>45</sup> In 2004, the Supreme Court in *United States v. Booker* excised the mandatory provisions of the Guidelines and held that although judges must still consider the Guidelines, they are not required to follow the Guidelines in any particular case.<sup>46</sup> In exercising discretion to follow the Guidelines, a judge may consider the offense behavior and the offender’s characteristics.<sup>47</sup> Taking the offense level and criminal history category together, the Guidelines specify a recommended

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<sup>41</sup> Section 924(e)(2)(B)(i)-(ii) defines “violent felony” as any crime 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 potential risk of physical injury to another.

<sup>42</sup> *Id.* (citing to U.S. Sentencing Guidelines Manual app. C at 106-07 (1991)).

<sup>43</sup> *See* *Stinson v. U.S.*, 508 U.S. 36, 46 (1993); *United States v. Garcia-Cruz*, 40 F.3d 986, 989 (9th Cir. 1994); United States Sentencing Commission, 2005 Federal Sentencing Guidelines Manual, Chapter 4, Part B (2005), <http://www.ussc.gov/2005guid/gl2005.pdf>.

<sup>44</sup> *See* *United States v. Bell*, 966 F.2d 703 (1st Cir. 1992); *United States v. Doe*, 960 F.2d 221 (1st Cir. 1992); *also* *United States v. Powell*, 813 F. Supp. 903 (Mass. Dist. Ct. 1992) (extending the First Circuit’s reasoning in *Bell* and *Doe* to the Bail Reform Act and holding that felon in possession of a firearm is not a crime of violence).

<sup>45</sup> *See* *United States v. Booker*, 543 U.S. 220, 259-60 (2004).

<sup>46</sup> 543 U.S. at 259-60; Lucien B. Campbell and Henry J. Bemporad, Office of the Federal Public Defender, Western District of Texas, *An Introduction to Federal Sentencing 2* (2006), <http://www.ussc.gov/training/intro9.pdf>.

<sup>47</sup> U.S.S.G. § 1A2.

narrow sentencing range in which a judge should impose a sentence.<sup>48</sup> The Guidelines allow the judge to enhance a recidivist's sentence based on a prior conviction without having it mentioned in the indictment or proved to a jury beyond a reasonable doubt.<sup>49</sup> Additionally, unlike the ACCA, the Guidelines allow for the possibility of supervised release.<sup>50</sup> Thus, although the language of the ACCA and the Guidelines are identical, the application of the Guidelines in determining a sentence in an advisory fashion may produce a shorter sentence than the ACCA's mandatory minimum of fifteen years.<sup>51</sup>

#### 4. The Guidelines and *United States v. Rutherford*

Three years after the First Circuit decided *Doe*, the Seventh Circuit in *United States v. Rutherford* was asked to determine as a matter of first impression whether a vehicular assault committed by a drunk driver constitutes a crime of violence under § 4B1.2 of the Guidelines.<sup>52</sup> Answering in the affirmative, the majority<sup>53</sup> explained that drunk driving poses serious risks to other motorists and pedestrians.<sup>54</sup> As such, drunk driving satisfied subsection (ii) of § 4B1.2(a) because the offense “involves conduct that presents a serious

<sup>48</sup> See United States Sentencing Commission, 2005 Federal Sentencing Guidelines Manual, Chapter 5, Part A (2005), <http://www.ussc.gov/2005guid/g12005.pdf>.

<sup>49</sup> *Booker*, 543 U.S. at 244 (specifically exempting a prior conviction from impermissible judicial factfinding); *Almendarez-Torres*, 523 U.S. 224, 226-27, 247 (1998).

<sup>50</sup> U.S.S.G §4B1.1; see *Rutherford*, 54 F.3d at 371.

<sup>51</sup> See Oral argument recording. *United States v. Ronald V. Sperberg*, No. 04-4135. (7th Cir. Dec., 2005). Seventh Circuit Court of Appeals, [http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-4135\(enter docket no. 04-4135\)](http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-4135(enter docket no. 04-4135)).

<sup>52</sup> *Rutherford*, 54 F.3d 370.

<sup>53</sup> *Id.* at 371 (JJ. Cummings and Rovner joining in the majority).

<sup>54</sup> *Id.* at 376-77.

potential risk of physical injury to another.”<sup>55</sup> The majority noted, however, that qualifying felony drunk driving as a crime of violence under the “otherwise” clause was “somewhat troubling,” and invited the Commission to re-evaluate its definition of crime of violence to determine whether drunk driving should qualify as a predicate act of crime of violence.<sup>56</sup> Judge Easterbrook observed in his concurrence that the defendant Rutherford was not charged with drunk driving, but rather was charged with a crime of assault<sup>57</sup> which resulted from driving under the influence and causing serious bodily injury to another with a motor vehicle.<sup>58</sup> Thus, while the majority concluded that all drunk driving offenses are crimes of violence, Judge Easterbrook suggested that a crime of violence existed in Rutherford’s case only because of the presence of first degree assault and injury.<sup>59</sup> But ten years later, Judge Easterbrook referred to his *Rutherford* concurrence saying, “[m]y concurrence is all very nice, but there was a reason why I was writing for myself. The decision, of course, is the decision of the majority. And there it is.”<sup>60</sup>

At the time *Rutherford* was decided, neither the Seventh Circuit nor any other court had determined whether a vehicular assault committed by a drunk driver or any other similar offense constitutes a crime of violence under § 4B1.2 of the Guidelines.<sup>61</sup> Since *Rutherford*,

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 377.

<sup>57</sup> *Id.* at 378 (J. Easterbrook concurring). Alabama Code § 13A-6-20(a)(5) provides that a person commits the crime of assault in the first degree if, while driving under the influence of alcohol or a controlled substance or any combination thereof in violation of Section 32-A-191 he causes serious bodily injury to the person of another with a motor vehicle.

<sup>58</sup> *United States v. Rutherford*, 54 F.3d 370, 378 (7th Cir. 1995) (J. Easterbrook concurring) (stating that “[d]runk driving is a lesser included offense that [first degree assault while driving under the influence] creates”).

<sup>59</sup> *See id.*

<sup>60</sup> Oral argument recording. *United States v. Ronald V. Sperberg*, No. 04-4135. (7th Cir. Dec., 2005). Seventh Circuit Court of Appeals, [http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-4135\(enter docket no. 04-4135\)](http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-4135(enter docket no. 04-4135)).

<sup>61</sup> *Rutherford*, 54 F.3d at 375.

however, the Fifth, Eighth, Tenth, and Eleventh Circuits have all found *Rutherford's* reasoning persuasive and have held DUI as a “crime of violence” within the meaning of § 4B1.2.<sup>62</sup> Each of those circuits explicitly referred to *Rutherford's* analysis that drunk driving is inherently dangerous and, as such, is a violent felony under the Guidelines because of its inherent risk of presenting physical injury to another.<sup>63</sup> Additionally, the Eighth Circuit in *United States v. Chauncey* adopted a line of reasoning similar to that in Judge Easterbrook’s *Rutherford* concurrence and held involuntary manslaughter resulting from a DUI as a “crime of violence” under § 4B1.2.<sup>64</sup>

### 5. The CCCA and *Leocal v. Ashcroft*

Nine years after *Rutherford*, in 2004, the federal courts were again faced with the question of whether drunk driving constitutes a “crime of violence.”<sup>65</sup> This time, however, the question arose in the context of the Comprehensive Crime Control Act of 1984 (“CCCA”).<sup>66</sup> The CCCA broadly reformed the federal sentencing system by revising bail and forfeiture procedures to ensure that criminals serve an appropriate amount of time in prison.<sup>67</sup> Congress used the term “crime of violence” in numerous places throughout the CCCA to define the elements of particular offenses.<sup>68</sup> Title 16 U.S.C. § 16 of the CCCA defines “crime of violence” as:

<sup>62</sup> *United States v. DeSantiago-Gonzalez*, 207 F.3d 261 (5th Cir. 2000); *United States v. McCall*, 439 F.3d 967 (8th Cir. 2006); *United States v. Moore*, 420 F.3d 1218 (10th Cir. 2005); *United States v. McGill*, 450 F.3d 1276 (11th Cir. 2006).

<sup>63</sup> *See DeSantiago-Gonzalez*, 207 F.3d at 264; *McCall*, 439 F.3d at 972; *Moore*, 420 F.3d at 1221; *McGill*, 450 F.3d at 1281.

<sup>64</sup> *See United States v. Chauncey*, 420 F.3d 864 (8th Cir. 2005).

<sup>65</sup> *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

<sup>66</sup> *Id.* at 6.

<sup>67</sup> *Id.*; *see also* H.R. REP. NO. 105-157, at 3 (1997) (stating that the CCCA “eliminated parole in the federal criminal justice system and required offenders convicted of federal crimes to serve at least 85 percent of their sentences”).

<sup>68</sup> *Leocal*, 543 U.S. at 6 (providing several examples of how Congress employed the term “crime of violence” to define the elements of particular offenses,

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and 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.

The question of whether drunk driving was a crime of violence under this section of the CCCA made its way to the United States Supreme Court, which answered in the affirmative.<sup>69</sup> The Court in *Leocal v. Ashcroft* held that drunk driving offenses are not crimes of violence under § 16, provided that the offenses either do not include a *mens rea* component or require only a showing of negligence in the operation of vehicle.<sup>70</sup> The Court focused on § 16's emphasis on the use of physical force, which the court concluded requires active employment against the person or property of another.<sup>71</sup> The Court found that a DUI offense could not include this requisite type of physical force because while one may actively employ *something* in an accidental manner, it is much more unusual to say that a person may actively employ physical force against another by accident.<sup>72</sup> Thus, the Court concluded, § 16's key phrase, "the use . . . of physical force against the person or property of another," suggests a higher degree of intent than the negligent or merely accidental conduct found in drunk driving.<sup>73</sup>

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such as: 18 U.S.C. § 1959 which prohibits threats to commit crimes of violence in aid of racketeering activity and § 3142(f) which requires a pretrial detention hearing for those alleged to have committed a crime of violence).

<sup>69</sup> *Id.* at 12-13.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 9.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 10.

In footnote seven of the Court's opinion, the Court compared the type of conduct referred to § 4B1.2 of the Guidelines to the type of conduct in § 16(b) of the CCA, and observed that § 4B1.2 refers to the risk that an accident may occur when an individual drives drunk and § 16(b) refers to the risk that a individual may use force against another in committing a DUI offense.<sup>74</sup> Despite its distinction, however, the Court favorably cited *Doe* later in its opinion by citing to Judge Breyer's observation that drunk driving was not a "violent felony" under the ACCA because § 924(e) "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence."<sup>75</sup> Referencing *Doe* with approval, the Court stated that the term "crime of violence" combined with § 16's emphasis on the use of physical force "suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses."<sup>76</sup> Thus, drunk driving was not a crime of violence under the CCA because § 16's language requires a higher *mens rea* than the merely accidental or negligent conduct involved in a DUI offense.<sup>77</sup>

Additionally, the Court provided the example Congress' use of the term "crime of violence" in § 101(h) of the Immigration and Nationality Act ("INA") to support its holding that drunk driving was not a "crime of violence."<sup>78</sup> Under § 101(h), Congress added the term "crime of violence" to a list that distinguished drunk driving from crimes of violence.<sup>79</sup> Section 101(h) defines the term "serious criminal offense" to mean:

- (1) any felony;
- (2) any crime of violence, as defined in section 16 of title 18; *or*

<sup>74</sup> *Id.* n.7.

<sup>75</sup> *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (citing *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992)).

<sup>76</sup> *Leocal*, 543 U.S. at 11.

<sup>77</sup> *Id.* at 10 n.7.

<sup>78</sup> *Id.* at 12.

<sup>79</sup> 8 U.S.C. § 1101(h).

(3) any crime of reckless driving or of driving while intoxicated under the influence of alcohol or of prohibited substances if such crime involves personal injury to another.” 8 U.S.C. § 1101(h).<sup>80</sup>

Because Congress chose to list drunk driving resulting in injury in a distinct provision separate from “crimes of violence,” the Court explained that interpreting “crime of violence” under § 16 to encompass DUI offenses would leave § 101(h)(3) practically devoid of significance.<sup>81</sup> Thus, the Court concluded, the distinct provision for these separate offenses bolsters its conclusion that § 16 does not itself encompass DUI offenses.<sup>82</sup>

## II. THE SEVENTH CIRCUIT CATEGORIZES DRUNK DRIVING AS A VIOLENT FELONY IN *UNITED STATES V. SPERBERG*

In 2005, despite the Supreme Court’s holding in *Leocal* that negligent drunk driving offenses are not crimes of violence, the Seventh Circuit categorized drunk driving as a violent felony subject to recidivist enhancement under the ACCA.<sup>83</sup> In *United States v. Sperberg*, the Seventh Circuit expanded the ACCA’s predicate violent acts and allowed heightened punishments to be imposed on defendants with a criminal history of negligent crimes.<sup>84</sup>

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<sup>80</sup> *Leocal*, 543 U.S. at 12 (citing 8 U.S.C. § 1101(h)) (emphasis in original).

<sup>81</sup> *Id.* (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)) (stating “[a]s we must give effect to every word of statute wherever possible...the distinct provision for these offenses under § 101(h) bolsters our conclusion that § 16 does not itself encompass DUI offenses).

<sup>82</sup> *Leocal*, 543 U.S. at 12.

<sup>83</sup> *United States v. Sperberg*, 432 F.3d 706, 709 (7th Cir. 2005).

<sup>84</sup> *Id.*



### A. Facts

Roland Sperberg pled guilty to possessing a firearm,<sup>85</sup> which normally carries a maximum penalty of 10 years of imprisonment.<sup>86</sup> Sperberg was sentenced to 210 months, however, because the district judge<sup>87</sup> concluded that he had been convicted of at least three other “violent felonies” under the ACCA.<sup>88</sup> Sperberg had a lengthy criminal conviction record and many of his convictions may have qualified as a predicate act under the ACCA’s definition of “violent felony.”<sup>89</sup> The district judge specified three in particular, including one for drunk driving in Wisconsin.<sup>90</sup>

Wisconsin treats operating while under the influence<sup>91</sup> (“OWI”) as a misdemeanor but elevates the charge to a felony for repeated OWI convictions.<sup>92</sup> Thus, after seven OWI convictions, Wisconsin elevated Sperberg’s eighth OWI conviction to a felony under state law.<sup>93</sup> Sperberg contended that his drunk driving conviction was not a crime of violence under the ACCA.<sup>94</sup>

### B. The Court of Appeals for the Seventh Circuit Opinion

Writing for the court, Judge Easterbrook stated that *Rutherford*, which held that drunk driving is a “violent felony” under § 4B1.2, was

<sup>85</sup> *Id.* at 707.

<sup>86</sup> 18 U.S.C. § 922(g).

<sup>87</sup> Sperberg was convicted by guilty plea in the United States District Court for the Western District of Wisconsin, Shabaz, J., of possessing a firearm despite prior felony convictions. *See Sperberg*, 432 F.3d 706.

<sup>88</sup> *Id.* at 707.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 707, 709.

<sup>91</sup> WISCONSIN DEPARTMENT OF TRANSPORTATION, DRUNK DRIVING LAW 0.08 (2006), Oct. 3, 2006, <http://www.dot.wisconsin.gov/safety/motorist/drunkdiriving/law.htm>

<sup>92</sup> *Sperberg*, 432 F.3d at 708.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.* at 707.

controlling.<sup>95</sup> The Seventh Circuit noted that although *Rutherford* dealt with the Guidelines, the language and context of § 4B1.2(a) of the Guidelines is identical to that of § 924(e) of the ACCA, and, thus, there is “no basis for reading the provisions differently.”<sup>96</sup> The Seventh Circuit also distinguished *Sperberg* from the Supreme Court’s decision in *Leocal*, which held that drunk driving is not a violent felony under § 16 of the CCCA.<sup>97</sup> The Seventh Circuit emphasized the difference in statutory language of § 16, which speaks of “using” force whereas § 924(e) speaks of conduct that “presents” a serious potential risk of physical injury to another.<sup>98</sup> The Seventh Circuit explained that the Supreme Court thought that to “use” force is to apply it deliberately, which excluded the offense of drunk driving because although driving is deliberate, the application of force is not.<sup>99</sup> By contrast, the Seventh Circuit stated, § 924(e)(2)(B)(ii)’s “presents” asks about consequences rather than whether the offender deliberately applied force.<sup>100</sup> Because of this difference, the Seventh Circuit found that *Rutherford* survives *Leocal* as “materially different language justifies a different interpretation.”<sup>101</sup>

The Seventh Circuit noted, however, that *Sperberg*’s best argument was that *Leocal* cited *Doe* with apparent approval, which stated that § 924(e) as a whole “calls to mind a tradition of crimes that involve the possibility of more closely related, active violence” which cannot be said to include drunk driving.<sup>102</sup> Indeed, the Seventh Circuit mentioned that not all crimes fit *Doe*’s description of “crime of violence,” and the catch-all “otherwise” clause in subsection (ii) “calls for risky activity to be classified with more traditional crimes of

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<sup>95</sup> *Id.* at 709.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* (quoting *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992)).

violence.”<sup>103</sup> But the court stated that several circuits have decided<sup>104</sup> the question whether drunk driving is a violent felony under § 924(e)(2)(B)(ii), and if the Seventh Circuit were to switch sides, “it would more likely aggravate than eliminate a conflict.”<sup>105</sup> Therefore, the court stated, *Rutherford* stands controlling and shall remain the circuit’s position.<sup>106</sup>

### III. THE SEVENTH CIRCUIT ERRED IN RELYING ON *RUTHERFORD*

*Sperberg* incorrectly followed *Rutherford*’s reasoning in holding that drunk driving is a crime of violence under the ACCA: first, *Rutherford*’s holding that drunk driving is crime of violence under § 4B1.2 of the Guidelines is questionable in light of *Leocal*; second, the offense involved in *Sperberg* was mere negligent drunk driving while the offense involved in *Rutherford* was vehicular assault with injury resulting from drunk driving; and lastly, sentence enhancement under the Guidelines is not nearly as severe as it is under the ACCA.<sup>107</sup>

*Sperberg*’s enlarging of the predicate acts under the ACCA raises serious concerns of overly severe punishments because it opens the

<sup>103</sup> *Sperberg*, 432 F.3d at 709.

<sup>104</sup> Although the courts are now in agreement, at the time *Sperberg* was decided, the circuits had split as to whether drunk driving was a violent felony for purposes of the ACCA. The Tenth Circuit in *United States v. Moore*, 420 F.3d 1218, 1224 (10th Cir. 2005) held that drunk driving was a violent felony, and the Eighth Circuit in *United States v. Walker*, 393 F.3d 819, 828 (8th Cir. 2005) held that it was not. Since *Sperberg*, the Eighth Circuit reheard en banc in *United States v. McCall*, 397 F.3d 1028 (8th Cir. 2006) and rejected the analysis in *Walker* and held that drunk driving qualified as a violent felony under § 924(e)(B)(ii).

<sup>105</sup> *Sperberg*, 432 F.3d at 709.

<sup>106</sup> *Id.*

<sup>107</sup> See *United States v. Leocal*, 543 U.S. 1 (2004); *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995); *United States v. Sperberg*, 432 F.3d 706 (2005); Oral Argument of Christopher Van Wagner, Attorney for Defendant-Appellant, Oral argument recording, *United States v. Ronald V. Sperberg*, No. 04-4135. (7th Cir. Dec., 2005). Seventh Circuit Court of Appeals, [http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-4135\(enter docket no. 04-4135\)](http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-4135(enter%20docket%20no.%2004-4135)).

door to a host of crimes of neglect that were not meant for heightened punishment.<sup>108</sup> Under *Sperberg*'s holding, a person may be exposed to severe, heightened punishment under the ACCA for negligent drunk driving despite the ACCA's purpose of targeting violent career offenders who commit intentional, active crimes for profit.<sup>109</sup> Because *Sperberg* raises such serious implications, the Seventh Circuit should revisit *Sperberg* and analyze § 924(e)(B)(2)(ii) of the ACCA by following the Supreme Court's suggestion in *Leocal* that the predicate acts under the ACCA should not be enlarged to include drunk driving and other crimes of neglect.<sup>110</sup> Moreover, interpreting § 924(e)(B)(2)(ii)'s "otherwise involves" clause to include only crimes similar in nature to the enumerated crimes which precedes it demonstrates that negligent crimes do not fit within the meaning of the ACCA.<sup>111</sup> Finally, tracing the legislative history also reinforces the conclusion that the ACCA should not be expanded to include drunk driving and other crimes of neglect.<sup>112</sup>

#### A. *The Predicate Acts under the ACCA in a Post-Leocal World*

*Sperberg* should not have relied on *Rutherford* in interpreting § 924(e)(B)(2)(ii) because *Rutherford* was not decided in a post-*Leocal* world where drunk driving is not considered a crime of violence under § 16(b) of the CCA.<sup>113</sup> *Rutherford* interpreted § 4B1.2 of the Guidelines to include drunk driving as a violent felony, but *Rutherford* was decided nine years before the Supreme Court's decision in

<sup>108</sup> See *Sperberg*, 432 F.3d at 709.

<sup>109</sup> See H.R. Rep. 98-1073, at 3.

<sup>110</sup> *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004) (citing *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992)).

<sup>111</sup> See *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) (instructing that "catch-all" provisions should be interpreted within the categories similar in type to those specifically enumerated within the statute).

<sup>112</sup> See *United States v. McCall*, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting).

<sup>113</sup> *Leocal*, 543 U.S. at 11.

*Leocal*.<sup>114</sup> Post-*Leocal*, drunk driving would not be considered a violent felony under § 4B1.2 of the Guidelines because the Commission specially noted that § 4B1.2(a) should still have the same substantive meaning as § 16(b) of the CCCA despite its amended language identical to the ACCA.<sup>115</sup> Because § 4B1.2(a) in effect has the same substantive meaning as § 16(b), interpreting § 4B1.2(a) to include drunk driving would thus contravene *Leocal*'s holding that drunk driving is not a "crime of violence" under § 16(b).<sup>116</sup> In light of *Rutherford*'s questionable holding, the *Sperberg* court should not have relied on *Rutherford* but rather should have relied on *Leocal*'s suggestion that *Doe* should be followed.<sup>117</sup>

*Doe* correctly held ACCA's predicate acts should not be enlarged to include crimes of neglect that raise only the possibility of violence because interpreting otherwise would blur the distinction between the violent crimes that Congress sought to distinguish for heightened punishment and other crimes.<sup>118</sup> Although *Sperberg* was correct in concluding that the word "presents" in § 924(e)(B)(2)(ii) focuses on the consequences of hurting a person, the court's main inquiry should have been whether the conduct by its nature involves a serious potential risk of physical harm against others.<sup>119</sup>

*Rutherford*, for example, correctly observed that subsection (ii) of the "crime of violence" definition focuses on the conduct involved in the offense, and its sole concern is with the actions of the offender.<sup>120</sup>

<sup>114</sup> See *Leocal*, 543 U.S. 1; *United States v. Rutherford*, 54 F.3d 370 (7th Cir. 1995).

<sup>115</sup> U.S. Sentencing Guidelines Manual app. C at 106-07 (1991) (stating that in amending the original § 4B1.2(1), the Sentencing Commission specifically noted that the amendment was not intended to change the substance of the guideline, but only to clarify its meaning).

<sup>116</sup> *Leocal*, 543 U.S. 1.

<sup>117</sup> *Id.* at 11.

<sup>118</sup> *Id.* (stating interpreting § 16 to include accidental or negligent conduct would blur distinction between violent crimes and negligent crimes for purposes of sentence enhancement); *Doe*, 969 F.2d at 225.

<sup>119</sup> See *Sperberg*, 432 F.3d at 709.

<sup>120</sup> *United States v. Rutherford*, 54 F.3d 370, 376 (7th Cir. 1995).

The *Rutherford* majority, however, failed to distinguish that the defendant *Rutherford* was not charged with drunk driving, but rather was charged with a crime of assault resulting from drunk driving and causing serious bodily injury to another with a motor vehicle.<sup>121</sup> The nature of the drunk driving offense in *Rutherford* includes assault and injury, while the type of the drunk driving at issue in *Sperberg* lacked any injury.<sup>122</sup> The lesser included offense of mere drunk driving, without assault or injury, simply does not involve a serious potential risk of physical harm to others that is associated with assault resulting from drunk driving.<sup>123</sup>

As *Doe* pointed out, the consequences of physical harm are significantly more likely to accompany inherently more dangerous crimes, such as burglary or arson, than to accompany accidental or negligent crimes such as drunk driving where there is no assault or injury.<sup>124</sup> Thus, the reckless disregard in § 924(e) relates not the general conduct or to the possibility that harm will result from a person's conduct, but to the serious potential risk that physical harm that will result from committing the offense.<sup>125</sup>

The *Leocal* Court provides the classic example of burglary to illustrate such a difference: the offense of burglary falls within the meaning of "crime of violence" not because the offense can be committed in a generally reckless way or because someone may be injured, but because burglary, by its nature, involves a substantial risk that a burglar will deliberately use force against a victim and create physical harm.<sup>126</sup> In contrast, mere drunk driving, without any assault or injury, does not have the accompanying serious potential risk that physical harm will result.<sup>127</sup> Although burglars are inherently more dangerous when they violate gun possession laws, "drunk drivers are

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<sup>121</sup> *Id.*

<sup>122</sup> *Id.*; See *Sperberg*, 432 F.3d 706.

<sup>123</sup> See *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992).

<sup>124</sup> *Id.* at 224-25.

<sup>125</sup> *Leocal v. Ashcroft*, 543 U.S. 1, 10 (2004).

<sup>126</sup> *Id.*

<sup>127</sup> *Doe*, 960 F.3d at 225.

not inherently more dangerous to society when they violate gun possession laws.”<sup>128</sup> As *Doe* emphasized, there is no reason to believe that Congress meant to enhance sentences based on proof of drunk driving convictions because the term violent felony “calls to mind a tradition of crimes that involve the possibility of more closely related, active violence.”<sup>129</sup>

The tension between the Supreme Court’s contrary initial observation in footnote seven that the risks associated with the conduct in § 16(b) of the CCCA are different from those of § 4B1.2 of the Guidelines, and the Court’s later favorable citation to *Doe*’s observation that DUI is not a “crime violence” under § 924(e) of the ACCA, “underscores the unsettled nature of whether Congress intended to include drunk driving convictions in the category of violent felonies as defined in § 924(e).”<sup>130</sup> Although *Leocal*’s observation in its footnote seven and its approval of *Doe* seem contradictory, the contradiction can be reconciled if one interprets the Court’s distinction of the risks of drunk driving under § 4B1.2 of the Guidelines to be referring to risks associated with drunk driving that involves assault and injury to another.<sup>131</sup> This conclusion is reinforced by the Court’s referencing to *Doe* with approval and its ultimate holding that a “crime of violence” requires a higher mental state than the merely accidental or negligent conduct involved in a DUI offense.<sup>132</sup> Thus, although the predicate act of drunk driving involving assault and injury may “present a serious potential risk of physical injury to another,” merely accidental or negligent drunk driving does not.<sup>133</sup>

Moreover, the *Leocal* court focused on the conduct that creates a “substantial risk” under § 16(b) of the CCCA and found that drunk

<sup>128</sup> *McCall*, 439 F.3d at 974 (Lay, J. dissenting).

<sup>129</sup> *See Doe*, 960 F.3d at 225.

<sup>130</sup> *McCall*, 439 F.3d at 982 (Lay, J. dissenting).

<sup>131</sup> *Leocal*, 543 U.S. at 11.

<sup>132</sup> *Id.*

<sup>133</sup> 18 U.S.C. § 924(e)(2)(B)(ii).

driving did not carry such a substantial risk.<sup>134</sup> Section 924(e) of the ACCA, however, focuses on the higher threat of “serious potential risk.”<sup>135</sup> Used as an adjective, the definition of the term “serious” means “dangerous” or “potentially resulting in death or other severe consequences” such as serious bodily harm.<sup>136</sup> In contrast, “substantial,” in tort’s substantial-factor context, refers to the causation that exists when one’s conduct is an important or significant contributor to another’s injuries.<sup>137</sup> As drunk driving does not carry a “substantial risk” that physical harm will result, it is less likely that drunk driving would carry the higher “serious potential risk” that physical harm will result.<sup>138</sup> Therefore, as Judge Breyer observed in *Doe*, Congress’ use of the words “serious potential risk” instead of the more traditional “substantial risk” shows that Congress did not intend to include non-violent crimes such as drunk driving within the scope of the ACCA.<sup>139</sup>

*Leocal* further points out that INA § 101(h)’s list of “serious criminal offenses” includes distinct and separate provisions for a “crime of violence” and for driving under the influence.<sup>140</sup> The structure of INA § 101 demonstrates that Congress distinguished drunk driving offenses involving injury from “crimes of violence” and knew that drunk driving was separate from and not subsumed within the term “crimes of violence.”<sup>141</sup> Thus, the structure of INA § 101 demonstrates that Congress knows how to include drunk driving in a separate provision if it intends to qualify drunk driving as a predicate act for sentence enhancement under the ACCA.<sup>142</sup>

<sup>134</sup> *Leocal*, 543 U.S. at 11.

<sup>135</sup> 18 U.S.C. § 924(e)(2)(B)(ii).

<sup>136</sup> BLACK’S LAW DICTIONARY (8th ed. 2004).

<sup>137</sup> *Id.*

<sup>138</sup> *See* United States v. Doe, 960 F.2d 221, 226 (1st Cir. 1992).

<sup>139</sup> *Id.*

<sup>140</sup> *Leocal*, 543 U.S. at 12.

<sup>141</sup> Brief for Petitioner, at 34-36, *Josue Leocal v. John D. Ashcroft*, 543 U.S. 1 (2004) (No. 03-583).

<sup>142</sup> *See id.*



However, Judge Easterbrook's apprehension with aggravating a conflict by not finding drunk driving as a crime of violence is understandable.<sup>143</sup> After all, all of the circuits who have been asked to determine whether drunk driving constitutes a crime of violence have answered in the affirmative.<sup>144</sup> But even if the Supreme Court were to agree with the circuits' holding of drunk driving as crime of violence under § 4B1.2(a) of the Guidelines, the Seventh Circuit could still find that drunk driving is not a crime of violence under § 924(e) of the ACCA because these seemingly contradictory holdings can be reconciled.<sup>145</sup> Although § 4B1.2(a) of the Guidelines and § 924(e) of the ACCA have identical language, their effects on sentence enhancements have drastically different results.<sup>146</sup> The ACCA's mandatory fifteen-year minimum imposes a much harsher penalty than would likely happen under a judge's interpretation of the Guidelines and application of it an advisory fashion.<sup>147</sup>

Under the Guidelines, the sentencing judge would take into account a number of factors determined by Congress to be pertinent to sentencing for those charged with possession of firearm and who also have previous convictions.<sup>148</sup> The Guidelines establishes different offense levels based on certain characteristics of the offense such as whether the gun was a machine gun, whether the defendant committed the act after sustaining two previous felony convictions, etc.<sup>149</sup> The Guidelines then specify a number of points that take into account

<sup>143</sup> United States v. Sperberg, 432 F.3d 706, 709 (7th Cir. 2005);

<sup>144</sup> United States v. DeSantiago-Gonzalez, 207 F.3d 261 (5th Cir. 2000); United States v. McCall, 439 F.3d 967 (8th Cir. 2006); United States v. Moore, 420 F.3d 1218 (10th Cir. 2005); United States v. McGill, 450 F.3d 1276 (11th Cir. 2006).

<sup>145</sup> See Oral Argument of Christopher Van Wagner, Attorney for Defendant-Appellant, Oral argument recording, *United States v. Ronald V. Sperberg*, No. 04-4135. (7th Cir. Dec., 2005). Seventh Circuit Court of Appeals, [http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-4135\(enter docket no. 04-4135\)](http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-4135(enter docket no. 04-4135)).

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> 21A Laura Dietz et. al., *Am. Jur. Criminal Law*, § 859 (2d ed. 2006).

<sup>149</sup> U.S.S.G. § 2K2.1(a).

certain characteristics of the defendant's criminal history background and categorizes the points into different criminal history categories.<sup>150</sup> Taking the base offense level and the criminal history category together, a judge would impose a sentence within a specified range of months.<sup>151</sup> Under this framework, a recidivist defendant likely would be sentenced to a penalty far less than he would be under the ACCA.<sup>152</sup>

To illustrate, consider the hypothetical<sup>153</sup> of Defendant Drinker:

Defendant Drinker was an alcoholic. Drinker was a frequent patron of a bar in Indiana which was across the state border and three miles away from his home in Illinois. Although Drinker could have easily walked the distance, Drinker believed he was able to handle his alcohol and stay in control while driving. The area between the bar and Drinker's home was also an area known for high incidences of crime, and Drinker thought he would be much safer driving rather than walking home while inebriated. Between 1988 and 2000, Drinker was arrested and charged five times for driving under the influence. None of Drinker's DUI offenses resulted in injuries, deaths, or damage to property. After the first two DUI misdemeanor convictions, the court raised Drinker's three subsequent DUI offenses to class 4 felonies for which Drinker served a total of seven years in prison (three years each for two felonies, and one year for the other felony), 90 days of probation, and paid the court a total of \$5,000 in fines. In 2004, one year after Drinker was released

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<sup>150</sup> U.S.S.G. at § 4A1.1.

<sup>151</sup> U.S. Sentencing Guidelines Manual, Chapter 5, Part A (2005), <http://www.ussc.gov/2005guid/g12005.pdf>.

<sup>152</sup> *See id.*; 18 U.S.C. § 924.

<sup>153</sup> For a well-articulated hypothetical explaining the mechanics of the Guidelines, *see* Gilles R. Bissonnette, "Consulting" the Federal Sentencing Guidelines After Booker, 52 UCLA L. REV. 1497, 1506-07 (2006).

from serving his last DUI conviction, Drinker decided he would no longer drive but would walk to and from his favorite bar. Because the area was unsafe, Drinker bought a handgun from a friend who sent it to Illinois from Florida. Drinker carried the handgun with him to and from the bar every night. One night Drinker was arrested and charged with possession of a firearm under 18 U.S.C. 922(g)(1). Drinker's only other offenses in his criminal history are the two DUI misdemeanors and three DUI felonies. Drinker pled guilty hoping to get a lenient sentence from the court.

If the judge decided to apply the Guidelines, Drinker would have a base offense level of 24 because the Guidelines specify a base level of 24 if a defendant committed the offense of possession of a firearm "subsequent to sustaining at least two felony convictions of...a crime of violence."<sup>154</sup> The Guidelines specify a number of points for certain offense behavior: Drinker would have 6 points for the two DUI felonies that he served three years each on because the Guidelines specify "3 points for each prior sentence of imprisonment exceeding one year and one month."<sup>155</sup> The judge would then add 2 points for the DUI felony that he served one year on because the Guidelines specify adding "2 points for each prior sentence of imprisonment of at least sixty days [that have not already been counted]."<sup>156</sup> Finally, the Guidelines would specify the judge to add 2 more points since Drinker was arrested just one year after he was released from serving time on his last DUI conviction.<sup>157</sup> Drinker would have a total of 10 criminal history points putting him in a criminal history category of V.<sup>158</sup> For a

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<sup>154</sup> U.S.S.G. § 2K2.1(2).

<sup>155</sup> U.S.S.G. § 4A1.1(a).

<sup>156</sup> U.S.S.G. § 4A1.1(b).

<sup>157</sup> U.S.S.G. § 4A1.1(e).

<sup>158</sup> See United States Sentencing Commission, 2005 Federal Sentencing Guidelines Manual, Chapter 5, Part A (2005), <http://www.ussc.gov/2005guid/gl2005.pdf>.

defendant with a base offense level of 24 and a criminal history category of V, the judge would impose a sentence between 92-115 months.<sup>159</sup> Thus, under the Guidelines, Drinker would receive a sentence between approximately 7.5 years and 9 years.<sup>160</sup>

If, on the other hand, Drinker had been charged under the ACCA, the judge would be required to impose at least a fifteen-year mandatory minimum, or 180 months.<sup>161</sup> This is nearly double the amount that Drinker would serve under the Guidelines.<sup>162</sup> Although § 4B1.2(a) of the Guidelines and § 924(e) of the ACCA have the same identical language, their effects are drastically different as the Drinker hypothetical illustrates.<sup>163</sup> The Seventh Circuit should distinguish drunk driving under § 924(e) of the ACCA from drunk driving under § 4B1.2(a) of the Guidelines because a crime of violence under the § 924(e) should encompass only truly violent crimes that deserve such severely heightened punishment.<sup>164</sup> The difference between § 4B1.2(a) and § 924(e) is a crime of violence that considers an advisory Guidelines-type enhancement and a crime of violence that mandates a more severe ACCA-type enhancement.<sup>165</sup> Because the ACCA imposes such an excessive penalty, the Seventh Circuit should have distinguished *Sperberg* from *Rutherford* by concluding that drunk

<sup>159</sup> *Id.*

<sup>160</sup> See United States Sentencing Commission, 2005 Federal Sentencing Guidelines Manual, Chapter 5, Part A (2005), <http://www.ussc.gov/2005guid/g12005.pdf>.

<sup>161</sup> See 18 U.S.C. § 924(e).

<sup>162</sup> See United States Sentencing Commission, 2005 Federal Sentencing Guidelines Manual, Chapter 5, Part A (2005), <http://www.ussc.gov/2005guid/g12005.pdf>.

<sup>163</sup> See 18 U.S.C. § 924(e); United States Sentencing Commission, 2005 Federal Sentencing Guidelines Manual, Chapter 5, Part A (2005), <http://www.ussc.gov/2005guid/g12005.pdf>.

<sup>164</sup> See *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992).

<sup>165</sup> See Oral Argument of Christopher Van Wagner, Attorney for Defendant-Appellant, Oral argument recording, *United States v. Ronald V. Sperberg*, No. 04-4135. (7th Cir. Dec., 2005). Seventh Circuit Court of Appeals, [http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-4135\(enter docket no. 04-4135\)](http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=04-4135(enter docket no. 04-4135)).

driving is not the type of conduct that warrants an ACCA-type penalty enhancement.<sup>166</sup> The Seventh Circuit should reconcile *Rutherford* in limiting the types of drunk driving crimes deserving of heightened punishment under the ACCA by adopting Judge Easterbrook's line of reasoning in his *Rutherford* concurrence and hold that a crime of violence exists where there is both assault and injury.<sup>167</sup>

### B. Applying *Ejusdem Generis*

Despite *Leocal*'s holding that drunk driving is not a "crime of violence," *Sperberg* expanded the predicate acts under the ACCA to include the drunk driving as a predicate violent crime.<sup>168</sup> The effect of *Sperberg* is that § 924(e)(2)(B)(ii)'s "otherwise involves" clause has been enlarged to include crimes of neglect despite the list of violent, active crimes that precedes the clause.<sup>169</sup> The term "otherwise," however, is an elastic term,<sup>170</sup> and *Leocal* instructs that when interpreting a statute that features an elastic term, the context of the term should be construed in light of the terms surrounding it.<sup>171</sup> Thus, the catch-all "otherwise involves" clause should be construed in light of the nature of violent, active crimes because specific statutory language should control more general language when there is conflict between them.<sup>172</sup>

<sup>166</sup> *Id.*

<sup>167</sup> See *United States v. Rutherford*, 54 F.3d 370, 378 (7th Cir. 1995).

<sup>168</sup> *United States v. Sperberg*, 432 F.3d 706, 709 (7th Cir. 2005).

<sup>169</sup> See 18 U.S.C. § 924(e)(2)(B)(ii).

<sup>170</sup> See *United States v. McCall*, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting) (citing to WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1984) (observing that "when used as an adverb, 'otherwise,' means (1) 'in a different way or manner'; (2) 'in different circumstances'; and (3) 'in other respects.' Depending on which definition of "otherwise" one chooses to apply, and which elements of the chosen definition one emphasizes, the "otherwise involves" provision can be read to support both the "any crimes" and "similar crimes" interpretations.

<sup>171</sup> *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004).

<sup>172</sup> *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002).

The Supreme Court instructs that “catch-all” provisions should be interpreted within the categories similar in type to those specifically enumerated within the statute.<sup>173</sup> When general words follow an enumeration of more specific items, the “sensible and long established” maxim of *ejusdem generis* limits the understanding of the general words to refer to the items belonging to the same class that is defined by the more specific terms in the list.<sup>174</sup> The doctrine of *ejusdem generis* does not apply “where there are no specific terms followed by general terms,<sup>175</sup> where all of the terms in the statute are general,<sup>176</sup> or where the terms in question are both specific in nature.”<sup>177</sup> Similarly, the doctrine should not be applied to restrict the general terms following a class of particular terms where the particular terms exhaust the class.<sup>178</sup>

Section 924(e)(2)(B)(ii) enumerates four specific crimes of burglary, arson, extortion, and those involving use of explosives followed by the catch-all provision “or otherwise involves conduct that presents a serious potential risk of physical injury to another.”<sup>179</sup> The specific crimes do not exhaust the types of “violent felonies” that may fall under the catch-all “otherwise involves” provision.<sup>180</sup> For

<sup>173</sup> Federal Mar. Comm’n v. Seatrain Lines, Inc., 411 U.S. 726, 734 (1973).

<sup>174</sup> Holder v. Hall, 512 U.S. 874, 917 (1994); *see also* Washington State Dep’t of Soc. & Health Servs. v. Guardianship Estate of Keffler, 537 U.S. 371, 384 (2003) (“Where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the proceeding specific words”); Norfolk & Western R. Co. v. Train Dispatchers, 499 U.S. 117, 129 (1991); *McCall*, 439 F.3d at 976 (Lay, J. dissenting).

<sup>175</sup> 82 John Bourdeau et al., Corpus Juris Secundum § 329(2006); *see also* State v. Tin Yan, 355 P.2d 25 (1960); Burke v. Sullivan, 265 P.2d 203 (1954); Bergen County Bd. Of Taxation v. Borough of Bogota, 250 A.2d 440 (Law Div. 1969).

<sup>176</sup> Bourdeau, *supra* note 175; *see also* Accident & Cas. Ins. Co. of Winterthur, Switzerland v. Cook, for Use of State, 33 S.E.2d 571 (1932); McNamara v. State, 181 N.E. 512 (1932).

<sup>177</sup> Bourdeau, *supra* note 175; *see also* Slocum v. Dep’t of Soc. Welfare, 580 A.2d 951 (1990).

<sup>178</sup> Bourdeau, *supra* note 175.

<sup>179</sup> 18 U.S.C. § 924(e)(2)(B)(ii).

<sup>180</sup> *See id.*

example, armed robbery may well be a violent crime that presents a serious potential risk of physical injury to another but armed robbery is not included amongst the enumerated specified crimes.<sup>181</sup> Analyzing 924(e)(2)(B)(ii) under the principle of *ejusdem generis*, the “otherwise involves” clause should not be read in isolation but should be construed to embrace only crimes similar in nature to the enumerated violent crimes.<sup>182</sup> In light of drunk driving’s non-violent nature, the “otherwise involves” clause should not be interpreted to encompass drunk driving offenses which are made felonious by state recidivist statutes but do not have elements of assault or injury to other persons.<sup>183</sup> Rather, the “otherwise involves” clause should be read to encompass only serious violent crimes that are similar in nature to burglary, arson, extortion, and those involving use of explosives.<sup>184</sup>

### C. Congressional Intent in Enacting the ACCA

The legislative history of the ACCA strongly reinforces the conclusion that the “otherwise involves” clause should be interpreted to include only crimes similar in nature to the enumerated crimes that precede it.<sup>185</sup> The history of the ACCA reveals that Congress focused its efforts on targeting career offenders—those who commit serious crimes as a means of livelihood<sup>186</sup> and whose occupation solely consists of “crime for profit.”<sup>187</sup> Interpreting the “otherwise involves” clause to include drunk driving and other crimes of neglect would thus make little sense, as no one can possibly make a livelihood from driving drunk since drunk driving “is not the result of plan, direction,

<sup>181</sup> *Id.*

<sup>182</sup> *Guardianship Estate of Keffler*, 537 U.S. at 384; *United States v. McCall*, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting).

<sup>183</sup> *United States v. McCall*, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting).

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> *See United States v. Taylor*, 495 U.S. 575, 587-8 (1990).

<sup>187</sup> H.R. Rep. 98-1073.

or purpose but of recklessness at worst and misfortune at best.”<sup>188</sup> Including drunk driving as predicate violent felony within the ACCA’s purview would not only be unusual, but it would open the door to permitting severe penalties for negligent crimes that were not meant for heightened punishment.<sup>189</sup> Because interpreting the “otherwise involves” clause in isolation produces an unusual and unjust result, the legislative history of the ACCA should be consulted “to verify that what seems to us an unthinkable disposition . . . was indeed unthought of.”<sup>190</sup>

When Congress enacted the ACCA in 1984, the sentence enhancement provision was contained in § 1202 and was targeted at convicted felons possessing a firearm who had three previous convictions for “robbery or burglary.”<sup>191</sup> In 1986, § 1202 was recodified as 18 U.S.C. § 924(e) by the Firearms Owners’ Protection Act, and just five months later, was amended again by the Career Criminal Amendments Act of 1986 to its present form.<sup>192</sup> The 1986 amendment expanded the predicate offenses triggering sentence enhancement from “burglary or robbery” to “a violent felony or serious drug offense.”<sup>193</sup>

The Report of the House Committee on the Judiciary, H.R. Rep. No. 99-849, (“Report”), indicates that during the 1986 debate hearings, Congress intended § 924(e)(2)(B)(i) to encompass offenses against *people* and § 924(e)(2)(B)(ii) to encompass offenses against

<sup>188</sup> United States v. Rutherford, 54 F.3d 370, 372 (7th Cir. 1995).

<sup>189</sup> See United States v. Doe, 960 F.2d 221, 225 (1st Cir. 1992).

<sup>190</sup> Green v. Bock Laundry Machine Co., 490 U.S. 504, 527 (Scalia, J. concurring).

<sup>191</sup> See Taylor, 495 U.S. at 581 (citing to Pub.L. 98-473, ch. 18, 98 Stat. 2185, 18 U.S.C.App. § 1202(a) (1982 ed., Supp. III) (repealed in 1986 by Pub.L. 99-308, § 104(b), 100 Stat. 459).

<sup>192</sup> Taylor, 495 U.S. at 581; United States v. McCall, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting).

<sup>193</sup> Taylor, 495 U.S. at 581; United States v. McCall, 439 F.3d 967, 979 (8th Cir. 2006) (Lay, J. dissenting).



*property*.<sup>194</sup> The Report explains that Congress intended § 924(e)(2)(B)(i) to include such “felonies involving physical force against a person such as murder, rape, assault, robbery, etc.”<sup>195</sup> The Report further explains that the other major discussion involved which offenses against *property* would qualify as predicate acts under the ACCA.<sup>196</sup> The Subcommittee agreed to add “State and Federal crimes 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.”<sup>197</sup> Congress’ determination that § 924(e)(2)(B)(ii) should encompass offenses directed against property and its reference to “similar crimes” indicates that the “otherwise involves” clause was intended to encompass crimes similar in nature to the violent, active crimes against property such as burglary, arson, extortion, and crimes that involves the use of explosives—not negligent crimes such as drunk driving.<sup>198</sup>

#### CONCLUSION

Driving under the influence of alcohol is among America’s deadliest crimes as alcohol and automobiles can be a lethal combination.<sup>199</sup> DUI is a nationwide problem and the legislature has

<sup>194</sup> See *McCall*, 439 F.3d at 979 (Lay, J. dissenting) (citing to H.R. Rep. No. 99-849).

<sup>195</sup> H.R. Rep. No. 99-849.

<sup>196</sup> *Id.* (emphasis in original).

<sup>197</sup> *Id.* (emphasis added); Ellen Martin, *U.S. DOT Releases 2005 Data on Alcohol-Related Traffic Fatalities; State, National Statistics Underscore Severity of Drunk-Driving Problem*, NHTSA, September 23, 2006, <http://www.nhtsa.dot.gov> (follow “In the News” hyperlink; then follow “U.S. DOT Releases 2005 Data on Alcohol-Related Traffic Fatalities; State, National Statistics Underscore Severity of Drunk-Driving Problem” hyperlink).

<sup>198</sup> H.R. Rep. No. 99-849.

<sup>199</sup> Ellen Martin, *U.S. DOT Releases 2005 Data on Alcohol-Related Traffic Fatalities; State, National Statistics Underscore Severity of Drunk-Driving Problem*, NHTSA, September 23, 2006, <http://www.nhtsa.dot.gov> (follow “In the News” hyperlink; then follow “U.S. DOT Releases 2005 Data on Alcohol-Related Traffic

put effort into prohibiting it and imposing appropriate penalties.<sup>200</sup> Drunk driving is with little doubt a very reckless act that poses serious risks to other motorists and pedestrians.<sup>201</sup> “After all,” the Court of Appeals for the Seventh Circuit has said, that is “why it is forbidden.”<sup>202</sup> But the dangers and seriousness of drunk driving “does not warrant [the court’s] shoehorning it into statutory sections where it does not fit.”<sup>203</sup> Drunk driving simply does not fit within the meaning of “violent felony” as defined by the ACCA. *Sperberg* incorrectly relied upon *Rutherford*, which is questionable in a post-*Leocal* world. The enhancements under the advisory Guidelines are also not nearly as severe as the mandatory minimum and maximum set by the ACCA. The Seventh Circuit’s expansion of the ACCA’s predicate acts to include drunk driving raises serious concerns of opening the door to include a host of negligent crimes that were not meant for severely heightened punishment. By reading the “otherwise involves” clause in isolation and disregarding Congress’ intent in enacting the ACCA, *Sperberg* produces an unusual, and unjust, result of punishing drunk drivers under an act targeted at rehabilitating chronic violent offenders and protecting the public from those whose occupation is crime for profit.

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Fatalities; State, National Statistics Underscore Severity of Drunk-Driving Problem” [hyperlink](#)).

<sup>200</sup> *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004).

<sup>201</sup> *United States v. Sperberg*, 432 F.3d 706, 708 (7th Cir. 2005).

<sup>202</sup> *Id.*

<sup>203</sup> *Leocal*, 543 U.S. at 13.