

2010

Violent Felonies under the Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun without a Permit Should Be Considered a Violent Felony

Jeffrey C. Bright

Follow this and additional works at: <https://dsc.duq.edu/dlr>



Part of the [Law Commons](#)

Recommended Citation

Jeffrey C. Bright, *Violent Felonies under the Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun without a Permit Should Be Considered a Violent Felony*, 48 Duq. L. Rev. 601 (2010).

Available at: <https://dsc.duq.edu/dlr/vol48/iss3/3>

This Article is brought to you for free and open access by Duquesne Scholarship Collection. It has been accepted for inclusion in Duquesne Law Review by an authorized editor of Duquesne Scholarship Collection.

Violent Felonies Under The Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun Without a Permit Should be Considered a Violent Felony

*“I don’t have to be careful, I got a gun.” Homer Simpson**

Jeffrey C. Bright†

I.	INTRODUCTION	602
II.	THE DANGER OF HANDGUNS	604
III.	THE EVOLUTION OF THE ACCA: TRACING THE ACT FROM ITS ORIGINS TO ITS CURRENT STATE	605
	A. <i>Origins of the ACCA</i>	606
	B. <i>The Current ACCA</i>	608
	C. <i>A Review of Case Law Addressing Whether Carrying a Concealed Handgun Constitutes a Violent Felony</i>	612
IV.	<i>BEGAY V. UNITED STATES: A RECENT SUPREME COURT DECISION CONCERNING THE ACCA’S RESIDUAL CLAUSE</i>	613
V.	AN APPLICATION OF <i>BEGAY</i> : DEMONSTRATING THAT CARRYING A CONCEALED HANDGUN PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY, AND THAT IT SATISFIES THE THREE CHARACTERISTICS OF A VIOLENT FELONY.....	618
	A. <i>Presents a Serious Potential Risk of Physical Injury: Begay’s First Prong</i>	619
	1. <i>The Inherent Danger of Unlawfully Carrying a Concealed Handgun as a Violent Felony</i>	619
	2. <i>Carrying Concealed Handguns and the Violent Felony of Escape: Two Continuing Crimes that Present a Serious Risk of Potential Injury to Another</i>	621
	3. <i>You Talking to Me?: Why Certain People with a Concealed Handgun Are Dangerous</i>	622
	B. <i>Begay’s Second Prong, Three Characteristics of a Violent Felony:</i>	

	<i>Purposeful, Violent, and Aggressive</i>	624
C.	<i>Shooting Oneself in the Foot: How the Archer Court Incorrectly Applied Begay</i>	625
VI.	PROPOSAL OF AN EXTENSION OF THE MODIFIED CATEGORICAL APPROACH THAT WILL FLEXIBLY PROVIDE FOR DETERMINATION OF DANGEROUS ELEMENTS OF CARRYING CONCEALED HANDGUN STATUTES.....	628
VII.	AN AMENDMENT TO FIX THE ACCA.....	631
A.	<i>The ACCA Has Not Prevented the Proliferation of Handguns</i>	631
B.	<i>An Amendment to the ACCA that Uniformly Sentences Carrying Concealed Handgun Convictions</i>	633
VIII.	CONCLUSION	636

I. INTRODUCTION

The Armed Career Criminal Act (ACCA), a sentencing enhancement, provides that a “violent felony” includes “conduct that presents a serious potential risk of physical injury to another.”¹ Currently, various federal district and circuit courts disagree on whether illegally carrying a concealed firearm constitutes a violent felony under the ACCA. The Sixth and Eighth Circuits, as well as the district court for the district of Kansas, hold that it is not a violent felony.² The Eleventh Circuit, however, holds that it is a violent felony.³ Interestingly, the United States Supreme

* *The Simpsons: The Cartridge Family* (Fox television broadcast Nov. 2, 1997).

† A.B., Franklin and Marshall College; J.D., *summa cum laude*, Thomas Jefferson School of Law. Associate at Stock and Leader, LLP, York, Pennsylvania. The author thanks Jennifer Dockter, Hayley Clair, Stephen Zeller, and Jessica Flynn for their thoughts and advice on this article. And a special thank you to my wife, Beth, for her support of all my pursuits.

1. 18 U.S.C. § 924(e) (2006).

2. *United States v. Flores*, 477 F.3d 431, 435-36 (6th Cir. 2007) (holding that carrying a concealed weapon is not a violent felony); *United States v. Whitfield*, 907 F.2d 798, 800 (8th Cir. 1990) (holding that carrying a concealed weapon is not a violent felony); *United States v. Crawley*, 213 F. Supp. 2d 1250, 1256 (D. Kan. 2002) (holding that carrying a concealed weapon in violation of MO. REV. STAT § 571.030.1(1) (2002) is not a violent felony).

3. *United States v. Hall*, 77 F.3d 398, 402 (11th Cir. 1996) (holding that carrying a concealed weapon is a violent felony under the ACCA). *Hall* has been questioned by *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008), which held that *Begay v. United States*, 553 U.S. 137 (2008), abrogated *United States v. Gilbert*, 138 F.3d 1371 (11th Cir. 1998); thus, carrying a concealed weapon is not a “crime of violence” under the United

Court may have weakened the Eleventh Circuit's ruling. In *Begay v. United States*,⁴ the Court held that driving under the influence does not qualify as a violent felony under the ACCA.⁵ Because the Court did not squarely address whether carrying concealed handguns constitutes a violent felony, the issue remains.⁶

This article argues that carrying a concealed handgun is dangerous,⁷ and illegally carrying a concealed handgun should be a violent felony under the ACCA.⁸ Additionally, it recommends Congress amend the ACCA's definition of "violent felony" so that it applies uniformly to laws regulating the illegal carrying of concealed handguns. Part II of this article introduces background facts regarding the dangers of firearms, particularly emphasizing handguns, which are very easily concealed. Part III discusses the legislative history and relevant case law of the ACCA and Congress's purpose and objective in enacting the legislation. Part IV discusses the Supreme Court's recent decision in *Begay v. United States*, which held that driving under the influence was not a violent felony.⁹ Part V applies *Begay's* rationale to violations for ille-

States Sentencing Guideline section 4B1.2. *Archer*, 531 F.3d at 1352. And since a "crime of violence" is identical to a "violent felony" under the ACCA, it is possible that *Archer* undermined *Hall*. *Id.*

4. 553 U.S. 137, 148 (2008).

5. *Archer*, 531 F.3d at 1352 (holding that *Begay* abrogates *United States v. Gilbert*, and since *Gilbert* relied on *Hall*, it is possible that *Hall* is abrogated); see also *Hunter*, 559 F.3d at 1190 (*Archer* "stated, in dicta, that carrying a concealed weapon is not a violent felony under the [ACCA].").

6. Even as recently as January 13, 2009, Justice Alito has included the issue of carrying a concealed weapon as a circuit split. See *Chambers v. United States*, 129 S.Ct. 687, 694 n.2 (2009) (Alito, J., concurring, joined by Thomas, J.).

7. See *United States v. Carswell*, 144 F. Supp. 2d 123, 132 (N.D.N.Y. 2001) (dictum) (discussing that possession of a gun creates some risk that it will be used in violence); FEDERAL BUREAU OF INVESTIGATION, U.S. DEPT OF JUSTICE, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 2005, at tbl. 7 (2006), available at http://www.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_07.html [hereinafter UNIFORM CRIME REPORT]. Of the 14,860 recorded murders in 2005, 10,100 were committed with a firearm. *Id.*

8. This article specifically argues that carrying a concealed handgun without a permit is a violent felony under the ACCA. For an example of various ways to violate a concealed handgun statute, see, e.g., MO. ANN. STAT. § 571.030 (West 2003). There are generally three ways to violate a concealed carrying law. One way is for a person with a permit to carry concealed handguns to commit a strict liability, technical violation. For example, the person may inadvertently walk within twenty-five feet of a polling station with a concealed handgun. See, e.g., *id.* § 571.107(1)(2). The second way to violate a concealed carry law is for a person to commit an improper act with a handgun. For example, the person possesses or discharges a firearm while intoxicated. See, e.g., *id.* § 571.030(1)(5). A third way to violate a concealed carry law is to carry a concealed weapon without ever receiving a permit to do so. See, e.g., *id.* § 571.030(1)(1).

9. *Begay*, 553 U.S. at 148 ("We consequently conclude that New Mexico's crime of 'driving under the influence' falls outside the scope of the Armed Career Criminal Act's

gally carrying concealed firearms and argues that illegally carrying a concealed firearm presents a serious potential risk of injury to another, which is similar to the enumerated crimes of the ACCA. Part VI proposes a new, extended categorical approach that will focus on the dangerous elements of carrying concealed handguns. Part VII proposes an amendment to the ACCA that strengthens the ability to punish dangerous persons who carry concealed handguns, and discusses how this amendment will lead to a more satisfactory fulfillment of the ACCA's objectives.

II. THE DANGER OF HANDGUNS

Firearms are dangerous because of their potential to create immediate and devastating injury.¹⁰ A sampling of statistics from several reports published by bureaus within the Department of Justice confirms this. In 2005, for example, firearms were the primary weapons used to commit murder in the United States, accounting for nearly sixty-eight percent of all domestic murders.¹¹ In addition, just over forty-two percent of all robberies reported in 2005 were committed with a firearm.¹² Notably, most of these firearms crimes were committed with handguns.¹³ Indeed, seventy-five percent of the firearms murders committed in the United States were committed with *handguns*, making handguns the weapon of choice in approximately *half* of all domestic murders.¹⁴ Moreover, handguns were used in approximately sixty-four percent of murders committed during robberies and forty-seven percent of murders committed during burglaries.¹⁵

Clause (ii) 'violent felony' definition. And we reverse the judgment of the Court of Appeals in relevant part and remand the case for proceedings consistent with this opinion.").

10. See *United States v. Carswell*, 144 F. Supp. 2d 123, 132 (N.D.N.Y. 2001) (dictum) (discussing that possession of a gun creates some risk that it will be used in violence).

11. UNIFORM CRIME REPORTS TABLE 7, *supra* note 7. Of the 14,860 recorded murders in 2005, 10,100 were committed with a firearm. *Id.*

12. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CRIMES COMMITTED WITH FIREARMS, 1973-2006 (2006), available at <http://bjs.ojp.usdoj.gov/content/glance/tables/guncrimetab.cfm>.

13. Marianne W. Zawitz, *Guns Used in Crime*, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS, July 1995, at 1, 4, available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/GUIC.PDF> (noting that Handguns predominate in firearms crime, and that in 1994, more than three-quarters of the 85,132 guns traced by the ATF were handguns). Criminals prefer handguns because they are concealable. *Id.* In fact, the Maryland legislature found that a high percentage of violent crimes involve handguns and that many deaths and injuries are the result of criminals carrying handguns in public places. MD. CODE ANN., CRIM. LAW § 4-202 (LexisNexis 2002).

14. *Id.*

15. See U.S. DEP'T OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES 2005, at tbl. 10 (2006), available at

While the use of firearms all too frequently occurs in these felony-type circumstances, they are also used, more often in fact, in other circumstances.¹⁶ For example, romantic triangles were related to 117 murders, fifty-two percent of which were committed with a handgun.¹⁷ Brawls due to the influence of alcohol were related to 120 murders, thirty-five percent of which were committed with a handgun.¹⁸ Brawls due to the influence of narcotics were related to ninety-seven murders, sixty-one percent of which were committed with a handgun.¹⁹ Arguments over money or property were related to 211 murders, fifty-eight percent of which were committed with handguns.²⁰ Astonishingly, other various arguments were related to 3,692 murders, forty-eight percent of which were committed with handguns.²¹ This means that a person is far more likely to be killed by a handgun in connection with a brawl or argument than from a rape, robbery, or burglary.²²

III. THE EVOLUTION OF THE ACCA: TRACING THE ACT FROM ITS ORIGINS TO ITS CURRENT STATE

Although many people in the United States have always viewed gun control as a controversial issue,²³ three significant acts of gun violence in the 1960s brought national attention to the gun debate.²⁴ In 1963, John F. Kennedy was assassinated.²⁵ Then in

http://www.fbi.gov/ucr/05cius/offenses/expanded_information/data/shrtable_10.html [hereinafter UNIFORM CRIME REPORT]. This *Report* states that of the 921 murders from robberies, 698 were committed with a firearm, and 588 of those involved the use of a handgun; of the 88 murders from burglaries, 51 were committed with a firearm, and 41 of those involved the use of a handgun; and of the 44 murders from rapes, only 4 were committed with a firearm, but 3 of those 4 involved the use of a handgun. *Id.*

16. *See id.* Of the 14,860 murders in 2005, felonies including but not limited to rape, robbery, burglary, theft, arson, and narcotics violations constituted 2161 murders. These are known as some of the more violent crimes, yet *argument* related conflicts resulted in more homicides: romantic triangles, children killed by a babysitter, brawls induced by drugs or alcohol, arguments, gang related activity, and other causes constituted 7044 murders. *Id.* *See* State v. Chippey, 33 A. 438, 438 (1892) (dictum) (stating that persons who are angered or intoxicated may use a pistol when it is immediately accessible).

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. UNIFORM CRIME REPORT TABLE 10, *supra* note 15.

22. *See id.*

23. *See* Clayton E. Cramer, *The Racist Roots of Gun Control*, KAN. J.L. & PUB. POL'Y, Winter 1995, at 17, 17 (discussing America's first use of gun control and its ties to racism).

24. *See* Nicholas J. Johnson, *Imagining Gun Control in America: Understanding the Remainder Problem*, 43 WAKE FOREST L. REV. 837, 840 n.12 (2008) ("In the 1960s after the assassinations of President John F. Kennedy, Dr. Martin Luther King, Jr., and Senator

1968, both Martin Luther King Jr. and Robert F. Kennedy were assassinated.²⁶ All three assassins used firearms. In response to this gun violence, Congress enacted stringent gun control legislation.²⁷

A. *Origins of the ACCA*

In the late 1960s, Congress sought to increase public safety by restricting dangerous individuals from owning guns.²⁸ Congress believed that restricting these individuals' ability to obtain firearms would decrease violent crime.²⁹ Because of this belief, Congress passed, inter alia, the Gun Control Act of 1968.³⁰ The Gun Control Act prohibited felons, and others deemed unsafe, from owning firearms.³¹

Later, Congress enacted the Armed Career Criminal Act of 1984, which amended the Gun Control Act and brought career

Robert F. Kennedy, it [gun control] became a major subject of public passion and controversy").

25. John F. Kennedy, 6 *THE NEW ENCYCLOPEDIA BRITANNICA: MICROPAEDIA* 798 (15th ed. 2003).

26. See David T. Hardy, *The Firearms Owner's Protection Act: A Historical and Legal Perspective*, 17 *CUMB. L. REV.* 585, 601-02 (1987) (discussing the impact of Martin Luther King Jr. and Robert F. Kennedy's assassinations on gun control laws).

27. See Katheryn L. Munger, Comment, *Foreign Felons—Firearms and Beyond: The Implications of Small v. United States and the Proposed Amendments to 18 U.S.C. § 922(g)(1)*, 38 *U. TOL. L. REV.* 467, 468-69 (2006) (discussing the impact of John F. Kennedy's, Robert F. Kennedy's, and Martin Luther King Jr.'s assassinations on gun control laws).

28. *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (citing Pub. L. No. 90-351, § 1201, 82 Stat. 236 (1968), as amended by Pub. L. No. 90-618, § 301(a)(1), 82 Stat. 1236 (1968) (codified at 18 U.S.C.A. § 1201 (2006)) ("When Congress enacted the provisions . . . it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest.").

29. *Id.* (citing S. REP. NO. 90-1097, at 108 (1968) (Conf. Rep.) ("Congress had determined that the ease with which firearms could be obtained contributed significantly to the prevalence of lawlessness and violent crime in the United States.")).

30. Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213 (codified at 18 U.S.C. §§ 921-27 (2006)). Congress also passed the Omnibus Crime Control and Safe Streets Act in 1968. Pub. L. No. 90-351, 82 Stat. 197 (1968) (codified as amended in scattered sections of 5, 18 U.S.C.). Due to complex legislative procedures, both the Gun Control Act and the Omnibus Crime Control and Safe Streets Act were passed in a short time-span. See Hardy, *supra* note 26, at 603 ("The resulting legislation, under the now-familiar name of 'The Gun Control Act of 1968,' supplanted both the earlier enactment of Titles IV and VII [of The Omnibus Crime Control and Safe Streets Act] and large portions of the National Firearms Act.").

31. Cynthia R. Cook, Note, *The Armed Career Criminal Act Amendment: A Federal Sentence Enhancement Provision*, 12 *GEO. MASON L. REV.* 99, 99 (1989).

offenders within its scope.³² Congress had determined that a limited number of criminals were responsible for “an extraordinary large volume of crime.”³³ Thus, the amendment’s purpose was to “curb armed, habitual (career) criminals.”³⁴ The ACCA of 1984 focused on habitual robbers and burglars because Congress believed that such crimes were some of the most damaging to society³⁵ and, thus, provided a mandatory minimum sentence of fifteen years for felons in possession of a firearm who had three prior convictions for robbery or burglary.³⁶

In 1986, Congress passed the Firearms Owners’ Protection Act (FOPA), which recodified the ACCA as 18 U.S.C. § 924(e).³⁷ Congress believed the Gun Control Act of 1968, although it targeted criminals, also allowed for prosecution of innocent citizens who made slight and easily correctable mistakes.³⁸ The FOPA’s purpose was to relieve legally compliant firearm owners and dealers from “unnecessary burdens under the Gun Control Act of 1968,” while still providing law enforcement with the ability to fight violent crime.³⁹ The recodification of the ACCA at Section 924 established the ACCA as a sentencing enhancement provision.⁴⁰

Five months after enactment of the FOPA, the Career Criminals Amendment Act of 1986 amended Section 924(e).⁴¹ The amendment broadened the ACCA’s application beyond the traditional

32. Armed Career Criminal Act of 1984, Pub. L. No. 98-473, 98 Stat. 1837 (codified at 18 U.S.C. § 1202 (2006)). See Cook, *supra* note 31, at 102 (stating that the ACCA was added to section 1202(a) of the Gun Control Act of 1968).

33. H.R. REP. NO. 98-1073, at 2 (1984), reprinted in 1984 U.S.C.C.A.N. 3661, 3662.

34. *Id.* at 1.

35. *Id.* at 3.

36. Armed Career Criminal Act of 1984, §§ 1801-1803 (current version at 18 U.S.C. § 924(e) (2006)).

37. Firearms Owners’ Protection Act, Pub. L. No. 99-308, 100 Stat. 449 (codified as amended in scattered sections of 18 and 26 U.S.C. (2006)). See also Taylor v. United States, 495 U.S. 575, 582 (1990) (citing Pub. L. No. 99-308, § 104, 100 Stat. 458 (1986)) (noting the recodification of the ACCA); *Firearms Owners’ Protection Act: Hearing on H.R. 945 Before the H. of Rep.*, 99th Cong. ____ (1985) (statement of Larry Craig, Republican, Representative of Idaho) (“It targets those who knowingly sell weapons to those who are prohibited from owning them . . . as well as those who use them for purposes contrary to the interests of our society.”).

38. “[I]nnocent citizens . . . who have done nothing wrong more criminal than to own a gun or . . . [made] some slight mistake in a bookkeeping error that is easily correctable.” *Firearms Owners’ Protection Act: Hearing on H.R. 945 Before the H. of Rep.*, 99th Cong. ____ (1985) (statement of Larry Craig, Republican, Representative of Idaho).

39. H.R. REP. NO. 99-495, at 1 (1986), reprinted in 1986 U.S.C.C.A.N. 1327, 1327.

40. Cook, *supra* note 31, at 103.

41. Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402, 100 Stat. 3207. The Career Criminals Amendment Act of 1986 is part of the Anti-Drug Abuse Act of 1986, § 1402, 100 Stat. 3207 (codified as amended in scattered sections of 5, 10, 15, 16, 18, 19, 20, 21, 22, 25, 31, 42, 47, 48 U.S.C.).

categories of robbers and burglars. The ACCA would now include violent offenders and drug dealers as well.⁴² Congress's broadening of the ACCA focused on crimes inherently and potentially dangerous because they result in physical injury to a victim.⁴³ The current ACCA's main components derive from this amendment.⁴⁴

In summary, the ACCA is a direct result of Congress's attempt to curb gun violence. First, the Gun Control Act attempted to prevent dangerous individuals from receiving firearms. The ACCA followed, imposing severe penalties on the criminal use of firearms. Finally, Congress enacted the FOPA, which had two purposes: limit the burden of gun control laws on law-abiding citizens and provide strong prosecution of felons in possession of firearms.⁴⁵

B. *The Current ACCA*

The ACCA is a sentencing enhancement provision aimed at criminals who have previously committed specific felonies and who illegally possess firearms.⁴⁶ In particular, an individual convicted of unlawful possession of a firearm receives a sentence enhancement if he has three previous convictions for either a "violent felony" or a "serious drug offense."⁴⁷ The sentence enhancement mandates a minimum of fifteen years in prison without parole.⁴⁸ For purposes of the ACCA, a violent felony is any conviction punishable by a term exceeding one year⁴⁹ that either: (1)

42. *Taylor v. United States*, 495 U.S. 575, 583-84 (1990).

43. *Taylor*, 495 U.S. at 585-87.

44. *Compare* Career Criminals Act § 1402 with 18 U.S.C. § 924(e). In particular, this amendment added the residual clause, which is now § 924(e). *Id.*

45. Note that many courts have looked to the legislative history of the ACCA when attempting to interpret § 924(e). These courts have found it mostly unhelpful. In *Taylor v. United States*, Justice Scalia noted:

I join in the Court's opinion except for Part II, which examines in great detail the statute's legislative history. The examination does not uncover anything useful . . . I can discern no reason for devoting 10 pages of today's opinion to legislative history, except to show that we have given this case close and careful consideration. We must find some better way of demonstrating our conscientiousness.

Taylor v. United States, 495 U.S. 575, 603 (1990) (Scalia, J., concurring in part and concurring in the judgment).

46. *See* § 924(e); 18 U.S.C. § 922(g) (2006) (clarifying the punishment requirements of the ACCA).

47. § 924(e)-(e)(A) (defining a serious drug offense). Although a serious drug offense qualifies as a predicate conviction under the ACCA, that aspect of the ACCA is beyond the scope of this article.

48. § 924(e).

49. § 924(e)(2)(B).

“ha[s] as an element the use, attempted use, or threatened use of physical force against the person of another,”⁵⁰ or (2) is a “burglary, arson, or extortion, involves the use of explosives or otherwise involves conduct that presents a serious potential risk of physical injury to another.”⁵¹ The italicized phrase is called the residual clause of the ACCA.⁵² The specific crimes of burglary, arson, extortion, and use of explosives are called the “enumerated crimes” of the ACCA.⁵³

Application of the ACCA can be parsed into two distinct components. First, the prior convictions must be punishable by imprisonment for more than one year.⁵⁴ Congress has considerably narrowed this component, however, by excluding certain business crimes and misdemeanors punishable by a term of imprisonment of two years or less.⁵⁵

Second, the crime must be a “violent felony” or “serious drug offense.”⁵⁶ In *Taylor v. United States*, the Supreme Court examined whether burglary as defined by Missouri law sufficed as burglary under the ACCA’s enumerated crimes.⁵⁷ Burglary is an enumerated crime because it is one of the specified crimes in the ACCA.⁵⁸ Each state, however, independently defines burglary and its punishment. Thus, a uniform categorical approach, as opposed to various burglary definitions, was required to ensure that uniform elements of burglary trigger the ACCA sentence enhancement.⁵⁹

50. § 924(e)(2)(B)(i). Although such elements of force against another person qualify as a predicate conviction under the ACCA, that aspect of the ACCA is beyond the scope of this article.

51. § 924(e)(2)(B)(ii) (emphasis added). The language, “burglary, arson or extortion, involves the use of explosives,” is referred to as the “enumerated offenses” under the ACCA’s definition of a violent felony. *Begay v. United States*, 553 U.S. at 148 (J. Scalia, concurring). The language, “or otherwise involves conduct that presents a serious potential risk of physical injury to another,” is referred to as the “residual clause” under the ACCA’s definition of a violent felony. *Id.* It is under this language that carrying a concealed handgun should be considered a violent felony. *Id.*

52. *See Begay*, 553 U.S. at 148.

53. *James v. United States*, 550 U.S. 192-93 (2007).

54. *Begay*, 553 U.S. at 148; *see also* § 924(e)(2)(B).

55. 18 U.S.C. § 921(a)(20) (2006). “[A]ny Federal or State offense pertaining to anti-trust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices” is not a crime with punishment exceeding one year. § 921(a)(20)(A). In addition, “[A]ny State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less” is not a crime with punishment exceeding one year. § 921(a)(20)(B).

56. § 924(e). This article addresses only the violent felony prong of predicate offenses under ACCA.

57. *See Taylor*, 495 U.S. at 602.

58. § 924(e)(2)(B)(ii).

59. *See Taylor*, 495 U.S. at 598-602. Congress’s language in § 924(e)(2)(B)(ii) meant the generic version of the crimes of burglary, arson, and extortion. *Id.* at 589. Therefore, when

Many different interpretations of burglary under the ACCA existed prior to *Taylor*. Some courts defined burglary according to state law, while others used the common law definition.⁶⁰ Still others based their definition of burglary on the statutory predecessor to the ACCA.⁶¹ Others conducted case-by-case inquiries to determine whether burglary, as defined by state statute, involves conduct that presents a serious potential risk of injury to another.⁶²

According to *Taylor*, Congress intended certain specific elements to trigger the ACCA's sentence enhancement.⁶³ The Court determined that Congress did not intend the meaning of burglary to be dependent on individual state definitions⁶⁴ because such a statutory interpretation allows for crimes labeled burglary in one state to fall within the sentencing enhancements of the ACCA, while crimes of a similar nature would fall outside the enhancement simply because a different state's legislature labeled the crime differently.⁶⁵ Congress did not intend for such "odd results."⁶⁶ Rather, Congress had a "generic" view of burglary, roughly corresponding to the definitions of burglary in a majority of the States' criminal codes.⁶⁷

Taylor then concluded that a categorical approach was the correct method to determine whether a state conviction for burglary qualifies as generic burglary.⁶⁸ This categorical approach does not look at particular facts underlying a conviction, but instead "look[s] only to the fact of conviction and the statutory definition of the prior offense" to determine if a generic burglary had occurred.⁶⁹

determining if a specific state's burglary, arson, or extortion statute qualified as a violent felony under the ACCA, a court must compare the state's statute to the generic definitions of such crimes. *Id.* at 598-602.

60. *Id.* at 580 n.2.

61. *Id.*

62. *Id.*

63. *Id.* at 588.

64. *Taylor*, 495 U.S. at 590 (stating it was "implausible" for Congress to intend the states to control the meaning of the federal statute's term).

65. *Id.* at 590-91.

66. *Id.* at 592-93.

67. *Id.* at 598. "Generic" is a term of art used by the *Taylor* Court referring to the type of crime Congress intended to be included as a violent felony. *Id.* The Court also rejected a common law interpretation of burglary as Congress's intent because Congress did not intend for antiquated versions of burglary to be a violent felony. *Id.* at 593-95 ("This Court has declined to follow any rule that a statutory term is to be given its common-law meaning, when that meaning is obsolete or inconsistent with the statute's purpose.").

68. *Id.* at 600.

69. *Taylor*, 495 U.S. at 602.

Under limited circumstances, however, courts may consider more than the fact of conviction and the statutory definition of the prior offense. In situations where the state statute has a broader meaning than the generic offense, the court applies a modified categorical approach.⁷⁰ The modified categorical approach allows courts to look at charging papers and jury instructions to determine whether the jury found elements of the generic offense when convicting the defendant.⁷¹

Shepard v. United States clarified the modified categorical approach.⁷² *Shepard* held that a court may not look at police reports or complaint applications when determining whether the defendant was convicted of the generic offense.⁷³ But courts may look at statutory definitions, charging documents, written plea agreements, transcripts of the plea colloquy, and any explicit factual finding by the trial judge assented to by the defendant while entering a plea.⁷⁴

In summary, Congress attempted to enact gun control legislation that allowed for gun ownership by law-abiding citizens while, at the same time, penalizing criminal use and criminal possession of guns. The ACCA furthers these objectives by deterring career violent felons from firearm possession and subjecting them to longer prison sentences. Generally, courts apply a categorical approach to the ACCA and refrain from delving into the specific facts of the prior convictions. But in narrow circumstances, when the statute provides for some conduct that qualifies as a violent felony and other conduct that does not qualify as a violent felony, a court applies the modified categorical approach by examining other evi-

70. See, e.g., *United States v. Grisel*, 488 F.3d 844, 847 (9th Cir. 2007) (noting that when the court looks to not only the conviction, but also information such as the jury instructions, it is called the “modified categorical approach”); *United States v. Cook*, 26 F.3d 507, 509 (4th Cir. 1994) (looking to extra information in addition to the conviction because it was unclear whether the use of force was present while committing the obstruction of justice).

71. *Taylor*, 495 U.S. at 602. The Court gives an illustration of this situation as well. Suppose that a state statute for burglary includes entry of an automobile or entry into a building. Entry of the automobile does not constitute generic burglary; however, entry of the building constitutes generic burglary. The court may look to the charging documents and the jury instructions to determine the specific subsection of the statute which conviction resulted from. *Id.*; see also *United States v. Cadieux*, 500 F.3d 37, 42 (1st Cir. 2007) (holding that illegal entry into an aircraft is not included in the generic definition of burglary).

72. 544 U.S. 13, 16 (2005).

73. *Shepard*, 544 U.S. at 16.

74. *Id.*

dence concerning which elements of the statute resulted in conviction.

C. *A Review of Case Law Addressing Whether Carrying a Concealed Handgun Constitutes a Violent Felony*

Presently, there is a circuit split regarding whether carrying a concealed handgun presents a serious risk of physical injury to another, i.e., whether it is a violent felony.⁷⁵ In *United States v. Whitfield*, the Eighth Circuit held that carrying a concealed weapon is not a violent felony.⁷⁶ The Eighth Circuit determined that “although carrying an illegal weapon may involve a continuing risk to others, the harm is not so immediate as to present a serious potential risk of physical injury to another.”⁷⁷

The Sixth Circuit, in *United States v. Flores*, agreed with *Whitfield* and held that carrying a concealed weapon was not a violent felony.⁷⁸ The *Flores* Court reasoned that a violent felony required active conduct or use, rather than simple possession.⁷⁹ The court cited *United States v. Oliver* in support of this proposition, which held that a felon in possession of a firearm did not present a serious potential risk of physical injury to another.⁸⁰ The court further noted Michigan’s allowance of citizens to carry concealed weapons, if they have a permit to do so, as proof that such activity was not overtly dangerous.⁸¹

75. Compare *Hall*, 77 F.3d at 402 (holding that carrying a concealed weapon is a violent felony under the ACCA), with *United States v. Whitfield*, 907 F.2d 798, 800 (8th Cir. 1990) (holding that carrying a concealed weapon is not a violent felony), *United States v. Crawley*, 213 F. Supp. 2d 1250, 1256 (D. Kan. 2002) (holding that carrying a concealed weapon and a violation of MO. REV. STAT § 571.030.1(1) (2002) is not a violent felony), and *United States v. Flores*, 477 F.3d 431, 438 (6th Cir. 2007) (holding that carrying a concealed weapon is not a violent felony). Although the Eleventh Circuit later held in *Archer v. United States* that carrying concealed handguns is not a crime of violence, the court still held that it presents a serious potential risk of physical injury to another person. *Archer*, 531 F.3d at 1350. And, *Archer* applied a United States Sentencing Guidelines statute, not the ACCA. *Id.* at 1348. Thus, the circuit courts are still split on whether carrying concealed handguns present a serious potential risk of physical injury to another.

76. *Whitfield*, 907 F.2d at 800.

77. *Id.*

78. *Flores*, 477 F.3d at 435, 38.

79. *Id.* at 436.

80. See *id.* at 437 n.3 (citing *United States v. Oliver*, 20 F.3d 415, 417 (11th Cir. 1994) (holding that possession of a firearm by a convicted felon is not a crime of violence)). Many courts have held that a crime of violence is synonymous with a violent felony. See *id.* (stating that crime of violence under 18 U.S.C. § 4B1.2 (2006) is identical to violent felony under the ACCA); *Stinson v. United States*, 508 U.S. 36, 47 (1993) (holding that possession of a firearm by a convicted felon is not a crime of violence).

81. *Flores*, 477 F.3d at 438.

The U.S. District Court for the District of Kansas similarly held in *United States v. Crawley* that carrying a concealed weapon is not a violent felony.⁸² The *Crawley* court concluded that “the imminence or likelihood of violence associated with a person carrying a weapon is [not] appreciably different from that presented when the weapon is simply otherwise readily available to a person.”⁸³

Contrarily, in *United States v. Hall*, the Eleventh Circuit held that carrying a concealed weapon is a violent felony because it went beyond the mere possession of a firearm and is an active-conduct crime.⁸⁴ “Active conduct” simply means that the conduct involves “exerting will on the external world.”⁸⁵ The court distinguished active conduct from mere possession, because a weapon could be possessed constructively and safely in a felon’s basement.⁸⁶ Conversely, carrying a concealed weapon requires the additional step of keeping the gun available for immediate use against another person.⁸⁷

IV. *BEGAY V. UNITED STATES*: A RECENT SUPREME COURT DECISION CONCERNING THE ACCA’S RESIDUAL CLAUSE

In *Begay v. United States*, the Supreme Court held that driving under the influence is not a violent felony under the ACCA.⁸⁸ In a six-to-three decision, the Court focused on two issues for determining whether a particular act constitutes a violent felony: (1)

82. *Cawley*, 213 F. Supp. 2d at 1256.

83. *Id.* at 1256. The court’s reasoning is creative, yet flawed. It is true that there is no more risk from a person carrying a gun compared to a person *stationary* with a gun at their immediate disposal. Note the use of the word *stationary*, because a person cannot be mobile with a gun immediately at their disposal unless they are carrying it. This, however, is an incorrect application of the ACCA. Contrary to the district court’s assumption, risk is not measured in a vacuum. The measurement of risk is the ordinary amount of risk than is a result of the conduct. Certainly the probability of harm from a person carrying a concealed handgun is higher than the probability of harm from a person stationary with a handgun at their disposal in the ordinary situation. See *James v. United States*, 550 U.S. 192, 208 (2007) (“[Not] every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony.”). Also, carrying a concealed handgun is distinguishable from possession with immediate accessibility because carrying a concealed weapon involves the extra step of active conduct of carrying the weapon. See *Hall*, 77 F.3d at 402 (holding that carrying a concealed weapon is a violent felony under the ACCA).

84. *Hall*, 77 F.3d at 401.

85. BLACK’S LAW DICTIONARY 337 (9th ed. 2009).

86. *Hall*, 77 F.3d at 401 (“The pertinent language of the ACCA does not include simple possession of a firearm.”).

87. *Id.* (stating that the weapon must be “on or about the person” meaning physically on the person and readily accessible by him).

88. *Begay*, 553 U.S. at 148.

whether the conduct presents a serious potential risk of physical injury to another, and (2) whether the conduct is similar to the enumerated offenses.⁸⁹ The Court found that the first issue was satisfied because driving under the influence presents a serious potential risk of physical injury to another.⁹⁰ But driving under the influence was still not a violent felony because it is not similar to the enumerated offenses.⁹¹

To determine whether a crime is similar to the enumerated offenses of the ACCA, the Court introduced three characteristics common to the enumerated offenses—the conduct must be purposeful, violent, and aggressive.⁹² The Court focused on the offender's intent when analyzing the purposeful characteristic. The Court opined that the crime of driving under the influence is more similar to a strict liability crime, as opposed to an intentional enumerated crime such as extortion.⁹³ Thus, the Court concluded that the offender did not have the level of intent necessary for an enumerated crime.⁹⁴ The Court also noted the public policy be-

89. *Id.* at 142 (stating that the enumerated crimes presence “indicates that the [residual clause] covers only *similar* crimes, rather than *every* crime that ‘presents a serious potential risk of physical injury to another’”). *Begay* also noted that “a strict liability crime, differs from a prior record of violent and aggressive crimes committed intentionally such as [the enumerated crimes].” *Id.* at 148. The Court also noted that “[t]hese considerations taken together convince us that “to give effect . . . to every clause and word” of this statute, we should read the examples as limiting the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.” *Id.* at 1585 (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). See also *United States v. Herrick*, 545 F.3d 53, 58-60 (1st Cir. 2008) (applying the *Begay* test in two phases).

Begay also appears to answer questions regarding the doctrine of *ejusdem generis*. Prior to *Begay*, *ejusdem generis* was a contested aspect of the residual clause of the ACCA. See Neal Eriksen, Note, *Criminal Law—The Meaning of Violence: An Interpretive Analysis on Whether A Prior Conviction For Carrying A Concealed Weapon is a “Crime of Violence” under the United States Sentencing Guidelines*, 29 W. NEW ENG. L. REV. 801, 826-29 (2007). *Ejusdem generis* provides that “when a general phrase follows a list of specifics, it should be read to include only things of the same type as those specifically enumerated.” *James v. United States*, 550 U.S. 192, 199 (2007). The *James* Court addressed this topic and noted that the common trait of the enumerated crimes of burglary, arson, extortion, and explosives is that they “create significant risks of bodily injury or confrontation that might result in bodily injury.” *Id.* Yet, some argued that the common trait is active conduct. See Eriksen, *supra* at 826-29. Either way, carrying concealed handguns suffices these requirements because it presents a significant risk of bodily injury and is an active crime. Regardless, the *Begay* Court elaborated on the common trait of causing risk of injury, and includes purposeful, aggressive, and violent conduct as common traits of the enumerated violent felonies. See *Begay*, 553 U.S. at 144-145. Thus, the focal point of similarity is now *Begay*'s three characteristics, not whether the crime is active conduct.

90. *Begay*, 553 U.S. at 141.

91. *Id.* at 141-42.

92. *Id.* 553 U.S. at 145.

93. *Id.*

94. *Id.* The court concluded that “unlike the example crimes, the conduct for which the drunk driver is convicted . . . need not be purposeful or deliberate.” *Id.*

hind the ACCA as an additional consideration when determining purposefulness.⁹⁵ The majority explained that the ACCA's purpose is to focus on criminals *who are more likely to use a firearm in committing a crime*.⁹⁶ Since driving under the influence is a strict liability crime, which is also removed from the nature of firearm crimes, the Court determined that driving under the influence is not a valid indicator of a criminal's likelihood to use a firearm in the execution of a future crime.⁹⁷

To determine whether a crime is violent or aggressive, the Court focused on whether the crime demonstrates the type of criminal who is more likely to deliberately use a gun against a victim while committing a crime in the future.⁹⁸ The Court discussed the enumerated crimes to determine whether this characteristic is present.⁹⁹ Furthermore, the Court focused on the level of intent necessary to commit an enumerated violent and aggressive crime, stating that the enumerated crimes have a higher degree of culpability than mere negligence.¹⁰⁰ And this higher degree of culpability demonstrates that the criminal is the type of person who might deliberately shoot someone.¹⁰¹ The Court concluded that driving under the influence is different from the enumerated crimes because it is a strict liability crime, and driving under the influence is not "associated with a likelihood of future violent, aggressive, and purposeful 'armed career criminal' behavior."¹⁰² Therefore, if the past crime was intentional and not too far removed from a firearms crime, then it is indicative of a likelihood to use a firearm in the future commission of a crime.¹⁰³ Since the elements of pur-

95. *Begay*, 553 U.S. at 146 (noting that the act focuses on what particular types of offenders use guns). In particular, "[A]n offender's criminal history is relevant to the question whether he is a career criminal, or, more precisely, to the kind or degree of danger the offender would pose were he to possess a gun." *Id.*

96. *See id.* at 146-47.

97. *Id.* at 146. After listing crimes such as polluting, the Court noted that "[w]e have no reason to believe that Congress intended to bring within the statute's scope these kinds of crimes, far removed as they are from the deliberate kind of behavior associated with violent criminal use of firearms." *Id.* Note that the Court mentions pollution and crimes of negligence as too far removed. The Court did not list any crimes involving guns as too far removed. *Id.*

98. *Id.* at 146.

99. *Id.* (analyzing the degree of risk of injury and intent included with the enumerated crimes).

100. *Begay*, 553 U.S. at 145-46.

101. *Id.* Courts have also noted that the analysis for whether the conduct was aggressive dovetails with the issue of whether there was an intentional act. *Herrick*, 545 F.3d at 59. (finding that purposeful "involves a degree of intent").

102. *Begay*, 553 U.S. at 148.

103. *See id.* at 146-47.

poseful, violent, and aggressive were missing, driving under the influence is not similar enough to the enumerated crimes to be a violent felony.¹⁰⁴

The *Begay* case was quite surprising. It was already difficult to determine which crimes sufficed as a serious potential risk of physical injury to another, and the Court inserted an extra layer of analysis by requiring the three characteristics of purposefulness, violence, and aggressiveness. And the majority was not faithful to the ACCA because it merely invented these characteristics out of thin air.¹⁰⁵ Furthermore, the three characteristics are difficult to apply because they are similar to each other. In fact, the Court focused only on intent when analyzing whether driving under the influence was purposeful, violent, and aggressive.¹⁰⁶ Without further guidance from the Court, it appears that intent is the underlying requirement for the three characteristics to be present.

Even more surprising, this rule completely reversed the Court's recent holding that the residual clause was independent from the enumerated crimes in that it does not require the offense to "present[] as great a risk as any of the enumerated offenses."¹⁰⁷ In *Begay*, the Court ignored this precedent by declaring that the residual clause must be similar to the enumerated crimes in both "kind *as well as* in degree of risk posed."¹⁰⁸ Additionally concerning, the majority inexplicably came to this conclusion by citing an established, non-controversial canon of statutory construction, which states that all language in the statute must be given proper effect.¹⁰⁹ The ACCA's residual clause had existed for over twenty

104. *Id.* at 148.

105. *See id.* at 150 (Scalia, J., concurring) ("[T]he problem with the Court's holding today is that it is not remotely faithful to the statute that Congress wrote. There is simply no basis . . . for holding that the enumerated and unenumerated crimes must be similar in respects *other than the degree of risk that they pose*."). Justice Scalia also noted that "the requirement of 'purposeful, "violent," and "aggressive" conduct was one that the Court invents." *Id.* at 153.

106. *Id.* at 145-48.

107. *James*, 550 U.S. at 209.

108. *Begay*, 128 S. Ct. at 143 (emphasis added).

109. *Id.* The Court stated:

These considerations taken together convince us that, "to give effect . . . to every clause and word" of this statute, we should read the examples as limiting the crimes that clause (ii) covers to crimes that are roughly similar, in kind as well as in degree of risk posed, to the examples themselves.

Id. (quoting *Duncan*, 533 U.S. at 174).

years, and the only authority for the majority's three characteristics test came from an antique canon of statutory construction.¹¹⁰

For this canon of statutory construction to create three new elements means that the Court inadvertently neglected to apply this canon over the past twenty years. And it is questionable that applying this canon should result in the specific characteristics of purposeful, violent, and aggressive. The Court previously held that the similarity between the residual clause and the enumerated crimes was that the conduct "creates significant risks of bodily injury or confrontation that might result in bodily injury."¹¹¹ Without clarification, the Court determined that the similarity was no longer a significant risk of injury, but was the ambiguous three characteristics. The newly created characteristics, without any reference to past precedent, is concerning.

Furthermore, the purpose of this canon of construction is to ensure that words in the statute are given their proper effect, and not treated as mere surplusage.¹¹² Holding that the residual crimes must be the same kind and degree of risk as the enumerated crimes renders the statute's use of "otherwise" a mere surplusage.¹¹³ The word "otherwise" indicates that the residual crimes are of a different, other kind.¹¹⁴ But it does not mean that they are of a different degree of risk.¹¹⁵

110. Researching the authority for interpreting the ACCA led to even more interesting results. *Duncan* does not even involve interpretation of the ACCA. *Duncan*, 533 U.S. at 174 ("[H]old[ing] that an application for federal habeas corpus review is not an 'application for State post-conviction or other collateral review' . . ."). Although *Duncan* clarifies the canon of statutory construction, it certainly does not explain how using this method of statutory construction leads the Court to conclude that the residual clause must be "roughly similar, in kind as well as in degree of risk posed, to the examples themselves." *Begay*, 553 U.S. at 143.

111. *James*, 550 U.S. at 199.

112. *Duncan*, 573 U.S. at 173-75.

113. See *James*, 550 U.S. at 218-19 (Scalia, J., dissenting). Justice Scalia clarifies that "otherwise," as used in the residual clause, means causing a serious risk of physical injury to another, but in a different manner or in another way, as compared to the enumerated crimes. *Id.* By requiring the residual crimes to be of the same *kind*, *Begay* has rendered "otherwise" as useless.

114. *Id.* ("[T]he most natural reading of the statute is that committing one of the enumerated crimes (burglary, arson, extortion, or crimes involving explosives) is *one way* to commit a crime 'involv[ing] conduct that presents a serious risk of physical injury to another'; and that *other ways* of committing a crime of that character similarly constitute 'violent felonies.'").

115. *Id.* ("In this case, the application of the principle suggests that what the residual provision means by the general phrase 'conduct that presents a serious potential risk of physical injury to another' is conduct that resembles, *insofar as the degree of such risk is concerned*, the previously enumerated crimes.") (emphasis added).

The Court has done more than protect the enumerated crimes from surplusage; the Court has imposed restrictions onto the residual clause. This is not giving all words their proper effect: This is the use of *ejusdem generis*, which is a canon of statutory construction that applies when there is a specific list of items (enumerated items) followed by a broad item.¹¹⁶ Oddly, the Court analyzed *ejusdem generis* in 2006 and held that the restricting trait imposed on the residual crimes was that they must pose a significant risk of bodily injury.¹¹⁷ Justice Scalia's dissent asserted that the majority's connection between the enumerated crimes and the residual clause was too imprecise, and the lower courts would need more guidance.¹¹⁸ His analysis did not use the canon of construction used by *Begay*; it used *ejusdem generis*.¹¹⁹

V. AN APPLICATION OF *BEGAY*: DEMONSTRATING THAT CARRYING A CONCEALED HANDGUN PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY, AND THAT IT SATISFIES THE THREE CHARACTERISTICS OF A VIOLENT FELONY

Generally, carrying a concealed handgun consists of three elements.¹²⁰ First, the person must knowingly possess the handgun.¹²¹ Second, the handgun must be concealed.¹²² Finally, the handgun must be accessible for immediate use.¹²³ The first element is important because it demonstrates a higher level of intent

116. *Pitt County v. Hotels.com, L.P.*, 553 F.3d 308, 313 (4th Cir. 2009) (“where general words follow a designation of particular subjects or things, the meaning of the general words will ordinarily be presumed to be, and construed as, restricted by the particular designations and as including only things of the same kind, character and nature as those specifically enumerated.”) (quoting *Smith v. Smith*, 314 N.C. 80 (1985)).

117. *James*, 550 U.S. at 199 (majority opinion).

118. *Id.* at 216-19 (Scalia, J., dissenting).

119. *Id.*

120. See *Eriksen*, *supra* note 89, at 818-19 (stating that the three elements for carrying a concealed firearm are: (1) knowingly possessing the firearm, (2) the firearm must be concealed, and (3) the firearm must be “readily accessible” for use).

121. See, e.g., ARIZ. REV. STAT. ANN. § 13-3102(A) (West 2010) (“[A] person commits misconduct involving weapons by *knowingly* . . .” (emphasis added)).

122. See, e.g., COLO. REV. STAT. ANN. § 18-12-105(1)(b) (West 2010) (“[The firearm must be] concealed on or about his or her person.”).

123. See, e.g., ARK. CODE ANN. § 5-73-120(a) (West 2010) (stating that weapon must be “otherwise readily available for use”). The legal definition of “carrying,” “concealed,” or “immediate use” is beyond the scope of this article. Currently, there is a split among states regarding the elements of concealment, immediate use, and other issues such as whether the gun is operable or loaded. See generally Jeffrey F. Ghent, Annotation, *Fact that Gun was Broken, Dismantled, or Inoperable as Affecting Criminal Responsibility under Weapons Statute*, 81 A.L.R. 4th 745 (2010) (discussing these legal issues).

than negligence.¹²⁴ The second and third elements are also important because they demonstrate active conduct and that the crime is a continuing, dangerous crime.

A. *Presents a Serious Potential Risk of Physical Injury: Begay's First Prong*

To determine whether the conduct presents a serious risk for potential injury, courts consider the possibility of physical injury from completion of the crime as well as the dangers present during the crime.¹²⁵ In addition, courts focus on the inherent dangerousness of the crime, rather than the specific means used by the defendant in committing the crime.¹²⁶ There is no requirement that “every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felony.”¹²⁷ The correct inquiry is whether the ordinary offense presents a serious potential risk of injury to another.¹²⁸ There need not be a “metaphysical certainty” of injury; all that is necessary is a potential risk of injury.¹²⁹ The court evaluates the degree of risk or probability that the prohibited conduct will result in physical harm.¹³⁰

1. *The Inherent Danger of Unlawfully Carrying a Concealed Handgun as a Violent Felony*

As early as 1892, *State v. Chippey* recognized that “the carrying of concealed deadly weapons” is dangerous, because many people have poor temperament and hastily use handguns.¹³¹ The *Chip-*

124. See MODEL PENAL CODE § 2.02(5) (1985) (implying that there is a hierarchy of culpability, and knowingly is more culpable than negligence).

125. *James*, 550 U.S. at 203-04.

126. See *United States v. Lancaster*, 501 F.3d 673, 675 (6th Cir. 2007), *vacated*, 129 S. Ct. 991 (2009) (holding that crime of escape is a violent felony).

127. *James*, 550 U.S. at 206.

128. *Id.*

129. *Id.*

130. See *United States v. Winter*, 22 F.3d 15, 21 (1st Cir. 1994) (holding that the crime of horse race fixing usually does not involve violence, and therefore the potential for injury is low; therefore, horse race fixing is not a crime of violence); *United States v. Billups*, 536 F.3d 574, 580 (7th Cir. 2008) (stating that it is the probability of violence, not the inevitability of violence that is to be considered, and not every factual manifestation must require the act to be dangerous).

131. See *State v. Chippey*, 33 A. 438, 438 (1892) (“[B]ecause the persons becoming suddenly angered, and having such a weapon in their pocket, would be likely to use it, which in their sober moments they would not have done, and which could not have been done had not the weapon been upon their person.”). *Chippey* also held that a determination of a violation of carrying concealed weapons statutes requires a fact-based evaluation depend-

pey court's fear was legitimate. Although persons unlawfully carrying concealed handguns may use sound judgment, this is often not the case.¹³² The statistics discussed in Part II of this article demonstrate how often poor judgment is used with firearms.¹³³ The very nature of carrying a concealed firearm is dangerous. The United States District Court for the Northern District of New York reasoned that without a gun, the gun violence cannot occur, and "it is the ammunition and the gun which, together, pose the greatest risk of violence."¹³⁴

The inquiry for whether an activity presents a "serious risk of physical injury to another" is not whether the crime could have been committed in a safe manner; it is whether the ordinary violation creates a serious potential risk of injury.¹³⁵ Individuals demonstrate by the very nature of *unlawfully* carrying a handgun that they cannot make mindful, sound decisions and that they do not feel obligated to abide by the law. Because illegal carriers of concealed handguns make poor decisions and handguns are inherently dangerous, it should qualify under the ACCA as a serious risk of potential injury to another person.

The *Flores* Court mistakenly concluded that concealed handguns are not overtly dangerous because Michigan issues permits to allow such activity, and carrying a concealed handgun does not include active conduct.¹³⁶ These arguments are flawed. Simply because a select group of citizens are deemed safe to carry concealed handguns does not mean the activity is not overtly dangerous under other, more common circumstances. Clearly, a trained professional with a concealed handgun is less dangerous than a

ing on the circumstances. *Id.* "Sober," in this context, means that the actor has self-control. BLACK'S LAW DICTIONARY 1516-17 (9th ed. 2009).

132. For an example of such a situation where the unlawful carrier of a handgun was attempting to use sound judgment, see Eriksen, *supra* note 89, at 801, hypothesizing a situation where a wife attempts to obtain a license for carrying a concealed handgun due to fear for her life from her husband. The processing time for the wife to receive the license for carrying a concealed handgun is simply too long for her to wait, and she begins carrying a concealed handgun without a permit. Please note, although this person attempted to use sound judgment, there is no reason to believe that she has the capacity, knowledge or temperament to carry a concealed handgun in a safe manner.

133. See *supra* notes 11-15 and accompanying text.

134. *United States v. Carswell*, 144 F. Supp. 2d 123, 132 (N.D.N.Y. 2001) ("[B]y definition, without possessing a gun, one cannot use a gun for the commission of a violent act; with a gun, one can."). It additionally held that mere possession of guns or ammunition was a crime of violence as defined within the Bail Reform Act, 18 U.S.C. § 3156 (a)(4)(B). *Carswell*, 144 F. Supp.2d. at 133.

135. *James*, 550 U.S. at 209.

136. *Flores*, 477 F.3d at 435-36 (holding that carrying a concealed weapon is not a violent felony).

mentally unstable criminal in possession of a handgun. And handguns are extremely dangerous, even when possessed by *ordinarily* responsible people. They are the most common instrument used to commit murder and are the preferred weapon of criminals.¹³⁷ In addition, carrying a concealed handgun is an active crime, and the danger is more extensive than mere possession because the person has taken the additional step of keeping the handgun within their possession for immediate use on others.¹³⁸

2. *Carrying Concealed Handguns and the Violent Felony of Escape: Two Continuing Crimes that Present a Serious Risk of Potential Injury to Another*

In *United States v. Franklin*, the United States Court of Appeals for the Seventh Circuit held that the crime of escape is a violent felony under the ACCA.¹³⁹ The court stated, “[E]very escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious potential to do so.”¹⁴⁰ Regardless of the details, escape is inherently dangerous because there is a continuing public threat.¹⁴¹

Similar to escape, carrying a concealed handgun without a permit is a continuing crime lasting the entire time the criminal is carrying the concealed weapon.¹⁴² It creates a present risk of confrontation and the potential to cause serious bodily injury at all moments. The risk of deadly confrontation would likely not exist

137. See *supra* notes 11-15 and accompanying text; see also MD. CODE ANN., CRIM. LAW § 4-202 (West 2010).

138. *Hall*, 77 F.3d at 401 (“[C]arrying a concealed weapon is an active conduct crime: the danger of carrying a concealed weapon extends beyond mere possession—the person has taken the extra step of having the weapon immediately accessible for use on another.”). *Hall* has been questioned by *Archer*, 531 F.3d at 1352, which held that *Begay* abrogated *United States v. Gilbert*; thus, carrying concealed weapons are not “crimes of violence,” or “violent felonies.”

139. *United States v. Franklin*, 302 F.3d 722, 724-25 (7th Cir. 2002). For a recent case decided after *Begay*, see *United States v. Charles*, 566 F. Supp. 2d 1229 (D.Kan. 2008) (holding that even after *Begay*, escape is still a violent felony). *But see United States v. Nichols*, 563 F.Supp.2d 631, 638 (S.D.W.Va. 2008) (holding that walk-away escape is not a violent felony in light of the recent *Begay* decision).

140. *Franklin*, 302 F.3d at 724 (quoting *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994)) (emphasis added).

141. *Id.* at 723-24.

142. See *United States v. Crawley*, 213 F. Supp. 2d 1250, 1256 (D. Kan. 2002) (holding that carrying a concealed firearm is not a crime of violence, because carrying a concealed firearm is no more dangerous than a handgun otherwise readily available to a person). The *Crawley* Court, however, agreed that carrying a concealed firearm is a continuing crime. *Id.*

but for the carrying of the concealed handgun.¹⁴³ Similar to escape, special precautions are irrelevant while the crime is occurring. The details of the crime are not important because the crime inherently has the potential for physical injury to another.

Recall that *Whitfield* and *Flores* held that carrying a concealed handgun is not a violent felony because such conduct is not the type of harm that is *immediate*, and it does not present a serious potential risk of physical injury to another.¹⁴⁴ These holdings are incorrect because carrying a concealed handgun has the same type of serious potential risk of injury as escape. If escape has the risk necessary to be a violent felony, then carrying a concealed handgun does as well.¹⁴⁵

3. *You Talking to Me?: Why Certain People with a Concealed Handgun Are Dangerous*

Not only is handgun possession inherently dangerous, but certain individuals in possession of handguns are more dangerous than others.¹⁴⁶ State legislators have recognized this. In many states, intoxicated or unstable violators of concealed handgun statutes are punished with longer sentences.¹⁴⁷ In addition, many states prohibit unstable or criminal persons from obtaining a permit to carry concealed handguns.¹⁴⁸ The Ninth Circuit has even held that possession of an unregistered firearm is presumptive evidence of unlawful violent intentions.¹⁴⁹ Thus, under the ACCA,

143. *Carswell*, 144 F. Supp. 2d at 132.

144. *Whitfield*, 907 F.2d at 800 (holding that carrying a concealed weapon is not a violent felony); *Flores*, 477 F.3d at 435 (holding that carrying a concealed weapon is not a violent felony).

145. *Whitfield* and *Flores* of the Eighth and Sixth Circuit respectively have both held that escape is a violent felony under the ACCA or a crime of violence. See *Franklin*, 302 F.3d at 724 (holding that crime of escape is a violent felony); *United States v. Nation*, 243 F.3d 467, 472 (8th Cir. 2001) (holding that every escape is a crime of violence).

146. See *Hines v. State*, 578 S.E.2d 868, 872 (Ga. 2003) (holding that felony possession of a firearm is inherently dangerous depending on the facts and circumstances).

147. See, e.g., TEX. PENAL CODE ANN. § 46.02 (Vernon 2010) (giving higher punishment to an intoxicated person).

148. See, e.g., VA. CODE ANN. §§ 18.2-308(E)(1)-(20) (West 2010) (stating that many types of persons, including unstable persons and criminals are prohibited from obtaining carrying concealed handgun permits).

149. *United States v. Dunn*, 946 F.2d 615, 621 (9th Cir. 1991) (holding that "possession of an unregistered firearm is presumptive evidence of unlawful violent intentions and therefore involves the substantial risk of violence necessary to label the possession a crime of violence").

when certain people violate concealed firearm statutes, it should be classified as a serious potential risk of physical injury.¹⁵⁰

All but two states permit *some* people to carry concealed handguns.¹⁵¹ In addition, Congress recognizes that certain people are not qualified to handle firearms and prohibits such persons from possessing firearms.¹⁵² Persons without a permit to carry concealed handguns have not been deemed safe or qualified by the state to carry a concealed handgun and may even be criminals.¹⁵³ As previously noted, many criminals carry concealed handguns for criminal purposes.¹⁵⁴ It is dangerous for a person with criminal intentions to carry a concealed handgun. Similar to possession of an unregistered firearm, carrying a concealed handgun without a permit should be considered evidence of unlawful violent intentions.¹⁵⁵ Therefore, carrying a concealed handgun has a serious potential risk of physical injury to another.

Also, recall *Begay*, which found that driving under the influence is not a violent felony; however, it still presents a serious potential risk of physical injury to another.¹⁵⁶ *Begay* adheres to the concept that some people are more dangerous than others because *Begay* observed that some drivers, those under the influence of alcohol, are more dangerous than other drivers.¹⁵⁷ The level of risk from illegally concealed handguns and drunk drivers is very similar. A drunk driver is dangerous because he or she cannot operate the

150. Earlier aspects of this article emphasized that the ACCA does not take the specific circumstances and underlying facts of the previous conviction into account when determining if it is a violent felony. Accordingly, a court does not have to look to the circumstances or facts of the conviction because the definition of the concealed handgun statute will most likely describe the underlying circumstances. See KAN. STAT. ANN. § 21-4201 (2010) (describing in great detail the different circumstances that constitute a violation of a carrying concealed handgun statute in Kansas).

151. All states have permits available for carrying concealed weapons except for Alaska, Illinois, Vermont, and Wisconsin. Illinois and Wisconsin do not allow citizens to carry concealed weapons and thus does not issue permits. WIS. STAT. ANN. § 941.23 (West 2005) and 720 Ill. Comp. Stat. Ann. 5/24-1(a)(4) (West 2010). Alaska and Vermont allow everyone to carry concealed weapons, and thus do not issue permits either. See ALASKA STAT. § 11.61.220 (2007) (weapons misconduct); § 11.61.210 (same); § 11.81.250 (classification of offenses); VT. STAT. ANN. tit. 13, § 4003 (2007) (carrying dangerous weapons); see also Erikson, *supra* note 89, at 838.

152. 18 U.S.C. § 922(g) (2006) (prohibiting fugitives, drug addicts, mentally infirm, illegal aliens, dishonorably discharged military persons, stalkers, and people found guilty of domestic violence crimes from possessing firearms or ammunition).

153. For an example of prerequisites and qualifications for obtaining a permit to carry a concealed handgun, see MO. ANN. STAT. § 571.101 (West 2010).

154. See *supra* note 13 and accompanying text.

155. *Id.*; see also *Dunn*, 946 F.2d at 621.

156. *Begay*, 553 U.S. at 141.

157. See *id.* (noting the alarming amount of injuries from alcohol related accidents).

vehicle as safely. Similarly, persons without a permit to carry concealed handguns have not been deemed safe or qualified to handle such weaponry. Unlawfully carrying a concealed handgun presents more serious potential risks than driving while intoxicated because, unlike a drunk driver, one of the purposes for carrying a concealed handgun is to use the firearm in the commission of a crime.¹⁵⁸

B. Begay's Second Prong, Three Characteristics of a Violent Felony: Purposeful, Violent, and Aggressive

Unlike driving under the influence, carrying a concealed handgun is similar to the enumerated crimes because it demonstrates both the requisite level of intent and a likelihood of committing future crimes of violence and aggression; therefore, it should be considered a violent felony. Carrying a concealed handgun without a permit is similar to the enumerated crimes regarding the offender's intent and purpose because most statutes require the offender to knowingly carry the concealed handgun.¹⁵⁹ This higher level of intent is similar to the enumerated crimes language, "use of explosives." The Supreme Court noted that *use* inherently demonstrates a higher degree of intent than negligence or accidental conduct.¹⁶⁰ Therefore, carrying a concealed handgun has the requisites of purpose and intent because illegally carrying a concealed handgun includes a degree of intent higher than strict liability and negligence.

The last two characteristics of the enumerated crimes, likelihood of violence and aggression, are met as well. Carrying a concealed handgun without a permit demonstrates the likelihood of committing future crimes with firearms because it is an intentional crime that is not too far removed from gun violence.¹⁶¹ One indicator of future violent, aggressive, and career criminal behavior

158. See *supra* note 13 and accompanying text.

159. See Eriksen, *supra* note 89, at 818 (stating that knowingly possessing the handgun is a requirement for some carrying concealed handgun violations). See, e.g., ARIZ. REV. STAT. ANN. § 13-3102(A) (2010) ("[A] person commits misconduct involving weapons by knowingly" (emphasis added)). [Georgia Code Ann. § 16-11-126 is another one, but I guess it isn't necessary b/c of the signal, see, e.g.]

160. *Begay*, 553 U.S. at 1586 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)).

161. *Id.* at 144-45 (noting that the ACCA's purpose is to determine which criminals are likely to use a gun).

is illegally carrying a concealed handgun.¹⁶² In many cases, carrying a concealed handgun without a permit is the first step towards violent and aggressive armed criminal behavior. Certainly, unlawfully carrying concealed handguns is a type of crime that is associated with being an armed career criminal.

Baltimore, Maryland, for example, is the nation's second deadliest city in terms of per-capita homicides.¹⁶³ A study of the 107 people charged with murder in 2008 showed that there had been 380 prior arrests related to guns.¹⁶⁴ These same 107 people had only ninety-nine prior arrests related to drugs.¹⁶⁵ Based on this study, it appears that firearm violations are a stronger indication than drug arrests of a person's likelihood to commit murder. Thus, the characteristics of violence and aggression are also present.

Unlawfully carrying a concealed handgun, compared to driving while under the influence, demonstrates a higher likelihood of using a firearm in the commission of a future crime. It passes the three new characteristics introduced in *Begay* and presents a serious potential risk of physical injury to another. Therefore, it should be a violent felony under the ACCA.

C. *Shooting Oneself in the Foot: How the Archer Court Incorrectly Applied Begay*

United States v. Archer weakens *Hall's* holding that carrying a concealed handgun is a violent felony.¹⁶⁶ In *Archer*, the Supreme Court of the United States granted certiorari to a case where the defendant's sentence was enhanced because of a prior conviction for carrying a concealed handgun.¹⁶⁷ This sentencing enhancement was under the United States Sentencing Guidelines definition of "crime of violence", as opposed to the ACCA. After granting certiorari to *Archer*, the Court remanded the case to the Eleventh

162. See *supra* note 13 (Surveys of inmates show that they prefer concealable, large-caliber guns and juvenile offenders appear to be more likely to possess semi-automatic weapons than adult offenders.).

163. Peter Hermann, *Delving More Deeply Into Shooting Stats*, THE BALTIMORE SUN, Sept. 24, 2009, at 1, available at http://articles.baltimoresun.com/2009-09-24/news/0909230076_1_nonfatal-shootings-arrests-numbers.

164. *Id.*

165. *Id.*

166. *Archer*, 531 F.3d at 1351-52 (holding that carrying a concealed weapon under Florida law is not a "crime of violence." Thus, *Gilbert v. United States* is abrogated, and *Hall* might be abrogated as well.).

167. *Id.* at 1348-49.

Circuit in light of the recent *Begay* decision, and the Eleventh Circuit held that carrying a concealed handgun is not a “crime of violence.”¹⁶⁸

The *Archer* Court relied on four main reasons in reaching this holding. First, the court noted that carrying a concealed handgun without a permit is a passive crime.¹⁶⁹ Second, carrying a concealed weapon is not universally considered a violent felony.¹⁷⁰ Third, unlawful possession of a firearm by a felon is not a violent felony.¹⁷¹ Fourth, the court noted that carrying concealed handgun violations under Florida law did not require purposeful conduct.¹⁷²

The first reason is not very persuasive. As previously addressed, illegally carrying a concealed handgun is not a passive crime because the *carrying* of the handgun is the overt act.¹⁷³ Likewise, the second reason is unpersuasive as well. Simply because the majority of jurisdictions punish concealed handgun crimes with terms less than one year does not conclusively mean that the crime is not dangerous and violent. Additionally, violent felonies are determined by the *risk* of violence to another, as opposed to whether the crime in itself is violent.¹⁷⁴ The third reason is equally unpersuasive. A felon in possession of a firearm is distinguishable from a felon carrying a concealed handgun because carrying a concealed handgun, unlike felony possession, specifically focuses on the active conduct of carrying the weapon rather than constructive possession.¹⁷⁵ The last reason, that Florida law did not require purposeful conduct, is valid. The handgun need not be carried purposefully under Florida law.¹⁷⁶ But many states include *knowing* as the level of intent when committing the crime.¹⁷⁷ The requisite level of intent may preclude Florida’s car-

168. *Id.* at 1351-52.

169. *Archer*, 531 F.3d at 1351.

170. *Id.*

171. *Id.* at 1352.

172. *Id.* at 1351 (citing *Dorelus v. State*, 747 So.2d 368, 372 (Fla. 2000)).

173. *See supra* Part V.A.1.

174. Consider the fact that burglary is a violent felony. § 924(e)(2)(B)(ii). Yet burglary in itself is not violent. What makes burglary violent is the risk that a violent crime will occur as a result of the burglary. *See James*, 550 U.S. 192, 207-08 (2007).

175. *See Hall*, 77 F.3d at 401, *abrogated by Hunter*, 559 F.3d 1188.

176. FLA. STAT. ANN. § 790.01 (West 2010) (lacking an intent requirement). *See also Archer*, 531 F.3d at 1351 (noting that Florida’s carrying concealed handgun statute does not require intent).

177. *See Eriksen, supra* note 89 at 818. (stating that knowingly possessing the handgun is a requirement for most carrying concealed handgun violations). *See, e.g., ARIZ. REV.*

rying concealed handgun law from passing the *Begay* test; however, other state statutes will pass the *Begay* test.¹⁷⁸

Begay and *Archer*, do not abrogate the Eleventh Circuit's holding that carrying concealed handguns present a serious potential risk of physical injury to another. In fact, *Begay* found that driving under the influence presented a serious risk of physical injury to another person.¹⁷⁹ And *Archer* held that carrying concealed handguns, although not a crime of violence, also presented such a risk.¹⁸⁰ Thus, *Begay* and *Archer* did not reject that carrying a concealed handgun presents a serious risk of physical injury to another. This type of dangerous risk is the crux of a violent felony. But after *Begay*, presenting a serious risk of physical injury to another is not enough; the Court has implied other requirements to the finding of a violent felony.

Whether carrying a concealed handgun is a violent felony is still unresolved because there is still a circuit split over whether carrying a concealed handgun presents a serious potential risk of physical injury to another. Also, it is uncertain how courts across the country will apply *Begay*. In *Archer*, the Eleventh Circuit applied *Begay* to find that carrying a concealed handgun is a serious potential risk of injury and still is not a crime of violence, but stare decisis from *Archer* is limited to carrying concealed handgun violations arising under Florida law.¹⁸¹ And *Archer* interpreted the U.S.S.G., as opposed to the ACCA.¹⁸² Even though the crime of violence under the U.S.S.G. has been construed as synonymous to a violent felony under the ACCA,¹⁸³ the *Archer* holding is not directly on point to vacate *Hall*.

STAT. ANN. § 13-3102(A) (West 2010) (“[A] person commits misconduct involving weapons by knowingly . . .” (emphasis added)) and Georgia Code Ann. § 16-11-126 (West 2010)..

178. See generally 94 C.J.S. *Weapons* § 11 (2008) (discussing the various laws in different jurisdictions concerning the level of intent required to be convicted for carrying a concealed weapon).

179. *Begay*, 553 U.S. at 141-42. In fact, only Justice Scalia, in his concurrence in *Begay*, believed that driving under the influence did not create a serious potential risk of physical injury to another. See *Begay*, 553 U.S. at 153 (Scalia, J., concurring). All the other justices believed that it did. *Id.* at 141-42 (majority opinion) and 156-57 (Alito, J., dissenting).

180. *Archer*, 531 F.3d at 1351.

181. The ACCA analyzes the violated statute to determine whether the crime was a violent felony. *Archer* analyzed FLA. STAT. ANN. § 790.01 (West 2010). Presently, there is a circuit split on whether carrying a concealed handgun presents a serious potential risk of physical injury to another. See *supra* Part I. It would not be shocking if the circuits also split on whether carrying concealed handgun violations contain the three *Begay* characteristics.

182. *Archer*, 531 F.3d. at 1348.

183. *Archer*, 531 F.3d at 1350.

Many states have different laws addressing carrying concealed handguns, and it is uncertain whether courts will apply *Begay* in the same fashion as the *Archer* court.¹⁸⁴ In addition, the Eleventh Circuit was too quick to conclude that because driving under the influence is not a violent felony, then carrying concealed handgun is not a crime of violence. The Eleventh Circuit's analysis and application of *Begay* was hasty in that the court agreed with arguments that were contrary to *Hall*.¹⁸⁵

VI. PROPOSAL OF AN EXTENSION OF THE MODIFIED CATEGORICAL APPROACH THAT WILL FLEXIBLY PROVIDE FOR DETERMINATION OF DANGEROUS ELEMENTS OF CARRYING CONCEALED HANDGUN STATUTES

Presently, the modified categorical approach only applies when more information is needed to determine if the statutory conviction satisfies the generic offense.¹⁸⁶ Since carrying concealed firearm statutes include a variety of possible offenses,¹⁸⁷ the court should extend the modified categorical approach to all carrying concealed firearm violations. Thus, information beyond the statute would be used to determine the dangerousness of the offense. This extended categorical approach would allow the court to determine the exact type of carrying concealed firearm violation and whether it presents a serious potential risk of physical injury to another.

Generally, there are three ways to violate a concealed carrying law. First, a legally licensed holder may commit a technical, strict liability violation.¹⁸⁸ For example, a person with a permit to carry concealed handguns may be required to have the permit physically on their person while carrying the handgun.¹⁸⁹ Thus, anyone car-

184. Compare 720 ILL. COMP. STAT. ANN. 5/24-1.6 (West 2010) (requiring the intent level of "knowingly"), with FLA. STAT. ANN. § 790.01 (lacking an intent requirement). This is especially important because the *Archer* Court conceded that there is no intent requirement in Florida's statute. *Archer*, 531 F.3d at 1348.

185. Compare *Hall*, 77 F.3d at 401-02 (holding that carrying a concealed handgun is an active crime that poses a serious risk of potential injury to another), with *Archer*, 531 F.3d at 1351-52 (holding that carrying a concealed handgun is not an active crime).

186. See *Taylor*, 495 U.S. at 602.

187. See, e.g., IDAHO CODE ANN. § 18-3302(9) (a complicated statute regarding transportation of firearms in a car, which could innocently be violated by a generally law-abiding gun owner or could be violated by an armed career criminal).

188. In Missouri, an example of a technical, strict liability violation is a person who inadvertently walks within twenty-five feet of a polling station with a concealed handgun. See MO. ANN. STAT. § 571.107.1(2) (West 2010).

189. See WASH. REV. CODE ANN. § 9.41.050(1)(b) (West 2010)

rying a concealed handgun without the permit is in violation of the law.¹⁹⁰ The second way to violate carrying concealed laws is to commit a firearms crime. Discharging a firearm while intoxicated is an example of such an offense.¹⁹¹ The third way to violate a concealed carrying law is to carry a handgun without a license to do so.¹⁹² Individuals with criminal motives or poor judgment who have immediate access to a handgun are dangerous examples of this third type of violation.¹⁹³

Through the extended categorical approach, courts should distinguish the first type of violation, a strict liability violation, from the latter two types, which are active crimes and dangerous. Furthermore, the latter two types of violations should count as violent felonies due to the serious potential risk of physical injury to another. This proposal falls within the concept of *Begay's* three characteristics and the Court's reluctance to include strict liability crimes within the ACCA.¹⁹⁴ With this approach, strict liability crimes lacking intent—such as technical and negligent carrying concealed handgun violations—are not violent felonies; however, the purposeful, violent, and aggressive crimes are violent felonies.¹⁹⁵

Many states already follow a system where different types of carrying concealed handgun violations receive different punishments.¹⁹⁶ For example, Missouri provides different punishments

190. *Id.* § 9.41.050(2)(b).

191. *See* MO. ANN. STAT. § 571.030(1)(5) (West 2003).

192. *See id.* § 571.030.1(1).

193. *See supra* note 13 and accompanying text.

194. *Begay*, 553 U.S. at 148 (declaring that strict liability crimes are not similar enough to the enumerated crimes because of the lack of intent). Specifically, this modified categorical approach agrees with *Begay* because the carrying concealed handgun violations that indicate purposeful, violent and aggressive conduct will be violent felonies. *Id.* Contrarily, carrying concealed handgun violations arising from strict liability or negligence will not be violent felonies. *Id.*

195. This proposed application of the modified categorical approach may be a current trend in the law. Recently, *Chambers v. United States* held that failure to report for penal confinement was not a violent felony. 129 S. Ct. 687, 689 (2009). In concluding that failure to report was not a violent felony, the Court noted that the statute at issue—720 ILL. COMP. STAT ANN. 5/31-6(a) (West 2010)—was really a statute with *two separate crimes*: escape, which is aggressive, and failure to report, which is passive. *Chambers*, 129 S. Ct. at 691-92. The proposed modified categorical approach in Part VI uses the same technique by differentiating the subsections of carrying concealed weapon statutes that are strict liability from the subsections which are purposeful, violent, and aggressive. Although the Court used this approach in *Chambers*, no court has used this new approach with carrying concealed handgun convictions.

196. *See, e.g.*, MO. ANN. STAT. § 571.101(application for carrying concealed handgun permit); § 571.030 (unlawful carrying of a concealed handgun); § 571.070 (unlawful carrying of concealed handgun by especially dangerous persons); § 571.107 (people authorized to carry a concealed handgun and violate provisions of the permit);

for different violations of carrying concealed handgun laws. In Missouri, persons who carry concealed handguns without a permit face a felony punishable up to four years.¹⁹⁷ Persons who have a permit to carry concealed handguns and violate technical strict liability rules of the permit face minor penalties and often simply pay a fine.¹⁹⁸ Persons deemed dangerous because of their criminal history that illegally carry concealed handguns receive felonies punishable by up to seven years.¹⁹⁹

Pennsylvania also has two different punishments for unlawfully carrying concealed handguns. Those who do not have a permit, but are otherwise eligible to receive a permit, receive a lesser punishment than violators who do not have a permit and would be unable to obtain a permit had they correctly applied for one.²⁰⁰ Such legislation recognizes that certain individuals with a concealed handgun are potentially more dangerous than others, and certain carrying concealed handgun violations are more dangerous than others.

Similar to state legislatures, courts should differentiate between the different types of carrying concealed handgun violations to determine whether the crime presents a serious potential risk of physical injury to another.²⁰¹ The courts can use the categorical approach to determine the specific elements of the carrying concealed handgun conviction.²⁰² This would allow the court to analyze the statute as well as information such as the charging document, the written plea agreement, a transcript of the plea colloquy, and any explicit factual finding by the trial judge that the defendant assented to when the defendant entered a plea.²⁰³ In the case of the Missouri statutes, a court would be able to deter-

§ 558.011 (punishment).

197. See §§ 571.030, 558.011.

198. See § 571.107.

199. See §§ 571.070, 558.011.

200. 18 PA. CONS. STAT. ANN. § 6106(a)(1)(2) (West 2010).

201. 18 U.S.C. § 924(e)(2)(B)(ii) (2006). When courts apply the categorical approach to state statutes, they must analyze the elements of the concealed handgun statute for conduct that presents a serious potential risk of injury to another. See *Taylor v. United States*, 495 U.S. 575, 600 (1990) (stating that § 924 mandates the application of a formal categorical approach).

202. There are many different elements within carrying concealed handgun statutes, and the court should determine whether the defendant's conviction was for a violent or strict liability aspect of the statute. See *Cook*, 26 F.3d at 509 (holding that prior conviction for obstruction of justice was a violent felony under the ACCA). The Fourth Circuit looked to extra information in addition to the conviction because it was unclear whether or not the conviction was for one of force. *Id.* at 509.

203. *Shepard*, 544 U.S. at 16.

mine whether the conviction for carrying a concealed handgun was based on a technical strict liability permit violation²⁰⁴ or another, more dangerous violation.²⁰⁵ Not all carrying concealed handgun violations are the same; accordingly, determination of a violent felony should differ based on the potential of injury.

This extended version of the categorical approach satisfies *Taylor*, which requires courts to look to the elements of the statute violated.²⁰⁶ In addition, this method satisfies the *Begay* characteristics of not including strict liability and negligence based crimes as violent felonies.²⁰⁷ There is a difference between a law-abiding citizen inadvertently walking within five feet of a polling station while carrying his licensed concealed handgun and a career criminal or mentally infirm person illegally obtaining a handgun and carrying it for purpose of immediate use. It is because of these differences that a court should use an extension of the categorical approach when analyzing carrying concealed firearm offenses.

VII. AN AMENDMENT TO FIX THE ACCA

The ACCA has fallen short of Congress's objectives and purposes. Handguns are still accessible and are widely used in criminal activities.²⁰⁸ Even more frustrating, carrying a concealed handgun is one of the most obvious links between a criminal possessing a firearm and using a firearm in the commission of a crime. Therefore, the ACCA must uniformly punish carrying concealed handgun violations, and an amendment is necessary to enable the ACCA to punish habitual criminals that carry concealed handguns.

A. *The ACCA Has Not Prevented the Proliferation of Handguns*

Presently, the ACCA does not achieve Congress's objectives from the Gun Control Act of 1968 or the current ACCA.²⁰⁹ In

204. An example of a technical, strict liability permit violation is a person who inadvertently walks within twenty-five feet of a polling place. See MO. ANN. STAT. § 571.107 (West 2010).

205. An example of a more dangerous violation is a person who discharges a firearm while intoxicated. See *id.* § 571.030.

206. *Taylor*, 495 U.S. at 600.

207. See *Begay*, 128 S. Ct. at 1588.

208. See Zawitz, *supra* note 13, at 3; see also Caroline Harlow, *Firearm Use by Offenders (NCJ-189369)*, U.S. DEPARTMENT OF JUSTICE, BUREAU OF JUSTICE STATISTICS 2 (2001), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=940>.

209. See *Huddleston*, 415 U.S. at 824 (citing Pub. L. No. 90-351, § 1201, 82 Stat. 236 (1968), as amended by Pub. L. No. 90-618, § 301(a)(1), 82 Stat. 1236 (1968) (codified at 18

1968, Congress sought to stop the widespread ease through which criminals could obtain firearms.²¹⁰ Later, in an effort to stop career offenders from using firearms, Congress severely punished firearm crimes.²¹¹ At that point, Congress determined that the ACCA targeted law-abiding gun dealers and gun owners, as opposed to dangerous criminals possessing firearms.²¹²

Today, handguns are easily obtainable. And further steps are required to deter criminals from using guns in their habitual, criminal activities.²¹³ Although some criminals receive their guns from dealers, nearly 80% of criminals receive their guns from the black market.²¹⁴ The black market is evenly divided, as half of these criminals receive guns from friends or family, and half receive guns from an illegal source.²¹⁵ Thus, regulating gun supply alone has not stopped guns from reaching criminal hands.

Since criminals can easily obtain guns, the best way to resolve this problem is harsher punishment for carrying and possessing guns illegally. Criminals are deterred from a crime if a long prison sentence is attached to it.²¹⁶ Indeed, some of the criminals purposefully avoid using guns because of increased prison sentences.²¹⁷ If prevention will not work, the next logical step is strong enforcement of firearm laws.

U.S.C.A. § 1201 (2006)) (“[W]hen Congress enacted the provision . . . it was concerned with the widespread traffic in firearms and with their general availability to those whose possession thereof was contrary to the public interest.”); *see also* H.R. REP. NO. 98-1073, *supra* note 33, at 2.

210. *Huddleston*, 415 U.S. at 824.

211. *See* H.R. REP. NO. 98-1073, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3662.

212. 131 CONG. REC. H8951-02 (1985).

213. *See* Zawitz, *supra* note 13, at 3.

214. *See* Harlow, *supra* note 208.

215. *Id.*

216. *See* STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* 120 (2005) (“[O]ne deterrent that has proven moderately effective is a stiff increase in prison time for anyone caught in possession of an illegal gun.”).

217. Congressman Mollohan entered an article regarding Professor James Wright’s research. 131 CONG. REC. E3712-01 (daily ed. Aug. 1, 1985) (statement of Rep. Mollohan). Professor Wright testified to his research:

MONITOR: What about mandatory penalties for criminal misuse of a firearm?

WRIGHT: We asked the men in our sample, who had never committed any firearm related crimes, “Why not?” The possibility of getting a stiffer sentence for using a firearm in crime figured very high in their reasoning.

Id.

B. An Amendment to the ACCA that Uniformly Sentences Carrying Concealed Handgun Convictions

There are many different variations of carrying concealed handgun laws amongst the different states. Currently, there are only thirteen states with sentence lengths punishing the crime in excess of one year.²¹⁸ Therefore, in thirty-seven states, the crimes for carrying concealed handguns are not violent felonies under the ACCA because they do not meet the threshold requirement of “punishable by imprisonment for a term exceeding one year.”²¹⁹

In *Taylor*, the Supreme Court emphasized that if burglary was not categorized as a generic crime there would be discrepancies throughout the country in determining whether burglary is a violent felony.²²⁰ One of *Taylor’s* main purposes was to ensure that burglary is consistently held as a violent felony by the circuits, even if states identify burglary differently. The problem identified in *Taylor* may also arise with carrying concealed handguns because of the differing sentence lengths of state crimes. This is an unsatisfactory result, and it frustrates the purposes of the ACCA. It goes against Congress’s intent, and it inconsistently punishes conduct based upon the state in which the individual happened to commit the crime.

Without an amendment to the ACCA, different states’ arbitrary punishment of a crime will result in different outcomes under the ACCA.²²¹ Congress should amend the ACCA to resolve this problem and to achieve the purpose of uniformly preventing firearm use and possession by criminals and other dangerous individuals. An amendment with the following language would achieve these objectives (proposed amendment in italics):

§ 924(e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not sus-

218. See Eriksen *supra* note 89, at 838.

219. 18 U.S.C. § 921(a)(20) (2006).

220. *Taylor*, 495 U.S. at 590-91.

221. See *id.* at 590-92 (stating that Congress did not intend for varied results due to different definitions of burglary).

pend the sentence of, or grant a probationary sentence to, such persons with respect to the conviction under 922(g).

(2) As used in this subsection—

(A) the term “serious drug offense” means— . . .

(B) the term “violent felony” means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, 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; and

(C) the term “conviction” includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

(D) for purposes of subsection (e)(2)(B)(ii), carrying a concealed handgun violation need not be punishable in excess of one year to qualify as a violent felony under the “otherwise” clause of section 924(e)(2)(B)(ii).

This amendment exempts the violation of carrying concealed handguns from the punishable in excess of one year requirement. Therefore, every state’s carrying concealed handgun statute would be within the scope of the ACCA. This would allow application of the extended categorical approach. As outlined previously in Part VI, technical, strict liability violations would not be violent felonies. Only dangerous firearm conduct and individuals carrying concealed handguns without a permit would be violent felonies. Also, this amendment does not conflict with the Assimilative Crimes Act (ACA), because the ACA is applied only when the federal government prosecutes a state crime. Here, it is inapplicable

because the concealed handgun statute is only for enhancement purposes and not prosecution under the ACCA.²²²

This amendment creates a special exception for concealed handgun statutes in that they need not be punishable by a term exceeding one year. This exception is not spectacular or alarming. Indeed, the definition of “crime punishable by imprisonment for a term exceeding one year” includes special exceptions and exclusions already.²²³ Under these current exclusions, certain business crimes fail the requirement of punishable in excess of one year.

This proposed amendment takes a similar approach. Here, instead of excluding a business crime that normally would fall within the definition, the amendment includes a dangerous crime that normally would *not* meet the requirements of punishable in excess of one year. Congress specifically excluded certain business crimes from the definition because it believed white-collar business crimes are not violent, and such criminals are not dangerous in possession of a firearm.²²⁴ Congress faced the predicament of wanting to include crimes punishable by a certain length; however, Congress simultaneously wanted to exclude some of those very crimes due to their non-relation to violence and firearms. It worked around the problem by creating the exception for business crimes.

222. The Assimilative Crimes Act (ACA), 18 U.S.C. § 13 (2006) allows federal enclaves to enforce state criminal laws. The proposed amendment does not provide for prosecution of state concealed carry laws, which would deprive the defendant of civil rights. The proposed amendment simply allows for a convicted felon to be sentenced to a longer sentence under 18 U.S.C. § 922(g) (2006) based upon a prior carrying a concealed handgun conviction. This conviction itself is not a felony because it does not deprive the defendant of civil rights. The ACA will not be discussed in further detail because it is beyond the scope of this article.

223. 18 U.S.C. § 921(a)(20) (2006). “[C]rime punishable by imprisonment for a term exceeding one year” does not include offenses “pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.” *Id.*

224. *United States v. Jester*, 139 F.3d 1168, 1171 (7th Cir. 1998). The court noted:

Congress enacted § 922(g)(1) in order to keep firearms out of the hands of those persons whose prior conduct indicated a heightened proclivity for using firearms to threaten community peace Section 921(a)(20)(A) reduces unnecessary restrictions on the conduct of some felons who do not exhibit these dangerous tendencies. It was perfectly reasonable for Congress to assume that violent felons would pose a higher risk of endangering the public with a firearm than § 921(a)(20)(A)'s class of exempted non-violent offenders.

Id. at 1171. Additionally, see, e.g., *United States v. Stephens*, No. 1:05-CR-87, 2006 WL 208576, at *6 (E.D. Tenn. 2006) (dictum) (“[I]t seems reasonable for Congress to believe felons convicted of offenses related to the regulation of business practices are less likely to misuse a gun than other felons convicted of non-violent crimes.”).

Similarly, Congress should tweak the rules again. This time, instead of excluding a business crime because of its non-violent traits, it should include a dangerous crime because of its violent and aggressive characteristics. The ACCA's purpose is to punish dangerous and violent felons when they are in possession of a firearm. The inclusion of all carrying concealed handgun crimes furthers the ACCA's purpose because, unlike business crimes, carrying concealed handgun violations are dangerous and indicate a higher likelihood of firearm use in the commission of a crime.

VIII. CONCLUSION

The ACCA is an important sentence enhancement statute, providing the federal government with the ability to incarcerate dangerous persons illegally in possession of a handgun for longer sentences. It is important for the interpretation and execution of the statute to provide results that further Congress's intentions. One of the main purposes of gun control legislation is to prevent dangerous persons from possessing handguns.²²⁵ The proposed amendment to the ACCA works towards this purpose because it strongly penalizes persons not allowed to possess firearms.

Carrying a concealed handgun is an inherently dangerous act. And punishing violators of concealed handgun laws achieves Congress's intentions. Persons who carry concealed handguns without a permit present a serious potential risk of physical injury to others because the carrier may very well be either a criminal or a person with poor judgment. Public policy supports the notion that deterring dangerous people from having immediate access to handguns is in the best interest of society.

225. *See supra* note 209.