No. 06-11543

IN THE

Supreme Court of the United States

LARRY BEGAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF PETITIONER

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November 5, 2007

QUESTION PRESENTED

Is felony driving while intoxicated a "violent felony" for purposes of the Armed Career Criminal Act?

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The opinion of the United States Court of Appeals for the Tenth Circuit is reprinted in the Joint Appendix (JA) at 78-121. It is also available at 470 F.3d 964 (10th Cir. 2006). The opinion of the United States District Court for the District of New Mexico is reprinted in the JA at 46-52 and is also available at 377 F. Supp. 2d 1141 (D.N.M. 2005).

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued an opinion affirming the application of the Armed Career Criminal Act ("ACCA") to Larry Begay on December 12, 2006. JA 78-121. The Tenth Circuit Court of Appeals denied Mr. Begay's petition for rehearing on February 21, 2007. JA 122. Mr. Begay timely filed his petition for writ of certiorari on May 22, 2007. *See* 28 U.S.C. § 2101(c); Sup. Ct. R. 13.1 & 13.3. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution is attached to this brief as Appendix A.

The Sixth Amendment to the United States Constitution is attached to this brief as Appendix B.

Section 922(g) of Title 18 of the United States Code is attached to this brief as Appendix C.

Section 924(a)(2) of Title 18 of the United States Code is attached to this brief as Appendix D.

Section 924(e) of Title 18 of the United States Code is attached to this brief as Appendix E.

New Mexico Statute § 31-18-15 (2001) is attached to this brief as Appendix F.

New Mexico Statute § 66-8-102 is attached to this brief as Appendix G.

STATEMENT OF THE CASE

Over objection, the district court held that Larry Begay's three recidivist driving while intoxicated ("DWI") convictions subjected him to the fifteen-year mandatory minimum of the Armed Career Criminal Act ("ACCA"), on the ground that recidivist DWI is a "violent felony," pursuant to the "otherwise" clause of 18 U.S.C. § 924(e)(2)(B)(ii). Absent application of the ACCA, the district court would have determined Mr. Begay's sentence in light of a sentencing guideline range of forty-one to fifty-one months and a statutory maximum of ten years. Section 924(e)(2)(B)(ii) provides that a "violent felony" "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." In an opinion by Judge Harris Hartz, a divided Tenth Circuit panel affirmed the district court's ruling on the ground that the "otherwise" clause referred to all crimes, despite the enumeration of specific property offenses preceding the clause. In a concurring opinion, Judge Carlos Lucero joined in only a small portion of Judge Hartz's opinion affirming the application of the ACCA. The concurring opinion acknowledged the force of the dissent's argument, including the point that DWI may not have been among the offenses Congress contemplated when it enacted the "otherwise" clause.

Judge Michael McConnell wrote a well-reasoned dissent. Based on the language, purpose and legislative history of the ACCA and the "otherwise"

clause, and upon application of well-established canons of statutory construction, Judge McConnell concluded the "otherwise" clause included only offenses similar to the enumerated offenses, i.e., offenses involving active violence that are typical of career criminals and more dangerous when committed in conjunction with firearms. Consequently, Judge McConnell found DWI was not a "violent felony" under the ACCA.

A. The District Court Proceedings

Mr. Begay pleaded guilty to violating 18 U.S.C. § 922(g)(1) by possessing a firearm while being a felon. JA 1, 8-13. The maximum penalty for a violation of § 922(g)(1) is ten years' imprisonment. 18 U.S.C. § 924(a)(2). The presentence report determined Mr. Begay's recommended imprisonment range under the United States Sentencing Guidelines was forty-one to fifty-one months. JA 47.

The government objected that Mr. Begay should be sentenced under the ACCA based on his three prior recidivist DWI convictions. JA 14-20. The ACCA, as its name suggests, is "focused . . . on career offenders-those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Taylor v. United States*, 495 U.S. 575, 587-88 (1990). The ACCA increases the statutory range of imprisonment for § 922(g)(1) violations from zero to ten years, *see* 18 U.S.C. § 924(a)(2), to fifteen years to life, if the defendant has three prior convictions for a "serious drug offense" or a "violent felony." 18 U.S.C. § 924(e)(1). The government contended recidivist DWI is a "violent felony."

The government relied on § 924(e)(2)(B)(ii), which includes as a "violent felony" a crime that "is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Ignoring the significance of the crimes listed before the "otherwise" clause, the government asserted that, because DWI creates a serious potential risk of physical injury to another, it fits the ACCA definition. JA 14-20, 27-32, 35-37, 57-59, 65. Due to application of the ACCA, a mandatory minimum sentence of fifteen years, and, under USSG § 4B1.4(b)(3)(A), a sentencing guideline range of 188 to 235 months applied, the government argued. JA 19.

At the sentencing hearing, the government submitted as exhibits copies of three New Mexico recidivist DWI judgments against Mr. Begay, one in 1998 and two in 2002. JA 26, 39-45. New Mexico treats first, second and third convictions under the DWI statute, N.M. Stat. § 66-8-102 (1978), as misdemeanors punishable by no more than 364 days in jail. N.M. Stat. § 66-8-102(E) & (F) (1978). In the judgments the government submitted, the state courts found Mr. Begay's convictions to be fourth or subsequent DWI convictions, activating a maximum possible punishment above one year. JA 39, 41-42, 43. *See* N.M. Stat. § 66-8-102(G) (1978) (upon a fourth or subsequent conviction the offender is guilty of a fourth degree felony); N.M. Stat. § 31-18-15(A)(6) (2001) (basic sentence for a fourth degree felony is eighteen months). The government offered no evidence that DWI, as a categorical matter, presents a serious potential risk of physical injury to another, but instead relied on case law. JA 14-20, 27-32, 35-37, 57-59, 65.

The elements of recidivist DWI in New Mexico are identical to the elements of a misdemeanor DWI. *State v. Anaya*, 933 P.2d 223, 229 (N.M. 1996). New Mexico DWI is a strict-liability offense. *State v. Rios*, 980 P.2d 1068, 1070 (N.M. Ct. App. 1999); *State v. Harrison*, 846 P.2d 1082, 1086-87 (N.M. Ct. App. 1992). If a person drives while under the influence of alcohol or with an alcohol concentration of .08 or more in his blood or breath, he or she has committed a "per se" violation. *Harrison*, 846 P.2d at 1087; N.M. Stat. § 66-8-102(A) (influence) & (C) (alcohol level) (1978). To establish the violation, the state must prove only that the accused exercised control of a motor vehicle while under the influence of alcohol or while his or her blood or breath contained a certain amount of alcohol. *Rios*, 980 P.2d at 1070. The state is not required to prove the defendant had any intent, such as the intent to drive. *Id.*; *Harrison*, 846 P.2d at 1087.

No dangerous conduct of any sort or any other traffic code transgression is required to establish DWI. Indeed, as long as the offender has physical control of the vehicle, the vehicle need not be moving or the engine running to constitute a violation of § 66-8-102. *State v. Johnson*, 15 P.3d 1233, 1235-38 (N.M. 2000); *Boone v. State*, 731 P.2d 366, 368-69 (N.M. 1986); N.M. Stat. § 66-1-4.4(K) (1978) (defining driver); UJI 14-4511 NMRA (defining operating a motor vehicle).

Mr. Begay disagreed with the government's ACCA contention. He argued that a proper reading of the "otherwise" clause in light of its textual context, statutory rules of construction and the legislative history of the ACCA establishes that DWI is not a "violent felony" because it is very unlike the other crimes listed before that clause, that is, burglary,

arson, extortion, and offenses involving use of explosives. JA 21-25, 32-35, 38. He also argued that: the government failed to meet its burden to prove DWI presents a serious potential risk of physical injury to others; the elements of DWI are not punishable in excess of a year; and a finding that DWI poses the requisite risk would violate the separation-of-powers doctrine. JA 22, 33, 54-55, 64-65.

The district court rejected Mr. Begay's arguments and accepted the government's argument that New Mexico recidivist DWI was a "violent felony." Accordingly, the court ruled Mr. Begay's three recidivist DWI convictions subjected him to the fifteen-year mandatory minimum sentence under the ACCA. JA 46-52, 66-67. *See* 18 U.S.C. § 924(e)(1). The court found the sentencing guideline range, as enhanced by virtue of the ACCA application, *see* USSG § 4B1.4(b)(3)(A), to be 188 to 235 months. JA 67. *See* USSG ch. 5. pt. A (Sentencing tbl.). The court imposed a sentence of 188 months—137 months above the top of the guideline range applicable absent the ACCA. JA 67, 70.

B. The Tenth Circuit Proceedings

Mr. Begay appealed his ACCA sentence to the Tenth Circuit. Mr. Begay's appeal presented the Tenth Circuit with a choice of two interpretations of § 924(e)(2)(B)(ii). Under the "all crimes" interpretation favored by the government, that provision covers any crime, regardless of its nature, that involves conduct presenting a serious risk of physical injury to another. Under the "similar crimes" interpretation Mr. Begay set out, the clause is limited to crimes of a nature similar to those enumerated before that clause—burglary, arson, extortion, and crimes using explosives—that is, property crimes

involving active violence that are typically committed by career criminals as a means of livelihood and that are more dangerous when committed with firearms.

The appeal prompted three opinions by the three-judge panel. A majority adopted the "all crimes" approach, holding recidivist DWI is a "violent felony" under the ACCA[1]. JA 81-99, 104. Judge Hartz asserted that the natural meaning of the phrase "conduct that presents a serious potential risk of physical injury" "certainly" includes DWI because "[m]any would say that the gravest risk to their physical safety from criminal misconduct is from drunk drivers." JA 91-92. He declined to read the phrase in light of the term defined—"violent felony"—or the title of the statute, the Armed Career Criminal Act. JA 92. He posited, at variance with the legislative history, that the "all crimes" interpretation served the purpose of imposing long terms of imprisonment on those who have displayed contempt for human life, which, in his opinion, included recidivist DWI offenders, not just those whose prior crimes would become more dangerous due to the possession of a firearm. JA 94. He found unhelpful the ACCA's legislative history and canons of statutory construction. JA 95-98.

Judge Lucero joined only in that part of Judge Hartz's opinion concerning the natural meaning of the "otherwise" clause. Judge Lucero believed the statute's language, in particular the word "otherwise," is so unambiguous it does not allow

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[1] The Tenth Circuit remanded for resentencing on the ground that the district court had misunderstood its discretion under *United States v. Booker*, 543 U.S. 220 (2005), to sentence at or above the mandatory minimum, but below the guideline range. JA 99-103.

consideration of the legislative history. He acknowledged dissenting Judge McConnell was "right to highlight the dramatic increase in sentence" Mr. Begay received as a result of the ACCA's application, and he agreed with Judge McConnell that DWI "may not have been in the minds of the 1986 amendment's sponsors when they drafted the residual language in § 924(e)(2)(B)(ii)." Nevertheless, Judge Lucero believed the statute's wording "clear[ly]" covered DWI. JA 104.

In dissent, Judge McConnell initially underscored the substantial difference between Mr. Begay's non-ACCA guideline range of forty-one to fifty-one months and Mr. Begay's ACCA sentence of more than fifteen years. JA 104-05. Judge McConnell found the statutory language was capable of either the "all crimes" or the "similar crimes" interpretation, but determined a number of factors relevant to statutory construction supported the latter interpretation. JA 109-121. Those factors were: the term "violent felony" that the "otherwise" clause defined; the purpose of the ACCA—to keep firearms out of the hands of those who commit serious crimes as a means of livelihood and whose crimes would be more dangerous if committed with firearms; the word "otherwise" connecting the residual clause to the preceding enumerated offenses; the well-established canons of statutory construction *noscitur a sociis* and *ejusdem generis*; the rule against rendering statutory language surplusage; the specific legislative history; and, if necessary, the rule of lenity. JA 110-21. Judge McConnell determined the ACCA's residual clause covers only those "violent, active" crimes, like burglary, arson, extortion, and use of explosives, that are "typical of career criminals, and which are more dangerous when committed in conjunction with

firearms." JA 119. Since DWI does not fit that description, he concluded recidivist DWI is not a "violent felony" under the ACCA. JA 121.

Mr. Begay filed a petition for rehearing en banc. Over Judge McConnell's dissent, the Tenth Circuit denied the petition. JA 122.

SUMMARY OF ARGUMENT

The district court applied to Mr. Begay the fifteen-year mandatory minimum sentence of the Armed Career Criminal Act ("ACCA"), based on Mr. Begay's prior state convictions for driving while intoxicated ("DWI")—a strict-liability, traffic offense that is, unless a recidivist enhancement applies, punished as a misdemeanor. That result is contrary to the language of the statute and far from what Congress intended when it enacted the ACCA in 1984 and amended it in 1986 to deter violent career criminals from possessing firearms.

The ACCA mandates a fifteen-year minimum sentence and raises the maximum sentence from ten years to life for violators of 18 § 922(g)(1) who have three prior convictions for a "violent felony." 18 U.S.C. § 924(e)(1). Section 924(e)(2)(B)(ii) provides that a "violent felony" "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." Contrary to the Tenth Circuit's holding below, the "otherwise" clause definition of "violent felony" does not include recidivist DWI.

As its title suggests, the purpose of the Armed Career Criminal Act is to keep firearms out of the hands of "career offenders . . . who commit a large number of fairly serious crimes as their means of

livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Taylor*, 495 U.S. at 587-88. As this Court indicated in *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), the term the "otherwise" clause defines—"violent felony"—calls to mind a category of violent, active crimes.

In light of the term "violent felony," the ACCA's purpose, the need to accord meaning to every word of a statute, including the word "otherwise," commonly accepted canons of statutory construction—*ejusdem generis* and *noscitur a sociis*—and this Court's comparative risk analysis in *James v. United States,* 127 S. Ct. 1586, 1594-96 (2007), the offenses included in the "otherwise" clause share with the enumerated offenses the following attributes: they must involve active violence; they must be property offenses that are typically committed by career criminals to provide a means of livelihood; they must become more dangerous when committed with a firearm; and they must have a *mens rea* requirement. New Mexico recidivist DWI satisfies none of these requirements. DWI does not involve active violence, as this Court found in *Leocal*; DWI is not a property offense; DWI is not a characteristic offense of career criminals; DWI does not become more dangerous if a firearm is present; and in New Mexico DWI has no *mens rea* requirement. Therefore, the "otherwise" clause does not include New Mexico recidivist DWI.

Mr. Begay's DWI convictions also are not for "violent felonies" because they are not for crimes "punishable by imprisonment for a term exceeding one year," under 18 U.S.C. § 924(e)(2)(B). While New Mexico punished Mr. Begay's convictions as felonies under a recidivist scheme, the elements of the offense are identical to the elements for DWI that New

Mexico punishes as a misdemeanor offense, absent prior DWI convictions. The "violent felony" definition focuses on the crime, not the characteristics of the individual offender. Under *Taylor, Shepard v. United States*, 544 U.S. 13, 17-18 (2005), and *James*, only the elements of the offense in the abstract, not an individual's criminal history, determine whether an offense is a "violent felony." Because the elements of New Mexico DWI do not call for punishment in excess of one year, it is not a "violent felony."

Even if the "otherwise" clause may include all crimes, the government cannot and did not prove the clause encompasses DWI, as defined in New Mexico, because DWI, as defined in New Mexico, does not present a serious potential risk of physical injury to another. The elements of the offense, which control the analysis under the categorical approach this Court employs—driving while under the influence of alcohol to the slightest degree or with a .08 blood or breath alcohol level—do not inherently involve conduct that creates any danger to anyone. Indeed, a person can commit DWI by merely exercising physical control of a nonmoving vehicle. Consequently, the "otherwise" clause does not include New Mexico DWI.

Finding the ACCA's "otherwise" clause includes DWI raises serious constitutional questions that warrant application of the constitutional avoidance doctrine. First, if read to include any crime that presents a "serious potential risk" of physical injury to another, the "otherwise" clause is too vague to afford fair warning that an offense such as DWI presents such a risk because it requires excessive speculation to arrive at that conclusion. Second, the "all-crimes" interpretation places the burden on the courts to make a quintessentially legislative

judgment to define and fix the penalty for categories of crimes. That is lawmaking that is the province of Congress, not the courts, in violation of the separation-of-powers doctrine. Third, the finding that DWI presents a serious potential risk of physical injury to another was made without any evidence having been presented in the district court and without any of the constitutional procedural requirements applicable to the resolution of facts that raise the statutory maximum sentence. To avoid these profound constitutional problems, this Court should adopt Mr. Begay's coherent, well-supported interpretation of the "otherwise" clause and hold that DWI is not a "violent felony."

Finally, at the very least, grave doubt exists that Congress intended the "otherwise" clause to include strict-liability, misdemeanor DWI. The rule of lenity requires this Court to resolve that doubt in favor of Mr. Begay.

Because Mr. Begay's DWI convictions were not for "violent felonies," the ACCA does not apply to him. This Court should reverse the Tenth Circuit's judgment affirming the ACCA's application to Mr. Begay.

ARGUMENT

I. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" UNDER THE "OTHERWISE" CLAUSE OF THE ARMED CAREER CRIMINAL ACT BECAUSE IT IS NOT A VIOLENT, ACTIVE PROPERTY CRIME THAT IS TYPICAL OF CAREER CRIMINALS AND THAT BECOMES MORE DANGEROUS WHEN COMMITTED WITH A FIREARM.

Congress passed the ACCA in 1984 and amended it in 1986 to single out for particularly severe punishment "career offenders—those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Taylor v. United States*, 495 U.S. 575, 587-88 (1990). The ACCA requires the imposition of a minimum sentence of fifteen years and increases the maximum sentence from ten years, *see* 18 U.S.C. § 924(a)(2), to life imprisonment for certain defendants convicted of a violation of 18 U.S.C. § 922(g). 18 U.S.C. § 924(e)(1). Section 922(g) prohibits particular categories of people from possessing firearms. The dramatic ACCA enhancement applies to those § 922(g) defendants who have a total of three prior convictions for "serious drug offenses" or "violent felonies." 18 U.S.C. § 924(e).

Congress narrowly defined "violent felony" as a "crime punishable for a term exceeding one year" that fits within one of two classifications. Under § 924(e)(2)(B)(i), a crime is a "violent felony" when it "has as an element the use, attempted use, or threatened use of physical force against the person of another." Under § 924(e)(2)(B)(ii), a crime is a

"violent felony" when it "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."

The question raised in this case is whether Congress intended the "otherwise" clause under § 924(e)(2)(B)(ii) to be read so broadly as to include recidivist DWI, as defined in New Mexico, or whether the clause includes only offenses that are like the enumerated offenses that precede it in that they are violent, active property crimes that are typically committed by career criminals as a means of livelihood and that are more dangerous when committed with firearms. The latter reading is the one that gives effect to every word of the clause and the statute, the one that accords with the understanding of the ACCA this Court expressed in *Taylor* and *James v. United States*, 127 S. Ct. 1586 (2007), the one that is consistent with the purpose and legislative history of the ACCA and the one supported by well-established canons of statutory construction. Driving while intoxicated in New Mexico is not a violent, active property crime that is typically committed by career criminals as a means of livelihood and that is more dangerous when committed with a firearm. Therefore, New Mexico DWI is not a "violent felony" under the ACCA.

A. The Term "Violent Felony," The Title, Purpose, And Structure Of The ACCA, And The Language Of The "Otherwise" Clause Limit That Clause To Violent, Active Property Crimes That Are Typical Of Career Criminals And That Are More Dangerous When Committed With Firearms.

The term the "otherwise" clause defines—"violent felony," the title of the ACCA—the "Armed Career Criminal Act," the purpose of the ACCA—to deter career criminals from possessing firearms, the structure of the ACCA, and the language of the "otherwise" clause all restrict the scope of that clause to offenses that are similar to the enumerated offenses of burglary, arson, extortion, and use of explosives, in that they are violent, active, property crimes that are typically committed by career criminals as their means of livelihood and made more dangerous when committed with a firearm.

1. "Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006); *see also Lopez v. Gonzales*, 127 S. Ct. 625, 631 (2006) (referring to "the cardinal rule that statutory language must be read in context") (quoting *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 596 (2004)). Thus, to determine whether the ACCA applies to DWI, this Court must "examine first the language of the governing statute, guided not by 'a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy.'" *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (alteration in original) (quoting *Pilot Life Ins.*

Co. v. Dedeaux, 481 U.S. 41, 51 (1987) (quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986))).

That the "otherwise" clause defines the term "violent felony" strongly points to the interpretation that the "otherwise" clause includes only violent, active crimes like burglary, arson, extortion, and crimes involving the use of explosives. Then Circuit Judge Stephen Breyer, speaking for the First Circuit, reached that conclusion in *United States v. Doe*, 960 F.2d 221, 225 (1st Cir. 1992). After opining that Congress did not intend the residual clause of the ACCA to include drunk driving, he stated: "we must read the ['otherwise' clause] definition in light of the term to be defined, 'violent felony,' which calls to mind a tradition of crimes that involve the possibility of more closely related, active violence." *Id.*

In *Leocal v. Ashcroft*, this Court took the same approach with respect to an almost identical term. In that case, this Court held that the residual clause definition of "crime of violence" under 18 U.S.C. § 16(b)—"any other [felony] that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"—does not encompass driving while intoxicated. 543 U.S. 1, 8-12 (2004). This Court observed: "In construing both parts of § 16, we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.* at 11. The ordinary meaning of that term, combined with the emphasis of 18 U.S.C. § 16 on the use of physical force, "suggests a category of violent, active crimes that cannot be said naturally to include [driving under the influence] offenses," this Court explained. *Id.* As support for that determination, this Court cited then Circuit Judge Breyer's above-quoted observations in *Doe* regarding

the term applicable in this case—"violent felony." *Id.; see also Lopez*, 127 S. Ct. at 629-30 (rejecting the government's argument in part because of its argument's "incoherence with any commonsense conception of 'illicit trafficking,' the term ultimately being defined").

Because "violent felony" is the term the "otherwise" clause ultimately defines, the "otherwise" clause includes only offenses that involve active violence—a characteristic burglary, arson, extortion, and use of explosives share. *See Leocal*, 543 U.S. at 11; *Doe*, 960 F.2d at 225.

2. The title of the relevant legislation—the "Armed Career Criminal Act," Pub. L. No. 98-473, § 1801 98 Stat. 1837, 2185 (1984)—confirms that conclusion and that the "otherwise" clause offenses must be offenses ordinarily committed by career criminals that become more dangerous when committed with a firearm. The title of a statute is a "'tool[] available for the resolution of a doubt' about the meaning of a statute." *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) (quoting *Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 528-529 (1947)). In *Almendarez-Torres*, for example, the word "penalties" in the title of 8 U.S.C. § 1326 supported this Court's holding that Congress intended § 1326(b)(2) to set out a sentencing factor, not a separate criminal offense. *Id.* at 234-35. Likewise, in *INS v. National Ctr. for Immigrants' Rights*, 502 U.S. 183 (1991), this Court determined that, because the title of the statute in question referred to "unauthorized employment," the word "employment" in the text should be read as a reference solely to "unauthorized employment." *Id.* at 189; *see also FTC v. Mandel Bros., Inc.*, 359 U.S. 385, 388-90 (1959) (title's reference to the purpose of the statute to protect consumers against false invoicing

indicated the invoice provisions were applicable to retail sales); *Maguire v. Commissioner*, 313 U.S. 1, 9 (1941) (the title "Property transmitted at death" suggested the interpreted provision was confined to the specific property the decedent owned at his death).

Similarly, the title of the Armed Career Criminal Act restricts the scope of the "otherwise" clause to serve the obvious intent of the Act, as the title proclaims—to keep firearms out of the hands of career criminals. As a Senate Report during the early stages of the Act's formation stated: "The title is meant to suggest that the Bill have limited scope in that it only deals with career criminals and only those career criminals . . . who are armed." *United States v. Brady*, 988 F.2d 664, 672 (6th Cir. 1993) (quoting S. Rep. No. 97-585, at 69 (1982)). Thus, the "otherwise" clause should be read to include only violent, active crimes which, like burglary, arson, extortion, and crimes involving explosives, are typical of career criminals, and which are more dangerous when committed in conjunction with firearms. *See* JA 119 (McConnell, J., dissenting).

3. The purpose of the ACCA, as explained in *Taylor*, evidences Congressional intent to limit the dramatic increases in punishment the Act prescribes to career criminals who commit crimes to further their livelihood that are more dangerous when committed with firearms. In *Taylor*, this Court analyzed the purpose of the ACCA in discerning the meaning of "burglary" in § 924(e)(2)(B)(ii). 495 U.S. at 581, 587-88. So also that purpose is instructive in determining the scope of the "otherwise"clause of § 924(e)(2)(B)(ii).

In *Taylor*, this Court pointed out Congress intended the Act to supplement the states' law enforcement efforts against "career" criminals—that "'very small

percentage of repeat offenders'" who commit a "'large percentage' of crimes of theft and violence." 495 U.S. at 581 (quoting H.R. Rep. No. 98-1073, at 1, 3 (1984)). This Court concluded that "throughout the history of the enhancement provision, Congress focused on career offenders-those who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons." *Id.* at 587-88. Because it is this group Congress singled out for especially severe punishment, the "otherwise" clause should encompass only those violent, active, property offenses ordinarily committed as a means of livelihood that become a powder keg when committed with a firearm.

4. The structure of § 924(e)(2)(B) supports the conclusion that the "otherwise" clause includes only property offenses. In that provision, Congress created two subcategories to define "violent felony." Subsection (i) includes only crimes against the person that have as an element the use, attempted use, or threatened use of physical force. Subsection (ii) includes only crimes against property, such as burglary, arson, extortion, and use of explosives, that present a serious potential risk of physical injury to another. *See United States v. Mathis*, 963 F.2d 399, 405 (D.C. Cir. 1992). That is how this Court viewed the structure of § 924(e)(2)(B) in *Taylor*. 495 U.S. at 584-85, 589 (describing the Congressional debate regarding what property crimes to include in subsection (ii)). Congress' logical classification of offenses under § 924(e)(2)(B) strongly indicates the "otherwise" clause under subsection (ii) includes only property crimes.

5. The term "violent felony," and the title, purpose, and structure of the ACCA inform the interpretation

of the language of § 3553(e)(2)(B)(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." *See Dolan*, 546 U.S. at 486 (interpreting "a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute"). That language evidences a "substantive connection" between the "otherwise" clause and the enumerated offenses that precede it. The word "otherwise" refers the residual clause back to the listed offenses.

To read the "otherwise" clause without regard to the crime's relationship to burglary, arson, extortion, and use of explosives, as the majority of the Tenth Circuit did below, contravenes the well-established principle that every word of a statute must be given meaning if at all possible. *See Leocal*, 543 U.S. at 12. Such a reading leaves the word "otherwise" completely out of the residual clause. The word "or" alone would communicate that the residual clause refers to all crimes. JA 110-11 (McConnell, J., dissenting); *United States v. McCall*, 439 F.3d 967, 977 (8th Cir. 2006) (en banc) (Lay, J., dissenting). Indeed, the "all crimes" construction would eliminate the need for listing burglary, arson, extortion, and use of explosives, because those offenses present a serious potential risk of physical injury to another. *See James*, 127 S. Ct. at 1592. That construction would also render redundant Congress' references to "serious drug offenses" and offenses that involve the use of physical force against a person, because those offenses also create a serious potential risk of physical injury to another.

To be meaningful the word "otherwise" must connote a relationship of similarity between the

phrase that follows it and the enumerated offenses that precede it. On a number of occasions, this Court has interpreted "otherwise" to mean "similar" to other entities. For instance, this Court interpreted the phrase "otherwise qualified" in 29 U.S.C. § 794 to mean that the person is qualified for the position in the same way as non-disabled people are. *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979); *see also United States v. Mississippi*, 380 U.S. 128, 136-38 (1965) ("otherwise qualified" voters means voters who are as qualified as voters of a different race); *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U.S. 290, 295 (1902) (that a case may be brought by "certiorari or otherwise" means the manner of reaching the Court must be of the same kind as certiorari).

This Court in *James* engaged in an analysis in accord with the interpretation of the "otherwise" clause advanced here. To determine whether the "otherwise" clause included attempted burglary under Florida law, this Court compared the risks of physical injury associated with that offense to the physical injury risks associated with the enumerated offense of burglary. 127 S. Ct. at 1594-1596. "In the end," this Court's analysis "turn[ed]" on that risk comparison. *Id*. at 1599. This Court found the risks similar and, as a consequence, held the "otherwise" clause included Florida attempted burglary. *Id.* at 1594-1596.

The language and structure of § 924(e) establish that offenses encompassed by the "otherwise" clause must be similar to the enumerated offenses. Given the term "violent felony" that the "otherwise" clause defines, and the purpose, title, and structure of the ACCA, the "otherwise" clause offenses and the enumerated offenses must be similar in the following

respects: they must involve active violence; they must be typically committed by career criminals to pursue their livelihood; they must be property offenses; and they must become more dangerous when committed with firearms.

B. Well-Settled Canons Of Statutory Construction Establish The "Otherwise" Clause Offenses Must Be Similar To The Enumerated Offenses In That They Are Violent, Active, Property Crimes That Are Typical Of Career Criminals, And That Are More Dangerous When Committed With Firearms.

The time-honored statutory construction principles of *noscitur a sociis* and *ejusdem generis* counsel restriction of the offenses within the general "otherwise" clause of § 924(e)(2)(B)(ii) to offenses with the characteristics common to the specifically-enumerated crimes that precede it. Those principles come into play when a general phrase follows more specific words, as in § 924(e)(2)(B)(ii). As this Court said long ago, it is this Court's "duty to restrict the meaning of general words, whenever it is found necessary to do so, in order to carry out the legislative intention." *Reiche v. Smythe*, 80 U.S. 162, 164 (1871). The meaning of general words must be evaluated in light of the surrounding specific words "in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G. D. Searle & Co.*, 367 U.S. 303, 307 (1961).

Under *noscitur a sociis*, "a word is known by the company it keeps." *Id.* Words capable of many meanings may be understood by reference to their relationship with other associated words and phrases. *Id.* Under *ejusdem generis*, where general words follow specific words in a statute, the "general words

are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." W*ashington State Dep't of Social & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003) (internal quotation marks omitted) (quoting *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 114-15 (2001)). This principle has special force with respect to penal statutes. *Krugh v. Miehle Co.*, 503 F.2d 121, 125 (6th Cir. 1974).

The doctrines of *noscitur a sociis* and *ejusdem generis* apply to the interpretation of the "otherwise" clause of § 924(e)(2)(B)(ii). That clause is a general phrase that follows a list of specific, enumerated offenses and is tied to that list by the word "otherwise." Under *noscitur a sociis* and *ejusdem generis*, the "otherwise" clause includes only those offenses that "present[ ] a serious potential risk of injury" *and* share with the listed offenses common attributes germane to the term it defines—"violent felony"—and the purpose, title, and structure of the ACCA. Consequently, the "otherwise" clause encompasses only offenses that are like burglary, arson, extortion, and use of explosives in that: they involve active violence; they are typically committed by career criminals as a means of livelihood; they are property offenses; and they become more dangerous when committed with firearms. *See Guardianship Estate of Keffeler*, 537 U.S. at 382-86 (under *noscitur a sociis* and *ejusdem generis*, general term "other legal process" in phrase "execution, levy, attachment, garnishment, or other legal process" referred only to processes "much like" the processes of execution, levy, attachment, and garnishment, i.e., processes that use some judicial or quasi-judicial mechanism); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109, 114-15 (2001) (in light of *ejusdem generis* doctrine, "any

other class of workers engaged in foreign or interstate commerce" meant only transportation workers because the words "seamen" and "railroad employees" preceded the general phrase); *F.W. Fitch Co. v. United States*, 323 U.S. 582, 585-86 (1945) (in light of the *ejusdem generis* doctrine, "other charge" in the phrase "transportation, delivery, insurance, or other charge" included only shipment costs, not pre-shipment costs).

Application of the *noscitur a sociis* and *ejusdem generis* axioms to the "otherwise" clause obviates this Court's expressed concern in *James* about how to compare the risks of the enumerated offenses with the risks of "entirely unrelated unenumerated offenses." 127 S. Ct. at 1598. Those axioms eliminate the need for such a comparison.

In *James*, this Court effectively applied the *ejusdem generis* principle to the "otherwise" clause where the offense in question was related to an enumerated offense. It found the "most common relevant attribute" of the enumerated offenses is that they create a significant risk of bodily injury or confrontation that might result in bodily injury. *Id.* at 1592. It then held the "otherwise" clause included attempted burglary under Florida law because the risk of confrontation associated with that offense was similar to the confrontation risk associated with one of the enumerated offenses, i.e., burglary. *Id.* at 1594-96. This Court rejected the defendant's *ejusdem generis* argument that the "otherwise" clause offenses had to be completed offenses, *id.* at 1591-92, but did not address what characteristics, aside from risk of physical injury, that the "otherwise" clause offenses must share with the enumerated offenses.

The doctrines of *noscitur a sociis* and *ejusdem generis*, together with the language and structure of

§ 924(e), in particular of § 924(e)(2)(B)(ii), the term "violent felony" that the "otherwise" clause defines, and the title and purpose of the ACCA, answer that question. Together they establish that the offenses included in the "otherwise" clause, like burglary, arson, extortion, and crimes involving the use of explosives, involve active violence, are property crimes, are commonly committed by career criminals to further their livelihood, and become more dangerous when firearms are present.

C. The Legislative History Demonstrates Congress Intended The "Otherwise" Clause Offenses To Include Only Offenses That Are Violent, Active, Property Crimes That Are Typical Of Career Criminals, And That Are More Dangerous When Committed With Firearms.

A review of the legislative history of § 924(e)(2)(B)(ii) confirms the above analysis. Just as this Court's discussion of that history in *Taylor* shed light on the meaning of "burglary" in that provision, 495 U.S. at 581-90, so also that history illuminates how this Court should interpret the "otherwise" clause.

Congress enacted the first version of the ACCA in 1984. That version provided for the mandatory minimum sentence of fifteen years and maximum sentence of life for those § 922(g) offenders with three previous convictions for "robbery or burglary." *Id.* at 581. Congress selected those offenses because it believed those were the crimes most frequently committed by the career criminals it wished to deter from carrying firearms. *Id.*; H.R. Rep. No. 98-1073, at 1, 3 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3661, 3661-63.

In 1986, Congress amended the ACCA to its present form in the respects relevant to this case. Throughout the legislative process, Congress maintained "its general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders." *Taylor*, 495 U.S. at 590. Congress expanded the predicate offenses that triggered the enhancement to include "serious drug offenses" and "violent felonies." During hearings on the proposed amendments, witnesses reiterated the concerns that prompted the original enactment of the ACCA: "the large proportion of crimes committed by a small number of career offenders, and the inadequacy of state prosecutorial resources to address this problem." *Id.* at 583 (citing *Armed Career Criminal Legislation*: *Hearing on H.R. 4639 and H.R. 4768 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 99th Cong. (1986) ("House Hearing"); *Armed Career Criminal Act Amendments*: *Hearing on S. 2312 Before the Subcomm. on Criminal Law of the S. Comm. on the Judiciary*, 99th Cong. (1986)).

Two different bills were originally proposed. Each "extend[ed] the range of predicate offenses to all crimes having certain common characteristics-the use or threatened use of force, or the risk that force would be used." *Id.* at 589. One defined the predicate crimes similar to the way 18 U.S.C. § 16 defines "crimes of violence." It included: (1) "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another" and (2) any felony "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the

course of committing the offense." *Id.* at 583; S. 2312, 99th Cong. (1986); H.R. 4639, 99th Cong. (1986). The other bill included only the first "element" provision, which would have excluded burglary and arson. *Taylor*, 495 U.S. at 583; H.R. 4768, 99th Cong. (1986).

Some witnesses and Congress members criticized the narrower bill because it excluded property crimes, pointing out that property crimes such as burglary, arson, extortion, and explosive offenses were inherently dangerous due to the likelihood of confrontation with residents or law enforcement officers, although those offenses did not have use of force as an element. *Taylor,* 495 U.S. at 584-85 (citing House Hearing at 9, 12, 15, 49-53). As an example, this Court related the testimony of one witness who said: "Now the question has been raised, well, what crimes against *property* should be included? We think, burglary, of course; arson; extortion; and various explosives offenses . . . . It is these crimes against *property*-which are inherently dangerous-that we think should be considered as predicate offenses." *Id.* at 585 (quoting House Hearing at 15) (emphases added). Others considered the broader bill to be too broad, noting the need to prioritize offenses. *Id.* at 586 (citing House Hearing at 11, 16).

Congress agreed to address crimes against people in what became subsection (i) of § 924(e)(2)(B). The debate on the bills "centered upon whether any *property* crimes should be included" in a second subsection, "and if so, which ones." *Id.* at 589 (emphasis added). A consensus developed that certain "*property* crimes-namely burglary, arson, extortion, and the use of explosives-so often presented a risk of injury to persons, or were so often committed by

career criminals, that they should be included in the enhancement statute." *Id.* at 597 (emphasis added).

The House of Representatives report on the legislation summarized the intent of the final version of the ACCA amendments:

> The other major question involved in these hearings was as to what violent felonies involving physical force against *property* should be included in the definition of 'violent' felony. The Subcommittee agreed to add the crimes punishable for a term exceeding one year that involve conduct that presents a serious risk of physical injury to others. This will add State and Federal crimes against *property* such as burglary, arson, extortion, use of explosives and *similar crimes* as predicate offenses where the conduct involved presents a serious risk of injury to a person.

Id. at 587 (quoting H.R. Rep. No. 99-849, at 3 (1986)) (first emphasis in original, other emphases added).

Thus, Congress intended to include in the "otherwise" clause "property" offenses that were "similar" to burglary, arson, extortion, and use of explosives. The legislative history—replete with expressed concern for the eruption of violence during a firearm-wielding offender's commission of a property crime as a means of criminal livelihood—demonstrates the "otherwise" clause offenses and the enumerated offenses share the following features: they involve active violence; they are property offenses; they are typically committed by career criminals to maintain a criminal livelihood; and they become more dangerous when committed with firearms. *See Taylor*, 495 U.S. at 581-90.

D. DWI, As Defined Under New Mexico Law, Is Not A Violent, Active, Property Crime That Is Typical Of Career Criminals And That Is More Dangerous When Committed With Firearms And Therefore It Is Not A "Violent Felony" Under The ACCA.

The "otherwise" clause of § 924(e)(2)(B)(ii) does not encompass the strict-liability traffic offense of DWI, as defined under New Mexico law, because that offense is not a violent, active, property offense that is typically committed by career criminals to maintain a criminal livelihood and that becomes more dangerous when committed with a firearm. When assessing whether the "otherwise" clause includes a particular offense, courts must employ the "categorical approach." *James*, 127 S. Ct. at 1593. Under that approach, courts "'look only to the fact of conviction and the statutory definition of the prior offense,'" and do not generally consider the "particular facts disclosed by the record of conviction." *Shepard v. United States*, 544 U.S. 13, 17 (2005) (quoting *Taylor*, 495 U.S. at 602). In other words, courts "consider whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." *James*, 127 S. Ct. at 1594 (emphasis in original).

The three convictions of Mr. Begay that triggered the district court's application of the ACCA were DWI convictions under N.M. Stat. § 66-8-102. JA 39-45. The record in this case does not indicate precisely

under what subsection Mr. Begay was convicted. The relevant subsections are § 66-8-102(A) and (C)[2].

Section 66-8-102(A) provides that "[i]t is unlawful for a person who is under the influence of intoxicating liquor to drive" a vehicle. The elements of that offense include: (1) the defendant operated a motor vehicle; and (2) at that time, the defendant was under the influence of intoxicating liquor, that is, as a result of drinking liquor the defendant "'was less able to the slightest degree, either mentally or physically, or both, to exercise the clear judgment and steady hand necessary to handle a vehicle with safety to [the driver] and the public.'" *State v. Sanchez*, 36 P.3d 446, 449 (N.M. Ct. App. 2001) (quoting UJI 14-4501 NMRA); *see also State v. Deming*, 344 P.2d 481, 484-85 (N.M. 1959).

Section 66-8-102(C) provides that "[i]t is unlawful for a person who has an alcohol concentration of eight one hundredths or more in his blood or breath to drive" a vehicle. The critical element of § 66-8-102(C) is that at the time of the operation of the vehicle the defendant must have an alcohol concentration of eight one-hundredths grams or more in 100 milliliters of blood or 210 liters of breath. UJI 14-4503 NMRA.

Driving while intoxicated in New Mexico is a strict-liability offense. *State v. Rios*, 980 P.2d 1068, 1070 (N.M. Ct. App. 1999); *State v. Harrison*, 846 P.2d

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[2] Section 66-8-102(B) involves driving while under the influence of drugs. That provision is not relevant because at least one of Mr. Begay's three convictions was clearly not for drug impairment, JA 39-40, and this Court, in assessing whether an offense is a "violent felony," must examine how an offense is committed "in the ordinary case." *James*, 127 S. Ct. at 1597.

1082, 1086-87 (N.M. Ct. App. 1992). To establish DWI, the state need only prove the accused exercised control of a motor vehicle while under the influence of alcohol or while his or her blood or breath contained a certain amount of alcohol. *Rios*, 980 P.2d at 1070. That conduct is a "per se" violation. *Harrison*, 846 P.2d at 1087. The state is not required to prove the defendant had any intent, such as the intent to drive. *Rios*, 980 P.2d at 1070; *Harrison*, 846 P.2d at 1087.

No dangerous conduct of any sort or any other traffic code transgression is required to establish a violation of § 66-8-102(A) or (C). In fact, a person can violate § 66-8-102 as long as he or she has physical control of the vehicle, even when the vehicle is not moving and its engine is not running. *State v. Johnson*, 15 P.3d 1233, 1235-38 (N.M. 2000); *Boone v. State*, 731 P.2d 366, 368-69 (N.M. 1986); N.M. Stat. § 66-1-4.4(K) (1978) (defining driver); UJI 14-4511 NMRA (defining operating a motor vehicle). This is true even when the driver is parked on private property. *Johnson*, 15 P.3d 1233.

New Mexico treats first, second, and third violations of § 66-8-102(A) or (C) as misdemeanors punishable by no more than 364 days in jail. N.M. Stat. § 66-8-102(E) & (F) (1978). Upon a fourth or subsequent conviction under § 66-8-102, an offender is guilty of a fourth degree felony with a basic sentence of 18 months under N.M. Stat. § 66-8-102(G) (1978). *See* N.M. Stat. § 31-18-15(A)(6) (2001) (18 months is the basic sentence for a fourth degree felony). Mr. Begay's violations of § 66-8-102 became punishable as felonies due to application of that recidivist provision.

The elements of DWI punishable as a felony are identical to the elements of a misdemeanor DWI. *State v. Anaya*, 933 P.2d 223, 229 (N.M. 1996). By

punishing a DWI as a felony, the New Mexico legislature did not intend to change the nature of the offense, but merely to increase the punishment for DWI recidivists. *Id.* at 228. Under New Mexico law, a DWI punishable as a felony, unlike all non-DWI felonies, is not a felony for habitual offender purposes. *State v. Begay*, 17 P.3d 434, 435-37 (N.M. 2001).

Driving while intoxicated, as defined in New Mexico, is not a violent, active, property crime ordinarily committed as a means of criminal livelihood that becomes more dangerous when committed with a firearm. First, it is not a violent, active crime. In *Leocal*, this Court found that accidental, negligent drunk driving does not fit in the category of violent, active crimes. 543 U.S. at 11. Then Circuit Judge Breyer, speaking for the First Circuit, in support of the holding that firearm possession is not a "violent felony" under the ACCA, opined that a contrary holding would bring within the ACCA's scope other crimes that "do not seem to belong there," such as "drunken driving." *Doe*, 960 F.2d at 225. Judge Breyer explained that the term "violent felony" "calls to mind a tradition of crimes that involve the possibility of more closely related, active violence" than does DWI. *Id.* A DWI offender in New Mexico, who need not have any intent of any kind or any awareness of the possibility of a confrontation or a risk of physical injury, is not the violent, active offender Congress had in mind when it enacted the ACCA and, in particular, the "otherwise" clause. JA 110-21 (McConnell, J., dissenting). *Cf.* N.M. Stat. § 33-2-34(L) (1978) (not including DWI as a "serious violent felony" for good time credit purposes).

Second, DWI is not a property crime. It is a traffic offense, the elements of which are completely unrelated to property. Third, obviously, DWI is not the kind of offense career criminals commit to pursue their livelihood. DWI is unlike burglary, arson, extortion, or the use of explosives, which are typically committed for pecuniary gain. One cannot make a career out of driving while intoxicated. *See United States v. Rutherford*, 54 F.3d 370, 377, n.19 (7th Cir. 1995) ("'it is doubtful that one can make a career out of recklessness'") (quoting *United States v. Parson*, 955 F.2d 858, 874 (3d Cir. 1992)).

Fourth, DWI does not become any more risky when accompanied by a firearm. Indeed, unlike those who commit the enumerated crimes, a DWI offender cannot use a firearm during the commission of the offense. DWI does not provoke the risk of violent confrontation the enumerated crimes occasion. Whatever risks of physical injury are involved with DWI are unrelated to the presence of firearms. JA 111-12 (McConnell, J., dissenting); *see also McCall*, 439 F.3d at 983 (Lay, J., dissenting) (a repeat drunk driver's threat to society "is not intensified by possession of a gun").

Because DWI under New Mexico law is not a violent, active, property crime, is not ordinarily committed as a means of criminal livelihood, and does not pose an elevated risk of injury when committed with a firearm, DWI is not a "violent felony" within the purview of the "otherwise" clause. As would be true if DWI were deemed a "crime of violence" under 18 U.S.C. § 16(b), so also deeming DWI a "violent felony" "would blur the distinction between the 'violent' crimes Congress sought to distinguish for heightened punishment and other crimes." *Leocal*, 543 U.S. at 11. While "drunk driving

is a nationwide problem, ... this fact does not warrant . . . shoehorning it into statutory sections where it does not fit." *Id.* at 13. DWI does not fit within the "otherwise" clause of the ACCA. Mr. Begay's DWI convictions were not for "violent felonies." The ACCA does not apply to Mr. Begay.

II. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" UNDER THE "OTHERWISE" CLAUSE OF THE ARMED CAREER CRIMINAL ACT BECAUSE IT HAS NO *MENS REA* ELEMENT.

In light of the compelling interpretative arguments under point I and the longstanding presumption in favor of employing a *mens rea* requirement in criminal statutes that impose harsh punishment, the ACCA's "otherwise" clause includes only offenses that, like the enumerated offenses, have a *mens rea* element. DWI under New Mexico law has no such element. Therefore, the "otherwise" clause does not include DWI, as defined in New Mexico.

1. Because the requirement of *mens rea* is a bedrock principle of Anglo-American criminal jurisprudence, offenses with no *mens rea* requirements are disfavored. *Staples v. United States*, 511 U.S. 600, 605-06 (1994). As a result, "some indication of Congressional intent, express or implied, is required to dispense with *mens rea* as an element of a crime." *Id*. at 606. This is especially true when the offense is a felony and the punishment is harsh. *Id.* at 616-19. The presumption against strict liability applies to the interpretation of sentence enhancement statutes as well as statutes defining offenses. *United States v. Brown*, 449 F.3d 154, 157 (D.C. Cir. 2006).

The presumption in favor of a *mens rea* requirement applies here. The ACCA mandates such a severe enhancement that Congress must be presumed to require ACCA predicate offenses that are governed by the "otherwise" clause to have a *mens rea* element.

2. The language, structure, purpose, and legislative history of the ACCA confirm the appropriateness of imposing a *mens rea* requirement here. As demonstrated above, the "otherwise" clause encompasses only offenses similar to the enumerated offenses. All four of the enumerated offenses have a *mens rea* requirement. Burglary includes an intent to commit a crime. *Taylor*, 495 U.S. at 599. Arson is the wilful and malicious burning of property. *United States v. Hathaway*, 949 F.2d 609, 610 (2d Cir. 1991) (per curiam). Extortion involves the intentional use of force or threats to obtain something of value. *James*, 127 S. Ct. at 1604-06 (Scalia, J., dissenting); *United States v. Unthank*, 109 F.3d 1205, 1209-10 (7th Cir. 1997). "Use" of explosives "most naturally suggests a higher degree of intent than negligent or merely accidental conduct." *See Leocal*, 543 U.S. at 9. Like the enumerated offenses, the "otherwise" clause offenses must have a *mens rea* element.

A *mens rea* requirement serves Congress' purpose in enacting the ACCA and, in particular, the residual provision of § 924(e)(2)(B)(ii)—to severely punish "career offenders . . . who commit a large number of fairly serious crimes as their means of livelihood, and who, because they possess weapons, present at least a potential threat of harm to persons," *Taylor*, 495 U.S. at 587-88. Building a "career" from accidental crimes is not possible. A person acting with no particular purpose in mind does not present an increased threat to others due to possession of a

firearm. As this Court pointed out in *Taylor*, a burglar's awareness of the possibility of a violent confrontation between the burglar and someone who might try to interfere with the burglary "may mean that he is prepared to use violence if necessary to carry out his plans or to escape." *Id.* at 588. By contrast, a strict-liability offender has no goal that a third party could thwart and thus no awareness of the possibility of a violent confrontation or desire to provoke one.

Treating offenses with no *mens rea* as offenses within the "otherwise" clause is inconsistent with the *mens rea* presumption and the language, structure, purpose, and legislative history of the ACCA and the "otherwise" clause. *See United States v. Parson*, 955 F.2d 858, 874 (3d Cir. 1992) (suggesting the "otherwise" clause of § 924(e)(2)(B)(ii) does not include offenses, such as DWI, that have no element of intent to do harm, and expressing concern that an interpretation of the "otherwise" clause of the career offender sentencing guidelines, USSG § 4B1.2, cmt., n.1, to include such offenses results in unfairness); *Rutherford*, 54 F.3d at 377 (expressing the same concern). *Cf.* 42 U.S.C. § 13701(2) (including in the definition of "violent crime" under the truth-in-sentencing grant program only offenses with a *mens rea* more egregious than negligence, for example, "nonnegligent manslaughter").

3. As discussed under point I, New Mexico DWI has no *mens rea* element. It is a strict-liability offense. *Rios*, 980 P.2d at 1070; *Harrison*, 846 P.2d at 1086-87. Since the "otherwise" clause does not include offenses without a *mens rea* requirement, the "otherwise" clause does not include New Mexico DWI. *See Leocal*, 543 U.S. at 11, 13 (DWI is not a "crime of violence" as defined by 18 U.S.C. § 16(b) because DWI

may be committed negligently or accidentally). Mr. Begay's DWI convictions are therefore not for "violent felonies." The ACCA does not apply to Mr. Begay.

III. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" UNDER THE "OTHERWISE" CLAUSE OF THE ARMED CAREER CRIMINAL ACT BECAUSE, BASED SOLELY ON ITS ELEMENTS, IT IS "NOT PUNISHABLE BY IMPRISONMENT FOR A TERM EXCEEDING ONE YEAR."

The "otherwise" clause does not include DWI that New Mexico punishes as a felony because the elements of that offense are the same as the elements of misdemeanor DWI, which is not punishable by imprisonment for more than a year. Under 18 U.S.C. § 924(e)(2)(B), to qualify as a "violent felony," an offense must be " punishable by imprisonment for a term exceeding one year." The definition of "violent felony" under that provision focuses on the offense, not on the characteristics of the offender that may increase the DWI punishment to a felony level. The mandated categorical approach requires consideration solely of the elements of the offense and prohibits consideration of the offender's particular circumstances. Looking solely at the elements of a New Mexico recidivist DWI offense, that offense is not punishable by a term of imprisonment exceeding a year under § 924(e)(2)(B) and is therefore not a "violent felony."

1. DWI is ordinarily a misdemeanor under New Mexico law punishable by less than a year of imprisonment. N.M. Stat. § 66-8-102(E) & (F) (1978). The nature of a DWI conviction in New Mexico does not change when it is punished as a felony with a

maximum possible sentence above a year, due to the defendant's prior DWI convictions. *Anaya*, 933 P.2d at 228. The elements of a DWI punished as a felony are identical to the elements of a misdemeanor DWI. *Id.* at 229. In sum, the crime itself is the same regardless of the defendant's individual criminal history.

For that reason, DWI punished as a felony in New Mexico is not a "crime punishable by imprisonment for a term exceeding one year" that "is burglary, arson, or extortion or involves conduct that presents a serious potential risk of physical injury to another" under § 924(e)(2)(B). The focus of the quoted language is on the "crime," not the offender. As this Court has said, "recidivism 'does not relate to the commission of the offense' itself." *Apprendi v. New Jersey*, 530 U.S. 466, 496 (2000) (quoting *Almendarez-Torres*, 523 U.S. at 230, 244). The crime of DWI in New Mexico, properly viewed without regard to the offender's criminal record, is not punishable by more than a year of imprisonment. *See* N.M. Stat. § 66-8-102(E) (1978).

2. To consider a defendant's particular circumstances to determine the felony nature of the crime would contradict the required categorical approach to the ACCA. Under the categorical approach, this Court looks "only to the fact of conviction and the statutory definition of the prior offense,'" and does not generally consider the "particular facts disclosed by the record of conviction." *Shepard*, 544 U.S. at 17 (quoting *Taylor*, 495 U.S. at 602). This Court considers "whether the *elements of the offense* are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of this particular offender." *James*, 127 S. Ct. at 1594 (emphasis in original). In New Mexico,

the elements of DWI constitute a misdemeanor offense punishable by less than a year of incarceration. *Anaya*, 933 P.2d at 228; N.M. Stat. § 66-8-102(E) (1978).

3. The language of the "otherwise" clause also suggests recidivist DWI should not be treated as a felony under the ACCA. The "otherwise" clause speaks in terms of the risk of physical injury to another. *See* 18 U.S.C. § 924(e)(2)(B)(ii). The crime of DWI, as defined by its elements, does not become any more dangerous as a result of the offender's prior convictions because the elements are the same regardless of the offender's criminal history. *See Anaya*, 933 P.2d at 229. Thus, triggering application of the "otherwise" clause solely based on the accumulation of prior convictions does not make sense.

4. Given the harshness of the punishment under the ACCA and the purpose of the ACCA to keep firearms from the possession of hardened criminals who have committed "fairly serious" offenses, *Taylor*, 495 U.S. at 587-88, Congress did not intend to apply the ACCA to those who committed offenses which the relevant jurisdictions do not regard as serious enough to warrant designations as felonies. This is particularly true with respect to DWI in New Mexico where DWIs punished as felonies, unlike all non-DWI felonies, are not considered felonies for habitual offender purposes. *Begay*, 17 P.3d at 435-37. It would be ironic indeed if the federal ACCA counted New Mexico DWIs as predicate felonies, when New Mexico does not.

5. The Ninth Circuit's decision in *United States v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), *superceded on other grounds by statute, as recognized in United States v. Narvaez-Gomez*, 489

F.3d 970, 977 (9th Cir. 2007), supports Mr. Begay's position. In that case, the defendant had been convicted of a theft offense and sentenced to two years of imprisonment pursuant to a recidivist statute. *Id.* at 1208. Absent the recidivist enhancement, the maximum penalty for defendant's offense would have been six months. *Id.* The Ninth Circuit held the prior offense was not an offense "for which the term of imprisonment [is] at least one year," as required by 8 U.S.C. § 1101(a)(43)(G) in order to constitute an aggravated felony. *Id.* at 1208-11. The court reasoned that the categorical approach this Court mandates precluded consideration of the particular facts of the defendant's prior criminal history. *Id.* at 1208-09. Instead, the court could only consider the maximum sentence available for the crime itself—an approach congruent with this Court's historic separation of recidivism provisions and substantive crimes. *Id.* at 1209.

In *United States v. Rodriguez*, 464 F.3d 1072 (9th Cir. 2006), the Ninth Circuit followed its holding in *Corona Sanchez* when it interpreted the ACCA. The court held that, in determining whether a drug offense has a maximum term of imprisonment of ten years or more for purposes of qualifying as a predicate "serious drug felony" under the ACCA, it would consider the punishment that was available without application of the state's recidivist statute. *Id.* at 1079-82. This Court granted certiorari to review that decision this term. *United States v. Rodriguez*, ___ S. Ct. ___, 2007 WL 1700499 (Sept. 25, 2007) (No. 06-1646).

6. For the reasons stated above, this Court must only consider the elements constituting the crime of DWI in New Mexico to determine if Mr. Begay's convictions for DWI were for "violent felonies." That

his prior DWI convictions led to the availability of felony punishment is irrelevant. The elements of DWI constitute a misdemeanor not punishable by a sentence exceeding one year. Therefore, Mr. Begay's recidivist DWI convictions are not for "violent felonies." The ACCA does not apply to Mr. Begay.

IV. RECIDIVIST DRIVING WHILE INTOXICATED, AS DEFINED UNDER NEW MEXICO LAW, IS NOT A "VIOLENT FELONY" UNDER THE "OTHERWISE" CLAUSE OF THE ARMED CAREER CRIMINAL ACT BECAUSE IT DOES NOT INVOLVE CONDUCT THAT PRESENTS A SERIOUS POTENTIAL RISK OF PHYSICAL INJURY TO ANOTHER.

Even assuming arguendo that the "otherwise" clause may include all crimes with the requisite risk of injury, the government has not and cannot meet its burden to prove the clause encompasses DWI, as defined in New Mexico, because DWI, as defined in New Mexico, does not present a serious potential risk of physical injury to another. The elements of the offense in themselves do not require any conduct that presents any danger. They present only a possibility that risky behavior might follow. Consequently, the government cannot meet its burden to prove DWI satisfies the prerequisites for inclusion in the "otherwise" clause of § 924(e)(2)(B)(ii).

1. The government bears the burden to prove the ACCA applies to a particular defendant. *United States v. Amos*, ___ F.3d ___, No. 06-5032, 2007 WL 2262852, at *1 (6th Cir. Aug. 9, 2007); *United States v. Thomas*, 159 F.3d 296, 300 (7th Cir. 1998). In this case, the government bears the burden of proving DWI, as defined under New Mexico law, "presents a serious potential risk of physical injury to another."

That burden is a heavy one. While this Court opined in *James*, 127 S. Ct. at 1597, that the phrase "potential risk" suggested "Congress intended to encompass possibilities even more contingent or remote than a simple 'risk,'" the word "serious" that precedes that phrase must be given significance as well. *Leocal*, 543 U.S. at 12 (every word of a statute should have a meaning if at all possible). "Serious" means weighty, important, grave, considerable. *Oxford English Dictionary*, *available at* http://dictionary.oed.com (search "serious"; then follow "find word" hyperlink); *Black's Law Dictionary* 1371 (7th ed. 1999); *United States v. Two Eagle*, 318 F.3d 785, 791 (8th Cir. 2003) ("'serious bodily injury'" is of a "grave" nature); *Gutierrez v. Peters*, 111 F.3d 1364, 1373 (7th Cir. 1997) ("serious" medical condition is an injury that a reasonable doctor or patient would find important).

2. New Mexico DWI does not present a weighty, important, grave, considerable potential risk of physical injury to another. Under the mandated categorical approach, only the elements of the offense matter in making that risk determination. *James*, 127 S. Ct. at 1593-94. A person violates N.M. Stat. § 66-8-102(A) by driving under the influence of intoxicating liquor to the "'slightest degree.'" *Sanchez*, 36 P.3d at 449 (quoting UJI 14-4501 NMRA). Section 66-8-102(C) does not require any impairment at all. Exercising control of a motor vehicle with a .08 blood or breath alcohol level is a "per se" violation. *Rios*, 980 P.2d at 1070; *Harrison*, 846 P.2d at 1087. No injury-threatening conduct of any sort or any other traffic code breach is necessary to constitute a violation of § 66-8-102. In fact, a person can be guilty of DWI while safely parked on private property. *See Johnson*, 15 P.3d 1233; *Boone*, 731 P.2d at 368-69.

Because the elements of DWI lack any conduct component that creates any particular danger to anyone, DWI does not present a serious potential risk of physical injury to another. DWI in New Mexico contrasts sharply with, for example, the enumerated offense of burglary. A burglar enters another's home or business with the intent to commit a felony. *Taylor*, 495 U.S. at 599. Such conduct invites a violent confrontation with anyone who happens to discover the burglar, such as an "occupant, caretaker, or some other person who comes to investigate." *Id.* at 588. On the other hand, a DWI offender drives on a road or sits in a driveway impaired to the slightest degree or with a certain blood or breath level of alcohol. *Sanchez*, 36 P.3d at 449; *Rios*, 980 P.2d at 1070; *Harrison*, 846 P.2d at 1087. The offender does not provoke a violent confrontation or act in a way that creates a risk of injury to anyone. The offender might eventually engage in conduct that is dangerous, but that conduct is not an element of the offense.

3. For these reasons, the government cannot meet its burden to prove DWI, as defined under New Mexico law, "presents a serious potential risk of physical injury to another[3]." *See Thomas*, 159 F.3d at 299-300 (government did not submit evidence sufficient to meet its burden to prove statutory rape of a 16 year old presents a serious potential risk of physical injury). Therefore, Mr. Begay's New Mexico

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[3] The National Association of Criminal Defense Lawyers will be filing an amicus curiae brief explaining that a statistical analysis of the chances of a single drunk driving episode leading to physical injury demonstrates the risk of physical injury associated with DWI is not a "serious potential risk" under the "otherwise" clause.

DWI convictions are not for "violent felonies." The ACCA does not apply to Mr. Begay.

V. THE CONSTITUTIONAL AVOIDANCE DOCTRINE AND THE RULE OF LENITY PROHIBIT THE INCLUSION OF RECIDIVIST DWI, AS DEFINED UNDER NEW MEXICO LAW, IN THE ACCA'S "OTHERWISE" CLAUSE.

The constitutional avoidance doctrine and the rule of lenity require resolving the interpretation of the "otherwise" clause in Mr. Begay's favor. A determination that the "otherwise" clause includes DWI, as defined under New Mexico law, raises serious constitutional questions, which the "similar crimes" interpretation would avoid. Given the strong arguments Mr. Begay has presented above, at the very least a grave doubt exists that the "otherwise" clause includes New Mexico recidivist DWI. Accordingly, the constitutional avoidance doctrine and the rule of lenity apply. The "otherwise" clause must be read to exclude New Mexico recidivist DWI.

A. The Constitutional Avoidance Doctrine Prohibits Inclusion Of Recidivist DWI, As Defined Under New Mexico Law, In The ACCA's "Otherwise" Clause.

Because the courts below adopted the "all crimes" interpretation of the ACCA's "otherwise" clause, they were forced to answer the factual and policy question whether DWI "presents a serious potential risk of physical injury to another." Their affirmative answer raises grave constitutional questions. First, if read to include any crime that presents a "serious" "potential" "risk" of injury, the "otherwise" clause is too vague to afford fair warning of what offenses satisfy those criteria. Second, that reading requires

the Judiciary, in violation of the separation-of-powers doctrine, to define and fix the penalty for categories of crimes, i.e., to make a legislative judgment reserved for Congress, not the courts. Third, the finding that DWI presents a serious potential risk of physical injury to another without any evidence being presented on that matter before the district court and without being afforded any of the constitutional procedural rights applicable to the resolution of facts that raise the statutory maximum sentence, deprived Mr. Begay of his Fifth and Sixth Amendment rights. To avoid these serious constitutional issues, this Court should adopt the coherent, well-supported interpretation of the "otherwise" clause Mr. Begay advances and find the "otherwise" clause does not include DWI.

1. "'[I]t is a cardinal principle' of statutory interpretation . . . that when an Act of Congress raises 'a serious doubt' as to its constitutionality, 'this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.'" *Zadvydas v. Davis*, 533 U.S. 678, 689 (2001) (alteration in original) (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)). "[E]very reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 127 S. Ct. 1610, 1631 (2007) (quotation marks and citation omitted). Consequently, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided [this Court's] duty is to adopt the latter." *Jones v. United States*, 526 U.S. 227, 239 (1999).

2. Finding DWI presents a serious potential risk of physical injury to another under the "otherwise" clause raises "grave and doubtful constitutional

questions." First, under the "all crimes" interpretation of the "otherwise" clause, the clause is too vague to afford fair warning of what crimes it includes because persons of "common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Adrift from any requirement of a relationship between the "otherwise" clause offenses and the enumerated offenses, that interpretation necessitates boundless judicial speculation to reach a conclusion as to what crimes the "otherwise" clause covers.

The "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). "[V]ague sentencing provisions may [pose] constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *United States v. Batchelder*, 442 U.S. 114, 123 (1979). "A criminal statute must be definite and certain in respect to the punishment it is intended to impose." *Smith v. United States,* 145 F.2d 643, 644 (10th Cir. 1944).

In this case, a determination that DWI "presents a serious potential risk of physical injury to another," within the meaning Congress intended, would rely solely on conjecture or a gut feeling as to the risks involved in drunk driving and the degree of risk Congress wanted the "otherwise" clause to cover. The Tenth Circuit's decision below is powerful evidence of

the accuracy of that contention. As sole support for its determination that DWI met the "otherwise" clause risk requirement, the court surmised: "[m]any would say that the gravest risk to their physical safety from criminal misconduct is from drunken drivers." JA 91-92. Under the "all crimes" interpretation, the Tenth Circuit made "speculation law," *see United States v. Evans*, 333 U.S. 483, 495 (1948), which could hardly give fair notice to a person of ordinary intelligence that ACCA's severe penalty would apply to prior DWI offenses.

As Judge Ann Williams of the Seventh Circuit said in dissenting from the application of the "all crimes" interpretation to find the "otherwise" clause included failure to report to jail:

> All crimes carry the *possibility* of violent confrontation-even the feeblest episode of shoplifting . . . It seems unlikely, however, that Congress would have gone to the trouble of delimiting the reach of section 924 to "violent felonies" if it intended to subject even this crime to enhanced punishment for recidivism. Moreover, if Congress intended for the courts to examine the risk of physical injury in the abstract, it could have simply instructed the courts that "violent felonies" are all those involving "conduct that presents a serious potential risk of physical injury to another," but it did not . . . . By extending our violent felony jurisprudence to crimes such as failure to report to jail, we run the risk of compromising the [principle that] "**a fair warning should be given to the world in language that the common world will understand.**"

United States v. Golden, 466 F.3d 612, 617-18 (7th Cir. 2006) (Williams, J., dissenting) (emphases in

original) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)), *petition for cert. filed*, (U.S. Apr. 9, 2007) (No. 06-10751); *see also United States v. Chambers,* 473 F.3d 724, 726 (7th Cir. 2007), (regarding application of the "otherwise" clause to every escape, "it is an embarrassment to the law when judges base decisions of consequence on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses"), *petition for cert. filed*, (U.S. May 8, 2007) (No. 06-11206). Thus, ruling that DWI is a "violent felony" implicates the void-for-vagueness doctrine.

That conclusion is consistent with this Court's decision in *James*. In the course of holding that Florida attempted burglary satisfied the "otherwise" clause, this Court opined in *James* that that clause was not unconstitutionally vague. 127 S. Ct. at 1598, n.6. In that case, however, this Court could readily compare the risks of attempted burglary to a closely-related analog—burglary. As Justice Scalia pointed out in his dissent, DWI has no such analog. *Id.* at 1601 (Scalia, J., dissenting). As a result, this Court is left with no basis for comparison, only an indefinite notion of what "serious potential risk" could possibly mean and, with neither legislative findings nor properly admitted empirical evidence, no information as to how risky DWI is. This Court acknowledged in *James* that, without hard statistics, it could not compare the risk posed by an entirely unrelated unenumerated offense to the risk posed by an enumerated offense. *Id.* at 1598. Given these circumstances, the "otherwise" clause is unconstitutionally vague when applied to DWI.

As Justice Scalia noted in his dissent in *James*, the best solution to the vagueness problems of the "otherwise" clause is to devise "a coherent way of interpreting the statute so that it applies in a relatively predictable and administrable fashion to a smaller subset of crimes" than virtually every crime. *Id.* at 1609 (Scalia, J., dissenting). Mr. Begay has demonstrated above under points I and II that there is such a way which is in keeping with well-established rules of statutory construction and the language, structure, purpose, and legislative history of the ACCA. To avoid the serious constitutional vagueness issues raised by applying the ACCA to DWI, this Court should adopt Mr. Begay's interpretation of the "otherwise" clause and hold that the clause does not include DWI.

3. Second, determining that DWI meets the "otherwise" clause standard seriously implicates the separation-of-powers doctrine. "[D]efining crimes and fixing penalties are legislative, not judicial, functions." *Evans*, 333 U.S. at 486. Interpreting and applying law that Congress enacted is a judicial function. While trial judges have the power, ancillary to their power to pronounce sentence, to decide what factors justify a greater or lesser sentence within a statutory range Congress has set, they do not have the power to determine the circumstances that set the statutory range. *Mistretta v. United States*, 488 U.S. 361, 378 n.11, 390-91, 395 (1989); *id.* at 417-18 (Scalia, J., dissenting).

In this case, to determine that DWI "presents a serious potential risk of physical injury to another," the Tenth Circuit, in compliance with its "all crimes" interpretation, made a fact and policy based assessment that New Mexico DWI presents such a risk, or that "[m]any would say" it did, JA 92, so as to

warrant a fifteen-year-to-life sentencing range. That assessment required "an essentially legislative judgment," *Thomas*, 159 F.3d at 299-300, with the effect of "bind[ing and] regulat[ing] the primary conduct of the public [and] vest[ing] in the Judicial Branch the legislative responsibility for establishing minimum and maximum penalties for every crime" determined to fit the "otherwise" clause. *See Mistretta*, 488 U.S. at 396. This is law making. It is not statutory construction and goes beyond the determination of a sentence within a range set by Congress. *See Evans*, 333 U.S. at 486-87 (when courts do too much to fill the gaps in legislation, they have performed a legislative function).

This Court can avoid encroaching on the legislating province of Congress by adopting Mr. Begay's sound, well-supported interpretation of the "otherwise" clause and hold that the clause does not include DWI.

4. Third, the district court's and Tenth Circuit's finding that DWI "presents a serious potential risk of physical injury to another" also raises grave questions with respect to Mr. Begay's rights under the Fifth and Sixth Amendments. If this Court adopts an "all crimes" interpretation, district courts will be required to hear evidence to resolve the factual question of whether particular offenses present a serious potential risk of physical injury to another. Because the finding will raise the statutory maximum, the full panoply of Fifth and Sixth Amendment rights must apply. *See United States v. Booker*, 543 U.S. 220, 230 (2005); *Apprendi*, 530 U.S. at 476; *Jones*, 526 U.S. at 243 n.6. Even when courts find facts to determine a sentence within a range set by Congress, the basic due process requirements of notice, a meaningful opportunity to be heard, and a burden of proof borne by the government apply. *See*

Rita v. United States, 127 S. Ct. 2456, 2465 (2007), *reh'g denied,* 2007 WL 2349931 (Aug. 20, 2007); *Burns v. United States*, 501 U.S. 129, 137-38 (1991); *United States v. Tucker*, 404 U.S. 443, 447 (1972).

None of those requirements were complied with here. To avoid a violation of Mr. Begay's constitutional procedural rights, and to avoid mini-trials on this factual issue as well, this Court should adopt Mr. Begay's "similar crimes" interpretation of the "otherwise" clause and hold that the clause does not include DWI.

B. The Rule Of Lenity Prohibits Inclusion Of Recidivist DWI, As Defined Under New Mexico Law, In The ACCA's "Otherwise" Clause.

Finally, even assuming arguendo the above considerations fail clearly to establish DWI is not a "violent felony" under the ACCA, the rule of lenity requires the resolution of doubt in Mr. Begay's favor. The rule of lenity provides that when a criminal statute is ambiguous, doubts must be resolved in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 348 (1971); *see also United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.) ("The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself."). The rule applies not only to the interpretation of statutes defining offenses, but also to penalty provisions. *United States v. Bifulco*, 447 U.S. 381, 387 (1980). This Court "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958).

The rule of lenity serves at least three purposes. First, it ensures fair notice. "[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931).

Second, it preserves the separation of powers. As Chief Justice Marshall observed: "the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *Wiltberger*, 18 U.S. at 95; *see also Bass*, 404 U.S. at 348 ("because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity"). "This policy 'embodies the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should.'" *Bass*, 404 U.S. at 348. Lenity prevents the imposition of punishment that Congress has not clearly authorized, because Congress is the only branch of government with the authority to establish criminal penalties. *See Evans*, 333 U.S. at 486.

Third, it "minimize[s] the risk of selective or arbitrary enforcement" of criminal statutes by requiring the resolution of ambiguity in the same direction. *United States v. Kozminski*, 487 U.S. 931, 952 (1988); *see also Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting) (rule of lenity "foster[s] uniformity in the interpretation of criminal statutes").

In this case, Mr. Begay has presented strong arguments that: the ACCA's "otherwise" clause includes only violent, active property offenses with a *mens rea* requirement that would provide a means of

livelihood for career criminals and that would be more dangerous if committed with a gun; "violent felonies" do not include offenses that are misdemeanors, absent application of a recidivist statute; and DWI, as defined under New Mexico law, does not present a serious potential risk of physical injury to another. At the very least, then, ambiguity exists whether DWI is a "violent felony" under the ACCA. This Court must resolve any such ambiguity in favor of precluding application of the ACCA to DWI. *See Leocal*, 543 U.S. at 11-12 & n. 8 (if 18 U.S.C. § 16 lacked any clarity as to whether it included DWI, this Court would be constrained to interpret any ambiguity in the petitioner's favor); *United States v. Granderson*, 511 U.S. 39, 54 (1994) (applying rule of lenity in deciding the "original sentence" that established the duration of the revocation sentence was the Guidelines sentence, not the revoked term of probation); *Simpson v. United States*, 435 U.S. 6, 14-15 (1978) (rule of lenity required an interpretation that precluded an additional sentence enhancement under 18 U.S.C. § 924(c)), *superseded by statute*, Pub. L. No. 98-473, § 1005(a), 98 Stat. 1837, 1238-39 (1984), *as recognized in United States v. Gonzales*, 520 U.S. 1, 10 (1997)).

If necessary, application of the constitutional avoidance doctrine and the rule of lenity precludes inclusion of New Mexico recidivist DWI in the "otherwise" clause. Therefore, Mr. Begay's DWI convictions are not for "violent felonies" under the ACCA. The ACCA does not apply to Mr. Begay.

CONCLUSION

For the reasons stated above, this Court should reverse the Tenth Circuit's judgment affirming

application of the ACCA to Mr. Begay and remand with instructions not to apply the ACCA to Mr. Begay.

Respectfully submitted,

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APPENDIX A

The Fifth Amendment to the United States Constitution provides in relevant part as follows: No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

APPENDIX B

The Sixth Amendment to the United States Constitution provides in relevant part as follows:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; . . . .

APPENDIX C

Section 922(g) of Title 18 of the United States Code provides in relevant part as follows:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

APPENDIX D

Section 924(a)(2) of Title 18 of the United States Code provides in relevant part as follows:

> Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

APPENDIX E

Section 924(e) of Title 18 of the United States Code provides in relevant part as follows:

> (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 suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).
>
> (2) As used in this subsection— . . .
>
> > (B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, . . . that—
> >
> > > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> > >
> > > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; . . . .

APPENDIX F

New Mexico Statute § 31-18-15 (2001) provided in relevant part as follows:

> A. If a person is convicted of a noncapital felony, the basic sentence of imprisonment is as follows: . . .
>
> > (6) for a fourth degree felony, eighteen months imprisonment . . . .

APPENDIX G

New Mexico Statute § 66-8-102 provides in relevant part as follows:

> A. It is unlawful for a person who is under the influence of intoxicating liquor to drive a vehicle within this state.
>
> B. It is unlawful for a person who is under the influence of any drug to a degree that renders him incapable of safely driving a vehicle to drive a vehicle within this state.
>
> C. It is unlawful for a person who has an alcohol concentration of eight one hundredths or more in blood or breath to drive a vehicle within this state . . . .
>
> E. A person under first conviction pursuant to this section shall be punished, . . . by imprisonment for not more than ninety days or by a fine of not more than five hundred dollars ($500), or both; . . .
>
> F. A second or third conviction pursuant to this section shall be punished, . . . by imprisonment for not more than three hundred sixty-four days or by a fine of not more than one thousand dollars ($1,000), or both; . . .
>
> G. Upon a fourth or subsequent conviction pursuant to this section, an offender is guilty of a fourth degree felony, as provided in Section 31-18-15 NMSA 1978, and shall be sentenced to a jail term of not less than six months, which shall not be suspended or deferred or taken under advisement . . . .