Mens Rea Defect Overturns 15–Year Enhancement

Felony Urination with Intent — "Three Strikes Yer Out"

Darryl Jones came to Spokane, Washington in Spring, 1991 to help a friend move. A police officer observed Jones relieving himself near a public sidewalk. As she approached, Jones appeared to pass a handgun to his companion. Challenging the couple, the officer recovered from Jones's companion a weapon believed to have been in Jones's possession. Jones was arrested and charged in federal court with being a felon in possession. A jury found him guilty. At sentencing the trial court reluctantly concluded that Jones's three prior felonies (a five–year–old burglary, a 15–year–old burglary and an 18-year-old negligent homicide) required that Jones be sentenced under the Armed Career Criminal Act (ACCA).[1] Within six months of being stopped for relieving himself in public, Jones's was sentenced to 235 months confinement — 19 and one half years.

Jones's three priors appeared to be fundamentally violent as defined under 18 U.S.C. § 924(e). The priors included:

DATE	CHARGE	JURISDICTION
1976	Negligent Homicide	Washington
1979	Burglary	Washington
1989	Burglary	Montana

The prosecutor easily proved the convictions at sentencing, each of which was obtained under a knowing, voluntary, and counseled plea.[2] Once proved, the three violent priors mandated the imposition of the ACCA enhancement.[3]

Non-violent "Violent Felony"

Separate counsel was appointed for the appeal. The briefing schedule permitted 12 weeks to develop some means to disqualify one of Jones's predicate felonies.

The ACCA enhancement is valid only if all three predicate offenses are properly

considered "violent felonies" under federal law. Sentencing Guidelines 4B1.4; 18 U.S.C. § 924(e)(2)(B); *United States v. Sherbondy*, 865 F.2d 996, 1004 (9th Cir. 1988). It was clear that Jones's two burglary offenses were "crimes of violence" under the property crimes subsection of § 924(e)(2)(B)(ii). *See Sherbondy*, 865 F.2d at 1009.

Jones's only hope lay in discrediting the violent felony nature of the 1976 conviction for negligent homicide. When is a homicide not "violent?"

Categorical Classification

In determining whether a predicate conviction constitutes a "crime of violence" the courts do not examine the specifics of the defendant's conduct; rather, the courts examine the "categorical nature of the offense." *United States v. Springfield*, 829 F.2d 860, 862 (9th Cir. 1987) (explicitly rejecting a circumstantial test under 18 U.S.C. § 924(c)(3)); *see also United States v. Sherbondy*, 865 F.2d at 1009 (applying the *Springfield* categorical test to § 924(e) offenses).

The *Sherbondy* court analyzed whether California's "witness intimidation act" was narrowly enough drawn to apply only to categorically violent acts and thus was a valid predicate conviction.

The *Sherbondy* court held that it was not bound by California's interpretation of what constituted a crime of violence — the classification was a matter of federal law. *Sherbondy* , 865 F.2d at 1004–05. The court did, however, scrutinize California's statute, element by element, to determine whether its violation met the federal definition of "crime of violence." The court held that the state offense was not sufficiently narrow in scope to preclude a conviction on conduct that was not categorically violent.[4] As a consequence, Sherbondy's conviction under the state statute, while likely involving violent conduct, could not categorically be classified as a "crime of violence." *Sherbondy*, 865 F.2d at 1011.

Rejecting a *per se* formulation, the court specifically restricted its ruling:

> [a] state statute limited to witness intimidation involving violence or threats of

> violence against persons would pose a wholly different issue than the one we decide today. In this opinion, we consider only the California statute and do not intend to suggest that the witness intimidation statutes of other states would not meet the test . . .

Id., at 1011.

***Mens Rea* to the Rescue**

The chief obstacle to attacking the ACCA enhancement was the character of Jones's priors: the burglaries were enumerated under the statute as "violent felonies" and the negligent homicide appeared to come under numerous case law decisions holding that generic vehicular homicide statutes to be categorically violent felonies. Another means of challenging the 1976 negligent homicide had to be found. The key turned out to be the *mens rea* requirement for ACCA predicate crimes, and it was hiding in a footnote.[5]

In *United States v. Springfield*, *supra*, the Ninth Circuit considered for the first time the minimum requirements of the term "crime of violence." *United States v. Springfield*, 829 F.2d at 863. Springfield argued that his offense of conviction—involuntary manslaughter—did not categorically constitute a "crime of violence." The *Springfield* court reviewed the Congressional history of section 924(c)(3) and held that, while not within its precise wording, the statutory intent was to extend the penalty enhancement to involuntary manslaughter.[6]

On the subject of criminal culpability, the *Springfield* court was explicit:

> The legislative history indicates that Congress did not intend to limit "crimes of violence" to crimes of specific intent: "Since no culpability level is prescribed in this section, *the applicable state of mind that must be shown is, at a minimum, 'reckless,'* i.e., that the defendant was conscious of but disregarded the substantial risk that the circumstances existed." [Cite omitted]. Our analysis of involuntary manslaughter in terms of the likelihood of the occurrence of violence reconciles the words of the statute and the legislative intent to include non–[specific] intent crimes.

Springfield, 829 F.2d at 863, n. 1 (emphasis added).

Thus, where Congress has not prescribed the *mens rea*, the courts have upheld Congress' mandate that a "crime of violence" under § 924(c) or "violent felony" under §

924(e) must require, at a minimum, reckless culpability.

Thus, there are two methods of demonstrating that a predicate offense is *not* categorically a crime of violence:

1. when a conviction under the predicate could be based on non–violent conduct (*Sherbondy*); or,

2. when a conviction under the predicate could lie based on less than reckless culpability (*Springfield*).

If either is possible, the offense is not a predicate conviction under the ACCA. In Jones's case, the question took this form: If Washington's Negligent Homicide statute permited convictions for conduct beneath the *Springfield* minimum *mens rea* standard, the statute is overbroad—that is, it applies to conduct outside the "violent felony" category—and cannot be used as a predicate offense for the ACCA.

1976–Era Negligent Homicide; Categorical Non-Violent Felony

Jones was charged by information under Washington's 1975 Negligent Homicide statute. The statute read:

> When the death of any person shall ensue within three years as a proximate result of injury received by the driving of any vehicle of any person while under the influence of or affected by intoxicating liquor or drugs, *or by the operation of any vehicle in a reckless manner or with disregard for the safety of others*, the person so operating such vehicle shall be guilty of negligent homicide by means of a motor vehicle.

RCW 46.61.520 (1975).

The 1976 information specifically stated that in 1975 Jones caused the death of a human being "in a reckless manner and with disregard for the safety of others" by driving at least 45 miles per hour on a public highway whose maximum lawful speed was 30. The information did not allege that Jones was "under the influence".

Is a reckless homicide by vehicle categorically violent? It is in California. *United States v. O'Neal*, 910 F.2d 663 (9th Cir. 1990).[7] But, in Washington, circa 1976, reckless driving was defined as follows:

> Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

RCW 46.61.500 (1975).

Most importantly, Washington deemed *any* violation of the speed limit to be reckless driving.

> The unlawful operation of a vehicle in excess of the maximum lawful speeds provided in this chapter at the point of operation and under the circumstances described shall be prima facie evidence of the operation of the motor vehicle in a reckless manner by the operator thereof.

RCW 46.61.465 (1975).

Consequently, in 1976, when Jones pled to Negligent Homicide, a Washington driver was presumed to be driving in a reckless manner upon a mere showing, without more, of speeding.

The Washington State presumption of recklessness has recently been declared unconstitutional. *State v. Delmarter*, 68 Wn. App. 770 (Feb. 1993) (invalidating an instruction based upon RCW 46.61.465).[8] Although the Washington court held that the permissive instruction did not shift the burden of proof, the court nevertheless ruled that the inference was not based upon a rational connection. *Delmarter*, 68 Wn. App. at 780–84. The court reasoned that the presumption, in context with the other trial instructions, permitted the jury to convict the defendant *solely* on evidence of speeding. *Delmarter*, 68 Wn. App. at 784–86.

The court's lengthy analysis culminated in the following inquiry: Could any reasonable trier find, beyond a reasonable doubt, that excess speed alone constituted a willful or wanton disregard for the lives or property of others? The court concluded that no trier could find that mere excess speed was sufficient proof. *State v. Delmarter*, 68 Wn. App. at 789.

A special concurrence to *Delmarte* cited a recent federal habeas corpus opinion invalidating the identical presumption in a Washington State vehicular assault conviction.

Schwendeman v. Wallenstein, 971 F.2d 313 (9th Cir. 1992), *cert. denied*, 113 S.Ct. 975 (1993). The federal court noted that there was ample evidence that Schwendeman engaged in reckless driving. Nevertheless, the instruction permitted the jury to convict Schwendeman of reckless driving on the solitary finding of excess speed—"not of speeding, but of reckless driving." *Schwendeman v. Wallenstein,* 971 F.2d at 316. The Ninth Circuit granted the writ and ordered a new trial.

Jones's 1976 information similarly offered *as the sole circumstance of his reckless driving* the fact of excessive speed. Consistent with the opinions in *Schwendeman* and *Delmarte*, the category of Jones's 1976 offense was not sufficiently "narrow in scope" to preclude a conviction for less than reckless culpability. *Sherbondy*, 865 F.2d at 1011.

In summary, Washington State's Negligent Homicide statute (coupled with RCW 46.61.465) permitted conviction on mere speeding, without establishing actual reckless culpability. As such, it falls below the Congressionally mandated standard adopted in *Springfield*. Although Jones caused the death of another by violent means, the defendant was not assured of minimum *mens rea* safeguards under the statute of conviction.

At oral argument, Jones was able to present the theory in precise bite-sized pieces:

1. To determine whether a pre-requisite offense is a "crime of violence" under 924(e)(2)(B), the court must conduct an analysis of the state's particular statutory scheme. *United States v. Sherbondy,* 865 F.2d 996, 1011 (1988).

2. The minimum *mens rea* permitted for a non-enumerated violent offense under 924(e)(2)(B) is "recklessness." *United States v. Springfield*, 928 F.2d 860, 863 n.1 (1987).

3. Washington's Negligent Homicide statute, as interpreted in 1976, permitted convictions on mere speeding that resulted in a death, an intent standard below recklessness. *State v. McAllister*, 60 Wn.App. 654, 658-59, 806 P.2d 772, ___ (1991); *State v. Delmarter*, 68 Wn. App 770 (1993); *Schwendeman v. Wallenstein*, 971 F.2d 313 (9th Cir. 1992); RCW 46.61.465 (presumption); RCW 46.61.500 (defining reckless driving); RCW 46.61.525 (lesser included offense to reckless driving).

The court extracted concessions from the government on each point during oral

argument. The ultimate concession was made before time was called and the case was decided within three weeks in a two sentence order vacating sentence. No opinion issued.

On re-sentencing, Jones received consideration for the two-and-a-half years he spent in custody believing he was facing twenty. He was resentenced to time served, approximately four months short of his earliest release date under his unenhanced guideline sentence. The basis for this shortened sentence was his acceptance of responsibility (which was subjectively heightened due to the imposition of the 19 year original sentence) and the special circumstances requiring a departure in order to acknowledge the highly punitive effect of enduring 30 months of a "hopeless" 235 month sentence.

The ultimate lesson of *Jones* is to cast your net broadly when facing insurmountable barriers. Although the case law was squarely set against Jones on the question of whether a vehicular homicide was violent, the broader view examined whether the *mens rea*, not the *actus rea*, was defective.

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[1] 18 U.S.C. § 924(e)(2) imposes a 15 year mandatory minimum for anyone convicted of being a felon in possession after three prior convictions for any violent felony or serious drug offense. A violent felony, similar to § 924(c) definition of "crimes of violence" means:

> any crime punishable by imprisonment for a term exceeding one year, . . . that —
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> (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
>
> (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another...

18 U.S.C. § 924(e)(2)(B)

[2] Although the case pre-dated *Custin v. United States*, ___ U.S. ___, 114 S.Ct. 1732 (1994) (barring collateral attacks on predicate convictions with narrow exceptions), Jones had no basis to attack the convictions for constitutional infirmity.

[3] The presentence report found that pursuant to the ACCA, Jones had an Offense Level of 33 and Criminal History Category of VI. Without ACCA enhancements, Jones's Offense Level would have been 12 and his Criminal History Category either V or VI. Career Offender status did not apply. *Stinson v. United States*, ___ U.S. ___, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993) (felon in possession not itself a crime of violence for Career Offender).

[4] Construing the non–enumerated crimes in section 924(e)(2)(B), the court noted that "subsection (ii) should be construed narrowly and applied only to those categories of

offenses which clearly meet the statutory test. Where a category is overly broad or inclusive, subsection (ii) is not applicable." *Sherbondy*, 865 F.2d at 1011. Thus, if a conviction could lie under the particular statute for non-violent conduct, then the statute was not categorically a "crime of violence" or a "violent felony."

[5] With credit to then–Rule–Nine–intern Kati Kintli for her discovery of the footnote.

[6] Virtually every court in this circuit called to analyze the term "violent felony" under section 924(e) has specifically cited*Springfield*'s analysis of "crime of violence" under 924(c)(3) with approval. *E.g*., *United States Sherbondy*, *supra; United States v. O'Neal*, 910 F.2d 663, 665 (9th Cir. 1990).

[7] O'Neal's enhancement under section 924(e) was upheld after the Ninth Circuit determined that Vehicular Manslaughter was categorically a "crime of violence." The specific violations leading to O'Neal's predicate charge amounted to killing during a hit-and-run accident (Cal. Veh.Code 2001), while drag racing on a public road (Cal Veh.Code 23109) under the influence (Cal. Veh.Code 23101). *United States v. O'Neal*, 910 F.2d at 664.

[8] The instruction read: "A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a manner indicating a wanton or willful disregard for the lives or property of others." *State v. Delmarter*, 68 Wn. App. at 773, 775 n. 2.