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Armed Career Criminal Act (18 U.S.C. 924(e)): An Overview

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Summary

The Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), requires imposition of a mandatory minimum 15-year term of imprisonment for recidivists convicted of unlawful possession of a firearm under 18 U.S.C. 922(g), who have three prior state or federal convictions for violent felonies or serious drug offenses.

Section 924(e) defines serious drug offenses as those punishable by imprisonment for 10 years or more. It defines violent felonies as those (1) that have an element of threat, attempt, or use of physical force against another, (2) that involve burglary, arson, or extortion, or (3) that constitute crime similar to burglary, arson, or extortion under the section's "residual clause." The Sentencing Commission recommended that Congress consider clarifying the statutory definitions of the violent felony categories. Thereafter in *Johnson v. United States*, the Supreme Court declared the residual clause unconstitutionally vague and thus effectively void.

Otherwise, constitutional challenges to the application of §924(e) have been largely unsuccessful, regardless of whether they were based on arguments of cruel and unusual punishment, double jeopardy, due process, grand jury indictment or jury trial rights, the right to bear arms, or limits on Congress's legislative authority.

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Introduction

> 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.... 18 U.S.C. 924(e)(1)

Section 922(g) outlaws the possession of firearms by felons, fugitives, and various other categories of individuals.[1] The Armed Career Criminal Act (ACCA), quoted above, visits a 15-year mandatory minimum term of imprisonment upon anyone who violates §922(g), having been convicted three times previously of a violent felony or serious drug offense.[2] Its provisions are most often triggered by felons, with three qualifying prior convictions, found in possession of a firearm. More often than not, the prior convictions are for violations of state law.

Congress directed the United States Sentencing Commission to report on the impact on the federal criminal justice system of mandatory minimum sentencing provisions like Section 924(e).[3] As part of its study, the commission solicited the views of federal trial judges. Almost 60% of those responding to a Sentencing Commission survey indicated that they considered §924(e) mandatory minimum sentences appropriate.[4]

Predicate Offenses

Section 924(e) begins with unlawful possession of a firearm ("a person who violates section 922(g)"). The triggering possession offense need not itself involve a drug or violent crime.[5] Section 924(e)'s 15-year mandatory minimum term of imprisonment instead flows as a consequence of the offender's prior criminal record ("three prior convictions ... referred to in section 922(g)(1) ... for a violent felony or a serious drug offense").[6] Not all violent felonies or serious drug offenses count. Section 922(g)(1) refers to "crime[s] punishable by imprisonment for a term exceeding one year." That term is defined in turn to exempt certain convictions, principally those which have been overturned, pardoned, or otherwise set aside as a matter of state law.[7]

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[1] The disqualified categories cover felons, fugitives, drug addicts, mental defectives, unlawful aliens, dishonorably discharged members of the Armed Forces, individuals who have renounced their U.S. citizenship, those under a domestic violence restraining order, and those convicted of misdemeanor domestic violence, 18 U.S.C. 922(g)(1)-(9).

[2] Section 924(e) appears in its entity as an **Appendix** to this report. The ACCA is not to be confused with the federal three-strikes statute, 18 U.S.C. 3559(c), which establishes a mandatory term of life imprisonment upon a third serious violent felony conviction, or with its two-strike counterpart in 18 U.S.C. 3559(e), relating to mandatory life imprisonment for repeated child sex offenders.

[3] Section 4713, P.L. 111-84, 123 Stat. 2843 (2009).

[4] United States Sentencing Commission, *Results of Survey of United States District Judges: January 2010 through March 2010, Question 1. Mandatory Minimums* (June 2010), available at http://www.ussc.gov/Judge_Survey/2010/JudgeSurvey_201006.pdf.

[5] *United States v. Raymond*, 778 F.3d 716, 717 (8th Cir. 2015).

[6] The sentence is mandatory plea agreements to the contrary notwithstanding, *United States v. Symington*, 781 F.3d 1308, 1313 (11th Cir. 2015), citing, *United States v. Davis*, 689 F.3d 349, 354 (4th Cir. 2012), and *United States v. Moyer*, 282 F.3d 1311, 1314 (4th Cir. 2002).

[7] 18 U.S.C. 921(20)("The term 'crime punishable by imprisonment for a term exceeding one year' does not include- (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less. What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.

Moreover, those violent felonies or serious drug offenses which do count must have been committed on different occasions.[8] "[T]o trigger a sentence enhancement under the ACCA, a defendant's prior felony convictions must involve separate criminal episodes. However, offenses are considered distinct criminal episodes if they occurred on occasions different from one another. Two offenses are committed on occasions different from one another if it is possible to discern the point at which the first offense is completed and the second offense beings."[9] Thus, separate drug deals on separate days will constitute offenses committed on different occasions though they involve the same parties and location.[10] The fact that two crimes occurred on a different occasion, however, must be clear on the judicial record; recourse to police records will not do.[11]

The question of whether a defendant's prior conviction qualifies as a predicate offense becomes more difficult when the statute of conviction encompasses some misconduct which qualifies as a predicate offense, as well as other misconduct which does not. For instance, does §924(e) apply to a conviction under a state arson statute which covers more than Congress contemplated when it designated "arson" as a predicate offense? The question turns on whether it can clearly be established from the elements of the statute of conviction, the charging documents, and comparable records that the defendant was convicted of "generic arson," that is, arson as understood in §924(e).[12]

Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms"); *United States v. Sellers*, 784 F.3d 876, 881-87 (2d Cir. 2015)(A New York youthful offender conviction set aside as a matter of New York law does not qualify as a predicate offense), citing in accord, *United States v. Collins*, 61 F.3d 1379, 1382 (9th Cir. 1995), and *United States v. Clark*, 993 F.2d 402, 403 (4th Cir. 1993); and distinguishing, *United States v. Ellis*, 619 F.3d 72,75 (1st Cir. 2010)("'It was not blatant error for the sentencing court to take [a defendant's] juvenile adjudication into consideration for the purpose of applying the ACCA' because 'juvenile adjudications [under Massachusetts law] are not "set aside" for the purpose of imposing sentence in later criminal proceedings'").

[8] 18 U.S.C. 924(e)(1).

[9] *United States v. Martin*, 526 F.3d 926, 938-39 (6th Cir. 2008)(internal citations omitted); see also, *United States v. Archie*, 771 F.3d 217, 223 (4th Cir. 2014); *United States v. Jenkins*, 770 F.3d 507, 509 (6th Cir. 2014)(internal citations omitted)(Sometimes the issue is a close question. "[I]f say several crimes occurred during a compressed period of time or in the same place. In such settings, we consider three basic questions in the context of the circumstances of the crimes. Can we distinguish between the point at which the first offense is completed and the point ... the second offense begins? Could the felon have ceased his criminal conduct after the first offense and withdrawn without committing the second? And did the offenses take place in different residences or business locations?"); *United States v. Weeks*, 711 F.3d 1255, 1261 (11th Cir. 2013)(internal citations and quotation marks omitted)("To satisfy the ACCA's different-occasions requirement, a defendant must have at least three prior convictions for crimes that are temporally distinct. So long as the predicate crimes are successive rather than simultaneous, they constitute separate criminal episodes for purposes of the ACCA"); *United States v. Chappell*, 704 F.3d 551, 552 (8th Cir. 2013)(internal citations and quotation marks omitted)("Under the ACCA, each distinct criminal episode—as opposed to a continuous course of conduct—is a separate predicate offense, regardless of the date of the convictions or the number of trials or pleas resulting in those convictions. And we have indicated that a criminal offense is a distinct criminal episode when it occurs in a different location and at a different time").

[10] *United States v. Ross*, 569 F.3d 821, 823 (8th Cir. 2009).

[11] *United States v. Tucker*, 603 F.3d, 260, 266 (4th Cir. 2010)("Here, the district court relied on the PSR's [Probation Service's Presentence Report] recitation of the facts about the burglaries, but the PSR relied on the police incident report, which is not allowed ..."); see also, *United States v. Dantzler*, 771 F.3d 137, 149-50 (2d Cir. 2014); *United States v. Weeks*, 711 F.3d 1255, 1260 (11th Cir. 2013); *United States v. Sneed*, 600 F.3d 1326, 1332-333(11th Cir. 2010), each citing, *Shepard v. United States*, 544 U.S. 13 (2005).

[12] *United States v. Gatson*, 776 F.3d 405, 410 (6th Cir. 2015)(internal citations omitted)("Section 924(e) specifically lists arson as a violent felony. But not every felony that a state labels as arson fits §924(e)'s definition of arson. Instead, we ask whether Gatson's offense comports with the 'generic contemporary meaning' of arson.... Thus, like every other court to consider the question, we conclude that generic arson embraces the intentional or malicious burning of any

There is "no authority to ignore [an otherwise qualified] conviction because of its age or its underlying circumstances. Such considerations are irrelevant ... under the Act."[13] Moreover, application of Section 924(e) provides no opportunity to challenge the validity of the underlying predicate offenses.[14]

Serious Drug Offenses

The section defines serious drug offenses as those violations of state or federal drug law punishable by imprisonment for 10 years or more.[15] Conviction under a statute which carries a 10-year maximum for repeat offenders qualifies, even though the maximum term for first-time offenders is five years.[16] It is the maximum permissible term which determines qualification, even when discretionary sentencing guidelines called for a term of less than 10 years,[17] or when the defendant was in fact sentenced to a lesser term of imprisonment.[18] To qualify as a predicate drug offense, the crime must have been at least a 10-year felony at the time of conviction for predicate offense.[19]

As long as the attempt or conspiracy was punishable by imprisonment for 10 years or more, the term "serious drug offense" includes attempts or conspiracies to commit a serious drug offense.[20] By the same token, there is no need to prove that the defendant knew of the illicit nature of the controlled substance involved in his predicate serious drug offense, as long as the serious drug offense satisfied the 10-year requirement and, in the case of state law predicate, involved the manufacture, distribution, or possession with intent to distribute a controlled substance.[21]

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property").

[13] *United States v. Moody*, 770 F.3d 577, 580 (7th Cir. 2014), citing inter alia, *Shepard v. United States*, 544 U.S. 13, 15-17 (2005).

[14] *Custis v. United States*, 511 U.S. 485, 487 (1994)("a defendant has no such right (with the sole exception of convictions obtained in violation of the right to counsel) to collaterally attack prior convictions"); *Daniels v. United States*, 532 U.S. 374, 378-82 (2001); *United States v. Coleman*, 655 F.3d 480, 485 (6th Cir. 2011); *United States v. Greer*, 607 F.3d 559, 565 (8th Cir. 2010); *United States v. Dean*, 604 F.3d 169, 174-75 (4th Cir. 2010); *United States v. Covington*, 565 F.3d 1336, 1345 (11th Cir. 2009); *United States v. Buie*, 547 F.3d 401, 403-404 (2d Cir. 2008); *United States v. Krejcarek*, 453 F.3d 1290, 1297 10th Cir. 2006).

[15] 18 U.S.C. 924(e)(2)(A)("the term 'serious drug offense' means - (i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), for which a maximum term of imprisonment of ten years or more is prescribed by law").

[16] *United States v. Rodriquez*, 533 U.S. 377, 380 (2008). The record must make it clear, however, that the defendant was subject to any recidivist provision needed to reach the 10-year threshold, *United States v. Lockett*, 782 F.3d 349, 352-53 (7th Cir. 2015)(*Rodriquez* requires the government to provide evidence from the record that the defendant was in fact subject to the enhanced recidivist penalties that could elevate his sentence past the ten-year mark").

[17] *United States v. Rodriquez*, 533 U.S. at 390; *United States v. Mayer*, 560 F.3d 948, 963(9th Cir. 2009).

[18] *United States v. Buie*, 547 F.3d 401, 404 (2d Cir. 2008); *United States v. Williams*, 508 F.3d 724, 728 (4th Cir. 2007); *United States v. Henton*, 473 F.3d 467, 470 (7th Cir. 2004).

[19] *McNeill v. United States*, 131 S.Ct. 2218, 2220 (2011); *Rivera v. United States*, 716 F.3d 685, 688-89 (2d Cir. 2013).

[20] *United States v. Trent*, 767 F.3d 1046, 1057 (10th Cir. 2014), citing in accord, *United States v. Bynum*, 669 F.3d 880, 887 (8th Cir. 2012); *United States v. Williams*, 488 F.3d 1004, 1009 (D.C. Cir. 2007); and *United States v. McKinney*, 450 F.3d 39, 44 (1st Cir. 2006).

[21] *United States v. Smith*, 775 F.3d 1262, 1226-227 (11th Cir. 2014).

Violent Felonies

The assessment of whether a past crime constitutes a violent felony for purposes of §924(e) is more complicated than whether a drug offense is a serious drug offense for such purposes. The task involves an examination of "how the law defines the offense and not ... how an individual offender might have committed it on a particular occasion."[22] Violent felony predicates under §924(e) come in three varieties: offenses in which the use of physical force is an element; offenses of the burglary/arson/extortion class; and offenses under the residual clause, that is, offenses comparable to the burglary/arson/extortion class of offenses.[23]

Physical force. The physical force category consists of those offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another."[24] "Physical force" here means "violent force - that is, force capable of causing physical pain or injury to another person."[25] Thus, it does not include state convictions for intentional touching of another, such as the Florida statute in *Johnson*,[26] but it does include convictions for the threatened use of violent force.[27]

Burglary et al. The second variety of violent felony predicates consists of the crimes of burglary, arson, extortion, or the use of explosives.[28] As noted earlier, whether a prior conviction qualifies as a conviction for burglary, arson, extortion or use of explosives depends upon whether the crime of conviction—as evidenced by the statutory elements, indictments, jury instructions, or comparable court records—matches the generic description of one of those offenses.[29]

Residual clause. The Supreme Court had previously held that the crimes found in the residual clause (crimes that "otherwise involve ...") were only those similar to the enumerated crimes of burglary, arson, extortion and the use of explosives, those marked by "purposeful, violent and aggressive conduct."[30] Most recently, as discussed below, the Court found the standard unconstitutionally vague, simply too uncertain in its reach to guide those who must honor the clause's prohibition and those who must apply any failure to do so.[31]

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[22] *Begay v. United States*, 553 U.S. 137, 141 (2008).

[23] 18 U.S.C. 924(e)(2)(B)("the term 'violent felony' means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that - (i) has 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"). The Supreme Court in *Johnson v. United States*, 135 S.Ct. 2551, 2563 (2015), declared the residual clause constitutionally vague and thus an impermissible basis upon which to impose §924(e)'s mandatory minimum sentence.

[24] 18 U.S.C. 924(e)(2)(B)(i).

[25] *Johnson v. United States*, 559 U.S. 133, 140 (2010); *United States v. Hood*, 774 F.3d 638, 645 (10th Cir. 2014); *Turner v. Warden*, 709 F.3d 1328, 1336 (11th Cir. 2013); *United States v. Anderson*, 695 F.3d 390, 400 (6th Cir. 2012); *United States v. Taylor*, 659 F.3d 339, 346 (4th Cir. 2011).

[26] *Johnson v. United States*, 559 U.S. at 145.

[27] *United States v. Elliott*, 757 F.3d 492, 496 (6th Cir. 2014).

[28] 18 U.S.C. 924(e)(2)(B)(ii).

[29] *United States v. Gatson*, 776 F.3d 405, 410 (6th Cir. 2015).

[30] *Begay v. United States*, 553 U.S. 137, 144-45 (2008); *Chambers v. United States*, 555 U.S. 122, 692 (2009); *United States v. Alexander*, 609 F.3d 1250, 1254-255 (11th Cir. 2010).

[31] *Johnson v. United States*, 135 S.Ct. 2551, 2563 (2015); see also, *United States v. Snyder*, ___ F.3d ___, ___*4 (July 20, 2015)("[T]he residual clause violates due process in all instances, even when the felony at issue falls clearly within its scope").

Prior to the Court's decision, the Sentencing Commission had recommended that Congress consider clarifying amendments to the ACCA's definitions of its predicate offenses.[32]

Constitutional Considerations

Defendants have raised a number of constitutional challenges to the application of Section 924(e). They have argued that Congress lacked the constitutional authority to enact the section, that application in their case violates the Second Amendment, the Fifth Amendment, the Sixth Amendment, and/or the Eighth Amendment. Other than the Due Process Clause challenge in *Johnson v. United States*,[33] their arguments have yet to succeed.

Due Process

The Fifth Amendment declares that no "person shall ... be deprived of life, liberty, or property, without due process of law."[34] This proscription condemns vague laws that punish without giving fair warning of the law's demands or that are so unclear as to invite arbitrary enforcement.[35] In the eyes of the Court in *Johnson*, "[t]wo features of the residual clause conspire to make it unconstitutionally vague. In the first place, the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime. It ties the judicial assessment of risk to a judicially imagined 'ordinary case' of a crime, not to real-world facts or statutory elements. How does one go about deciding what kind of conduct the 'ordinary case' of a crime involves?"[36]

Then to make matters worse, as the Court sees it, "the residual clause leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony."[37] In sum, "[b]y combining indeterminacy about how to measure the risk posed by a crime with indeterminacy about how much risk it takes for the crime to qualify as a violent felony, the residual clause produces more unpredictability and arbitrariness than the Due Process Clause tolerates."[38]

The Fifth Amendment Due Process Clause also has an equal protection component under which the federal government is subject to limitations akin to those which the Fourteenth Amendment Equal Protection Clause imposes upon the states.[39] Occasionally, a defendant has argued to no avail that §924(e) "violates equal protection because it does not apply uniformly to similarly situated defendants previously convicted of drug offenses in different states."[40]

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[32] United States Sentencing Commission, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System*, 365 (2011), available at http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Mandatory_Minimum_Penalties/20111031_RtC_Mandatory_Minimum.cfm.

[33] 135 S.Ct. 2551, 2563 (2015).

[34] U.S. Const. Amend. V.

[35] *Johnson v. United States*, 135 S.Ct. at 2556, citing, *Kolender v. Lawson*, 461 U.S.C. 352, 357-58 (1983)("Our cases establish that the Government violates this [due process] guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes or so standardless that it invites arbitrary enforcement").

[36] *Johnson v. United States*, 135 S.Ct. at 2557.

[37] *Id.* at 2558.

[38] *Id*.

[39] See *United States v. Armstrong*, 517 U.S. 456, 464 (1996), citing inter alia, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1957).

[40] *United States v. Titley*, 770 F.3d 1357, 1359-363 (10th Cir. 2014)(holding that §924(e)'s classifications were rationally related to legitimate governmental purposes, and consequently were compatible with equal protection

Legislative Authority

The Constitution vests Congress with authority to enact legislation "necessary and proper" to carry into execution the powers which the Constitution grants the Congress or any other officer, department, or agency of the United States.[41] Those powers which cannot be traced to an enumeration within the Constitution are reserved to the states and the people.[42] Congress's constitutional authority to regulate interstate and foreign commerce is among its most sweeping prerogatives, but the power is not boundless. It permits regulation of the use of the channels of commerce, of the instrumentalities of commerce, of the things that move there, and of those activities which substantially impact commerce.[43] Absent such a nexus, it does not permit Congress to enact legislation proscribing possession of a firearm on school grounds, as the Supreme Court observed in *Lopez*.[44] Section 922(g)[45] outlaws receipt by a felon of a firearm "which has been shipped or transported in interstate or foreign commerce." This, in the view of the circuit courts to address the issue, is sufficient to bring within Congress's commerce clause power the prohibitions of §922(g) that §924(e) makes punishable.[46]

Second Amendment

The Second Amendment provides that "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[47] The Supreme Court in *Heller* declared that "the Second Amendment confer[s] an individual right to keep and bear arms ... [but] the right is not unlimited.... "[48] It explained, however, that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on possession of firearms by felons.... "[49] Pointing to the statement in *Heller*, the lower federal appellate courts have concluded that the possession offense does not offend the Second Amendment.[50] From which it seems to follow that §924(e), at least when it imposes a mandatory minimum sanction upon felons who violate §922(g)(1), is similarly inoffensive.[51]

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demands); see also, *United States v. Lender*, 985 F.2d 151, 156 (4th Cir. 1993).

[41] U.S. Const. Art. I, §8, cl. 18.

[42] U.S. Const. Amend. X.

[43] *United States v. Lopez*, 514 U.S. 549, 558-59 (1995); *United States v. Morrison*, 529 U.S. 598, 609 (2000).

[44] *United States v. Lopez*, 514 U.S. at 552.

[45] 18 U.S.C. 922(g).

[46] *United States v. Kirk*, 767 F.3d 1136, 1142-153 (11th Cir. 2014); *United States v. Roszkowski*, 700 F.3d 50, 57-8 (1st Cir. 2012); *United States v. Jordan*, 635 F.3d 1181, 1189-190 (11th Cir. 2011); *United States v. McCane*, 573 F.3d 1037, 1047 (10th Cir. 2009).

[47] U.S. Const. Amend. II.

[48] *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008).

[49] *Id.* at 626.

[50] *United States v. Moore*, 666 F.3d 313, 316-17 (4th Cir. 2012), summarizing holdings from the Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits ("We begin our analysis by noting the unanimous result reached by every court of appeals that §922(g)(1) is constitutional, both on its face and as applied. The basis for the various decisions by our sister circuits has varied, but all have uniformly rejected challenges to §922(g)(1) usually based at least in part on the 'presumptively lawful' language in *Heller*").

[51] *United States v. Rozier*, 598 F.3d 768, 771-72 (11th Cir. 2010)(holding Section 922(g)(1) a permissible limitation of the defendant's Second Amendment right and upholding his sentence under Section 924(e)).

Apprendi and Its Progeny

The Supreme Court in *Almendarez-Torres* identified the fact of a prior conviction as a sentencing factor. It rejected the argument that the Fifth and Sixth Amendments required that the fact of a defendant's prior conviction be charged in the indictment and found by the jury beyond a reasonable doubt.[52] Yet almost immediately thereafter, it seemed to repudiate the broad implications of *Almendarez-Torres*, while clinging to its narrow holding, "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (*other than prior conviction*) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."[53]

And so the Court continued in *Blakely* and *Booker*: unless the defendant waived, a jury must decide any sentence enhancing fact, other than the fact of a prior conviction.[54] The Court waivered slightly in *Shepard* where a plurality held that a sentencing court may look no further than the judicial record of a prior conviction when faced with a dispute over whether a §924(e) defendant was convicted earlier of a qualifying predicate offense.[55] Justice Thomas, upon whose concurrence the result rested, however, opined that "*Almendarez-Torres* ... has been eroded by this Court's subsequent Sixth Amendment jurisprudence, and a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided."[56]

Nevertheless, the Court has yet to revisit *Almendarez-Torre*s,[57] and the lower federal courts continue to adhere to it in §924(e) cases: the fact of a prior qualifying conviction need not be charged in the indictment nor proved to the jury beyond a reasonable doubt.[58]

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[52] *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998).

[53] *Apprendi v. New Jersey*, 530 U.S. 466, 476 (2000)(emphasis added), quoting dicta in *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

[54] *Blakely v. Washington*, 542 U.S. 296, 301 (2004)("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"), quoting *Apprendi v. New Jersey*, 530 U.S. at 490; *United States v. Booker*, 543 U.S. 220, 231 (2005), quoting the same passage from *Apprendi*.

[55] *Shepard v. United States*, 544 U.S. 13, 16 (2005)("We hold that ... a later court determining the character of an admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented").

[56] *Id.* at 27 (Thomas, J. concurring in part and concurring in the judgment).

[57] *Alleyne v. United States*, 133 S.Ct. 2151, 2160 n.1 ("In *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), we recognized a narrow exception to this general rule for the fact of a prior conviction. Because the parties do not contest that decision's vitality, we do not revisit it for purposes of our decision today").

[58] *United States v. Smith*, 775 F.3d 1262, 1266 (11th Cir. 2014); *United States v. Daniels*, 775 F.3d 1001, 1005-1006 (8th Cir. 2014); *United States v. Burnett*, 773 F.3d 122, 136 (3d Cir. 2014); *United States v. Anderson*, 695 F.3d 390, 398 (6th Cir. 2012); *United States v. Charlton*, 600 U.S. 43, 55 (1st Cir. 2010)("This court normally is bound by a Supreme Court precedent unless and until the Court itself disavows that precedent. For that reason, we recently have rejected a parade of similarly sculpted challenges to the continued vitality of *Almendarez-Torres* in the context of the ACCA. We reiterate those holdings today"); *United States v. Rozier*, 598 F.3d 768, 771-72 (11th Cir. 2010)("Rozier argues that because these prior convictions were not included within the indictment, nor proven to a jury, any sentence over the 120-month maximum of §924(a)(2) is unconstitutional. This argument runs contrary to the established law of the Supreme Court and this Circuit. See *Almendarez-Torres v. United States*"); *United States v. Salahuddin*, 509 F.3d 858, 863 (7th Cir. 2007).

Eighth Amendment

Defendants sentenced under Section 924(e) have suggested two Eighth Amendment issues. First, they argue that their sentences are disproportionate to their offenses. Second, they contend that crimes committed when they were juveniles may not be used as predicates.

The Eighth Amendment prohibits the infliction of cruel and unusual punishments.[59] It has been said to prohibit sentences that are "grossly disproportionate" to the crime.[60] Under varying theories, the Supreme Court has held that it permits the imposition of life imprisonment without the possibility of parole of a first-time offender convicted of large scale drug trafficking;[61] and permits the imposition of a sentence of imprisonment for 25 years to life following a "three strikes" conviction resting on three nonviolent grand theft convictions.[62] On the other hand, the Court held in *Ewing* that the Eighth Amendment precludes execution for a capital offense committed by a juvenile,[63] and most recently in *Graham* that it precludes imprisonment for life without parole for a non-homicide offense committed by a juvenile.[64]

The lower federal courts have consistently rejected general claims that sentences under §924(e) were grossly disproportionate to the crimes involved.[65] In cases decided before *Graham*, the lower federal courts had also rejected claims that the Eighth Amendment precluded use of a juvenile predicate offense to trigger sentencing of an adult under §924(e).[66] That pattern appears to have continued.[67]

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[59] U.S. Const. Amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted").

[60] *Graham v. Florida*, 560 U.S. 48, 59 (2010); *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991)(Kennedy, J. concurring in part and concurring in the judgment); *Ewing v. California*, 538 U.S. 11, 21 (2003)(opinion of O'Connor, J.).

[61] *Harmelin v. Michigan*, 501 U.S. at 994.

[62] *Ewing v. California*, 538 U.S. at 30-1.

[63] *Roper v. Simmons*, 543 U.S. 551, 560 (2005).

[64] *Graham v. Florida*, 560 U.S. at 82.

[65] *United States v. Banks*, 569 F.3d 505, 507-508 (6th Cir. 2012); *United States v. Nigg*, 667 F.3d 929, 938-39 (7th Cir. 2012); *United States v. Jones*, 574 F.3d 546, 553 (8th Cir. 2009); *United States v. Bullick*, 550 F.3d 247, 252 (2d Cir. 2008).

[66] *United States v. Jones*, 574 F.3d at 552-53 (8th Cir. 2009); *United States v. Salahuddin*, 509 F.3d 858, 863-64 (7th Cir. 2007); *United States v. Wilks*, 464 F.3d 1240, 1243 (11th Cir. 2006).

[67] *United States v. Orona*, 724 F.3d 1297, 1307-308 (10th Cir. 2013)("Unlike the defendants in *Roper* and *Graham*, Orona is being punished for his adult conduct. As we recently explained in rejecting a substantive due process challenge to ACCA's use of juvenile adjudications, the case upon which Orona relies involve sentences imposed directly for crimes committed while the defendants were young. In the case before us, an adult defendant faced an enhanced sentence for a crime he committed as an adult"); see also, *United States v. Burnett*, 773 F.3d 122, 136-38 (3d Cir. 2014); *United States v. Young*, 766 F.3d 621, 628 (6th Cir. 2014).

Two other circuits have found no Eighth Amendment impediment to mandatory life imprisonment sentences imposed under provisions other than §924(e) upon adults convicted of drug trafficking and based in part on predicate juvenile offenses, *United States v. Scott*, 610 F.3d 1009, 1017 (8th Cir. 2010)("Scott argues that the Eighth Amendment prohibits enhancing his sentence based on his previous felony drug convictions because he was a juvenile when he committed those crimes.... [W]e have upheld the use of juvenile court adjudications to enhance subsequent sentences for adult convictions.... The U.S. Supreme Court cases that Scott cites, *Roper* and *Graham*, do not change this result. These decisions established constitutional limits on certain sentences for offenses committed by juveniles. However, Scott was twenty-five years old at the time he committed the conspiracy offense in this case. Neither *Roper* nor *Graham* involved the use of prior offenses committed as a juvenile to enhance an adult conviction, as here.... the Court's analysis in *Graham* was limited to defendants sentenced to life in prison without parole for crimes committed as juveniles. The Court in *Graham* did not call into question the constitutionality of using prior convictions, juvenile or

Double Jeopardy

The Fifth Amendment ensures that no "person be subject for the same offence to be twice put in jeopardy of life or limb."[68] The double jeopardy clause protects against both successive prosecutions and successive punishments for the same offense.[69] The test for whether a defendant has been twice tried or punished for the same offense or tried or punished for two different offenses is whether each of the two purported offenses requires proof that the other does not.[70] Defendants have argued to no avail that the double jeopardy clause bars reliance on the predicate offenses or on §922(g) to trigger §924(e).[71]

otherwise, to enhance the sentence of a convicted adult. Therefore, we affirm the constitutionality of Scott's life sentence under 21 U.S.C. §841(b)(1)(A)"); *United States v. Graham*, 622 F.3d 445, 461-64 (6th Cir. 2010)(same).

[68] U.S. Const. Amend. V.

[69] *United States v. Dixon*, 509 U.S. 688, 696 (1993); *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

[70] *Blockburger v. United States*, 284, U.S. 299, 304 (1932); *United States v. Dixon*, 509 U.S. at 696 (1993); *United States v. Faulds*, 612 F.3d 566, 569 (7th Cir. 2010); *United States v. Ayala*, 601 F.3d 256, 265 (4th Cir. 2010); *United States v. Mahdi*, 598 F.3d 883, 888 (D.C. Cir. 2010).

[71] *United States v. Keesee*, 358 F.3d 1217, 1220 (9th Cir. 2004); *United States v. Studifin*, 240 F.3d 415, 419 (4th Cir. 2001); *United States v. Bates*, 77 F.3d 1101, 1106 (8th Cir. 1996); *United States v. Wallace*, 889 F.2d 580, 584 (5th Cir. 1989).

Appendix. 18 U.S.C. 924(e)(text)

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

(A) the term "serious drug offense" means—

(i) an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802), for which a maximum term of imprisonment of ten years or more is prescribed by law;

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

(i) has 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*; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.[72]

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[72] Language in italics is constitutionally invalid and may be not be used for sentencing purposes, *Johnson v. United States*, 135 S.Ct. 2551 (2015).

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